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*Seeking Safety, Knowledge, and Security
in a Troubling Environment*

Misinformation and Technology: Rights and Regulation Across Borders
Women, Gendered Violence, and the Construction of the
“Domestic”

Courts, Climate Change, and the Global Pact for the
Environment

Surrogacy, Autonomy, and Equality

Functioning: Courts in the Pandemic

Multi-Layered Governance, Interaction Among Courts, and the
Economy: The Exchanges Between the FCC and the ECJ

Editor
Judith Resnik
2020





Gruber Program for Global Justice and Women's Rights

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Seeking Safety, Knowledge, and Security in a Troubling Environment

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Preface

This year's volume, *Seeking Safety, Knowledge, and Security in a Troubling Environment*, captures some of the complexities of these times. As the materials were underway, a global health crisis exploded, the fragility of the climate became increasingly vivid, and instances of racist state violence were recorded on video feeds that circled the world. The book's title, selected before COVID-19 pushed the Seminar sessions online, is all the more apt.

These chapters analyze new and ongoing challenges in several domains—virtual, ecological, economic, and private—as courts are asked to grapple with deteriorating climates, gendered violence, new reproductive technologies, the viral spread of misinformation, and other courts' decisions on complex issues. The questions that remain constant across these domains are whether constitutional norms apply to the conflicts among individuals, organizations, and the state and if judiciaries can provide remedies.

The chapter *Misinformation and Technology: Rights and Regulation Across Borders* explores the question of whether the internet poses distinctive questions for constitutional courts when they are called upon to regulate information. These materials, compiled by Robert Post and Miguel Maduro, examine how extant legal tools relate to the use of the internet to disseminate information, including “fake news,” and what role courts play when internet misuse undermines the integrity of elections and individuals' safety. Mandates for social distancing have underscored the centrality of the internet, which gives these issues heightened saliency.

Women, Gendered Violence, and the Construction of the “Domestic” asks how constitutional law responds to violence targeted at individuals because of their identity. Historically, law was “present” by being absent; jurists invoked liberty, privacy, and the autonomy of family life as they repeatedly abjured a role in protecting against such violence. In recent decades, national constitutions, international conventions, legislation, and constitutional interpretation have generated an active state presence, at times through criminalization of such violence. Edited by Susanne Baer, Marta Cartabia, and Judith Resnik, this chapter analyzes the sources that produce gendered—as well as racist, homophobic, or similarly marked—violence, and the social and political movements pressing for such acts to be understood as mechanisms of subordination and as markers of inequality. Dozens of jurisdictions have taken up the questions of what obligations flow to the state and of how to expand the repertoire of remedies deployed when governments work towards achieving substantive equality. The call for “sheltering in place” in the wake of COVID-19 has served as a sad reminder of the urgent need to limit violence based in households.

Questions of state obligations are also central in the chapter *Courts, Climate Change, and the Global Pact for the Environment*, edited by Daniel Esty, Laurent Fabius, and Douglas Kysar. This segment continues the exploration begun at the 2019 Global Constitutionalism Seminar about courts' roles in light of the documented injuries of climate change that are felt disproportionately by communities of color and in areas of the world in which poverty is rampant. Problems of obtaining accurate information come to the fore, as do questions about whether state and corporate actors who have knowledge about risks have obligations of public disclosure and can be held accountable for current and future environmental harms. Through a review of the ambitions for a Global Pact for the Environment, this chapter also considers what new agreements can be shaped across jurisdictions.

Surrogacy, Autonomy, and Equality, edited by Douglas NeJaime, Reva Siegel, and Daphne Barak-Erez, considers how decisions about the regulation of reproduction through the involvement of third parties implicate constitutional guarantees and human rights. The complex issues to be parsed include whether the enforcement of surrogacy contracts advances women's liberty or equality rights and the autonomy and privacy interests of those seeking to have children through surrogacy. The materials explore equality rights of access to this reproductive practice, governmental interplays in the regulation of parentage in cross-border surrogacy arrangements, and the impact of class and culture on the rules that have emerged.

Two additional sets of materials respond to events of the last few months, when this volume was underway. One segment, *Functioning: Courts in the Pandemic* sketches some of the temporary, emergency orders issued by courts to enable their work to continue while many countries required shuttering public activities. First-hand experiences with these efforts come from several Global Constitutionalism Seminar participants who are involved in court governance. With the help of the Honorable Marta Cartabia (President of the Constitutional Court of Italy); Laurent Fabius (President of the Constitutional Council of France); Robert Reed (President of the Supreme Court of the United Kingdom); Carlos Rosenkrantz (Chief Justice of the Supreme Court of Argentina); and Daniela Salazar (Vice President of the Constitutional Court of Ecuador), we are able to glimpse some of the many accommodations made. The alterations of court rules in light of COVID-19 have raised questions about how, when in-person exchanges become unavailable, courts can be loyal to values of fair and just decision-making predicated on access, transparency, and even-handedness. "Online dispute resolution" (ODR) for various kinds of proceedings had been in use in many jurisdictions, and the shift to virtual proceedings has prompted some to advocate for more (or less) of it in the future.

The economic vulnerabilities and inequalities long predating COVID-19 came to the fore in light of the radical dislocations resulting from the pandemic. Efforts by the European Central Bank (ECB) in response are part of the backdrop for the readings in *Multi-Layered Governance, Interaction Among Courts, and the Economy: The Exchanges Between the FCC and the ECJ*. In May 2020, the German Federal

Constitutional Court (FCC) disagreed with the European Court of Justice (ECJ) about measures taken by the ECB. This Seminar has many times addressed the complexities of federations, transnational policies, proportionality review, and competences; these issues are at the core of the debates about the ECB's economic measures. In its May ruling, the FCC held that Germany's participation in the ECB's Public Sector Asset-Purchase Program (PSPP) violated the country's Basic Law. According to the FCC, the ECB did not properly apply the principle of proportionality, as it failed to balance the PSPP's monetary policy objective (which is within the purview of Bank competencies) against the significant economic policy effects (which intrude upon competencies that reside solely with EU Member States). The FCC decision rejected the ECJ's own review of the PSPP in its December 11, 2018 judgment, *Heinrich Weiss and Others*. Since the FCC decision, many commentators have responded, some in praise and others worried about its implications. The implications of these interactions will be the subject of a roundtable, led by Professor Bruce Ackerman; Stephen Breyer (Associate Justice of the Supreme Court of the United States); Professor Paul Gewirtz; Dieter Grimm (former Justice of the Federal Constitutional Court of Germany); and Professor Kim Lane Scheppele.

* * *

These materials would not exist without the efforts of participants, faculty, staff, administrators, and students. Every year, we depend on collaboration across continents. This year's contributors merit special recognition, as they worked while daily life was upended. The global health crisis closed the doors of courthouses, schools, and other venues of public life. Yet participants continued to send suggestions, read drafts, and meet virtually to discuss materials, and far-flung students brought the project to conclusion. And to be clear, amidst the anxieties of these months, we drew comfort from the continuity of the work and the sense of community provided by jurists, scholars, students, and staff who are Yale's Global Constitutionalism Seminar.

In many respects, our process was familiar. Participants suggested topics and materials, and the discussion leaders spent hours reviewing compilations, which were then heavily edited. In this book, as in prior volumes, we have compressed a great deal by pruning ruthlessly. Paragraphs have been combined, and most footnotes and citations have been omitted; the footnotes that are retained keep their original numbering. For accessibility across jurisdictions, we add excerpts of referenced legal texts in footnotes marked by asterisks that, along with square brackets, indicate editorial insertions.

As has become our custom since 2012, in the fall of 2020, this book will be published as an e-book and distributed electronically free of charge. This year's volume will be the ninth book available online. Thanks are due to the staff of the Lillian Goldman Law Library, under the interim direction of Jason Eiseman, for help in identifying sources that would otherwise have been unavailable. We are doubly thankful to Jason, who previously served as Yale Law School's Associate Law Librarian for Technology and Digital Initiatives, and continues to provide guidance on how to turn

the Seminar's volumes into e-books. This work began with assistance from Jack Balkin, in connection with the Information Society Project that he chairs, and it continues with the support of the Oscar M. Ruebhausen Fund at Yale Law School.

We are indebted to remarkable students at Yale Law School, led by Lawrence Liu, who serves as the Executive and Managing Editor of this volume. He is a wonderful junior colleague who has mixed managerial and analytic skills and dealt graciously with the many challenges of this novel form of production. Lawrence is joined by Sofea Dil, the Associate Managing Editor, who has been tireless and astute in understanding the complexity of the issues raised in this volume. Returning as a Senior Editor is Neil Alacha, who again showed his many abilities at integrating a wide range of sources. We welcomed new Editors Evelin Caro Gutierrez, Alexandria Miskho, Akanksha Shah, Mark Stevens, and Rachael Stryer, who mixed energy, patience, and insights as they gained familiarity with law around the globe and the peculiarities of the format of this book. All of these students were involved in substantive research and editing. They persevered gracefully and collaboratively despite the many challenges of the spring of 2020, when we suddenly had to shift our working methods. Our regular video meetings were one way to stay grounded as so many activities were reconceived, and many plans had to be cancelled. We also had the pleasure of getting guidance from Global "alums" José Argueta Funes, David Louk, and Clare Ryan, former students now graduated and in other parts of their careers; they served as Editors before, and each reviewed chapters in this volume. José is currently a doctoral candidate in history at Princeton University and a law clerk for the Honorable Guido Calabresi of the U.S. Court of Appeals for the Second Circuit. David, who was previously an Academic Fellow at Columbia Law School, currently serves as a law clerk to Associate Justice Ruth Bader Ginsburg of the Supreme Court of the United States. Clare is an Assistant Professor of Law at the Louisiana State University Law Center, where she teaches courses in human rights, family law, and comparative law.

In the midst of the chaotic spring, Renee DeMatteo, who is Yale Law School's talented Senior Conference and Events Services Manager, kept us all going. Participants rightly admire her kindness. In a year when the Global Constitutionalism Seminar has gone virtual, Renee managed uniquely challenging logistics and kept participants informed. Renee also ensures that this book will come into being for physical circulation when circumstances permit. Assistance also came from Barbara Corcoran, the Conference and Events Administrator, who provided logistical support and helped secure permissions to reprint excerpted articles. Once again, Bonnie Posick demonstrated her expertise as a proofreader and editor. Advice as we tried to manage the new logistics came from Susan Monsen, Yale Law School's Chief Information Officer; Daniel Griffin, Associate Director of Yale Law School's Media Services Department; and their team members Gregg Akoury and Nick Cifarelli, all of whom enable us to convene the virtual meetings. In addition, Mindy Jane Roseman, Yale Law School's Director of International Law Programs and Director of the Gruber Program for Global Justice and Women's Rights, continues to facilitate the Seminar's activities and to give generous guidance.

We have long had a tradition of thanking those who started the Seminar and acknowledging the institutional support that enables it. As we continue the process of intergenerational transitions, we appreciate the early participants, many of whom remain involved today. That group included Yale Law School professors Bruce Ackerman, Akhil Amar, Robert Burt, Drew Days, Owen Fiss, Paul Gewirtz, Paul Kahn, Harold Hongju Koh, Anthony Kronman, John Langbein, and Jed Rubenfeld, and constitutional court justices Aharon Barak (Israel), Stephen Breyer (United States), Pedro Cruz Villalón (Spain), Lech Garlicki (Poland), Dieter Grimm (Germany), Frank Iacobucci (Canada), and László Sólyom (Hungary). We celebrate both their framing of this endeavor and the ways in which the Seminar has grown to foster a diverse and inclusive community.

The commitment of the Deans of the Yale Law School has been unfailing. Thanks are due to Anthony Kronman, who was the dean when Paul Gewirtz founded the Seminar in the 1990s, to Harold Hongju Koh, Robert Post, and now to our current dean, Heather Gerken. In its founding years, the resources for Yale Law School's Global Constitutionalism Seminar were provided by Betty and David A. Jones, Sr. '60, and by Mary Gwen Wheeler and David A. Jones, Jr. '88, who helped to build bridges across oceans and legal systems. Since 2011, this Seminar has been part of the Gruber Program for Global Justice and Women's Rights at Yale Law School.

Although we are not able to gather together physically this fall, we are nonetheless lucky to come together virtually, to welcome new participants, and to have the luxury of time to spend with one another. Despite the need to have discussions across time zones and continents, we remain committed to thinking about a range of problems and to continuing with as much normalcy as possible to have a rich set of exchanges.

For the ability to do so, we are the beneficiaries of Peter and Patricia Gruber, who had the vision decades ago to respond to the world's problems by developing projects aiming to enhance fairness and justice. Their commitment to this and many other activities at Yale University and elsewhere sustain the Seminar and our relationships across borders. In the last few years, a host of targeted efforts aim to undermine democratic processes and independent judging. This year, even as the number of people at risk of disease and economic instability grows, that aggression is unabated. Once again, the Global Constitutional Seminar reasserts the importance of insisting on the contributions of institutions committed to just, thoughtful, and fair treatment.

Judith Resnik
Chair, Editor, Global Constitutionalism Seminar
Arthur Liman Professor of Law
Yale Law School, July 2020

MISINFORMATION AND TECHNOLOGY: RIGHTS AND REGULATION ACROSS BORDERS

DISCUSSION LEADERS

ROBERT POST AND MIGUEL MADURO

I. MISINFORMATION AND TECHNOLOGY: RIGHTS AND REGULATION ACROSS BORDERS

DISCUSSION LEADERS:
ROBERT POST AND MIGUEL MADURO

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In the spring of 2020, as we were writing this introduction, COVID-19 spread to 210 countries and territories. Like many others around the world, we found ourselves working remotely and refraining from in-person contact. The internet had already been an essential feature of our lives, but now the “virtual” has taken on an unprecedented importance. If the internet seemed to be reshaping our public sphere, it may now have become our public sphere. This shift makes sharper and more inevitable a variety of legal questions regarding the governance of the internet and its relation with democracy, free speech, and the public sphere. In this Chapter, we consider how the internet poses

distinctive questions for constitutional courts in the context of disseminating and regulating information.

We begin with reflections on the traditional public sphere, and we then consider its transformation into a virtual phenomenon. The distortion of information (“fake news”) is not a new problem, but it is one that the internet has complicated. With the professionalism of journalism during the progressive era, newspaper editors and publishers began to serve a gatekeeping function that vouched for the reliability of information. The internet’s ease of access means that such gatekeepers are now easy to circumvent by the mass public. Information is often confused with knowledge, which results in growing challenges to traditional sources of authoritative knowledge, including experts and mediating social actors such as political parties or trade unions.

The distribution of information on the internet is nevertheless highly curated. Social media platforms control the distribution of information. They do not do so in order to ensure the veracity of information, but to maximize the engagement of the public. Information on social media platforms is also disbursed according to mechanical algorithms that power “bots,” indices, and search engines.

The question is how law should and can control an entirely new architecture of information.

CONCEPTUALIZING THE PUBLIC SPHERE

The materials commence *in media res*, with an opinion from the European Court of Human Rights that was the product of a court grappling with how old conceptions of publication ought to be applied in the evolving environment of the internet. We then step back and present historical accounts of the “public sphere,” and the political and legal values that we might wish it to serve.

Węgrzynowski and Smolczewski v. Poland European Court of Human Rights (Fourth Section) Application No. 33846/07 (2013)

The European Court of Human Rights (Fourth Section), sitting as a Grand Chamber composed of: Ineta Ziemele, President, David Thór Björgvinsson, Päivi Hirvelä, George Nicolaou, Ledi Bianku, Zdravka Kalaydjieva, Krzysztof Wojtyczek, judges . . . [d]elivers the following judgment[:]

1. The case originated in an application . . . against the Republic of Poland lodged . . . by two Polish nationals, Mr Szymon Węgrzynowski and Mr Tadeusz Smolczewski (“the applicants”)

3. The applicants alleged that their rights to respect for their private life and reputation had been breached. . . .

6. . . . B.K. and A.M., journalists working for the national daily newspaper *Rzeczpospolita*, . . . published an article about a number of politicians. The journalists had alleged that the applicants, who were lawyers, had made a fortune over the years by assisting in shady business deals in which these politicians were involved. The journalists had alleged that the applicants had taken advantage of their positions at the expense of the public purse by obtaining unjustified benefits

7. . . . [The Warsaw Regional Court found that the] journalists had failed to contact the applicants and that their allegations were, to a large extent, based on gossip and hearsay . . . [rather than] a plausible factual basis . . . [and that they] had smeared the applicants' good name and reputation. The court allowed the applicants' claim in its entirety, by ordering the journalists and the editor-in-chief to pay, jointly, PLN 30,000 to a charity and to publish an apology in the newspaper. . . .

9. On 7 July 2004 the applicants sued again the newspaper under the same provisions They alleged that they had recently found out that the article remained accessible on the newspaper's Internet website. They submitted that the article was positioned prominently in the Google search engine and that anyone seeking information about them had very easy access to it. The article's availability on the newspaper's website, in defiance of the earlier judicial decisions, created a continuing situation enabling a large number of people to read it. The applicants' rights were thereby breached in the same way as had occurred through the publication of the original article. It rendered the protection granted by the judgments in their favour ineffective and illusory.

The applicants sought an order requiring the defendants to take down the article from the newspaper's website and publish a written apology for their rights having been breached by way of the article's continued presence on the Internet. . . .

11. The Warsaw Regional Court . . . dismissed the applicants' claim. . . .

12. . . . [T]he court stressed that removing the article from the website would have been devoid of any practical purpose and would amount to censorship and to rewriting history. Moreover, it would run counter to the principles of archiving. . . .

14. The applicants appealed. . . . They submitted that each new reading of the article on the newspaper's website, which was open to the general public, amounted to a new publication of that article. . . . The Internet was not an instrument for archiving materials, but had to be regarded as a means of communication of information on current topics. The mere fact that a part of a website was called an "archive" did not affect this in any way. . . .

24. The applicants complained that their rights to respect for their private life and reputation had been breached. They referred to Article 8 of the [European Convention on Human Rights], which in so far as relevant provides as follows:

“1. Everyone has the right to respect for his private . . . life

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.”

. . . 51. [The Government argued that the] fact that the article had remained on the newspaper’s website after the first set of the proceedings had come to end had not amounted to a separate violation, given that it had been published simultaneously with the print edition of the newspaper. . . . The applicant could have sought the rectification of the article or the publication of a footnote or an apology covering the Internet version of the article during the first set of proceedings [but] . . . had been negligent in formulating his first claim.

56. . . . [I]n cases concerning newspaper publications, this Court has previously held that the protection of private life has to be balanced, among other things, against the freedom of expression guaranteed by Article 10* of the Convention. . . . As a matter of principle the rights guaranteed by these provisions deserve equal respect. . . .

58. The Court has held that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ.

* 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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The latter undeniably have to be adjusted according to technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.

59. . . . Internet archives fall within the ambit of the protection afforded by Article 10. . . . [T]he substantial contribution made by Internet archives . . . [constitutes] an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. While the primary function of the press in a democracy is to act as a "public watchdog," it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported. The maintenance of Internet archives is a critical aspect of this role. . . .

62. The Internet archive of Rzeczpospolita is a widely known legal resource for Polish lawyers and for the general public, often used and acceded to by members of legal professions. . . .

65. . . . [I]t is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations. Furthermore, it is relevant for the assessment of the case that the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention. . . .

68. . . . [T]he State complied with its obligation to strike a balance between the rights guaranteed by Article 10 and, on the other hand, Article 8 of the Convention. A limitation on freedom of expression for the sake of the applicant's reputation in the circumstances of the present case would have been disproportionate

70. . . . [T]here has been no violation of Article 8 of the Convention.

Data Privacy and Dignitary Privacy

Robert C. Post (2018)*

. . . If democracy is "the organized sway of *public* opinion," democracy must presuppose the existence of a "public" capable of possessing an "opinion." A "public" is a specific kind of social organization that arises within the "public sphere" by uniting strangers through common exposure to common texts. A public is "not localized in space and time." It is defined "by the fact that its members ha[ve] access to the kind of publicness made possible by the printed word." A public emerges from "the circulation of texts among strangers who become, by virtue of their reflexively circulating discourse, a social entity."

* Excerpted from Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to be Forgotten, and the Construction of the Public Sphere*, 67 DUKE LAW JOURNAL 981 (2018).

The literary critic Michael Warner observes that

[o]ne of the most striking features of publics, in the modern public sphere, is that they can in some contexts acquire agency. They are said to rise up, to speak, to reject false promises, to demand answers, to change sovereigns, to support troops, to give mandates for change, to be satisfied, to scrutinize public conduct, to take role models, to deride counterfeits.

. . . The pioneering French sociologist Gabriel Tarde, who was one of the first to theorize the nature of the public, observed that the people who comprise publics do not meet in the public street or in the public square, but instead “are all sitting in their own homes scattered over a vast territory, reading the same newspaper.” Although “[t]he public could begin to arise only after the first great development in the invention of printing, in the sixteenth century . . . [t]he true advent . . . of the public” occurred with the invention of journalism in the eighteenth century. For the last several centuries, the press has been “the public sphere’s preeminent institution.” That is why Thomas Jefferson observed in 1787 that

[t]he basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.

Newspapers offered a continual and current stream of information and opinion that provoked widespread interest and so created an ever-expanding field of shared textuality. Only a newspaper, Alexis de Tocqueville wrote, “can succeed in putting the same thought in a thousand minds at the same instant.” “[T]he newspaper will create an immense, abstract, and sovereign crowd which it will name opinion.” The social psychologist Charles Cooley put it well in 1909:

In politics communication makes possible public opinion, which, when organized, is democracy. The whole growth of this . . . is immediately dependent upon the telegraph, the newspaper and the fast mail, for there can be no popular mind upon questions of the day, over wide areas, except as the people are promptly informed of such questions and are enabled to exchange views regarding them.

Two centuries ago, the vast majority of newspapers in the United States were “organs of political parties.” The “party press . . . came to be what we know as a ‘journal of opinion,’” in which the editor and the opinion page were most prominently featured. But in the 1830s “a new breed of urban paper, the so called ‘penny press,’ discovered that one could make money by printing local news as well as national political news, by hawking newspapers on the street and . . . by lowering the price of a copy from 6 cents

to a penny or two.” A fierce competition developed for readers and advertisers. This “marked a revolution in American journalism,” which “led to the triumph of ‘news’ over the editorial and ‘facts’ over opinion, a change which was shaped by the expansion of democracy and the market.”

The penny press expanded newspaper circulation. It did so by inventing “the modern concept of ‘news’”:

For the first time the American newspaper made it a regular practice to print political news, not just foreign but domestic, and not just national but local; for the first time it printed reports from the police, from the courts, from the streets, and from private households. One might say that, for the first time, the newspaper reflected not just commerce or politics but social life. To be more precise, in the 1830s the newspapers began to reflect, not the affairs of an elite in a small trading society, but the activities of an increasingly varied, urban, and middle-class society of trade, transportation, and manufacturing.

Newspapers hired reporters who fanned out across the urban environment and inculcated a “democratic attitude toward the happenings of the world: any event, no matter how apparently trivial, might qualify for print in a newspaper.” The collapse of earlier structures of hierarchy and deference, celebrated in the boisterous egalitarian American democracy described by de Tocqueville, found apt expression in the expansion of the concept of news, which reached out to include whatever might be of interest to the scrambling interests of the newly liberated middling classes.

Newspapers began to compete in the “commodity” of “news, i.e. information respecting recent events in which the public takes an interest, or in which an interest can be excited.” The penny press assigned reporters “to the police, the courts, the commercial district, the churches, high society, and sports. The penny papers made the ‘human interest story’ not only an important part of daily journalism but its most characteristic feature.” Power within newspapers began to shift from editors and the editorial page to “the news and the reporter.”

The devotion of the penny press to the news was denounced as sensationalism. It was considered unseemly and improper to expose the criminal underbelly of urban life or the balls and parties of high society. At root, these denunciations were “a cover for class conflict.” Old elites resented a communicative medium designed to satisfy the curiosity of upstart plebeians. This conflict intensified as the nineteenth century progressed, and as immigrants, both domestic and foreign, poured into American cities. These new residents were mystified by the spectacle, by the language, by the complex patterns of the urban scene.

To increase circulation and hence advertising revenue, newspapers responded by creating photographs and illustrations, larger and darker headlines, abbreviated news

stories, an ever-widening variety of topics, comic strips, the potpourri that makes up the Sunday paper, and so on. In the process they created a mass audience. On the sidewalk, one could observe a “torrent of workmen pouring down town, many of them reading as they go, and most of them provided with a newspaper for dinner-time, not less as a matter of course than the tin kettle”; on the street was a “long line of hackney-coaches on a stand, nearly every driver sitting on his box reading his paper.”

From a democratic point of view, the commercial success of newspapers was all to the good. It swept up the masses into the reading public and produced a sense of belonging that cannot be overemphasized. “The newspaper is that which connects each individual with the general life of mankind, and makes him part and parcel of the whole; . . . those who neither read newspapers nor converse with people who do read them are not members of the human *family*[.]” There was a “craving” for news “and lots of it.” On days in New York without newspapers . . . ,

[a] shadow appears to rest on the world. We are separated from our brethren, cut off, lost, alone; vague apprehensions of evil creep over the mind. We feel, in some degree, as husbands feel who, far from wife and children, say to themselves, shuddering, “What things *may* have happened, and I not know it!” Nothing quite dispels the gloom until the Evening Post—how eagerly seized—assures us that nothing very particular has happened since our last.

Reading newspapers brought the masses into the circle of conversation that produced public opinion and thereby constructed public opinion on a broader and more democratic basis. In turn newspapers expanded their circulation by reshaping the commodity of news to meet the interests of the masses. Newspapermen justified their expansion by claiming to supply “what the public wanted—witness their growing sales.” By the end of the nineteenth century, newspapers were defining news as “everything that occurs, everything . . . which is of sufficient importance to arrest and absorb the attention of the public or of any considerable part.” Successful editors were said to possess the “sixth sense” to discern “what is most likely to interest the public . . . to tell the day before or at midnight what the world will be talking about in the morning.” The news became “what Charles A. Dana described it to be, ‘something that will make people talk.’” News promoted these forms of social solidarity because, in the words of social theorist George Herbert Mead, it allowed the reader to interpret “his experience as the shared experience of the community of which he feels himself to be a part.”

Packaged “in the form of small, independent communications that can be easily and rapidly comprehended,” news began to perform

the same functions for the public that perception does for the individual man; that is to say, it does not so much inform as orient the public, giving each and all notice as to what is going on. It does this without any effort of the reporter to interpret the events he reports, except in so far as to

make them comprehensible and interesting.

Because “[i]t is upon the interpretation of present events, i.e., news, that public opinion rests,” it can be said that “[t]he extent to which news circulates within a . . . political society, determines the extent to which the members of such a society may be said to participate . . . in its political acts.” By 1920, Walter Lippmann could write with assurance that “democracy is unworkable” and “[p]ublic opinion is blockaded . . . if there is no steady supply of trustworthy and relevant news.” Those excluded from the news could not fully take part in the formation “of that public opinion which is the final source of government in a democratic state.” . . .

Bring Back Bentham

Judith Resnik (2011)*

. . . Jeremy Bentham . . . was a major proponent of “publicity,” structuring encounters in many venues to provide the public with knowledge about and enable scrutiny of various actors and institutions—judges and courts, included. Open courts, codification of laws, and a free press were his methods for transferring authority to the public, forming a “tribunal” whose opinions were to influence ruling powers. . . .

One function of publicity was truth. Bentham argued that the wider the circle of dissemination of a witness’s testimony, the greater the likelihood that a falsehood (“mendacity”) would be ferreted out. . . .

A second product of publicity for Bentham was education. Bentham believed that the public features of adjudication would generate a desirable form of communication between citizen and the state. . . .

Publicity’s third function was disciplinary; “the more strictly we are watched, the better we behave.” . . .

Bentham’s views on the importance of publicity were not limited to courtrooms, for he believed its benefits—truth, education, interaction, and superintendence—to be useful in diverse settings across a vast swath of social ordering. 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.” . . .

Given his ambitions, Bentham ought to be read as broadening “the scope of democratic theory” by expanding the means of making elites accountable. Furthermore, he sought to facilitate participation by the non-elite Bentham aimed to produce what Robert Post has called “democratic competence,” which underlies commitments to free speech and a free press. . . .

* Excerpted from Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS OF HUMAN RIGHTS 226 (2011).

How does the public . . . obtain information? . . . [A]n unfettered press . . . would help, Bentham thought, promote the requisite “*instruction, excitation, correspondence.*” Indeed, Bentham thought the “newspaper was a far more efficient instrument than pamphlets or books” because of the “regularity and constancy of attention” it provided to unfolding events.

Bentham’s enthusiasm for an exchange among citizens, via press and post, was shared by others on both sides of the Atlantic. James Madison’s short essay, *Public Opinion*, extolled its virtues as “the real sovereign in every free” government. To enhance the “general intercourse of sentiments,” Madison wanted the ready “circulation of newspapers through the entire body of the people.” . . .

Bentham’s optimism about public knowledge gave way to concerns about the need to revitalize the public sphere, as elaborated during the second half of the twentieth century by Jürgen Habermas. Habermas credited Bentham with forging “the connection between public opinion and the principle of publicity.” Habermas also read Bentham as seeking a transparency in parliamentary debates so that deliberations there would be continuous with those of the “public in general.” . . . But Habermas argued that, because only property owners were admitted to the public debate, the public sphere had become a vehicle for “ideology” and could no longer serve as a means for the “dissolution of power.” . . .

Habermas both admired and critiqued “public opinion,” for he saw it as subject to manufacture through the intertwining forces of the market and the state. Publicity that had once served to enable opposition “to the secret politics of the monarchs” came instead to be used to earn “public prestige” for specially-situated interests. The press became entangled with “public relations” efforts, as advertisements promoted consumerism. The resulting consensus that might exist was superficial, “confusedly . . . subsume[d] under the heading ‘public sphere.’” The public sphere thus served as a space for performance of prestige rather than as a forum for “critical debate.” . . .

Habermas sought to interrupt such developments through prescriptions aimed at facilitating public reasoning as members of pluralist polities communicated, discursively, so as to reach a genuine consensus. According to Habermas, individual private interests themselves were not capable of being “adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different” Positive law needed legitimacy derived through a procedure of “presumptively rational opinion- and will-formation.” Thus, the public sphere needed to be reconstituted Without gods and monarchs, one needed a vibrant public sphere to establish that the relationship between the “rule of law and democracy” was more than a “historically contingent association.”

Borrowing from political theorist Nancy Fraser, I have added an “s” to the term public sphere . . . to underscore that no single “public” exists. Rather, a pluralistic social

order, replete with racial, gender, class and ethnic hierarchies, is constituted through a series of spheres in which norms are debated. Moreover, as Fraser has pointed out, the exchanges in these various and sometimes overlapping spheres are not equally participatory; certain voices dominate in stratified societies. Fraser also focused on the disparate capacities of those who need to be heard as she called for “participatory parity” and argued for more structures to enable a “plurality of competing publics” to emerge rather than aspire to the formation of “a single, comprehensive public sphere.” Courts are one site that is responsive in some measure to the inequities that undermine the kinds of “discourses” to which Habermas and Fraser aspire. . . .

. . . [C]ourts provide a unique service in that they create distinctive opportunities to gain knowledge. Conflicts have many routes into the public sphere. The media (including bloggers) or members of government may initiate investigations. . . . But courts distinguish themselves from either the media or other government-based investigatory mechanisms in an important respect: the attention paid to ordinary disputes. Courts do not rely on national traumas or scandals or on selling copies of their decisions. Courts do not respond only when something “interesting” is at issue. . . .

Bentham presumed what now seems to be a naïve faith in the free-forming public opinion. Post-Habermas commentators . . . are, in contrast, well aware of how “public relations” in courts can aim to manipulate opinion. In high-stakes, high-visibility litigation, disputants with resources may hire media consultants who work with lawyers to shape popular views of the merits of the claims. Courts in turn worry about distortion of their work; many now provide “public information services” or “media alerts” to directly disseminate decisions. Campaigns against judges also rely on publicity to pressure judges (who may, if needing to be reappointed or reelected, be vulnerable) to be responsive to opinions in ways that can undermine judicial autonomy. One anti-immigration prosecutor in Arizona, for example, has repeatedly accused the local courts and particular judges of failing to enforce laws related to unlawful entry into the United States. . . . [P]ublicity itself can be used to undercut the legitimacy of the very institution making the knowledge public. . . .

How does one assess such changes? Bentham had argued that expanding the flow of information will enable public opinion to become “more and more enlightened” to advance society’s interests. That metric requires some definition of what societal interests are. Experiences since Bentham with public displays make plain that openness does not necessarily trigger reasoned discourses, nor does increased information necessarily “produce an improvement in the quality of opinions held by the people.” Further, the harms of false accusations—vivid during the 1950s as individuals were accused of being Communists—are substantial—rendered all the more powerful through the distribution mechanism of the internet. Webcasting live trial testimony (as contrasted with appellate arguments) raises yet other problems, for it could turn the act of bearing witness to particular events into being put on display through YouTube. . . .

The Virtual Public Sphere, its Benefits, and its Burdens

The internet has transformed the material public sphere of newspapers, magazines, films, and books into a “virtual” public sphere. The new virtual public sphere differs from the traditional public sphere in many fundamental ways. To name just a few: (1) The marginal cost of information in the virtual public sphere is almost zero. This shift means that information can spread rapidly and easily. When information goes “viral,” its effects are magnified. (2) The scale of information access on the internet is unprecedented. The internet has broken the barriers by which information was previously compartmentalized, which in turn has undermined expertise and authority. Typical is a sign that may be found in the waiting room of some doctors: “Please DO NOT Confuse Your Google Search with My Medical Degree.” (3) The scale of information on the internet has permitted the collection and use of “big data” sets that can predict and guide the choices, predilections, and decisions of ordinary persons. (4) The virtual public sphere is interactive, which means that people can easily speak and find out about each other to form affinity groups that both empower and circumscribe life in the virtual sphere by creating information bubbles. (5) The virtual public sphere is distributed according to an architecture that invisibly but implacably controls what seems like an infinitely easy and costless access to a universe of information. This architecture works in a myriad of unseen ways, ranging from search engine algorithms to the formulae that fill our newsfeeds, and it profoundly influences our access to the internet, raising questions of control and accountability.

The Virtual Sphere Zizi Papacharissi (2002)*

. . . [C]elebratory rhetoric on the advantages of the internet as a public sphere focuses on the fact that it affords a place for personal expression, makes it possible for little-known individuals and groups to reach out to citizens directly and restructure public affairs, and connects the government to citizens. . . . Acquiring and dispersing political communication online is fast, easy, cheap, and convenient. Information available on the internet is frequently unmediated; that is, it has not been tampered with or altered to serve particular interests. . . .

Despite the fact that all online participants have the same access to information and opinion expression, the discourse is still dominated by a few. Moreover, not all information available on the internet is democratic or promotes democracy; for example, white supremacy groups often possess some of the cleverest, yet most undemocratic websites. However, this particular comment should not be misunderstood. Fundamental democratic principles guarantee the free expression of opinion. While sites that openly advocate discrimination on the basis of race or ethnicity exercise the right to free speech, they certainly do not promote democratic ideals of equality. . . .

* Excerpted from Zizi Papacharissi, *The Virtual Sphere*, 4 NEW MEDIA & SOCIETY 9 (2002).

. . . [A]nother reason why there is much enthusiasm regarding the future of the internet as a public sphere has to do with its ability to connect people from diverse backgrounds and provide a forum for political discussion. . . . [O]thers are skeptical about the prospect of disparate groups getting along. These technologies carry the promise of bringing people together, but also bear the danger of spinning them in different directions. . . .

. . . Often, online communication is about venting emotion and expressing what [some commentators] refer to as “hasty opinions,” rather than rational and focused discourse. Greater participation in political discussion does not automatically result in discussion that promotes democratic ideals. . . .

Another crucial issue lies in how interconnectedness affects discussion. The number of people that our virtual opinions can reach may become more diverse, but may also become smaller as the internet becomes more fragmented. Special interest groups attract users who want to focus the discussion on certain topics, providing opportunities for specialized discussion with people who have a few things in common. . . .

. . . [F]ragmentation does not manifest itself solely through the proliferation of special interest subgroups. A good amount of the information that we receive online is of a fragmented nature, presenting one aspect of an issue, snippets of information, or randomly assembled opinions or factoids. . . . Ultimately, there is a danger that these technologies may overemphasize our differences and downplay or even restrict our commonalities. . . .

Capitalist patterns of production may commodify these new technologies, transforming them into commercially oriented media that have little to do with promoting social welfare. Even if this scenario does not materialize, can new technologies mitigate the influence of special interests on politics? Internet-related technologies can certainly help connect, motivate, and organize dissent. Whether the expression of dissent is powerful enough to effect social change is a question of human agency and a much more complex issue. . . .

. . . [I]t would seem that the internet and related technologies have managed to create new public space for political discussion. This public space facilitates, but does not ensure, the rejuvenation of a culturally drained public sphere. Cheap, fast, and convenient access to more information does not necessarily render all citizens more informed, or more willing to participate in political discussion. Greater participation in political discussion helps, but does not ensure a healthier democracy. New technologies facilitate greater, but not necessarily more diverse, participation in political discussion In addition, our diverse and heterogeneous cultural backgrounds make it difficult to recreate a unified public sphere, on or offline. . . . Moreover, the quickly expanding commodification of internet-related resources threatens the independence and democratizing potential of these media.

Nevertheless, the most plausible manner of perceiving the virtual sphere consists of several culturally fragmented cyberspheres that occupy a common virtual public space. Groups of “netizens” brought together by common interests will debate and perhaps strive for the attainment of cultural goals. . . .

. . . The fact that people from different cultural backgrounds, states, or countries involve themselves in virtual political discussions in a matter of minutes, often expanding each other’s horizons with culturally diverse viewpoints, captures the essence of this technology. The value of the virtual sphere lies in the fact that it encompasses the hope, speculation, and dreams of what could be. . . . It is a vision, but not yet a reality. . . .

Code Version 2.0

Lawrence Lessig (2006)*

. . . [C]yberspace creates a new threat to liberty, not new in the sense that no theorist had conceived of it before, but new in the sense of newly urgent. We are coming to understand a newly powerful regulator in cyberspace. That regulator could be a significant threat to a wide range of liberties, and we don’t yet understand how best to control it.

. . . [C]ode is the “built environment” of social life in cyberspace. It is its “architecture.” And if in the middle of the nineteenth century the threat to liberty was norms, and at the start of the twentieth it was state power, and during much of the middle twentieth it was the market, then . . . we must come to understand how in the twenty-first century it is a different regulator—code—that should be our current concern. . . .

. . . [F]our constraints regulate . . . —the law, social norms, the market, and architecture—and the “regulation” . . . is the sum of these four constraints. Changes in any one will affect the regulation of the whole. Some constraints will support others; some may undermine others. . . .

The constraints are distinct, yet they are plainly interdependent. Each can support or oppose the others. Technologies can undermine norms and laws; they can also support them. Some constraints make others possible; others make some impossible. Constraints work together, though they function differently and the effect of each is distinct. Norms constrain through the stigma that a community imposes; markets constrain through the price that they exact; architectures constrain through the physical burdens they impose; and law constrains through the punishment it threatens. . . .

. . . But these separate constraints obviously don’t simply exist as givens in a social life. They are neither found in nature nor fixed by God. Each can be changed,

* Excerpted from LAWRENCE LESSIG, *CODE VERSION 2.0* (2d ed., 2006).

though the mechanics of changing them is complex. Law can have a significant role in this mechanics. . . .

. . . As life moves onto the Net, more of life will be regulated through the self-conscious design of the space within which life happens. That's not necessarily a bad thing. If there were a code-based way to stop drunk drivers, I'd be all for it. But neither is this pervasive code-based regulation benign. Due to the manner in which it functions, regulation by code can interfere with the ordinary democratic process by which we hold regulators accountable.

. . . Code-based regulation—especially of people who are not themselves technically expert—risks making regulation invisible. Controls are imposed for particular policy reasons, but people experience these controls as nature. And that experience, I suggested, could weaken democratic resolve. . . .

. . . [I]f we could put aside our own skepticism about our democracy for a moment, and focus at least upon aspects of the Internet and cyberspace that we all agree matter fundamentally, then I think we will all recognize a point that, once recognized, seems obvious: If code regulates, then in at least some critical contexts, the kind of code that regulates is critically important.

By “kind” I mean to distinguish between two types of code: open and closed. By “open code” I mean code (both software and hardware) whose functionality is transparent at least to one knowledgeable about the technology. By “closed code,” I mean code (both software and hardware) whose functionality is opaque. One can guess what closed code is doing; and with enough opportunity to test, one might well reverse engineer it. But from the technology itself, there is no reasonable way to discern what the functionality of the technology is. . . .

. . . In answer to those who say that the Net cannot be regulated, I've argued that whether it can be regulated depends on its architecture. Some architectures would be regulable, others the limits in open code would not. I have then argued that government could take a role in deciding whether an architecture would be regulable or not. The government could take steps to transform an architecture from unregulable to regulable, both indirectly (by making behavior more traceable) and directly (by using code to directly effect the control the government wants).

The final step in this progression of regulability is a constraint that is only now becoming significant. Government's power to regulate code, to make behavior within the code regulable, depends in part on the character of the code. Open code is less regulable than closed code; to the extent that code becomes open, government's power is reduced. . . .

. . . The values of a given space are not only the values of speech, autonomy, access, or privacy. They may also be values of limited control. . . .

. . . I certainly believe that government must be constrained, and I endorse the constraints that open code imposes, but it is not my objective to disable government generally. As I've argued . . . some values can be achieved only if government intervenes. Government has a role, even if not as substantial a role as it would wish. We need to understand this role, as well as how our values might be advanced in the context of the Web.

One constraint seems clear [E]ven if open code does not disable government's power to regulate completely, it certainly changes that power. On the margin, open code reduces the reward from burying regulation in the hidden spaces of code. It functions as a kind of Freedom of Information Act for network regulation. As with ordinary law, open code requires that lawmaking be public, and thus that lawmaking be transparent. . . .

Even this is an important—some might say an essential—check on the power of government. . . . Regulability is conditional on the character of the code, and open code changes that character. It is a limit on government's power to regulate—not necessarily by defeating the power to regulate, but by changing it.

Free Speech in the Algorithmic Society

Jack M. Balkin (2018)*

. . . [R]ecent calls for a solution to the problem of fake news [is one example] of a larger phenomenon: the emergence of a new form of government speech regulation. . . .

The first key feature of new school speech regulation is collateral censorship. . . .

Collateral censorship in the digital era involves nation states putting pressure on infrastructure providers to censor, silence, block, hinder, delay, or delink the speech of people who use the digital infrastructure to speak. Nation states . . . can impose fines or criminal penalties. They can threaten prosecution. Or they can engage in jawboning—urging digital infrastructure operators to do the right thing and block, hinder, or take down content. Ex ante methods of speech regulation include filtering and blocking. Ex post methods involve takedown, with or without notice to the speaker. . . .

A second key feature of new school speech regulation is public / private cooperation and cooptation New school speech regulation seeks to coax the infrastructure provider into helping the state in various ways. These methods range from blocking and filtering content ex ante, to removing content (and access) ex post, to

* Excerpted from Jack M. Balkin, *Free Speech in the Algorithmic Society*, 51 U.C. DAVIS LAW REVIEW 1149 (2018).

surveilling end-users and providing information about them and their online activities to government officials. . . .

The relationship between nation states and infrastructure providers varies along a spectrum. It ranges from direct regulation, to threats, to suggestions that things will go better for infrastructure operators if they cooperate, to negotiations over the terms of cooperation. . . .

This brings us to the third feature of new school speech regulation: private governance. Private governance means that the infrastructure provider governs the flow of information through the infrastructure that it owns, and it governs the behavior of the end-users and customers who employ the digital infrastructure. . . .

What has emerged is a new model of free expression. This model is pluralist rather than dyadic. For convenience, we can imagine it involving a struggle among at least three different groups of people and organizations. On one side of the triangle we have the state and supra-national entities like the European Union. . . .

On the second side of this triangle, we have the companies that operate the digital infrastructure, especially search engines and social media platforms. . . .

On the third side of the triangle we have the speakers who use the digital infrastructure to communicate. . . .

. . . In fact, the new system of speech regulation is actually far more complicated, because there are more than three sets of players.

. . . [I]nternational organizations and stakeholders . . . create rules and impose governing regimes.

. . . [E]nd-users can be governed by more than one infrastructure provider. . . .

. . . [L]egacy media organizations like newspapers, broadcasters, cable networks, and movie studios may strike deals with digital infrastructure providers to regulate content

. . . [C]ivil society organizations as well as end-users may . . . object to speech that they find obnoxious, bigoted, racist, or abusive. They may demand that social media platforms block or take down content and expel trolls or misbehaving end-users. There will also be pushback in the opposite direction by end-users and civil society organizations that want to relax content controls and expand end-user rights.

. . . [C]yberattacks by hackers and other rogue elements on the Internet infrastructure—and on particular websites and speakers—place additional pressure on digital infrastructure companies. . . .

. . . [G]roups can use a variety of techniques to discipline, harass, confuse, discourage, and silence other speakers, and to confuse, distract, and mislead Internet audiences. . . . Speakers may also *flood the Internet with propaganda* or other material designed to discredit reliable sources of information, or to distract or confuse people who get their news from social media. . . .

We can apply this analysis to . . . the problem of fake news. . . .

. . . Fake news travels through social media. Suppose one believes that fake news is a genuine problem for democracies. How should one regulate it? The least efficient way is for states to pursue the people and organizations that produce the fake news Most of these people are anonymous, or outside the country, and many of them employ armies of bots.

Instead, the government might put pressure on parts of the digital infrastructure . . . to solve the problem. . . . Social media companies would be directed to identify and surveil fake news stories and producers, block links to fake news stories and fake news sites, or else supplement them with clarifying and counteracting material. . . .

Social media companies may not even need to take the hint. They may decide as a public relations matter, or as a routine part of the governance of their online communities, they will take various steps to counteract fake news. These solutions might include curating news feeds, making purchases of advertisements more transparent, marking suspected links, or supplementing suspected links with suggested alternatives. Facebook has already announced policies along these lines.

. . . To solve a perceived problem of speech regulation, a wide variety of public and private actors urge infrastructure owners—in this case, social media companies—to develop their own programs, algorithms, and bureaucracies, and to help end-users make decisions about what kinds of news stories they should read and trust. . . .

This is the direction of the future, and it is by no means guaranteed to be free speech friendly. From the standpoint of free speech values, the best solution would be for large international infrastructure owners and social media platforms to change their self-conception. Ideally, they would come to understand themselves as a new kind of media company, with obligations to protect the global public good of a free Internet, and to preserve and extend the emerging global system of freedom of expression. . . .

This is not the first time this has happened. . . . Modern notions of journalistic objectivity and fairness [in the United States] . . . did not emerge fully until the 1920s. . . . Journalists “grew self-conscious about the manipulability of information in the propaganda age” and the deliberate use of disinformation by propagandists and publicity agents. They developed new norms and social responsibilities as a result. . . .

. . . Digital infrastructure owners are not in precisely the same situation as twentieth century mass media enterprises. But like them, they must take up a new set of social obligations to preserve the global public good of a free Internet and a healthy and vibrant global public sphere.

* * *

In response to the familiar, yet unique, characteristics of the internet, courts have had to decide whether existing jurisprudence should extend into the virtual public sphere. In *Shaul v. Nidaily*, the Supreme Court of Israel faced this question in the context of user interactions with Facebook posts.

Shaul v. Nidaily Communications, Ltd.
Supreme Court of Israel
Civil Appeal 1239/19 (2020)*

Before: The Honorable Justice D. Barak-Erez, The Honorable Justice M. Mazuz, and The Honorable Justice Y. Vilner.

Justice D. Barak-Erez:

1. A post on the social media network Facebook [may] receive a “share” or the reaction known as a “like.” When the original post is deemed defamatory, does further “echoing” of it, through sharing and liking it, become the basis of a tortious claim? In other words, does the action of sharing or liking a post constitute “publication” as defined by Section 2** of The Defamation Law (1965)? . . .

12. The respondent, . . . a publisher of a weekly newspaper . . . , filed a lawsuit in the Magistrate Court of Tel Aviv-Yafo against the appellants The lawsuit argued that the appellants posted content on Facebook slandering the local paper, which constitutes defamation. . . .

36. . . . The Defamation Law is applicable also to content published on the internet. Indeed . . . that law was enacted over half a century ago, when legislators were not aware of complexities created by the digital age. Nevertheless, . . . we must apply

* Translation by Elazar Weiss (Yale Law School, LL.M. Class of 2020).

** Section 2 of the Israel Defamation Law provides:

(a) publication, in relation to defamatory matter, means publication by speech, writing or printing, including painting, effigy, gesture, sound and any other means.

(b) without excluding other modes of publication, defamatory matter shall be regarded as published—(1) if it is intended for any person other than the injured party; (2) if it is in writing, and the writing is likely, in the circumstances of the case, to reach any party other than the injured party.

the law of defamation with appropriate adaptation, to the arena of internet publication, rather than assume the existence of a *lacuna*. At the same time, the law's application must consider, among other things, the characteristics of the internet. Accordingly, one has to note that social media networks have become a central arena of information and opinions, a sort of modern "town square" The availability and accessibility of social media networks enable the sharing of information and of many diverse opinions with little effort, as well as the distribution of content to the general public with little or no resources invested, in a way drastically different from the past. There are of course many advantages to this, among them the opportunity afforded to each individual to exercise his right to free speech without inhibition or government interference. In addition, the lack of restrictions regarding publication in social networks inherently enables a diversity of perspectives, enriching the marketplace of ideas and allows users to react swiftly to content that is damaging to them in their opinion. . . .

37. On the other hand, we must acknowledge certain flaws that unfortunately often characterize the discourse on social media. Thus, the availability and accessibility of social media enable swift and widespread circulation of incitement and hate publications, false and misleading information ("fake news"), or hurtful and defaming statements. . . .

38. . . . [A]ny decision regarding the manner of applying the law to statements made on social media networks is inevitably entangled with an interpretive effort to bridge the "generational gap," in order to find the right balance between achieving the purpose of Defamation Law and the of weighty public interests which counterbalance it, headed by freedom of speech—which is the very "heart and soul" of democracy Therefore, we must tread extremely carefully, and avoid interpretations that will create a "chilling effect" which deters free and legitimate expression on the internet. . . .

41. . . . [T]he definition of the term "publication" in section 2 of The Defamation Law is broad and includes publication in many ways—beginning from "traditional" avenues of publication, spoken, printed or written, continuing with more abstract forms of expression by painting, movement and sound, and culminating in the phrase "any other mode of expression" (section 2(a) of the law). According to section 2(b) of the law, for the purpose of the definition "publication" it is enough that the libelous statement reached only one single person other than the injured party . . . and in writing, it is enough if the statement had the potential of reaching someone other than the injured party.

42. . . . [I]t is abundantly clear that the direct action of writing a "status" or "post" on social media indeed constitutes publication in the sense of the law, and therefore may give rise for legal action when the content is defamatory. The question we focus on concerns actions that do not create a new and independent message, but rather are intended to relate to, or echo, content that has already been published by other users of the network. . . .

45. The act of sharing creates a kind of “copy” of the damaging publication that is presented to the sharer’s friends or followers on the social network. Thus, we are dealing with an action of a repeat publication that exposes it to additional users—usually, those who are included in the sharer’s list of friends or followers, who might not have been exposed to the original publication. . . . [T]he act of sharing may afford the specific publication greater circulation and resonance (and in this way contribute to its becoming “viral”), beyond what it would have received without the “share.” For instance, it is possible that the publisher of a certain post with defamatory elements does not have many friends or followers, so that the original content isn’t likely to be widely circulated, but once another user with a large amount of followers shares it, this action greatly widens the scope of the post’s exposure and exacerbates the damage to the injured party’s good name, or at the very least creates an equal amount of damage. It should be mentioned here that the default position of the Defamation Law is one that holds printers, sellers, and distributors liable for defamation, so long as they were aware—or should have been aware—that the published content contains libelous or defamatory statements

46. In contrast, it is difficult to regard a “like” as an act creating a “duplication” of a statement or as a repetition of it. Indeed, sometimes the algorithm used by the social network leads to the updating of additional network users of the reaction, and consequently more users are exposed to the original post. But one can hardly claim in this case that the user himself—who did not in any way attempt to duplicate the original publication—is the one reiterating it to these users, in contrast to indirectly influencing the operation of the social network’s algorithm. . . .

68. And what of other legal traditions? Questions regarding the liability of individuals who shared and liked posts on Facebook have . . . not so far led to binding precedents. Thus, for example, in 2017 a court in Zurich held an individual liable for liking a post that attributed anti-Semitic views to a man (*Kessler*). In other cases, the possibility of liability for “re-tweets” on Twitter has been recognized in principle. This was the position held by the High Court in Delhi in a judgement given in 2017 (*Chadha v. State*), and also in Japan in the Osaka District Court in 2019 (*Iwakami*). A relatively similar issue can be found in a judgment of the Supreme Court of the Province of New South Wales in Australia (*Bolton v. Stoltenberg* (2018)) . . . which in essence held that the action of liking a post would not in itself constitute a cause of action. . . .

75. . . . The content of the Defamation Law was crafted with the intent of balancing freedom of expression on the one hand and the right to one’s good name on the other. Holding an individual who knowingly chooses to share libelous content liable in tort, alongside the defenses and mitigations found in the law, as well as procedural tools meant to prevent the misuse of legal proceedings, constitutes a proper balance. In contrast, framing actions that solely express an emotional reaction to a statement as “publications” in the sense of the law, would upset this balance and may create a substantial and undesirable chilling effect on free discourse on social media networks.

76. . . . [T]he Legislature would do well to undertake a serious and in-depth update of the Defamation Law in a manner that would factor in technological developments—those that have already occurred and those that will occur in the foreseeable future. . . .

[The Court held that while “liking” an online post is not akin to publication, “sharing” social media posts constitutes publication under the Defamation Law. The Court affirmed an award of damages to the respondent.]

Ferretting Out “Fake News”

In the days before printing, sacred knowledge was in Western Europe the monopoly of the Church and clergy. So long as the Bible remained in Latin, so long as it was available only in expensive manuscripts, the Clergy could control knowledge of divine things. But after the Bible could be cheaply reproduced through printing, and after it could be translated into vernacular tongues that everyone understood, wide swaths of the population could come to believe themselves expert on first matters. The resulting reformation produced two centuries of antinomian chaos.

Like the invention of printing, the internet has once again unsettled the traditional prerogative of authority to know the nature of things. Everyone is now an expert on everything, whether it be vaccines or global warming. The upshot is that politics threatens to undermine expert knowledge. In this section, we ask how we might separate information from *misinformation*, and when is it imperative to do so? What level of trust should we place in private or public actors to make this determination?

Although the internet raises a host of new concerns with “fake news,” we begin with excerpts from political theorist Hannah Arendt, early twentieth-century-journalist Edward McKernon, and law professor Robert Post. These sources highlight societies’ longstanding struggle with misinformation.

Truth and Politics Hannah Arendt (1968)*

. . . [I]f we . . . think of factual truths—of such modest verities as the role during the Russian Revolution of a man by the name of Trotsky, who appears in none of the Soviet Russian history books—we at once become aware of how . . . vulnerable they are The chances of factual truth surviving the onslaught of power are very slim indeed; it is always in danger of being maneuvered out of the world not only for a time but, potentially, forever. Facts and events are infinitely more fragile things than axioms,

* Excerpted from HANNAH ARENDT, *Truth and Politics*, in BETWEEN PAST AND FUTURE (1968).

discoveries, theories—even the most wildly speculative ones—produced by the human mind; they occur in the field of the ever-changing affairs of men, in whose flux there is nothing more permanent than the admittedly relative permanence of the human mind’s structure. Once they are lost, no rational effort will ever bring them back. . . .

. . . While probably no former time tolerated so many diverse opinions on religious or philosophical matters, factual truth, if it happens to oppose a given group’s profit or pleasure, is greeted today with greater hostility than ever before. . . . The facts I have in mind are publicly known, and yet the same public that knows them can successfully, and often spontaneously, taboo their public discussion and treat them as though they were what they are not—namely, secrets. . . . What seems even more disturbing is that to the extent to which unwelcome factual truths are tolerated in free countries they are often, consciously or unconsciously, transformed into opinions—as though the fact of Germany’s support of Hitler or of France’s collapse before the German armies in 1940 or of Vatican policies during the Second World War were not a matter of historical record but a matter of opinion. . . . What is at stake here is this common and factual reality itself, and this is indeed a political problem of the first order. . . . [F]actual truth, though it is so much less open to argument than philosophical truth, and so obviously within the grasp of everybody, seems often to suffer a similar fate when it is exposed in the market place—namely, to be countered not by lies and deliberate falsehoods but by opinion

. . . [F]actual truth is no more self-evident than opinion, and this may be among the reasons that opinion-holders find it relatively easy to discredit factual truth as just another opinion. Factual evidence, moreover, is established through testimony by eyewitnesses—notoriously unreliable—and by records, documents, and monuments, all of which can be suspected as forgeries. In the event of a dispute, only other witnesses but no third and higher instance can be invoked, and settlement is usually arrived at by way of a majority; that is, in the same way as the settlement of opinion disputes—a wholly unsatisfactory procedure, since there is nothing to prevent a majority of witnesses from being false witnesses. On the contrary, under certain circumstances the feeling of belonging to a majority may even encourage false testimony. . . .

The hallmark of factual truth is that its opposite is neither error nor illusion nor opinion, no one of which reflects upon personal truthfulness, but the deliberate falsehood, or lie. . . . It is clearly an attempt to change the record, and as such, it is a form of action. The same is true when the liar, lacking the power to make his falsehood stick, does not insist on the gospel truth of his statement but pretends that this is his “opinion,” to which he claims his constitutional right. This is frequently done by subversive groups, and in a politically immature public the resulting confusion can be considerable. The blurring of the dividing line between factual truth and opinion belongs among the many forms that lying can assume

To be sure, . . . organized lying is a marginal phenomenon, but the trouble is that its opposite, the mere telling of facts, leads to no action whatever; it even tends, under

normal circumstances, toward the acceptance of things as they are. . . . Only where a community has embarked upon organized lying on principle, and not only with respect to particulars, can truthfulness as such, unsupported by the distorting forces of power and interest, become a political factor of the first order. Where everybody lies about everything of importance, the truth-teller, whether he knows it or not, has begun to act; he, too, has engaged himself in political business, for, in the unlikely event that he survives, he has made a start toward changing the world. . . .

It is quite natural that we become aware of the non-political and, potentially, even anti-political nature of truth—*Fiat veritas, et pereat mundus*—only in the event of conflict. . . . But this cannot possibly tell the whole story. It leaves out of account certain public institutions, established and supported by the powers that be, in which, contrary to all political rules, truth and truthfulness have always constituted the highest criterion of speech and endeavor. Among these we find notably the judiciary, which either as a branch of government or as direct administration of justice is carefully protected against social and political power, as well as all institutions of higher learning, to which the state entrusts the education of its future citizens. . . .

. . . The telling of factual truth comprehends much more than the daily information supplied by journalists, though without them we should never find our bearings in an ever-changing world and, in the most literal sense, would never know where we are. This is, of course, of the most immediate political importance; but if the press should ever really become the “fourth branch of government,” it would have to be protected against government power and social pressure even more carefully than the judiciary is. For this very important political function of supplying information is exercised from outside the political realm. . . .

Fake News and the Public

Edward McKernon (1925)*

The rush of the day seemed to have ended in the New York office of The Associated Press on the afternoon of June 8, 1921. . . . The night shift was nearly due. The Day Editor . . . looked at his watch and yawned.

Suddenly out of the air flashed an S O S followed by “Struck an iceberg off Newfoundland. Leaking.” There was no signature, the name of the vessel in distress having been lost somewhere. . . . Now this message in itself might have caused no great excitement except for the coincidence that during the preceding night the French line steamer *Rochambeau* had wirelessly the offices of the line in New York that she had “sighted ice off the North Atlantic coast.”

* Excerpted from Edward McKernon, *Fake News and the Public*, HARPER’S MAGAZINE (1925). Copyright ©1925 Harper’s Magazine. All Rights reserved. Reproduced from the October issue by special permission.

. . . Instantly the two messages were associated. As quickly members of the Associated Press staff were communicating with the offices of the French line. . . . Ten minutes passed. They worked fast. But rumor worked faster. . . . Telephone calls choked the switchboard. . . . “Have you any word of a collision at sea?” To all went the same answer: “We do not know of any disaster.”

The Day Editor . . . knew some papers were going to press with the rumor. If it were true, it was news of the first magnitude. . . . The peace of mind of many was in his keeping. “We’ll wait,” he said. Twelve minutes of suspense—thirteen—fourteen—fifteen—A flash from the cable: “*Rochambeau* reports all well.” . . .

This incident illustrates vividly the task of the responsible modern editor who would sift fact from rumor. . . .

The burden of responsibility to the public carried by . . . distributors of news has always been great, yet it has increased enormously in recent years by reason of the rapidly increased efficiency of the distributing mechanism. Advantage has been taken of every device of wit and science to speed up the report until the swift transmission of news is in itself a source of unprecedented danger. . . . Once the news faker obtains access to the press wires all the honest editors alive will not be able to repair the mischief he can do. . . .

What makes the problem of distributing accurate news all the more difficult is the number of people—a number far greater than most readers realize—who are intent on misinforming the public for their own ends. . . .

The Constitutional Concept of Public Discourse

Robert C. Post (1990)*

. . . The theory that has most influenced courts concerning the distinction between fact and opinion is the notion that an opinion is an assertion that “does not lend itself to verification and cannot, therefore, be regarded as one of fact.” Opinions are thus those statements that cannot be “proved true or false.” Simply stated in this fashion, however, the theory is subject to two fatal objections. First, the definition of opinion as unverifiable statements renders meaningless the constitutional rationale for protecting opinion. “The competition of the market” could not in any sense determine the validity of intrinsically unprovable statements, and hence, a market-place in such statements could not serve a valuable “truth-seeking function.”

Second, there are statements which, although unverifiable, would commonly be recognized as statements of facts. . . .

* Excerpted from Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARVARD LAW REVIEW 601 (1990).

There is, however, a more sophisticated formulation of the verifiability test that asks not whether statements are verifiable, but whether they are “objectively” verifiable, whether they are “subject to *empirical* proof.” . . .

. . . “False statements of fact” are constitutionally valueless, the [U.S. Supreme] Court in [*Hustler Magazine v.*] *Falwell* tells us, because “they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.” The Court’s point may perhaps be fairly generalized in the following manner: for constitutional purposes the truth of certain kinds of statements—opinions—can only be determined by the free play of speech and counterspeech characteristic of the marketplace of ideas. But the functioning of the marketplace depends upon the accuracy of other kinds of statements—factual assertions—whose truth must be determined independently of any mere process of discussion.

The difficulty with this interpretation of the Court’s analysis is that it appears to conceive of factual truth as independent of social processes of discussion and communication. This conception conjures up images of a long-discredited logical empiricism, in which the “verification” of facts was said to rest on “‘brute data’ . . . whose validity cannot be questioned by offering another interpretation or reading,” and “whose credibility cannot be founded or undetermined by further reasoning.” It is no doubt to these images that judicial use of the words “empirically” and “objectively” is meant to refer. But the vulnerability of such crude empiricism is now more or less taken for granted, because even if there were such things as “brute data,” the meaning of those data would necessarily depend upon processes of inference that themselves are susceptible to further interpretation or reasoning. All knowledge, therefore, ultimately depends, to one degree or another, upon social processes of discussion. . . .

We can . . . distinguish between statements that make claims whose validity purports to be independent of the standards or perspectives of any finite group of persons, and statements that instead make claims founded upon the “complex of obligations binding us, as members of a community, to sustain the institutions which provide structure for our collective life.” Judgments are intrinsically statements of the latter sort. That is because “there must be underlying grounds of judgment which human beings, qua members of a judging community, share, and which serve to unite in communication even those who disagree (*and who may disagree radically*). . . . Judgment implies a community that supplies common grounds or criteria by which one attempts to decide.” Hence “we require a definition of community in order to know how the judgment shall proceed.”

. . . Because the truth or falsity of judgments is determinable only by reference to the standards of a particular community, any government effort to penalize false judgments in public discourse would in effect use the force of the state to impose the standards of a specific community. This would of course violate the constitutional principle that the arena of public discussion be neutral as to community standards. It

might well be said, therefore, that from a constitutional point of view the evaluation of such statements must be left to the free play of speech and counterspeech through which communities compete within public discourse for the allegiance of individuals. . . .

. . . Whenever the state attempts definitively to determine the truth or falsity of a specific factual statement, it truncates a potentially infinite process of investigation and therefore runs a significant risk of inaccuracy. Thus although legal fact-finding may in theory be neutral, in practice we can expect it to be often inaccurate and inappropriately influenced by particular community sentiment and prejudice. . . .

. . . [S]tatements of fact make claims about an independent world, the validity of which are in theory determinable without reference to the standards of any given community, and about which we therefore have a right to expect ultimate convergence or consensus. Statements of opinion, on the other hand, make claims about an independent world the validity of which depends upon the standards or conventions of a particular community, and about which we therefore cannot expect convergence under conditions of cultural heterogeneity. If this reformulation is correct, it implies that *Falwell's* distinction between fact and opinion stems from the same central first amendment* concern as that which guided *Falwell's* other characterizations of public discourse: the preservation of the neutrality of public discourse from the domination of community mores. . . .

. . . [W]e must focus on the precise way in which opinions claim to be true or false. Statements of opinion seem to be inherently debatable and uncertain in a way that statements of fact do not. . . . If facts appeal for validation to those standards that would theoretically prevail only after a potentially infinite process of investigation and discussion, and hence that would obtain only after all debate is settled, opinions appeal for validation to standards that are instead local and particular, and hence that remain fully subject to reinterpretation. The meaning of these latter standards, moreover, inheres in no small degree in their application to particular situations. . . .

It does not follow that opinions do not claim to be true or do not solicit agreement on the basis of their truth, but it does follow that opinions are in their nature debatable. . . .

. . . Although legal determinations of the truth or falsity of factual statements may pose an inherent risk of error, . . . [t]heir truth does not ultimately depend upon any interpretation of the local and particular standards of a given community. . . .

. . . To regulate speech as action is to fix the social relations in which persons stand connected to one another; to privilege speech as a medium of ideas is to create a

* The First Amendment to the United States Constitution provides:

Congress shall make no law . . . abridging the freedom of speech, or of the press

clear and safe space within which persons can step back from those relations and reflect upon them, and so avoid committing themselves to those relations. . . .

Public discourse lies at the heart of democratic self-governance, and its protection constitutes an important theme of first amendment jurisprudence. . . . These include the protection of offensive speech, the distinction between fact and opinion, and the use of motivation as a criterion for the regulation of speech. The primary dynamic that underlies each of these doctrinal areas is the separation of public discourse from the domination of civility rules that define the identity of communities. The first amendment preserves the independence of public discourse so that a democratic will within a culturally heterogeneous state can emerge under conditions of neutrality, and so that individuals can use the medium of public discourse to persuade others to experiment in new forms of community life. The ultimate dependence of public discourse upon community life, however, suggests that this neutrality and freedom is always limited, for the very boundaries of public discourse must be located in a manner that is sensitive to ensuring the continued viability of the community norms that inculcate the ideal of rational deliberation. . . .

* * *

The problem of misinformation takes on a new dimension in the contemporary internet age. The following excerpts describe the unique challenges of seeking “truth” in the virtual public sphere and raise questions about the role of the intent of those disseminating the information.

Journalism, “Fake News” & Disinformation

Cherilyn Ireton and Julie Posetti (2018)*

. . . History . . . teaches us that the forces behind disinformation do not necessarily expect to persuade journalists or broader audiences about the truth of false claims, as much as cast doubt on the status of verifiable information produced by professional news producers. This confusion means that many news consumers feel increasingly entitled to choose or create their own ‘facts,’ sometimes aided by politicians seeking to shield themselves from legitimate critique.

Fast forward to 2018 and the proliferation of powerful new technological tools. These, along with the character of social media and messaging platforms that have limited quality control standards for determining what constitutes news, make it easy to counterfeit and mimic legitimate news brands to make frauds look like the real thing. Increasingly, it is also possible to engineer audio and video in ways that go beyond legitimate news editing in order to make it appear that a particular individual said or did

* Excerpted from CHERILYN IRETON & JULIE POSETTI, JOURNALISM, “FAKE NEWS” & DISINFORMATION: HANDBOOK FOR JOURNALISM EDUCATION AND TRAINING (2018).

something in some place, and to pass this off as an authentic record, sending it viral in the social communications environment. . . .

The consequence of all this is that digitally fuelled disinformation, in contexts of polarisation, risks eclipsing the role of journalism. Even more, journalism based on verifiable information shared in the public interest—a recent historical achievement that is by no means guaranteed—can itself become discredited when precautions are not taken to avoid it being manipulated. When journalism becomes a vector for disinformation, this further reduces public trust and promotes the cynical view that there is no distinction between different narratives within journalism on the one hand, and narratives of disinformation on the other. This is why the history around the contested use of content, and its various forms, is instructive. . . .

Freedom of expression advocates fear that legislation will hurt the very democratisation of information and opinion that new technologies have enabled. In some countries, legislation could be used to silence critical media. . . .

. . . [I]t is important . . . [to] consider the profound change for journalism and legacy media, at a structural, cultural and normative level, that has followed the rapid advance in digital technology and Internet-enabled personal devices. Most important is the relationship between the accelerated problems of trust in journalism and engagement with social media. . . .

Pre-digital journalistic practice and method included professional standards, and layers of centralised checks and controls to manage the accuracy, quality and fairness of news. Field reporters were backed by a newsroom team who verified content before it was published. This ‘gatekeeper’ model instilled a sense of professionalism in journalists. . . .

At a cultural level, the empowerment of other actors to witness, record, comment and publish news on social media channels forced change not only to the centralised model—but also to public-square debates. Social media platforms are now the key infrastructure for public and political discourse. Some argue that this has put democracies and open societies into a ‘democratic deficit.’

By insisting they are not news publishers, the technology companies and social platforms have sidestepped the normative obligations to which journalists and publishers are held accountable. While these actors do not employ journalists to produce news, their curation and editing significance are increasingly distancing them from the role of being ‘mere conduits’ or simple intermediaries. . . .

European Union Code of Practice on Disinformation (2018)*

. . . [The European] Commission . . . define[s] “Disinformation” as “verifiably false or misleading information” which, cumulatively,

(a) “Is created, presented and disseminated for economic gain or to intentionally deceive the public”; and

(b) “May cause public harm,” intended as “threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens’ health, the environment or security.”

The notion of “Disinformation” does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary, and is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising.

. . . [The Commission concludes] that “the exposure of citizens to large scale Disinformation, including misleading or outright false information, is a major challenge for Europe. Our open democratic societies depend on public debates that allow well-informed citizens to express their will through free and fair political processes.”

. . . [T]he Commission repeatedly acknowledges . . . the fundamental right to freedom of expression and to an open Internet, and the delicate balance which any efforts to limit the spread and impact of otherwise lawful content must strike. . . .

The Signatories recognize that trade associations that have signed this Code are not entering into obligations on behalf of their members. However, these associations commit to make their members fully aware of this Code, and encourage them to join it or respect its principles, as appropriate. . . .

2. Signatories commit to keep complying with the requirement set by EU and national laws, and outlined in self-regulatory Codes, that all advertisements should be clearly distinguishable from editorial content, including news, whatever their form and whatever the medium used. When an advertisement appears in a medium containing news or editorial matter, it should be presented in such a way as to be readily recognizable as a paid-for communication or labelled as such. . . .

- In line with the European Commission Communication, the Signatories recognise “the importance of intensifying and demonstrating the effectiveness of efforts to close fake accounts” as well as the importance of establishing “clear marking systems and rules for bots to ensure their

* Excerpted from CODE OF PRACTICE ON DISINFORMATION, EUROPEAN COMMISSION (2018).

activities cannot be confused with human interactions.”

- Relevant Signatories recognize the importance of ensuring that online services include and promote safeguards against Disinformation.

- Relevant Signatories underline an ongoing commitment that, before launching new services, they consider implementing and promoting safeguards against misrepresentation.

- Relevant Signatories consider reviewing existing services to ensure that such safeguards are likewise implemented, to the extent possible. . . .

- Consistently with Article 8 of the European Convention on Human Rights, Signatories should not be prohibited from enabling anonymous or pseudonymous use of accounts and services. . . .

5. Relevant Signatories commit to put in place clear policies regarding identity and the misuse of automated bots on their services and to enforce these policies within the EU. . . .

6. Relevant Signatories commit to put in place policies on what constitutes impermissible use of automated systems and to make this policy publicly available on the platform and accessible to EU users.

- Consistently with Article 10 of the European Convention on Human Rights and the principle of freedom of opinion, Signatories should not be compelled by governments, nor should they adopt voluntary policies, to delete or prevent access to otherwise lawful content or messages solely on the basis that they are thought to be “false.” . . .

7. Relevant Signatories commit to invest in products, technologies and . . . to help people make informed decisions when they encounter online news that may be false, including by supporting efforts to develop and implement effective indicators of trustworthiness in collaboration with the news ecosystem.

8. Relevant Signatories commit to invest in technological means to prioritize relevant, authentic and authoritative information where appropriate in search, feeds, or other automatically ranked distribution channels.

9. Relevant Signatories commit to invest in features and tools that make it easier for people to find diverse perspectives about topics of public interest.

10. Signatories commit to partner with civil society, governments, educational institutions, and other stakeholders to support efforts aimed at improving critical thinking and digital media literacy.

11. Signatories commit to encourage market uptake of tools that help consumers understand why they are seeing particular advertisements. . . .

12. Relevant Signatories commit to support good faith independent efforts to track Disinformation and understand its impact, including the independent network of fact-checkers facilitated by the European Commission upon its establishment. . . .

* * *

A number of states have begun to prosecute individuals accused of spreading misleading information regarding the pandemic. In Spain, for instance, the government has used the state's existing Penal Code to pursue criminal prosecutions, including of individuals who published social media posts meant to be satirical in nature. Other states have passed new legislation. In Act XII of 2020, Hungary passed a set of emergency measures that granted Prime Minister Viktor Orbán broad powers to punish distortive misinformation. The measures amended Section 337 of the Criminal Code to provide:

(1) A person who, at a site of public danger and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact . . . that is capable of causing disturbance or unrest in a larger group of persons . . . is guilty of a felony and shall be punished by imprisonment for up to three years.

(2) A person who, during the period of a special legal order and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact . . . is guilty of a felony and shall be punished by imprisonment for one to five years.

Under this emergency legislation, Hungary has arrested more than one hundred people, including for social media posts criticizing the government or reporting true information that reflects poorly on the state's response to the COVID-19 pandemic. Many of those arrested have been doctors, journalists, and activists. Even where states are not taking action, virtual forums for viewing and exchanging information—what we commonly call social media—have begun devising internal regulations for detecting and responding to misinformation of all stripes. The propriety and the efficacy of these self-help mechanisms is a subject of debate.

Coronavirus Fake News Isn't Like Other Fake News Sarah Kreps and Brendan Nyhan (2020)*

In the desperate fight against the novel coronavirus, social media platforms have achieved an important victory: they have helped limit the dissemination of life-

* Excerpted from Sarah Kreps & Brendan Nyhan, *Coronavirus Fake News Isn't Like Other Fake News: Political Speech is Harder and Riskier to Police*, FOREIGN AFFAIRS (Mar. 30, 2020). Reprinted by

threatening misinformation that could worsen the pandemic. But this success should not cause us to adopt a similar approach to political speech, where greater caution is required.

Facebook, Twitter, and YouTube have each moved quickly to remove coronavirus misinformation that encourages people to take actions that could put them at risk. Google is privileging information from official health agencies, such as the World Health Organization, and has established a 24-hour incident-response team that removes misinformation from search results and YouTube. Facebook's WhatsApp has teamed up with the WHO to provide a messaging service that offers real-time updates.

Misinformation, rumors, myths, and conspiracy theories still slip through the net, of course, and new threats may yet emerge—for instance, Russia is taking a page from its 2016 playbook and trying to use disinformation about the coronavirus to foment political unrest in Europe and the United States. But so far, social media and Internet groups have earned praise for making a concerted, and thus far successful, effort to limit misinformation. To date, no specific false claim or conspiracy theory has become widespread in the manner often observed during disasters and tragedies.

. . . [T]ech companies and policymakers have struggled to determine how best to respond to political misinformation—a problem that raises difficult questions about the appropriate role of private companies in policing speech.

The current success of social media platforms in limiting harmful content about COVID-19, the disease caused by the new coronavirus, may inspire a false hope that the same standards can or should be applied to political news. . . . [A] co-founder of the Global Disinformation Index . . . lauded the platforms to *The Washington Post*: “This is what it looks like when they really decide to take a stand and do something,” he said. “They haven’t had the policy will to act [on political misinformation]. Once they act, they can clearly be a force for good.”

The platforms’ approach to pandemic information has been aggressive, effective, and necessary—but it cannot and should not be applied to politics. Tactics that work against dangerous health misinformation are likely to be less effective and more harmful when applied to political speech within the United States.

False stories about the novel coronavirus are relatively easy to detect compared with political fake news. The platforms can focus their search for false content on a well-defined topic, rather than needing to identify and remove misinformation about any topic whatsoever. Such boundaries enable more effective moderation by artificial intelligence

permission of FOREIGN AFFAIRS, (March 30, 2020). Copyright (2020) by the Council on Foreign Relations, Inc. www.ForeignAffairs.com.

Evidentiary standards are also far easier to establish and enforce in health and medicine. For instance, it is widely accepted that drinking bleach is dangerous and does not cure coronavirus. False claims like this one can be quickly identified and removed, as Facebook now does in partnership with national and global health organizations. Standards of truth and accuracy in politics are more subjective and likely to provoke controversy.

Under ordinary circumstances, moderating the content of social media requires striking a difficult balance between free speech and public harm. People often disagree over what content should be prohibited and who should make such decisions. The pandemic, by contrast, has generated a strong consensus in favor of limiting harmful content. False information about COVID-19 can be a matter of life or death. . . .

None of these conditions apply to domestic political misinformation, where the need to protect free expression is more acute. False speech about politics is a necessary byproduct of living in a free society (unless it runs afoul of carefully circumscribed laws against libel and slander). Identifying false claims about politics is a laborious affair that requires difficult judgments about the nature of truth. As a result, the social consensus in favor of reducing political misinformation on social media is more limited. Facebook accordingly does not remove false information from its platform but instead reduces the reach of articles that third-party fact-checking partners identify as false or misleading. Similarly, following the standard practice in broadcast television, Facebook does not remove false ads sponsored by candidates (although it does remove false information about the census and how to vote).

When the coronavirus crisis subsides, the approach that social media platforms have taken will not and should not become the new normal. The domain of medical information differs enormously from that of politics, where free speech must be protected and where exposure to false information does not threaten people's health. The best a liberal democracy can do is limit the influence of misinformation, not try to eradicate it like a virus.

Synthetic and Manipulated Media Policy

Twitter (2020)*

You may not deceptively share synthetic or manipulated media that are likely to cause harm. In addition, we may label Tweets containing synthetic and manipulated media to help people understand their authenticity and to provide additional context.

You should be able to find reliable information on Twitter. That means understanding whether the content you see is real or fabricated and having the ability to find more context about what you see on Twitter. Therefore, we may label Tweets that

* Excerpted from *Synthetic and Manipulated Media Policy*, TWITTER (Mar. 5, 2020), <https://help.twitter.com/en/rules-and-policies/manipulated-media>.

include media (videos, audio, and images) that have been deceptively altered or fabricated. . . .

. . . [F]or content to be labeled or removed [as synthetic or manipulated], we must have reason to believe that media, or the context in which media are presented, are significantly and deceptively altered or manipulated. . . .

We are most likely to take action . . . on more significant forms of alteration . . . or content that has been doctored . . . to change its meaning. Subtler forms of manipulated media, such as isolative editing, omission of context, or presentation with false context, may be labeled or removed on a case-by-case basis. . . .

In order to determine if media have been significantly and deceptively altered or fabricated, we may use our own technology or receive reports through partnerships with third parties. In situations where we are unable to reliably determine if media have been altered or fabricated, we may not take action to label or remove them.

We also consider whether the context in which media are shared could result in confusion or misunderstanding or suggests a deliberate intent to deceive people about the nature or origin of the content, for example by falsely claiming that it depicts reality. . . .

Tweets that share synthetic and manipulated media are subject to removal under this policy if they are likely to cause serious harm. Some specific harms we consider include:

- Threats to the physical safety of a person or group
- Risk of mass violence or widespread civil unrest
- Threats to the privacy or ability of a person or group to freely express themselves or participate in civic events, such as: . . .
 - Targeted content that includes tropes, epithets, or material that aims to silence someone
 - Voter suppression or intimidation

We also consider the time frame within which the content may be likely to impact public safety or cause serious harm, and are more likely to remove content under this policy if we find that immediate harms are likely to result from the content's presence on Twitter. . . .

In most cases, if we have reason to believe that media shared in a Tweet have been significantly and deceptively altered or fabricated, we will provide additional context on Tweets sharing the media where they appear on Twitter. This means we may:

- Apply a label to the content where it appears in the Twitter product;
- Show a warning to people before they share or like the content;
- Reduce the visibility of the content on Twitter and/or prevent it from being recommended; and/or
- Provide a link to additional explanations or clarifications, such as in a Twitter Moment or landing page. . . .

Media that meet all three of the criteria defined above—i.e. that are synthetic or manipulated, shared in a deceptive manner, and is likely to cause harm—may not be shared on Twitter and are subject to removal. Accounts engaging in repeated or severe violations of this policy may be permanently suspended.

* * *

Twitter reported that it first applied the above-excerpted policy on March 8, 2020, when it marked a video of former U.S. Vice President Joe Biden as “manipulated media.” The video, which deceptively suggested that Mr. Biden urged the reelection of President Donald Trump, had been “shared” on Twitter by White House social media director Dan Scavino, and had been retweeted by President Trump. Before Twitter applied the “manipulated media” label, the video was viewed more than five million times and had been retweeted on over 21,000 occasions.* On May 26, 2020, Twitter for the first time marked as “potentially misleading” a tweet posted by President Trump in the first instance. In response to President Trump’s assertion that “[t]here is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent,” Twitter affixed to his post a factsheet with news articles and data concluding that there is no evidence associating mail-in voting with fraud.** Mark Zuckerberg, the CEO of Facebook, clarified shortly thereafter that Facebook’s policies do not permit such active engagement with political speech unless there is a threat of imminent harm.*** Zuckerberg’s statement came on the heels of news that an internal Facebook task force had concluded in 2018 that Facebook’s algorithm encourages polarization by “exploit[ing] the human brain’s attraction to divisiveness.” Though numerous Facebook

* Cat Zakrzewski, *Twitter Flags Video Retweeted by President Trump as ‘Manipulated Media,’* WASHINGTON POST (Mar. 9, 2020).

** Daniel Villarreal, *Donald Trump Accuses Twitter of ‘Stifling Free Speech’ After Site Fact-Checks Vote-by-Mail Tweet,* NEWSWEEK (May 26, 2020).

*** Daniel Villarreal, *Zuckerberg Says Twitter is Wrong to Fact-Check Trump,* NEWSWEEK (May 27, 2020).

employees had pushed the company to retool its algorithm in response to the task force’s conclusion, Facebook did not do so and has defended its approach.*

Following Twitter’s intervention, President Trump signed the *Executive Order on Preventing Online Censorship* on May 28, 2020. The Executive Order proclaims that “selective censorship” by online platforms harms public discourse. As such, it urges that U.S. law should not be interpreted to provide liability protection to online platforms that “engage in deceptive or pretextual actions . . . to stifle viewpoints with which they disagree.” The Order also includes a review of federal tax dollars allocated to “online platforms that restrict free speech,” and urges that content restrictions by online platforms be reviewed for consonance with state and federal laws that prohibit “unfair and deceptive acts and practices.” Many legal commentators do not believe the Executive Order can displace the governing federal statute.

Targeting Audiences

Although the virtual public sphere sweeps widely, allowing information to be dispersed in an instant across the globe, it also allows savvy participants to scale in the other direction by sending information to small audiences and to individuals. The two excerpts that follow address this phenomenon, known as “micro-targeting.” A large literature on the generation of preferences notes how what may seem to be individual choices about goals and desires are shaped by contexts constituted through and mediated by a variety of actors. Moreover, even as some may welcome micro-targeting in the context of commercial advertisements, the same calculus does not necessarily apply to political speech or to information in the public interest. Indeed, robust public discourse requires that individuals are not restricted to information, or sources of information, that suit what they understand to be their preferences. Micro-targeting also poses questions relating to free association. While micro-targeting may align with free association, those who are micro-targeted may not be targeted of their own accord, or even with their knowledge.

* Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, WALL STREET JOURNAL (May 26, 2020).

The Daily Me Cass Sunstein (2018)*

In 1995, MIT technology specialist Nicholas Negroponte prophesied the emergence of “the Daily Me.” With the Daily Me, he suggested, you would not rely on the local newspaper to curate what you saw, and you could bypass the television networks. Instead, you could design a communications package just for you, with each component fully chosen in advance.

If you want to focus only on basketball, you could do exactly that. If your taste runs to William Shakespeare, your Daily Me could be all Shakespeare, all the time. . . . Maybe your views are left of center, and you want to read stories fitting with what you think about climate change, equality, immigration, and the rights of labor unions. Or maybe you lean to the right, and you want to see conservative perspectives on those issues, or maybe on just one or two, and on how to cut taxes and regulation, or reduce immigration.

. . . What matters is that with the Daily Me, everyone could enjoy an *architecture of control*. Each of us would be fully in charge of what we see and hear.

In countless domains, human beings show “homophily”: a strong tendency to connect and bond with people who are like them. The tendency to homophily is dampened if people live within social architectures that expose them to diverse types of people—in terms of perspectives, interests, and convictions. But with an architecture of control, birds of a feather can easily flock together. . . .

True, there’s no Daily Me, at least not quite yet. But we’re getting there. Most Americans now receive much of their news from social media, and all over the world, Facebook has become central to people’s experience of the world. . . .

When people use Facebook to see exactly what they want to see, their understanding of the world can be greatly affected. Your Facebook friends might provide a big chunk of the news on which you focus, and if they have a distinctive point of view, that’s the point of view that you’ll see most. . . .

As it turns out, you do not need to create a Daily Me. Others are creating it for you right now (and you may have no idea that they’re doing it). Facebook itself does some curating, and so does Google. We live in the age of the algorithm, and the algorithm knows a lot. With the rise of artificial intelligence, algorithms are bound to improve immeasurably. They will learn a great deal about you, and they will know what you want or will like, before you do, and better than you do. They will even know your

* Excerpted from CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 1-30 (2018). Adapted from *#Republic: Divided Democracy in the Age of Social Media* by Cass R. Sunstein. Copyright © 2017 by Princeton University Press. Reprinted by permission.

emotions, again before and better than you do, and they will be able to mimic emotions on their own.

Even now, an algorithm that learns a little bit about you can discover and tell you what “people like you” tend to like. It can create something close to a Daily Me, just for you, in a matter of seconds. In fact that’s happening every day. If the algorithm knows that you like certain kinds of music, it might know, with a high probability, what kinds of movies and books you like, and what political candidates will appeal to you. And if it knows what websites you visit, it might well know what products you’re likely to buy, and what you think about climate change and immigration. . . .

Machine learning can be used (and probably is being used) to produce fine-grained distinctions. It is easy to imagine a great deal of sorting—not just from the political right to the political left, but also with specifics about the issues that you care most about, and your likely views on those issues (immigration, national security, equality, and the environment). . . . [T]his information can be useful to others—campaign managers, advertisers, fundraisers and liars, including political extremists. . . .

. . . To the extent that social media allow us to create our very own feeds, and essentially live in them, they create serious problems. And to the extent that providers are able to create something like personalized experiences or gated communities for each of us, or our favorite topics and preferred groups, we should be wary. Self-insulation and personalization are solutions to some genuine problems, but they also spread falsehoods, and promote polarization and fragmentation. An architecture of serendipity counteracts homophily, and promotes both self-government and individual liberty. . . .

. . . In particular, a well-functioning system of free expression must meet two distinctive requirements.

First, people should be exposed to materials that they would not have chosen in advance. Unplanned, unanticipated encounters are central to democracy itself. Such encounters often involve topics and points of view that people have not sought out and perhaps find quite irritating—but that might nevertheless change their lives in fundamental ways. They are important to ensure against fragmentation, polarization, and extremism, which are predictable outcomes of any situation in which like-minded people speak only with themselves. In any case, truth matters.

I do not suggest that government should force people to see things that they wish to avoid. But I do contend that in a democracy deserving the name, lives—including digital ones—should be structured so that people frequently come across views and topics that they have not specifically selected. That kind of structuring is, in fact, a form of *choice architecture* from which individuals and groups greatly benefit. . . .

Second, many or most citizens should have a wide range of common experiences. Without shared experiences, a heterogeneous society will have a much

more difficult time addressing social problems. People may even find it hard to understand one another. Common experiences, emphatically including the common experiences made possible by social media, provide a form of social glue. . . . A system of communications that radically diminishes the number of such experiences will create a range of problems, not least because of the increase in social fragmentation.

As preconditions for a well-functioning democracy, these requirements—chance encounters and shared experiences—hold in any large country. They are especially important in a heterogeneous nation—one that faces an occasional danger of fragmentation. They have even more importance as many nations become increasingly connected with others (Brexit or no Brexit) and each citizen, to a greater or lesser degree, becomes a “citizen of the world.” . . .

. . . Echo chambers can lead people to believe in falsehoods, and it may be difficult or impossible to correct them. . . .

These are points about governance, but . . . there is an issue about individual freedom as well. When people have multiple options and the liberty to select among them, they have freedom of choice, and that is exceedingly important. . . . But freedom requires . . . certain background conditions, enabling people to expand their own horizons and to learn what is true. It entails not merely satisfaction of whatever preferences and values people happen to have but also circumstances that are conducive to the free formation of preferences and values. . . .

In a system with robust public forums, such as streets and parks, and general-interest intermediaries, such as daily newspapers and network television, self-insulation is more difficult; echo chambers are much harder to create; and people will frequently come across views and materials that they would not have chosen in advance. For diverse citizens, this provides something like a common framework for social experience. . . .

. . . [T]he emerging situation does contain large differences, stemming above all from dramatic increases in individual control over content, the number of available options, the sheer speed with which people can receive information, and corresponding decreases in the power of *general-interest intermediaries*.

General-interest intermediaries include newspapers, magazines, and broadcasters. . . . People who rely on such intermediaries have a range of chance encounters, involving shared experiences with diverse others, and also exposure to materials and topics that they did not seek out in advance. . . .

. . . [O]ne of the distinguishing features of the current era, accompanying the Daily Me, is the *special-interest intermediary*. Instead of serving as broad sources of information that cover a variety of topics, online news outlets often take the form of specialized “verticals” that focus on narrower subjects, such as sports, technology, or

politics, or use specialized methodologies of interest to niche markets. . . . The greater specialization of these information sources . . . will produce some echo chambers—and to that extent, diminish the likelihood of shared experiences. . . .

The digital divides that I will explore may or may not be a nightmare. But if I am right, there is all the reason in the world to reject the view that free markets, as embodied in the notion of “consumer sovereignty,” exhaust the concerns of those who seek to evaluate any system of communications. The imagined world of innumerable, diverse editions of the Daily Me is not a utopian dream, and it would create—is creating—serious problems from the democratic point of view.

* * *

What causes this “echo chamber” phenomenon? Sunstein contends that social media platforms “create serious problems” because they allow us to create, and live in, “our own feeds.” Others have written, however, that this feature of social media allows them to magnify, but not generate, societal trends. Based on an empirical study of polarization in the United States, Yochai Benkler, Robert Faris, and Hal Roberts conclude that “the introduction of the internet and social media does not itself put pressure on democracy.” Instead, social media like Facebook exacerbates *pre-existing fissures* in the public sphere.

Mammon’s Algorithm: Marketing, Manipulation, and Clickbait on Facebook

Yochai Benkler, Robert Faris, and Hal Roberts (2018)*

. . . In the middle of 2017, Facebook’s willingness to sell advertising to Russian operatives and its hosting of a number of prominent Russian sockpuppet groups put it in the hot seat. By early 2018 the long-simmering story of Cambridge Analytica, the U.K.-based data analytics firm that had obtained tens of millions of Facebook profiles in order to develop techniques for manipulating voters, boiled over and spilled onto Facebook’s lap.

The fundamental problem is that Facebook’s core business is to collect highly refined data about its users and convert that data into microtargeted manipulations (advertisements, newsfeed adjustments) aimed at getting its users to want, believe, or do things. . . . But even if you think that microtargeted behavioral marketing is fine for parting people with their money, the normative considerations are acutely different in the context of democratic elections. That same platform-based, microtargeted manipulation used on voters threatens to undermine the very possibility of a democratic polity. That is true whether it is used by the incumbent government to manipulate its

* Excerpted from YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 269-288 (2018). <https://www.oxfordscholarship.com/view/10.1093/oso/9780190923624.001.0001/oso-9780190923624>.

population or by committed outsiders bent on subverting democracy. The clickbait factories, the Russians, and Cambridge Analytica all took advantage of the intentional design of Facebook’s system. . . . And while we remain unpersuaded by the evidence that any of these three distinct abusers made a significant impact on the election, the basic business of Facebook, when applied to political communication, presents a long-term threat to democracy. . . .

In October 2016, the Trump campaign had what appeared to be a highly sophisticated digital campaign that was focused on 13.5 million voters in 16 battleground states that they believed were persuadable. . . . [T]he strategy was not to expand the electorate but to shrink it through targeted voter suppression campaigns. The campaign messaging was explicitly negative and focused on three target populations that the Clinton campaign hoped to win by a large margin: African Americans, young women, and “idealistic white liberals.”. . .

. . . Facebook provided an interface that allowed campaigns to target specific voters, geographic regions, or demographics or to send ads to hyperspecific segments of the population based on this personal data. . . .

The ideas of using internet technologies to collect data and using as many data points as possible to deliver as microtargeted a message as possible are not new. But the dynamics that have increased the efficacy of big data analysis in general were at work here as well: Facebook’s massive footprint; the increased storage and processing capacity to allow major platforms to refine and scale data analysis; and the development of machine learning algorithms to extract meaning from ever larger data sets. . . .

Writing in the *New York Times* just after Obama’s November 2012 re-election, Zeynep Tufekci sounded an early alarm on the downsides of big data-fueled political campaigns. She emphasized two primary concerns that remain in play today. The first concern is campaigns taking “persuasion into a private, invisible realm” where opponents and watchdogs have no ability to respond. The second concern is that the science of persuasion is getting better and the ability to manipulate voters through the digital realm is heightened, offering an inroad for influencing voters through emotion and irrational biases. . . .

. . . [L]arge-scale data analysis will eventually make microtargeting much more effective than it is now. Because manipulations will happen at the level of the individual user, campaigns will be able to sharpen messages, including those intended to elicit fear and loathing or to intimidate voters from turning out, free of the relative moderation enforced by public scrutiny. . . . [S]olving the problem only for explicit formal electioneering will not solve the much more pervasive problem of “dark ads,” advertisements seen only by their narrowly-targeted intended recipients, and therefore unavailable for public scrutiny, and dark money, political funding whose sources are not disclosed. . . . It is precisely because of this longer-term threat that . . . we emphasize the importance of disclosure requirements and even more so the creation of a

comprehensive public record of all the ads, electioneering and issue ads, in a way that makes them accessible to third parties for continuous monitoring and exposure.

The concern over the role of psychological profiling in political persuasion hit the headlines in 2018 over the tactics and role of Cambridge Analytica . . . [which] was created to utilize cutting-edge data analysis techniques to provide insights on audiences to inform public communication and persuasion efforts. . . . The company has engaged in political campaigns around the globe and frequently touted its “special sauce”—psychographic profiling techniques meant to uncover political leanings of voters that would not otherwise be apparent, perhaps even to the voters themselves, and to offer guidance on how these voters might be more effectively persuaded by striking specific deep-seated emotional chords. . . .

A key outstanding question is how persuasive microtargeting tools based on social media usage actually are. This may seem like a silly question given all the money spent on online advertising and the value the stock market places on data-driven marketing potential. But it is in fact remarkable how little credible evidence there is that targeted political advertising based on social media usage works any better than techniques that already existed 15 years ago or even longer. . . .

What is clear is that Facebook was a far more important tool for the campaign and that its microtargeting functionality is considered by political consultants to be a potent and widely used campaign tool. Facebook’s initial public response to the Cambridge Analytica story emphasized . . . the fact that [Cambridge Analytica] harvested the data of millions of Facebook users without complying with the company’s terms of service. From the perspective of basic threat to democracy, however, the privacy violation was significantly less important than the fact that Facebook collects and uses all these data, and that it imposes on its users terms of service that certainly allow the company and its clients, if not outsiders like Cambridge Analytica, to use the data as manipulatively as they choose. . . . [I]t is plausible that microtargeting will improve as the algorithms for identifying personal characteristics improve; that it will be more effectively targeted only at those subjects most likely to be affected as desired; and that voter suppression campaigns on social media in particular may put a candidate over the top in very close campaigns. There is no evidence to confirm that this is true. Using tailored advertisements to change hearts and minds, and more importantly voter behavior, is still primarily an act of faith, much like most of the rest of online advertising. . . . [W]e do, however, suggest that the basic risk of undermining voter autonomy and the almost certain erosion of our collective confidence in the legitimacy of election outcomes are sufficient grounds to recommend that individually tailored, or too narrowly targeted advertising techniques should be constrained in the political context. At a minimum . . . platforms like Facebook should be required to maintain all of their ads and ad experiments in a publicly accessible database, so that abusive practices can be exposed by opposing candidates or independent researchers. . . .

Influencing Public Opinion Beyond Borders

Misinformation is also being weaponized and deployed to interfere with democratic elections throughout the world. The next two excerpts highlight this problem in the context of recent and upcoming election cycles in the United States and Europe.

Disinformation and Propaganda—Impact on the Functioning of the Rule of Law in the EU and its Member States

Judit Bayer, Natalija Bitiukova, Petra Bárd, Judit Szakács, Alberto Alemanno, and Erik Uszkiewicz (2019)*

. . . Manipulation and propaganda are as old as the hills—so what has changed in recent years? The manipulative campaigns of 2016 were organised strategically, as well-financed, concerted actions of a professional team, with the intent to influence—domestic or foreign—political processes. New technology made organising such campaigns significantly more accessible, promising a higher likelihood of success, both faster and with practically no risk. On the other hand, the same technology leaves traces, and enables investigation and revelation of the malicious actions. . . .

Legitimate criticism of the ruling government, and dissent over the status quo gets mixed with manipulation and propaganda by foreign governmental forces. Russia is suspected of being behind many of the disinformation actions, but they deny it and evidence is insufficient to form a basis for international legal consequences. And while the informational spaces of liberal democracies are open and accessible to anyone around the globe, Russian and Chinese counterparts are controlled and protected. Some of the disinformation and propaganda actions relate to raising hostility against ‘outgroups,’ such as migrants or national minorities. Increasing polarisation is an outspoken purpose of the Kremlin’s information war “to destabilise a society and a state through massive psychological conditioning of the population, and also to pressure a state to make decisions that are in the interest of the opponent.” . . .

Concerted propaganda campaigns can have the largest impact in societies where media freedom and pluralism have already been limited, and people are deprived of the possibility to check the information against independent sources. If a populist party is in government, there is a clear risk of a democratic backslide. . . .

Populistic political rhetoric in itself would not amount to a threat to democracy. However, when user databases are processed in order to find the vulnerabilities of citizens, profiles are created and political messages are targeted at people who are most likely to be susceptible, whereas other messages are shared with different people[. S]uch micro-targeting splinters public discourse, depriving the citizenry of the right to

* Excerpted from JUDIT BAYER, NATALIJA BITIUKOVA, PETRA BÁRD, JUDIT SZAKÁCS, ALBERTO ALEMANNI & ERIK USZKIEWICZ, DISINFORMATION AND PROPAGANDA—IMPACT ON THE FUNCTIONING OF THE RULE OF LAW IN THE EU AND ITS MEMBER STATES (2019).

informed political decision-making. . . . In the current online environment, monetisation and abuse of personal data [are] among the biggest threats, especially with regard to future technologies and to the lobbying power of the interested stakeholders. . . .

The disinformation campaign targeting US voters before the 2016 presidential elections was the first case when the global public had to face the enormous scale of online disinformation and propaganda. . . . The disinformation actions in this wide-ranging and years-long campaign include Russian trolls commenting on news stories and maintaining several bogus Facebook and Twitter accounts, with the “strategic goal to sow discord in the U.S. political system.” The Russian trolls infiltrated both right- and left-wing communities online to stir controversy by making emotionally charged posts about controversial issues. One important effect on society is the trenchant polarisation that can be observed in the US during and after the 2016 presidential campaign. At the same time, with such complex phenomena a cause-effect relationship is extremely difficult to prove empirically. . . .

Disinformation and manipulation were spread not exclusively through social media, but also via blogs, online journals, messaging applications, bulletin boards like 4chan and 8chan, and in the mainstream media. Among Trump voters, 40% named *Fox News* as their main source for election news in the presidential election. The right-leaning bias of *Fox News* is well-documented; it is arguably closer to hyper-partisan websites than to the Anglo-American tradition of ‘objective journalism.’ . . .

Although much less well-documented and with no conclusive evidence, it appears that the French elections . . . were subject to disinformation campaigns launched by Russia. . . . [Y]et the disinformation efforts largely failed in France. Some explain this by saying the French are less susceptible to fake news because they prefer mainstream media. Another claim is that the French institutions tasked with ensuring the integrity of the elections . . . worked better than they did in the US. . . . One key aspect appears to be that French voters and politicians were aware of the problem. . . . At the same time, it must be noted that far-right candidate Marine Le Pen, supported by Russia and Russian media, came in second in the presidential elections.

The 2017 German elections are noteworthy for the lack of disinformation actions. It is thought that greater awareness by all stakeholders prevented or discouraged attempts at manipulation. . . . German parties prepared for an eventual hack and disinformation campaign: they agreed not to use bots or leaked data. Germany also adopted the Network Enforcement Act . . . , which introduced fines of up to EUR 50 million on social media companies if they fail to remove fake, hate-inciting or criminal content. Additionally, Facebook took action against thousands of fake accounts before the elections, partnered with German authorities, and shared security tips with parties and candidates. . . .

It should be noted that the impact level of disinformation and propaganda depends—among many elements—on two main variables:

1) the pluralism of media and of ideas within the particular media landscape. A strong and lively public discourse—which presupposes media freedom and pluralism—makes the audience more resistant to disinformation and propaganda actions. . . .

2) the level of organisation of the disinformation and propaganda campaign. . . . Such concerted efforts must be well-financed, which offers another anchor for investigation and control. Governmental actors are known to have larger financial resources at their disposal. And when the system of checks and balances is weak or deconstructed, there are slim chances of resisting a decay of democracy. . . .

Education in critical thinking, development of a critical perception of reality and the ideal of the well-informed citizen are key elements of resilience against fake news and disinformation. . . .

A long-term harmful effect of the disinformation crisis is how it has undermined trust in the press. The already dominant relativism has grown with a feeling that “everyone is lying.” This could also be a strategic objective, to undermine confidence in democratic institutions and processes, including the media. . . .

The legitimacy of campaign silence rules has triggered many controversies recently. . . . [P]reventing at least dominant companies from disseminating game-changing disinformation with aggressive automated methods just hours before the [voting may] have an effect that should not be underestimated. On the one hand, the same could occur just before the start of campaign silence, leaving no time for the political opponent to fight back. On the other hand, . . . voters would still have some time left for reflection to consider the veracity of the information. . . .

Fact-checking has become a trendy buzzword, and several initiatives emerged even beyond the United States, for example in Sweden . . . , [where] four leading news outlets began a joint fact-checking initiative in order to combat disinformation. . . . Such services are very effective tools . . . , [especially when] they are created with the cooperation of various stakeholders, such as state, non-state, civil, academic and technology-relevant actors, experts and specialists

The limits of fact-checking sites are in their slowness: by the time they examine ‘suspicious’ content, it is likely to have rapidly multiplied and been distributed to many users. . . . Creating blacklists and whitelists of websites and sources that have a tendency to provide disinformation / trustworthy information may be more practical, as is already the case. Besides providing information to interested users, this could draw the attention of potential advertisers to the quality of the site (naming and shaming).

Some of these sites have a cooperation agreement with Facebook that helps to avoid the further spread of completely fake news posts. Automatic algorithms can also

be used to reduce the visibility of these posts. These measures and solutions can be in line with international legal obligations on freedom of expression and the press, as it does not limit the basic background action of the act (the free expression). . . .

Within this framework, one of the most important challenges is to engage the widest possible range of stakeholders. To achieve this goal, it is necessary, for example, to break the ice between political parties. . . . Campaigns must include a wide range of stakeholders (as we have also seen in France—a high level of cooperation among the state, political parties and the media), with the broadest possible geographical coverage (federal/state/national/regional/local organs) and an interdisciplinary approach as witnessed in Germany where ethical hackers and software engineers were involved in order to secure a pre-compliance examination in connection with the weaknesses and vulnerabilities of the German electoral system and infrastructure. . . .

In sum, the promising practices applied in various states during or before elections were those that are already known and recommended by other instruments . . . : increasing awareness and media literacy, improving the quality of journalism, including fact-checking and credibility indices, and the cooperation of all stakeholders within society. Besides platform providers and media outlets, self-regulation by political parties and their engagement to respect ethical campaign principles would also be necessary. . . .

Helping to Protect the 2020 US Elections Facebook (2019)*

We have a responsibility to stop abuse and election interference on our platform. That's why we've made significant investments since 2016 to better identify new threats, close vulnerabilities and reduce the spread of viral misinformation and fake accounts. . . .

Over the last three years, we've worked to identify new and emerging threats and remove coordinated inauthentic behavior across our apps. In the past year alone, we've taken down over 50 networks worldwide, many ahead of major democratic elections. . . .

We took down these networks based on their behavior, not the content they posted. In each case, the people behind this activity coordinated with one another and used fake accounts to misrepresent themselves, and that was the basis for our action. . . .

. . . [T]he most appropriate way to respond to someone boosting the popularity of their posts in their own country may not be the best way to counter foreign interference. That's why we're updating our inauthentic behavior policy to clarify how

* Excerpted from Guy Rosen, Katie Harbath, Nathaniel Gleicher & Rob Leathern, *Helping to Protect the 2020 US Elections*, FACEBOOK (Oct. 21, 2019), <https://about.fb.com/news/2019/10/update-on-election-integrity-efforts>.

we deal with the range of deceptive practices we see on our platforms, whether foreign or domestic, state or non-state. . . .

We want to help people better understand the sources of news content they see on Facebook so they can make informed decisions about what they're reading. [In November 2019], we'll begin labeling media outlets that are wholly or partially under the editorial control of their government as state-controlled media. . . .

We will hold these Pages to a higher standard of transparency because they combine the opinion-making influence of a media organization with the strategic backing of a state.

We developed our own definition and standards for state-controlled media organizations with input from more than 40 experts around the world specializing in media, governance, human rights and development. . . .

. . . [O]ur policy draws an intentional distinction between state-controlled media and public media, which we define as any entity that is publicly financed, retains a public service mission and can demonstrate its independent editorial control. At this time, we're focusing our labeling efforts only on state-controlled media. . . .

On Facebook and Instagram, we work to keep confirmed misinformation from spreading. . . . [O]n Facebook, if Pages, domains or Groups repeatedly share misinformation, we'll continue to reduce their overall distribution and we'll place restrictions on the Page's ability to advertise and monetize.

Over the [month of November 2019], content across Facebook and Instagram that has been rated false or partly false by a third-party fact-checker will start to be more prominently labeled so that people can better decide for themselves what to read, trust and share. . . . [L]abels . . . will be shown on top of false and partly false photos and videos . . . and will link out to the assessment from the fact-checker. . . .

In addition to clearer labels, we're also working to take faster action to prevent misinformation from going viral, especially given that quality reporting and fact-checking takes time. In many countries, including in the US, if we have signals that a piece of content is false, we temporarily reduce its distribution pending review by a third-party fact-checker.

Attempts to interfere with or suppress voting undermine our core values as a company, and we work proactively to remove this type of harmful content. Ahead of the 2018 midterm elections, we extended our voter suppression and intimidation policies to prohibit:

Misrepresentation of the dates, locations, times and methods for voting or voter registration (e.g. "Vote by text!");

Misrepresentation of who can vote, qualifications for voting, whether a vote will be counted and what information and/or materials must be provided in order to vote (e.g. “If you voted in the primary, your vote in the general election won’t count.”); and

Threats of violence relating to voting, voter registration or the outcome of an election. . . .

We also recognize that there are certain types of content, such as hate speech, that are equally likely to suppress voting. That’s why our hate speech policies ban efforts to exclude people from political participation on the basis of things like race, ethnicity or religion (e.g., telling people not to vote for a candidate because of the candidate’s race, or indicating that people of a certain religion should not be allowed to hold office). . . .

. . . [O]ur systems are now more effective at proactively detecting and removing this harmful content. We use machine learning to help us quickly identify potentially incorrect voting information and remove it.

We are also continuing to expand and develop our partnerships to provide expertise on trends in voter suppression and intimidation, as well as early detection of violating content. This includes working directly with secretaries of state and election directors to address localized voter suppression that may only be occurring in a single state or district. This work will be supported by our Elections Operations Center during both the primary and general elections.

Part of our work to stop the spread of misinformation is helping people spot it for themselves. That’s why we partner with organizations and experts in media literacy. . . .

These projects range from training programs to help ensure the largest Instagram accounts have the resources they need to reduce the spread of misinformation, to expanding a pilot program that brings together senior citizens and high school students to learn about online safety and media literacy, to public events in local venues like bookstores, community centers and libraries in cities across the country. We’re also supporting a series of training events focused on critical thinking among first-time voters. . . .

REGULATING THE VIRTUAL PUBLIC SPHERE

We now turn to how courts and legislatures have responded to misinformation in the public sphere. Doctrine across the world continues to evolve, and many questions remain live. What obligations should information intermediaries—such as Google or Facebook, or newspaper websites with public comment sections—hold, and how can

they be enforced, in courts or elsewhere? To what extent do previous legal and judicial approaches to regulating speech fit the new virtual public sphere? Although the reach of the internet is virtually boundless, the jurisdiction and remedial abilities of courts are not. How broad of a role can courts take and what impact can their rulings have, given these constraints?

Free Expression on Search Platforms and Other Internet Intermediaries

Data Privacy and Dignitary Privacy

Robert C. Post (2018)*

Lying at the intersection of big data and mass communication, the Internet has become the site of furious tension between data privacy and freedom of expression. The conflict is especially acute in the European Union (EU), which highly prizes the protection of personal information. . . .

. . . [T]he EU entrenched its commitment to data privacy by ratifying Article 8** of the Charter of Fundamental Rights of the European Union (Charter), which came into effect with the 2009 Treaty of Lisbon. . . .

Although there was always a potential contradiction between data privacy and freedom of expression, that tension remained largely latent until it burst into public view in 2014 when the Court of Justice of the European Union (CJEU) decided the monumental case of *Google Spain SL v. Agencia Española de Protección de Datos*. . . .

. . . *Google Spain* dismisses Google as a mere profit-making, data-processing corporation. But that interpretation of Google fails to appreciate how Internet search engines underwrite the virtual communicative space in which democratic public opinion is now partially formed. Google should have been accorded the same legal status as print media. . . .

Freedom of expression empowers persons to participate in the formation of public opinion and hence to experience the state as potentially responsive to them. It is for this reason that freedom of speech is generally regarded as essential to democracy.

* Excerpted from Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE LAW JOURNAL 981 (2018).

** Article 8 of the Charter of Fundamental Rights of the European Union provides:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. . . .

But if public discourse becomes sufficiently abusive and alienating, persons are unlikely to experience it as a medium through which they might influence the construction of public opinion. In such circumstances, public discourse will no longer serve the purpose of democratic legitimation and hence the democratic justification for freedom of speech will *pro tanto* diminish.

This creates what I have elsewhere called “the paradox of public discourse”—public discourse can sustain democratic legitimation only if it is conducted with a modicum of civility, yet the enforcement of civility constrains freedom of speech. Different legal systems resolve the paradox of public discourse in different ways. . . .

. . . *Google Spain* . . . holds that Google as a commercial company can assert only its own economic interests The reasoning of *Google Spain* misses what we can learn from the history of newspapers: there is a strong public interest in maintaining a vigorous press, regardless of whether the press is run for commercial reasons . . . because the press, by appealing to broad swatches of public curiosity, sustains the very possibility of a “public,” without which the emergence of public opinion is impossible.

The [EU] seems to acknowledge these points [O]f course, Article 11 of the Charter provides that “[t]he freedom and pluralism of the media shall be respected.”

These provisions point to the essential question of whether we should regard Google as serving journalistic purposes. . . .

. . . [N]ewspapers serve an essential public interest quite apart from their being speakers. By continuously circulating texts that engage mass readers, newspapers create a public sphere in which readers can imagine themselves both as persons who see the world through texts, and as persons who are seen by the world as texts. In effect, newspapers create the conditions in which readers conceive themselves as a *public*, and hence as implicated in the formation of the *public* opinion that is essential to a democracy.

Google also serves this essential public interest. The Internet is a massive collection of information in which texts circulate online just as they do in material form. . . . But the Internet is opaque unless readers are equipped with tools to locate texts that answer to their curiosity. Google provides such tools and so brings us our “daily history of the world.” . . .

. . . More than any newspaper, Google allows its readers to pursue their own curiosity by searching for news that is of interest to them. Like a newspaper, Google presents this news in a fragmentary, disjointed way, which allows readers to draw their own conclusions about the meaning of news. Like a newspaper, Google disrupts elite narratives and authority. In the antinomian world of the modern Internet, readers would feel disempowered were the state to prevent them from accessing texts about which they were curious unless those texts were first vetted, researched, referenced and composed by professional journalists or scholars. . . .

. . . [D]emocracies require a vigorous press in order to create a communicative infrastructure for the public sphere. The media circulate information that incites the common attention of strangers, and thus establish a public. Google unquestionably serves this purpose in an Internet age, even though Google does not itself speak in the traditional journalistic way. Google helps to create a “public” in the same manner as did the nineteenth- and twentieth-century press. For that reason, it implicates the same democratic values of freedom of expression as does the traditional press. . . .

* * *

The following materials portray courts that have been wary of committing to new legal obligations in the virtual public sphere. Instead, these courts have rested on existing conceptions of free expression which they believe have continued resonance.

Jian Zhang v. Baidu, Inc.

U.S. District Court for the Southern District of New York
10 F. Supp. 3d 433 (S.D.N.Y. 2014)*

Jesse M. Furman, United States District Judge:

. . . [A] group of New York residents who advocate for increased democracy in China sue one of China’s largest companies, Baidu, Inc. Plaintiffs contend that Baidu, which operates an Internet search engine akin to Google, unlawfully blocks from its search results here in the United States articles and other information concerning “the Democracy movement in China” and related topics. The case raises the question of whether the First Amendment protects as speech the results produced by an Internet search engine. . . . [A]t least in the circumstances presented here, it does. Accordingly, allowing Plaintiffs to sue Baidu for what are in essence editorial judgments about which political ideas to promote would run afoul of the First Amendment. . . .

. . . . As of 2010, Baidu purported to be “the third largest search engine service provider in the world and the largest in China, with an estimated more than 70% share of the Chinese-language market.” . . .

Each Plaintiff has published—on the Internet—articles, video recordings, audio recordings, or other publications regarding the democracy movement in China. Although such publications appear in results returned by other search engines, such as Google and Bing, they do not appear in Baidu’s search results because Baidu deliberately blocks them. . . .

* The New York residents withdrew their appeal to the Second Circuit Court of Appeals in August 2014.

The question of whether search-engine results constitute speech protected by the First Amendment . . . has garnered relatively little attention from courts. . . . It is . . . a question of first impression in this Circuit.

Although the Supreme Court has not addressed the precise question at issue, its First Amendment jurisprudence all but compels the conclusion that Plaintiffs' suit must be dismissed. The starting point . . . is *Miami Herald Publishing Co. v. Tornillo* (1974), in which the Court held that a Florida statute requiring newspapers to provide political candidates with a right of reply to editorials critical of them violated the First Amendment. "Although the statute did not censor speech in the traditional sense—it only required newspapers to grant access to the messages of others," the Court "found that it imposed an impermissible content-based burden on newspaper speech." The Court noted that, "in practical effect, Florida's right-of-reply statute would deter newspapers from speaking in unfavorable terms about political candidates" and that it also "induced the newspaper to respond to the candidates' replies when it might have preferred to remain silent." In both respects, the statute impermissibly infringed the newspaper's First Amendment right to exercise "editorial control and judgment." . . .

. . . [T]he Government . . . may not tell a private speaker what to include or not to include in speech about matters of public concern. . . . [T]he First Amendment's protections apply whether or not a speaker articulates, or even has, a coherent or precise message, and whether or not the speaker generated the underlying content in the first place. . . . [I]t does not matter if the Government's intentions are noble—for example, to promote "press responsibility," or to prevent expression that is "misguided, or even hurtful" "Disapproval of a private speaker's statement"—no matter how justified disapproval may be—"does not legitimize use of the [Government's] power to compel the speaker to alter the message by including one more acceptable to others."

. . . [T]here is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation. The central purpose of a search engine is to retrieve relevant information from the vast universe of data on the Internet and to organize it in a way that would be most helpful to the searcher. . . . [S]earch engines inevitably make editorial judgments about what information (or kinds of information) to include in the results and how and where to display that information [A] "search engine's editorial judgment is much like many other familiar editorial judgments," such as the newspaper editor's judgment of which wire-service stories to run and where to place them in the newspaper, [and] the guidebook writer's judgments about which attractions to mention and how to display them

. . . [T]he fact that search engines often collect and communicate facts, as opposed to opinions, does not alter the analysis. As the Supreme Court has held, "the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell v. IMS*

Health Inc. (2011). Nor does the fact that search-engine results may be produced algorithmically matter for the analysis. After all, the algorithms themselves were written by human beings, and they “inherently incorporate the search engine company engineers’ judgments about what material users are most likely to find responsive to their queries.” . . . When search engines select and arrange others’ materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected First Amendment expression— “[t]he presentation of an edited compilation of speech generated by other persons.” . . .

. . . [W]hether or not the First Amendment shields all search engines from lawsuits based on the content of their search results, it plainly shields Baidu from Plaintiffs’ claims. . . . [T]he very theory of Plaintiffs’ claims is that Baidu exercises editorial control over its search results on certain political topics—namely, by disfavoring expression concerning “the Democracy movement in China” and related subjects. . . . Plaintiffs do not . . . make any argument that Baidu is merely an “infrastructure or platform that delivers content” in a neutral way. Instead, they seek to hold Baidu liable for, and thus punish Baidu for, a conscious decision to design its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects. To allow such a suit to proceed would plainly “violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” . . .

. . . Baidu does not have the ability to block “pro-democracy” writings from appearing on the Internet in this country altogether; it can only control whether it will help users find them. And if a user is dissatisfied with Baidu’s search results, he or she “has access, with just a click of the mouse, to Google, Microsoft’s Bing, Yahoo! Search, and other general-purpose search engines, as well as to almost limitless other means of finding content on the Internet, including specialized search engines, social networks, and mobile apps.” . . .

. . . There is no irony in holding that Baidu’s alleged decision to disfavor speech concerning democracy is itself protected by the democratic ideal of free speech. As the Supreme Court has explained, “[t]he First Amendment does not guarantee that . . . concepts virtually sacred to our Nation as a whole . . . will go unquestioned in the marketplace of ideas.” *Texas v. Johnson* (1989). For that reason, the First Amendment protects Baidu’s right to advocate for systems of government other than democracy (in China or elsewhere) just as surely as it protects Plaintiffs’ rights to advocate for democracy. Indeed, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Thus, the Court’s decision—that Baidu’s choice not to feature “pro-democracy political speech” is protected by the First Amendment—is itself “a reaffirmation of the principles of freedom and inclusiveness that [democracy] best reflects, and of the conviction that our toleration of criticism . . . is a sign and source of our strength.”

Magyar Jeti Zrt v. Hungary
European Court of Human Rights (Fourth Section)
Application No. 11257/16 (2018)

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of: Ganna Yudkivska, *President*, Paulo Pinto de Albuquerque, Faris Vehabović, Egidijus Kūris, Carlo Ranzoni, Marko Bošnjak, Péter Paczolay, *judges* . . . [d]elivers the following judgment[:]

. . . 1. The applicant company complained under Article 10 of the [European] Convention [of Human Rights] that, by finding it liable for the posting of a hyperlink leading to defamatory content on its website, [Hungary’s] domestic courts had unduly restricted its freedom of expression. . . .

2. The applicant company operates a popular online news portal in Hungary called 444.hu, which averages approximately 250,000 unique users per day. . . .

3. On 5 September 2013 a group of apparently intoxicated football supporters stopped at an elementary school in the village of Konyár, Hungary, while travelling by bus to a football match. The students at the school were predominantly Roma. The supporters disembarked from the bus, and proceeded to sing, chant and shout racist remarks and make threats against the students who were outside in the playground. The supporters also waved flags and threw beer bottles, and one of them reportedly urinated in front of the school building. To protect the children, the teachers called the police, took the children inside and made them hide under tables and in the bathroom. The football supporters boarded the bus and left the area only after the police arrived.

4. On 5 September 2013 J.Gy., the leader of the Roma minority local government in Konyár, gave an interview . . . to . . . a media outlet with a focus on Roma issues. While describing the events, . . . J.Gy. stated that “Jobbik came in.”¹ He added: “They attacked the school, Jobbik attacked it,” and “Members of Jobbik, I would add, they were members of Jobbik, they were members of Jobbik for sure.” On the same day the media outlet uploaded the video of the interview to YouTube.

5. On 6 September 2013 the applicant company published an article on the incident in Konyár on the 444.hu website with the title “Football supporters heading to Romania stopped to threaten Gypsy pupils,” written by B.H., a journalist for the Internet news portal. . . .

. . . By clicking on the . . . text, readers could open a new web page leading to the video [interview with J.Gy.] hosted on the youtube.com website. . . .

¹ Jobbik is a right-wing political party which at the material time had the third largest representation in the Hungarian Parliament.

6. On 30 March 2014 the High Court upheld the plaintiff's claim, finding that J.Gy.'s statements falsely conveyed the impression that Jobbik had been involved in the incident in Konyár. It also found it established that the applicant company was objectively liable for disseminating defamatory statements and had infringed the political party's right to reputation, ordering it to publish excerpts of the judgment on the 444.hu website and to remove the hyperlink to the YouTube video from the online article. . . .

7. The applicant company complained that the rulings of the Hungarian courts establishing objective liability on the part of its Internet news portal for the content it had referred to via a hyperlink had amounted to an infringement of freedom of expression as provided in Article 10 of the Convention

8. . . . [T]he safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis . . . in accordance with the ethics of journalism. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance. . . .

9. . . . [T]he Internet has played an important role in enhancing the public's access to news and facilitating the dissemination of information in general. At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Because of the particular nature of the Internet, the "duties and responsibilities" of Internet news portals for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content. Although Internet news portals are not publishers of third-party comments in the traditional sense, they can assume responsibility under certain circumstances for user-generated content. . . .

10. . . . [T]he very purpose of hyperlinks is, by directing to other pages and web resources, to allow Internet users to navigate to and from material in a network characterised by the availability of an immense amount of information. Hyperlinks contribute to the smooth operation of the Internet by making information accessible through linking it to each other.

11. Hyperlinks, as a technique of reporting, are essentially different from traditional acts of publication in that, as a general rule, they merely direct users to content available elsewhere on the Internet. They do not present the linked statements to the audience or communicate its content, but only serve to call readers' attention to the existence of material on another website.

12. A further distinguishing feature of hyperlinks, compared to acts of dissemination of information, is that the person referring to information through a hyperlink does not exercise control over the content of the website to which a hyperlink enables access, and which might be changed after the creation of the link—a natural exception being if the hyperlink points to content controlled by the same person. Additionally, the content behind the hyperlink has already been made available by the initial publisher on the website to which it leads, providing unrestricted access to the public.

13. . . . [G]iven the particularities of hyperlinks, the Court cannot agree with the domestic courts' approach equating the mere posting of a hyperlink with the dissemination of defamatory information, automatically entailing liability for the content itself. Instead, . . . the issue of whether the posting of a hyperlink may justifiably, from the perspective of Article 10, give rise to such liability requires an individual assessment in each case, regard being had to a number of elements.

14. The . . . following aspects [are] relevant . . . : (i) did the journalist endorse the impugned content; (ii) did the journalist repeat the impugned content (without endorsing it); (iii) did the journalist merely include a hyperlink to the impugned content (without endorsing or repeating it); (iv) did the journalist know or could he or she reasonably have known that the impugned content was defamatory or otherwise unlawful; (v) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?

15. . . . [T]he article in question simply mentioned that an interview conducted with J.Gy. was to be found on YouTube and provided a means to access it through a hyperlink, without further comments on, or repetition even of parts of, the linked interview itself. No mention was made of the political party at all.

16. . . . [N]owhere in the article did the author imply in any way that the statements accessible through the hyperlink were true or that he approved of the hyperlinked material or accepted responsibility for it. Neither did he use the hyperlink in a context that, in itself, conveyed a defamatory meaning. It can thus be concluded that the impugned article did not amount to an endorsement of the impugned content.

17. . . . A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas. With these principles in mind, the Court would not rule out the possibility that, in certain particular constellations of circumstances, even the mere repetition of a statement, for example in addition to a hyperlink, may potentially engage the question of liability. This could include situations where a journalist does not act in good faith in accordance with the ethics of journalism and with the diligence expected in responsible journalism dealing with a matter of public interest. However, this was not the case in the present application, where . . . the article

in question repeated none of the defamatory statements, and the publication was indeed limited to posting the hyperlink. . . .

18. Furthermore, it must be noted that the relevant Hungarian law, as interpreted by the competent domestic courts, excluded any meaningful assessment of the applicant company's freedom-of-expression rights under Article 10 of the Convention, in a situation where restrictions would have required the utmost scrutiny, given the debate on a matter of general interest. Indeed, the courts held that the hyperlinking amounted to dissemination of information and imposed objective liability—a course of action that effectively precluded any balancing between the competing rights, that is to say, the right to reputation of the political party and the right to freedom of expression of the applicant company. . . . [S]uch objective liability may have foreseeable negative consequences on the flow of information on the Internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control. This may have, directly or indirectly, a chilling effect on freedom of expression on the Internet.

19. . . . [T]he domestic courts' imposition of objective liability on the applicant company was not based on relevant and sufficient grounds. Therefore, the measure constituted a disproportionate restriction on its right to freedom of expression.

20. Accordingly, there has been a violation of Article 10 of the Convention.

[Pinto de Albuquerque, J, concurring:]

. . . 21. The design of the Internet with the evolution of the World Wide Web was premised on the idea of the free linking of information. . . .

Two system design principles are fundamental to the Web's structure and operational mode, which make freedom of expression possible:

“The primary principle underlying the Web's usefulness and growth is universality. When you make a link, you can link to anything. That means people must be able to put anything on the web, no matter what computer they have, software they use or human language they speak and regardless of whether they have a wired or wireless Internet connection. . . . Decentralization is another important design feature. You do not have to get approval from any central authority to add a page or make a link. All you have to do is use three simple, standard protocols: write a page in the HTML format, name it with the URL naming convention, and serve it up on the Internet using HTTP. Decentralization has made widespread innovation possible and will continue to do so in the future.” . . .

22. The above-mentioned principles of universality and decentralization, which are especially important to the field of journalism, are bolstered by the Court’s view that domestic laws should allow “journalists to use information obtained from the Internet without fear of incurring sanctions.” As a technique of reporting, hyperlinking facilitates and improves the journalistic process by enabling content to be delivered more swiftly to users and enabling journalists to convey information that is more readily accessible and digestible. It also promotes diversity and pluralism in the media, which is substantively in the public interest, since through hyperlinking large and small media organizations are able to work together in a mutually beneficial manner to provide enriched content to users. Typically, journalists and journalistic organizations are not in a position to reassure themselves as to the legality of the content on any linked pages. . . .

23. . . . [N]either the mere use of a hyperlink nor the repetition of its content can be understood as a tacit expression of approval, adoption, ratification, promotion or condoning of the content to which it leads. In order to impute liability, be it civil or criminal, there must be concrete evidence of endorsement by the journalist, who knowingly assumed the unlawful content as his or her own by means of explicit and unequivocal language. . . .

24. The simple use of a hyperlink, without endorsing or even repeating the unlawful content to which it leads, is not equated to traditional forms of publication. Hyperlinking in this case does not make the journalist liable for that content, save in the very exceptional circumstance of non-compliance with a binding judicial decision. . . .

25. . . . [T]he Court’s principles regarding liability for the use of hyperlinks can be summed up as follows:

Principle 1: Where a journalist endorses, by means of explicit and unequivocal language, or repeats defamatory or otherwise unlawful content to which the hyperlink leads, the use of the hyperlink is equated to traditional forms of publication.

Principle 2: Liability should be imposed only where a journalist knows (actual and positive knowledge) that the content to which the hyperlink leads is unlawful, and acts with bad faith. Exceptionally, liability may also be imposed where the journalist could reasonably have known (constructive knowledge) that the content was unlawful, in the light of professional ethics and the due diligence obligations of responsible journalism.

Principle 3: Where a journalist uses a hyperlink and does not endorse or repeat the defamatory or otherwise unlawful content to which it leads, the use of the hyperlink is not equated to traditional forms of publication and does not entail liability, save in the case of non-compliance with a court order declaring such content unlawful and prohibiting its use.

Principle 4: All defenses available to primary publishers should be available to the journalist if he or she is subject to liability in respect of linked content. The journalist

does not have an obligation to distance him or herself from the defamatory or otherwise unlawful content to which the hyperlink leads.

Principle 5: The above-mentioned Convention principles require an individual assessment in each case, in the light of the situation as it presented itself to the author at the material time, rather than with the benefit of hindsight on the basis of the findings of the domestic courts' judgments.

Principle 6: Any regime of objective or strict liability for the use of hyperlinks is *per se* contrary to the above-mentioned Convention principles.

Principle 7: These principles apply both to natural persons (the journalists) and legal persons (the media companies). . . .

26. In sum, the Web is not intended, as a technology, to function in the way the respondent Government states, where spreading information via a hyperlink is itself always a “thought-content.” This approach begs the question of how people are to convey information across the estimated trillions of web pages in existence today and countless future pages if doing so can give rise to liability. It is too burdensome, and in many cases impossible, for people to make a legal determination as to whether each and every hyperlinked content is defamatory or otherwise unlawful. If such a burden were to be imposed automatically on journalists, by way of an objective liability regime, it would stifle the freedom of the press. . . . [H]yperlinks are critical not merely to the digital revolution but to our continued prosperity—and even our liberty. Like democracy itself, they need defending. It is indeed remarkable that, by finding a violation of Article 10 of the Convention, the present judgment has done just that.

* * *

In addition to constitutional commitments to free expression, legislatures and regulators sometimes step in to immunize online platforms from legal consequences related to posting content that originated elsewhere. The next two excerpts highlight the contrasting approaches towards internet intermediaries adopted in the United States and European Union.

Zeran v. America Online, Inc.
U.S. Court of Appeals for the Fourth Circuit
129 F.3d 327 (4th Cir. 1997)*

Before Wilkinson, Chief Judge, Russell, Circuit Judge, and Boyle, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

Chief Judge Wilkinson wrote the opinion

* The U.S. Supreme Court denied Zeran's subsequent petition for a writ of certiorari.

Kenneth Zeran brought this action against America Online, Inc. (“AOL”), arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The district court granted judgment for AOL on the grounds that the Communications Decency Act of 1996 (“CDA” [or “§ 230”]) bars Zeran’s claims. Zeran appeals, arguing that § 230 leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services. . . . Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties. Accordingly, we affirm the judgment of the district court.

. . . One of the many means by which individuals access the Internet is through an interactive computer service. These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service’s individual proprietary network. AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company’s millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber. . . .

The relevant portion of § 230 states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” It also found that the Internet and interactive computer services “have flourished, to the benefit of all Americans, with a minimum of government regulation.” Congress further stated that it is “the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for

the Internet and other interactive computer services, unfettered by Federal or State regulation.”

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.

Congress’ purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. . . .

. . . Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230’s broad immunity “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions. . . .

Zeran . . . contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined [above]. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA. . . .

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that

information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

Similarly, notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply “notify” the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230’s statutory purposes, we will not assume that Congress intended to leave liability upon notice intact. . . .

[The court thus absolved AOL of liability.]

Democratising Online Content Moderation

Giovanni De Gregorio (2019)*

. . . [T]he vertical and negative nature of freedom of expression is no longer enough to protect democratic values in the digital environment, since the flow of information is actively organised by business interests, driven by profit-maximisation rather than democracy, transparency or accountability. . . .

. . . [T]he right to free speech is based on the idea that liberties and freedoms can be ensured by limiting interferences coming from public actors. . . .

. . . [T]his general [thrust] for a vertical paradigm for free speech is not shared worldwide In the European framework, the right to freedom of expression is subject

* Excerpted from Giovanni De Gregorio, *Democratising Online Content Moderation*, 21 *COMPUTER LAW & SECURITY REVIEW* 29 (2019).

to a multilevel balancing with other rights enshrined in the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights, and national constitutions. . . . [U]nlike the US Supreme Court, the Strasbourg Court has shown a more cautious approach to the protection of the right to freedom of expression in the digital environment, perceived more like a risk rather than an opportunity for the flourishing of democratic values. . . .

This . . . framework is one of the most important reasons to understand why the EU has paved the way towards the regulation of online content moderation. . . . [T]he primary challenge for democracies is no longer protecting . . . freedom of expression by granting access to new digital channels and avoiding public actors' interferences, but ensuring that users can effectively enjoy their rights and freedoms in a democratic digital environment. . . .

. . . [T]he [existing] system of online intermediaries' liability [is] based on a liberal regulatory approach adopted by the US and EU at the end of the last century. When the US Congress passed Section 230 of the Communications Decency Act in 1996, the primary aim was to encourage the sharing of free expression and development of the digital environment . . . [by exempting] computer services from liability for merely conveying third-party content. . . .

Likewise, in the EU, the e-Commerce Directive, adopted in 2000, exempts hosting providers (e.g. social network or search engine) from liability for third-party content, provided that they remove or disable online content once they become aware of its unlawful nature.* . . .

While, in the US, the legal framework has not changed in the last twenty years . . . the [European] Union has started to pave the way towards a new regulatory season of online content moderation. One of the EU objectives is to ensure that online platforms 'protect core values' and increase 'transparency and fairness for maintaining user trust and safeguarding innovation.' According to the Commission, since online platforms give access to information and content to society, their role implies 'wider responsibility.' . . .

The approach of the [European] Union in this field shows the shift from a liberal approach . . . to transparency and accountability obligations. In particular, rather than just focusing on content regulation, the EU approach tends to introduce procedural safeguards [such as notice-and-take-down provisions] for users to dismantle the logic of opacity. . . .

. . . In the algorithmic society, . . . an equally important and pernicious threat for individuals come from those private actors which develop algorithms according to their

* *Węgrzynowski and Smolczewski v. Poland*, *supra*, provides an example of the European Court of Human Rights evaluating the sufficiency of this "notice and take-down" approach.

ethical, economic and self-regulatory frameworks. While, in the past, the threats for individual rights was linked with State actions, today, democratic States deal with the issue of limiting the exercise of freedoms (or powers) . . . by private actors in the digital environment. . . .

Constituting and Enforcing New Legal Obligations

An increasing number of jurisdictions are developing legal obligations designed to restrict misinformation in the virtual public sphere. A wave of recent national court opinions has subjected these new legal obligations to scrutiny in light of free expression. The materials below present legislative and common-law efforts to curtail the diffusion of false information, efforts which have been upheld as properly balancing constitutional considerations.

Computer Misuse and Cybercrimes Act Kenya (2018)

. . . 22. (1) A person who intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be considered or acted upon as authentic, with or without any financial gain, commits an offence and shall, on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both. . . .

23. A person who knowingly publishes information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of a person commits an offence and shall on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both. . . .

* * *

Earlier this year, the Constitutional and Human Rights Division of the High Court of Kenya dismissed a facial constitutional challenge to the Computer Misuse and Cybercrimes Act’s criminalization of publishing misinformation. *Bloggers Association of Kenya v. Attorney General & 3 others*, Petition No. 206 of 2019, High Court of Kenya at Nairobi (Constitutional and Human Rights Division, 2020). The Court noted that freedom of expression is not absolute; Article 33(3) of the Constitution of Kenya provides that “[i]n the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.” Moreover, the Court emphasized the need for government to adequately combat the unique challenge presented by misinformation in the virtual public sphere:

There is no doubt that in cyber space, there has been a real issue on misinformation also referred to or known as publication of “*fake news*” [F]alse information spreads so fast on the internet; often irredeemably. Such fake information if it concerns an individual, dead or alive, . . . often results in anguish and pain on the individual or family in question. Some of the fake information has resulted in fear and panic amongst members of [the] public and may create chaos, uncertainty and a threat to the national security of the country I find therefore that it is necessary to establish a law to regulate and control the spread of false information which could pose a threat to the national security of the country especially in a country as fragmented as ours.

Law No. 2018-1202 Regarding the Fight Against the Manipulation of Information
France (2018)*

Article 11

I.—Online platform operators, as defined in Article L.163-1 of the Electoral Code,** shall enforce measures to counter the spread of false information that can disrupt the public order

Online platform operators shall implement visible and accessible mechanisms for their users to report false information

They shall also implement complementary measures regarding:

1. The transparency of their algorithms; [and] . . .
3. The removal of online accounts that disseminate vast quantities of false information

These measures, as well as the resources devoted to them, shall be made public. Each online platform operator shall provide an annual report to the Conseil Supérieur de L’Audiovisuel [(France’s regulatory agency for electronic media)] specifying how it implements these measures. . . .

* Translation by Neil Alacha (Yale Law School, J.D. Class of 2021).

** Article L.163-1 itself refers to Article L111-7 of the Consumer Code, which defines an online platform operator as any person or corporation providing professional communication services to the public, whether for profit or not, either relying on search-engine indexing algorithms to display content, goods, or services provided by third parties, or while connecting parties to exchange or sell content, goods, or services.

Article 14

Online platform operators . . . that use algorithms to recommend, classify, or index information of public interest shall publish aggregated statistics regarding the operation of the algorithms. . . .

These statistics shall be published online and publicly accessible in a free and open format. . . .

Judgment SU-420 of 2019

Constitutional Court of Colombia (Full Chamber)

T-5.771.452, T-6.630.724, T-6.633.352 and T-6.683.135 (2019)*

[The Full Chamber of the Constitutional Court, composed of Gloria Stella Ortiz Delgado, Carlos Bernal Pulido, Diana Fajardo Rivera, Luis Guillermo Guerrero Pérez, Alejandro Linares Cantillo, Antonio José Lizarazo Ocampo, Cristina Pardo Schlesinger, José Fernando Reyes Cuartas, and Alberto Rojas Ríos delivers the following opinion:]

[The Court consolidated four *tutela*, or constitutional injunction, cases concerning the publication by private individuals on various social media—Facebook, YouTube, and a blog hosted by Google—of insults targeting other private individuals. The Google blog case had previously been decided by a three-Justice Chamber of the Court in 2017 (Decision T-063A). The Chamber ordered Google to remove the offending blog post, in which the plaintiff was accused of committing a crime and his business was denigrated. Google then petitioned the full Court to annul the decision of the Chamber. The Court agreed, finding that the Chamber had not given adequate constitutional weight to the censorship resulting from the removal of the blog. But since Google had complied with the elimination order by the time this consolidated case was decided and the creator of the blog failed to appear in Court, the Court held that the case was moot (T-5.771.452).]

[The remaining three cases were decided on the merits. In each, a private individual accused another private individual of being a “swindler” that robbed people. Each of the defendants had invited their social media “followers” to reproduce the accusatory message. Regarding T-6.630.724, the plaintiff was a journalist who sued the accuser for libel. Facebook argued that the journalist could have used Facebook community standards and procedures before seeking a *tutela*. The first-instance judge agreed, holding that the *tutela* was not the appropriate writ to seek redress due to the facts of the case. The Court affirmed, but on unrelated grounds. In T-6.633.352, the owners of an apartment published a Facebook post accusing the administrator of their building of being a thief. The first-instance judge held that a criminal action, not a constitutional writ, was the appropriate remedy. The Court affirmed, but on other

* Summary of facts provided by Justice Manuel José Cepeda Espinosa; translation by Evelin Caro Gutierrez (Yale Law School, J.D. Class of 2022).

grounds. What follows is the Court's discussion of T-6.683.135, in which it granted a *tutela*.]

36. [Defendant] Mr. RGRB . . . published messages on his Facebook and YouTube accounts . . . in which he called [plaintiff] Mr. RMM, who is currently a member of the Board of Directors of SAYCO (the Society of Authors and Composers of Colombia) and is First Notary of Santa Marta, a "thief," a "gangster" and "corrupt," among other names. . . .

37. . . . [Mr. RMM] warned that his fundamental rights to good name, dignity, and privacy were violated, as he was attacked not only in his capacity as a member of SAYCO, but also because of his status as First Notary of Santa Marta. . . .

39. . . . [T]hrough this petition, [Mr. RMM] requested that Mr. RGRB remove all material (videos, statements, comments, photos, etc.) from his social media networks and YouTube channels that contains information that is injurious, slanderous, and dishonorable, which violates the fundamental rights on which he invokes this protection. . . .

60. . . . [T]he Chamber will address the following questions: i) what role do social media play in protecting fundamental rights when criminal allegations or defamatory statements are made on their platforms against a person?; and ii) does the Internet platform . . . on which the publications were made bear responsibility for violations of the fundamental rights to honor and good name? . . .

71. [T]he . . . matter . . . must be analyzed according to the following parameters:

i) Who communicates: that is, whether the issuer of the content . . . is an anonymous profile or is an identifiable source, . . . if it is an individual, public official, legal entity, journalist, or [someone who] belongs to a historically discriminated group.

ii) . . . [W]ho the communication is about, that is, . . . whether the affected subject is a natural, legal or publicly relevant person. . . .

iii) How the content is communicated based on the defamatory burden of the expressions, where the following must be assessed:

- a) The content of the message: . . . the magnitude of the damage does not depend on the subjective assessment that the affected person makes of the manifestation, but on an objective, neutral and contextual analysis
- b) The medium or channel through which the statement is made.
- c) The impact on both parties (number of followers; number of reproductions, views, likes or similar; periodicity and repetition of publications).

From this analysis of context, it is possible to determine the lack of suitability and effectiveness of criminal and civil action, so constitutional protection is established as an effective mechanism for the protection of the aforementioned fundamental rights violated through the exercise of the freedom of expression on social media networks. . . .

91. . . . [F]reedom of expression “offline” is the same as “online,” so the presumption in favor of this right is fully valid in the digital environment. This means that this guarantee must be respected by States and protected from unlawful interference by third parties. . . .

92. . . . What is published on social media platforms is protected by freedom of expression, but it is also subject to limits, so that some publications are not under the protection indicated . . . by the international instruments that establish it. Thus, a limit to freedom of expression is activated when what is disclosed neither has a legitimate constitutional purpose, nor contributes to a specific debate, but rather involves a damaging or insulting intention

113. . . . Considering the significant importance of freedom of expression in a pluralistic and democratic society, . . . the restriction of its enjoyment will only be admissible in those cases in which it can be shown (i) that the restriction pursues an imperative constitutional purpose that is urgent or that cannot be postponed, (ii) that the restriction examined is . . . necessary and (iii) that its degree of interference can be justified at the level of importance that the protection of the other constitutional interests at stake have. . . .

126. . . . The Court concludes that: (i) freedom of expression, as a fundamental guarantee of any democratic society, acquires a special guarantee in the digital environment, by providing simple and quick access to a large number of people; (ii) this right may be restricted when a flagrant violation of the rights to honor, good name and privacy is ascertained, as a result of an exercise of balancing rights; (iii) internet intermediaries have a self-control process, which does not escape judicial intervention; (iv) the platforms cannot censor *ex ante* the content entered by their users; (v) the responsibility for infringement of a right lies with the person who makes a publication; and (vi) although the intermediary is not responsible for the violation to one’s honor or good name, it must delete the content whenever a judge decides that the information should be excluded from the public sphere. . . .

150. . . . The Chamber finds that the defendant in his personal profiles on Facebook and YouTube has repeatedly and systematically expressed insulting and other slanderous phrases, which in turn materialize harassment, insults, crimes, in short, disproportionate and humiliating expressions, which demonstrate a harmful and offensive intention, not for a legitimate purpose, but are on the contrary, defamatory.

The way in which these expressions have occurred undoubtedly constitutes a form of cyberbullying, especially when the publications in which the actor is hurt

continued to appear during these legal proceedings. The behavior of the plaintiff ignores the right to live without humiliation in addition to the rights to honor and good name of Mr. RMM. Posting this type of message shows a harmful intention on the part of the actor and breaks the constitutional protection of the right to freedom of expression. It is, ultimately, an abuse of the right to freedom of expression. In this sense, this right should be given less weight and its prevailing protection should be relaxed in view of the need to rectify the serious and systematic transgression of the honor and good name of RMM. . . .

. . . [T]he excessive exercise of freedom of expression ends up disregarding the right to a good name, since the publications made on the different social networks directly affect the perception that society forms about the party in question (Mr. RMM), based on the reputation these types of messages create, and given their offensive or insulting expressions that distort the opinions his family, friends, co-workers, partners, and all of society may have.

The same applies to the right to honor

. . . . [The Court decides] TO GRANT the protection of the fundamental rights to the good name and honor of the plaintiff

TO ORDER the accused, within three (3) days after being notified of this ruling, if he has not already done so, to remove from his personal Facebook and YouTube account the messages published on those social medial platforms about the plaintiff. . . . [I]n the future he must refrain from engaging in similar conduct

TO ORDER the judge of first instance to verify compliance with the order issued in the present decision, and that if within one (1) month the accused has not complied with the orders issued here, . . . [to] order Facebook and Google LLC (YouTube) to delete the publications

[Justices Carlos Bernal Pulido, Diana Fajardo Rivera, and Luis Guillermo Guerrero Pérez concurred on unrelated aspects of Colombian law. Justice Alejandro Linares Cantillo dissented in part, expressing disagreement with protecting the right to a good name of a public notary.]

Jurisdictional Autonomy and Extraterritorial Authority Over the “Virtual” in Public and Private Sector Adjudication

What are the effects of court orders? If harm has occurred in a virtual space, what is the relevance of the territorial boundaries of a court issuing a remedial order? These questions are not unique to the Web. In the 2015 Global Constitutionalism

Seminar volume, *The Reach of Rights*, we explored the issue of extraterritorial application across many domains, including human rights, data privacy, and surveillance. Here, we focus on the regulation of misinformation online, inter-jurisdictional comity, the effectiveness of remedies, and the impact of online platforms which have themselves developed adjudicatory-like bodies.

The excerpts below exemplify how courts have sought to structure remedies to remove information on the Web. Decisions from Brazil and the United States have asserted authority beyond their territorial borders. Similarly, in a ruling by the Supreme Court of Canada involving the online sale of intellectual property allegedly stolen from Equustek Solutions by Datalink Technologies Gateways, that court upheld an interlocutory injunction preventing Google from displaying Datalink’s websites on any of its search results worldwide. The Canadian Court concluded that an injunction with global effect was necessary to preserve Equustek’s property rights until resolution of the underlying lawsuit, and that the injunction imposed a minimal or non-existent harm to Google.* See *Google Inc. v. Equustek Solutions Inc.*, SCC 34 (2017). In contrast, and with some of the complexity detailed below, the European Court of Justice (ECJ) has generally issued remedial limits to content displayed to internet users within the Union.

Government-based courts are not the only bodies exercising authority. In the last few years, online platforms have developed decision-making procedures to determine content moderation and removal. Those entities could be understood to be a-territorial adjudicators that complement, compete, or make less relevant extant court systems. We conclude this chapter by considering whether doctrines addressing remedial authority and comity among jurisdictions, that have been developed outside the context of the virtual, fit the problems analyzed here and what innovations—based in government or nongovernment entities—are on the horizon.

Interlocutory Appeal N° 2026147-68.2019.8.26.0000
São Paulo Court of Appeals, Brazil (1st Private Law Panel)
August 26, 2019**

Decision rendered by the 1st Private Law Panel of the São Paulo Court of Appeals
[Rapporteur Judge Claudio Godoy:]

[An initial judgment ordered Google to remove the plaintiff’s name from its search results. The judgment was partially modified by the Court of Appeals, which ordered the plaintiff to provide specific URLs. Google appealed this decision, arguing that the permission for plaintiff to indefinitely indicate URLs to be removed from

* For a recent overview of online content removal, see Dan Jerker B. Svantesson, *Internet Jurisdiction and Intermediary Liability*, in OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 692 (Giancarlo Frossio ed., 2020).

** English summary and translation by Professor Miguel Maduro.

Google search results, without a prior judicial order specifically analyzing the content of each URL, violates national law and Superior Court of Justice precedent. This appeal is still pending.]

[The plaintiff nevertheless initiated a “provisional satisfaction of judgment,” in which he requested the complete removal of his name from respondent’s search mechanism until a final decision is rendered. Although Google presented evidence that the content whose URLs were indicated in the original complaint was completely removed from Brazilian search results, the plaintiff claimed that, through the use of a VPN (“virtual private network”), he was still able to access the content available in international domains. Thus, plaintiff requested the expansion of the content removal order to include websites located in international territory. The First Instance Judge ruled that, because the content could still be accessed through VPN, Google had not fully complied with the order.]

. . . Firstly, we [agree] that the removal order has been completely and effectively complied with.

Strictly speaking, as already emphasized in the preliminary decision of this appeal, the discussion at hand fundamentally concerns the fact that access to the content is still possible through a mechanism that redirects to websites located abroad.

The appellant, in this sense, without denying this fact, rather considers that the judicial command’s effects are limited to national territory, within which access has been effectively blocked and the content made unavailable.

It turns out, however, that, as concluded in the expert report, the content was blocked, but not deleted. Furthermore, access is still available to users in Brazil. And that happens through the use of a licit tool available to any ordinary user. That is why the expert concluded that the blockade was not effective in attending to the court order’s terms in this regard, whose violation has led to the application of monetary sanctions, which, nonetheless, may not yet be withdrawn by plaintiff.

This conclusion is not altered by the territorial limits of national jurisdiction. In spite of the precedents presented by the appellant, which are not ignored and whose conclusions are respected, this Panel has nevertheless previously analyzed the issue at hand and arrived at its own understanding of the way in which the matter should be handled when pertaining to access to virtual content, considering the lack of perfect correspondence to the concept of physical limits. We are dealing with content so far considered offensive and whose access, through one of plaintiff’s own tools, is still available to users within Brazil, even if for websites located outside of the country, all of which is made possible by the infrastructure offered by the defendant/appellant itself or its international partners. To this regard, it has been previously settled, in a precedent in which this rapporteur participated:

In virtual reality, the appellant (the same appellant company now in question) cannot invoke territorial limits or allegations of violation of art. 1 of the Federal Constitution, to avoid complying with the order to remove the content of its search website www.google.com and presenting information that is accessible through simple typing, within files, of its partner Google Inc., based in the United States of America, but which could be stored in any information cloud, particularly when it provides services in the country, where the appellant protects its commercial interests, in which case there is no violation of the sovereignty of a foreign state. (Interlocutory appeal n. 2169252-79.2014.8.26.0000, Rapporteur Judge Alcides Leopoldo e Silva Júnior, decision rendered on 3 mar. 2015). . . .

Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme
U.S. Court of Appeals for the Ninth Circuit
433 F.3d 1199 (9th Cir. 2006) (en banc)*

Before Schroeder, Chief Judge, and Ferguson, O'Scannlain, Hawkins, Tashima, W. Fletcher, Fisher, Gould, Paez, Clifton, and Bea, Circuit Judges:

Per Curiam.

. . . Yahoo! is a Delaware corporation with its principal place of business in California. . . .

. . . Yahoo!'s foreign subsidiaries, such as Yahoo! France, Yahoo! U.K., and Yahoo! India, have comparable websites for their respective countries. The Internet addresses of these foreign-based websites contain their two-letter country designations, such as fr.yahoo.com, uk.yahoo.com, and in.yahoo.com. . . . [N]ational boundaries are highly permeable. For example, any user in the United States can type www.fr.yahoo.com into his or her web browser and thereby reach Yahoo! France's website. . . .

Sometime in early April 2000, [the] chairman [of La Ligue Contre Le Racisme et L'Antisémitisme (LICRA)] sent . . . a cease and desist letter [regarding "presenting Nazi objects for sale,"] dated April 5, 2000, to Yahoo!'s headquarters in Santa Clara, California. . . .

. . . LICRA filed suit against Yahoo! and Yahoo! France in the Tribunal de Grande Instance de Paris. . . . UEJF [(Union des Etudiants Juifs en France)] joined LICRA's suit in the French court. . . .

* The U.S. Supreme Court denied LICRA's subsequent petition for a writ of certiorari, and there do not appear to be any later proceedings regarding Yahoo!'s content in French courts.

After a hearing on May 15, 2000, the French court issued an “interim” order on May 22 requiring Yahoo! to “*take all necessary measures to dissuade and render impossible any access [from French territory] via Yahoo.com to the Nazi artifact auction service and to any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes.*” . . . Yahoo! was required “to cease all hosting and availability in the territory of [France] from the ‘Yahoo.com’ site[.]” . . . Yahoo! was further required to remove [this content] from “all browser directories accessible in the territory of the French Republic”

In a second interim order, issued on November 20, 2000, the French court reaffirmed its May 22 order and directed Yahoo! to comply within three months, “subject to a penalty of 100,000 Francs per day of delay effective from the first day following expiry of the 3 month period.” . . . However, the French court found “that YAHOO FRANCE has complied *in large measure* with the spirit and letter of the order of 22nd May 2000[.]” . . .

The French court has not imposed any penalty on Yahoo! for violations of the May 22 or November 20 orders. Nor has either LICRA or UEJF returned to the French court to seek the imposition of a penalty. Both organizations affirmatively represent to us that they have no intention of doing so if Yahoo! maintains its current level of compliance. . . .

On December 21, 2000, Yahoo! filed suit against LICRA and UEJF in federal district court, seeking a declaratory judgment that the interim orders of the French court are not recognizable or enforceable in the United States. . . . [T]he district court concluded that . . . “the First Amendment precludes enforcement within the United States.”

. . . The legal question presented by this case is whether the two interim orders of the French court are enforceable in this country. These orders, by their explicit terms, require only that Yahoo! restrict access by Internet users located in France. The orders say nothing whatsoever about restricting access by Internet users in the United States. We are asked to decide whether enforcement of these interim orders would be “repugnant” to California public policy. . . .

Yahoo! argues that any restriction on speech and speech-related activities resulting from the French court’s orders is a substantial harm under the First Amendment. We are acutely aware that this case implicates the First Amendment, and we are particularly sensitive to the harm that may result from chilling effects on protected speech or expressive conduct. In this case, however, the harm to First Amendment interests—if such harm exists at all—may be nowhere near as great as Yahoo! would have us believe. . . . Yahoo! refuses to point to anything that it is now not doing but would do if permitted by the orders. In other words, Yahoo! itself has told us that there is no First Amendment violation with respect either to its previous (but now abandoned) speech-related activities, or to its future (but not currently engaged in)

speech-related activities. Any restraint on such activities is entirely voluntary and self-imposed.

The only potential First Amendment violation comes from the restriction imposed by the interim orders—if indeed they impose any restrictions—on the speech-related activities in which Yahoo! is now engaged, and which might be restricted if further compliance with the French court’s orders is required. . . .

Even if the French court took this step, Yahoo!’s claim to First Amendment protection would be limited. . . . [T]he French court’s interim orders do not by their terms require Yahoo! to restrict access by Internet users in the United States. . . .

The core of Yahoo!’s hardship argument may thus be that it has a First Amendment interest in allowing access by users in France. Yet under French criminal law, Internet service providers are forbidden to permit French users to have access to the materials specified in the French court’s orders. French users, for their part, are criminally forbidden to obtain such access. In other words, as to the French users, Yahoo! is necessarily arguing that it has a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others. As we indicated above, the extent—indeed the very existence—of such an extraterritorial right under the First Amendment is uncertain.

In sum, it is extremely unlikely that any penalty, if assessed, could ever be enforced against Yahoo! in the United States. . . . This level of harm is not sufficient to overcome the factual uncertainty bearing on the legal question presented

The dissent . . . makes two principal contentions. First, it contends that the French court’s interim orders are unconstitutional on their face, and that further factual development is therefore not needed. Second, it contends that if any further factual development is necessary, we should remand to the district court for that purpose. . . .

If it were true that the French court’s orders by their terms require Yahoo! to block access by users in the United States, this would be a different and much easier case. . . . The French court’s orders, by their terms, require only that Yahoo! restrict access by users in France. The boundary line between what is permitted and not permitted is somewhat uncertain for users in France. But there is no uncertainty about whether the orders apply to access by users in the United States. They do not. They say nothing whatsoever about restricting access by users in the United States.

The dissent’s conclusion that the French court’s orders are unconstitutional may be based in part on an assumption that a necessary consequence of compliance with the French court’s orders will be restricted access by users in the United States. . . .

If the only consequence of compliance with the French court’s orders is to restrict access by Internet users in France, Yahoo!’s only argument is that the First Amendment has extraterritorial effect. . . .

First Amendment issues arising out of international Internet use are new, important and difficult. We should not rush to decide such issues based on an inadequate, incomplete or unclear record. We should proceed carefully, with awareness of the limitations of our judicial competence, in this undeveloped area of the law. Precisely because of the novelty, importance and difficulty of the First Amendment issues Yahoo! seeks to litigate, we should scrupulously observe the prudential limitations on the exercise of our power. . . .

Fisher, Circuit Judge, with whom Hawkins, Paez, Clifton and Bea, Circuit Judges, join, concurring in part and dissenting in part:

. . . [T]he issue before us is whether a United States Internet service provider, whose published content has been restricted by a foreign court injunction, may look to the United States federal courts to determine the enforceability of those restrictions under the United States Constitution’s First Amendment. . . .

The issue is not whether the French defendants who obtained the injunctive orders, or the French court that issued them, are justified in trying to suppress hateful speech. . . . We do not question the validity of the French orders on French soil Rather the question we face in this federal lawsuit is whether our own country’s fundamental constitutional guarantee of freedom of speech protects Yahoo! (and, derivatively, at least its users in the United States) against some or all of the restraints the French defendants have deliberately imposed upon it *within the United States*. . . .

By peremptorily terminating Yahoo!’s access to federal court, the majority establishes a new and burdensome standard for vindicating First Amendment rights in the Internet context, threatening the Internet’s vitality as a medium for robust, open debate. . . .

First, Yahoo! does not target specific users by initiating content directed solely at them. Rather, anyone who logs on to, including users in France, gains access to material on Yahoo!’s message boards, search engines, auction sites and other services. . . .

Second, the factual question of whether it *is* technologically feasible for Yahoo! to monitor the postings and filter the millions of users accessing the website—assuming such technology actually bears on Yahoo!’s First Amendment claims—is an *unresolved* issue that should be returned to the district court. . . . Yahoo! has said that it “could not monitor the content of these millions of postings and listings to its U.S.-based Internet services” and that it essentially faces a binary choice between self-censorship and paying the French fines. . . .

. . . Under the majority’s reasoning, a party targeted for enforcement of a foreign judgment restricting its speech in the United States will have no recourse but to appeal to the foreign court, which does not recognize the First Amendment, to try to escape the

strictures of the decree—or to demonstrate compliance, either through voluntary action or by submitting to its terms. Only after enduring the decree’s chilling effects while this process plays out, and then faced with whatever sanction the foreign court may impose for noncompliance, may the doors of the United States District Court be opened.

We should not allow a foreign court order to be used as leverage to quash constitutionally protected speech by denying the United States-based target an adjudication of its constitutional rights in federal court. . . . [T]he majority does just that, denying Yahoo! the only forum in which it can free itself of a facially *unconstitutional* injunction. Moreover, in doing so the majority creates a new and troubling precedent for U.S.-based Internet service providers who may be confronted with foreign court orders that require them to police the content accessible to Internet users from another country. We therefore respectfully dissent

* * *

In 2014, the ECJ held in *Google Spain SL v. Agencia Española de Protección de Datos* that individuals have the right to request the removal of certain links resulting from a search of their name. The ECJ did not address whether this “right to be forgotten” extended to search results in other countries. In 2019, the ECJ ruled on the jurisdictional scope of the “right to be forgotten” in *Google LLC v. CNIL*. While the “right to be forgotten” and misinformation present distinct legal challenges, the breadth of remedial jurisdiction—for courts and other actors—remains in flux for both. Indeed, national courts in Europe continue to grapple with the challenge of harmonizing domestic and EU law. In November 2019, for example, the Federal Constitutional Court of Germany (FCC) issued an order (*Right to be forgotten I*, BvR 16/13 (2019)) holding that the FCC would apply the German constitution (the Basic Law) to decide cases of fundamental rights that are not settled under EU law, even when EU law might also apply. In its official press release describing the order, the FCC explained that “where EU law affords leeway to design, it seeks to accommodate the diversity of fundamental rights regimes.”

Google LLC v. Commission nationale de l’informatique et des libertés (CNIL)

European Court of Justice (Grand Chamber)

Case No. C-507/17 (2019)

THE COURT (Grand Chamber), composed of K. Lenaerts, President, A. Arabadjiev, E. Regan, T. von Danwitz, C. Toader and F. Biltgen, Presidents of Chambers, M. Ilešič (Rapporteur), L. Bay Larsen, M. Safjan, D. Šváby, C.G. Fernlund, C. Vajda and S. Rodin, judges, . . . gives the following Judgment:

. . . 30. By decision of 21 May 2015, the President of [French regulatory agency] CNIL served formal notice on Google that, when granting a request from a natural person for links to web pages to be removed from the list of results displayed following

a search conducted on the basis of that person's name, it must apply that removal to all its search engine's domain name extensions.

31. Google refused to comply with that formal notice, confining itself to removing the links in question from only the results displayed following searches conducted from the domain names corresponding to the versions of its search engine in the Member States. . . .

38. . . . Google maintains that the penalty at issue is based on a misinterpretation of the . . . 'right to de-referencing.' Google argues that this right does not necessarily require that the links at issue are to be removed, without geographical limitation, from all its search engine's domain names. In addition, by adopting such an interpretation, the CNIL disregarded the principles of courtesy and non-interference recognised by public international law and disproportionately infringed the freedoms of expression, information, communication and the press guaranteed

43. . . . [T]he questions referred . . . [are], where a search engine operator grants a request for de-referencing pursuant to those provisions, [whether] that operator is required to carry out that de-referencing on all versions of its search engine, or whether, on the contrary, it is required to do so only on the versions of that search engine corresponding to all the Member States, or even only on the version corresponding to the Member State in which the request for de-referencing was made

51. . . . [T]he fact that the search engine is operated by an undertaking that has its seat in a third State cannot result in the processing of personal data . . . on the territory of a Member State escaping the obligations and guarantees laid down by Directive 95/46 [(EU Data Protection Directive)] and Regulation 2016/679 [(EU General Data Protection Regulation)]

57. In a globalised world, internet users' access—including those outside the Union—to the referencing of a link referring to information regarding a person whose centre of interests is situated in the Union is thus likely to have immediate and substantial effects on that person within the Union itself.

58. Such considerations are such as to justify the existence of a competence on the part of the EU legislature to lay down the obligation, for a search engine operator, to carry out . . . a de-referencing on all the versions of its search engine.

59. That being said, it should be emphasised that numerous third States do not recognise the right to de-referencing or have a different approach to that right.

60. Moreover, the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. Furthermore, the balance between the right to privacy and the protection of personal data, on the one

hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world.

61. While the EU legislature has . . . struck a balance between that right and that freedom so far as the Union is concerned . . . it has not . . . struck such a balance as regards the scope of a de-referencing outside the Union.

62. In particular, it is in no way apparent . . . that the EU legislature would . . . have chosen to confer a scope on the rights enshrined in those provisions which would go beyond the territory of the Member States and that it would have intended to impose on an operator . . . [an] obligation which also concerns the national versions of its search engine that do not correspond to the Member States. . . .

64. . . . [C]urrently, there is no obligation under EU law, for a search engine operator . . . to carry out such a de-referencing on all the versions of its search engine. . . .

66. Regarding the question whether such a de-referencing is to be carried out on the versions of the search engine corresponding to the Member States or only on the version of that search engine corresponding to the Member State of residence of the person benefitting from the de-referencing, . . . the EU legislature has now chosen to lay down the rules concerning data protection by way of a regulation, which is directly applicable in all the Member States, . . . to ensure a consistent and high level of protection throughout the European Union and to remove the obstacles to flows of personal data within the Union

67. . . . [T]he interest of the public in accessing information may . . . vary from one Member State to another, meaning that the result of weighing up that interest . . . and a data subject's rights to privacy and the protection of personal data . . . is not necessarily the same for all the Member States, especially . . . as regards processing undertaken solely for journalistic purposes or for the purpose of artistic or literary expression, to provide for the exemptions and derogations necessary to reconcile those rights with . . . the freedom of information.

68. . . . [T]he various national supervisory authorities concerned must cooperate . . . in order to reach a consensus and a single decision which is binding on all those authorities . . . in the Union. Moreover, Article 61(1)* of Regulation 2016/679 obliges the supervisory authorities, in particular, to provide each other with relevant information and mutual assistance in order to implement and to apply that regulation in a consistent

* Article 61(1) of Regulation (EU) 2016/679 provides:

The information in relation to the processing of personal data relating to the data subject should be given to him or her at the time of collection from the data subject. . . .

manner throughout the Union, and Article 63* of that regulation specifies that it is for this purpose that provision has been made for the consistency mechanism set out in Articles 64** and 65*** thereof. . . .

69. That regulatory framework thus provides the national supervisory authorities with the instruments and mechanisms necessary to reconcile a data subject's rights to privacy and the protection of personal data with the interest of the whole public throughout the Member States in accessing the information in question and, accordingly, to be able to adopt, where appropriate, a de-referencing decision which covers all searches conducted from the territory of the Union

70. In addition, it is for the search engine operator to take, if necessary, sufficiently effective measures to ensure the effective protection of the data subject's fundamental rights. Those measures must themselves meet all the legal requirements and have the effect of preventing or, at the very least, seriously discouraging internet users in the Member States from gaining access to the links in question using a search conducted on the basis of that data subject's name

72. . . . EU law does not currently require that the de-referencing granted concern all versions of the search engine in question, [but] it also does not prohibit such a practice. Accordingly, a supervisory or judicial authority of a Member State remains competent to weigh . . . a data subject's right to privacy . . . and the right to freedom of information . . . to order, where appropriate, the operator of that search engine to carry out a de-referencing concerning all versions of that search engine.

73. In the light of all of the foregoing, . . . where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary,

* Article 63 of Regulation (EU) 2016/679 provides:

A data subject should have the right of access to personal data. . . . Every data subject should therefore have the right to know and obtain communication in particular with regard to the purposes for which the personal data are processed. . . . That right should not adversely affect the rights or freedoms of others. . . . However, the result of those considerations should not be a refusal to provide all information to the data subject. . . .

** Article 64 of Regulation (EU) 2016/679 provides:

The controller should use all reasonable measures to verify the identity of a data subject who requests access. . . .

*** Article 65 of Regulation (EU) 2016/679 provides:

A data subject should have the right to have personal data concerning him or her rectified and a 'right to be forgotten' where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject. . . .

measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access . . . to the links which are the subject of that request. . . .

* * *

The ECJ's holding in *Google v. CNIL* raises many questions. In 2016, Austrian politician Eva Glawischnig-Piesczek requested that Facebook Ireland delete a defamatory comment on Facebook platforms worldwide. In October 2019, the ECJ held that the EU's e-Commerce Directive does not preclude a Member State court from ordering a host provider to remove unlawful information "or to block access to that information worldwide within the framework of relevant international law." *Eva Glawischnig-Piesczek v. Facebook Ireland Ltd*, Case C-18/18 (2019). Within weeks of that opinion, the High Court of Delhi cited Case C-18/18 in issuing a similar order to remove worldwide content on Facebook, Google, and Twitter for violations of Indian defamation law. *Swami Ramdev & Anr v. Facebook, Inc. & Others* (2019). To some commentators, the ECJ's Facebook decision and others like it empower courts to order the removal of internet content worldwide. To others, the decision is limited to defamation law, which is not a harmonized EU right and thus outside the scope of EU law.

In June 2020, the Constitutional Council of France struck down provisions of a law that required social media to remove, within 24 hours, hateful content reported by users. Decision n° 2020-801 DC (2020). The Constitutional Council reasoned that because the law mandated that platforms make quick decisions under the threat of heavy fines, the removal requirement was likely to "encourage online platform operators to remove content reported to them, whether or not it is manifestly illegal." As a result, the Council held that the requirement "infringe[s] on the exercise of freedom of expression and communication in a way that is not necessary, appropriate and proportionate." Citing the freedom of expression and communication, the Council also struck down a provision of the law that required online platforms to remove, within one hour, content designated by French authorities as child pornography or content inciting acts of terrorism. The ruling left in place, however, the law's creation of an official online hate speech regulatory agency. It remains to be seen how this agency will function and what will result.

National and transnational courts are not the only bodies making rules (territorially bounded or not) about web content. Google, Facebook, and other platforms have developed their own dispute-resolution mechanisms. A mix of legislation, judicial decisions, and popular outcries have propelled such systems. Internal to a given platform, the decisions rendered could vary by regions and differing legal regimes or could aim to impose uniformity and reach across the world. As these institutional responses have come into being, questions have emerged about their relationship to government-based court systems and about whether and how these court-like

institutions embody attributes (such as procedural fairness and transparency) associated with adjudication. Below, we provide a glimpse of their aspirations and their procedures, and the kinds of critiques that they have prompted thus far.

The Functions of Publicity and of Privatization in Courts Judith Resnik (2019)*

. . . The ease of crossing all geographical boundaries when obtaining and exchanging information contrasts to what some refer to as the ‘practical obscurity’ of the ‘public’ records of courts. Before electronic materials, documents in many jurisdictions were ‘public’ in the sense that third parties were entitled to read them. Yet, if the materials were in file drawers inside courthouses, individuals had to have the resources for labor-intensive site visits, and further dissemination required yet other costs.

. . . Google does not just stockpile information; it organizes it. In these respects, search engines provide some of the functions . . . ascribed to courts, which also compile and disseminate information. Google has its methods of deciding what materials to put up and the order of retrieval, just as courts have rules on what documents are made public, the decorum required for in-person hearings, and the evidentiary boundaries of what is admissible.

. . . Google and other search engines are not only potential stand-ins *for* courts as ‘communicative spaces,’ but in practice, they *are* also courts, rendering decisions balancing data protection rights and public access to the information in question. After the [European Court of Justice’s] decision in *Google Spain*, the company created an ad hoc Advisory Council that proposed guidelines for how the company should make its rulings when individuals or governments requested that information be taken down. . . . Google, as a repeat player, may have presumptions to take down information rather than invite public appeals of its refusal to do so. . . .

. . . [D]ipping into Google’s self-reports of what it does reflects its quest to be perceived as legitimate in its court-like role. Google has embraced a form of Bentham’s publicity principles and a commitment to human decision-making—recorded in its publication of what it calls a ‘Transparency Report.’ In this document, Google reported that it makes decisions on a ‘case-by-case basis,’ that it sometimes asks for more information, and that no requests are ‘automatically rejected by humans or by machines.’

Further, Google described the process as ‘complex,’ requiring evaluation of factors such as the ‘requester’s professional life, a past crime, political office, position

* Excerpted from Judith Resnik, *The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and Google Spain)*, in OPEN JUSTICE: THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY (Burkhard Hess & Ana Koprivica eds., 2019).

in public life,’ and the authorship of the materials. Examples of delisting included requests at the behest of the wife of a deceased individual about alleged sex offenses. Illustrative of refusals to delist were decisions declining to do so for individuals who were in political life. Google reported that, from 2014 through the winter of 2018, it had received 665,000 requests for delisting almost two and a half million [URLs] and that it had removed more than forty percent—about 900,000 URLs.

. . . Google’s processes illustrate the privatization of court-like services. And Google is one of many companies running its own in-house dispute resolution system. Another example comes from eBay, which described dealing with sixty million disputes annually—said to yield a high satisfaction by its users. Companies may, like Google, employ their own, in-house decision-makers, or they may hire third-party firms Many other companies require using mechanisms for dispute resolution which they select, and many in the United States outsource to the American Arbitration Association.

. . . [But the] primary source of information about private courts such as that run by Google comes from them. The ‘corporation as courthouse’ is not an open space in which third parties can freely enter. Google and other corporate dispute resolution systems (some of which may be run by nonprofit companies) have concluded that some forms of transparency are requisite but have not embraced the principles that ‘all courts shall be open’ and that every ‘person can freely come and attend.’ Rather, we have Google’s self-reports, augmented by what it must tell webmasters, what can be gleaned from reports posted about outcomes of these adjudicatory-like decisions and by way of the press, scholars’ analyses, and litigation. . . .

. . . [C]onstitutional drafters mandated open courts in an era when vast numbers of potential claimants were legally barred from using them because of race and gender subordination. Today, . . . egalitarian norms have generated rights of access by all [but] the ability to pursue rights . . . remains limited by knowledge and economic resources. And many constitutions are silent on key questions of subsidies for courts and for their users, as well as on how to balance public and private interests in the dispute resolution fora that they create. . . .

Does Facebook’s Oversight Board Finally Solve the Problem of Online Speech?

Kate Klonick (2019)*

. . . The difficulty of preserving private companies such as Facebook, Twitter and YouTube as open platforms that support freedom of expression, while also meeting real-world concerns and removing harmful content, is as old as the internet itself. And

* Excerpted from Kate Klonick, *Does Facebook’s Oversight Board Finally Solve the Problem of Online Speech?*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (2019), <https://www.cigionline.org/articles/does-facebooks-oversight-board-finally-solve-problem-online-speech>.

while activists, scholars, government and civil society have called on platforms to be more accountable to their users for decades, the feasibility of creating some kind of massive global stakeholder effort has proved an unwieldy and intractable problem. Until now.

On September 17, 2019, . . . Facebook announced that it would be jettisoning some of its power to regulate content to an independent external body called the “Oversight Board.” Described unofficially by Facebook CEO Mark Zuckerberg as a “Supreme Court” of Facebook in interviews in early 2018, . . . the board will consist of 11-40 members, who will issue binding decisions on users’ content removal appeals for the platform, and issue recommendations on content policy to Facebook. . . .

Essential to the board’s gaining legitimacy as a public-private governance regime is others’ perception of it as independent. Right [now,] the board’s independence comes from two places. Financially, a third-party foundation will be given an irrevocable initial endowment by Facebook; that trust will operate independently to pay salaries and organizational costs for the board. Substantively, the board is in charge of its own “docket” or case selection (except in extreme circumstances where Facebook asks for expedited review on a piece of content), investigations and decisions. Moreover, a board member can’t be removed for their vote on a particular content question, only for violating a code of conduct. These factors to preserve independence certainly aren’t perfect, but they’re more robust firewalls than Facebook has implemented in the past.

One of the other elements in creating legitimacy is developing a public process that incorporates listening to outside users and stakeholders into developing what the board would look like. In a series of six large-scale workshops around the world, dozens of smaller town halls, hundreds of meetings with stakeholders and experts, and more than 1,000 responses from an online request for public input, the Facebook team creating the infrastructure and design of the board listened to 2,000 external stakeholders and users in 88 languages about what they wanted from it, how it should look and how it should be built. Then the team published all that feedback in a 44-page report, with 180 pages of appendices, in late June 2019. . . .

. . . [H]ow the board’s decisions will be binding on Facebook [was] a major point of contention Many in workshops and feedback fora thought the board’s views ought to have a binding effect on Facebook’s policy about what speech stayed up or came down on the platform. Others argued that the board having that much power was no better than Facebook having it—and that enacting those decisions online would be impractical to implement from an engineering perspective. Ultimately, the compromise made was that Facebook is to be bound by all decisions by the board on individual users’ appeals. However, and perhaps most significantly, although the board can only *recommend* policy changes to Facebook, the company is *required* to give a public explanation as to why it has or has not decided to follow that recommendation.

Although Facebook is not under a mandate to take up the board's recommendations, neither can the platform just autocratically avoid transparency and accountability in deciding not to follow such policy recommendations from the board. Instead, it must furnish reasons—and, one assumes, good reasons—for deciding not to take up a recommendation of the board, and publish those reasons. The mandate of transparency creates an indirect level of accountability through public pressure—or “exit, voice, and loyalty”—traditional measures of popular opposition to power structures private or public. While not perfect, this arrangement allows the public much more access and influence over content moderation policy than users have ever had before. . . .

* * *

As internet platforms establish internal bodies to identify and remove misinformation on their sites, governments have also considered creating institutions devoted to monitoring misinformation at international, national, and local levels. In Europe, the European Commission, with help from the European Regulators Group for Audiovisual Media Services, monitors compliance with EU Code of Practice on Disinformation.* In the United States, the state of Arizona created a Task Force on Countering Disinformation focused in particular on misinformation related to the courts.** The Task Force's goals include traditional monitoring, such as reviewing “examples of disinformation and misleading campaigns targeting the U.S. and Arizona justice systems;” and “[s]uggest[ing] technology and resources that can identify disinformation campaigns early enough to counter them with accurate information.” The Task Force also aims to “[c]onsider a centralized point of contact to assist in identifying disinformation and having it removed while respecting individual opinions and First Amendment rights,” creating a semi-adjudicative body.

Whether we combat misinformation with courts of old or “courts” of new, we face a similar challenge—we must first know what is true. The difficulty of this determination will not only endure but increase as the line between the virtual and the real continues to fade.

* *Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan Against Disinformation*, EUROPEAN COMMISSION (May 12, 2018).

** *Task Force on Countering Disinformation*, ARIZONA JUDICIAL BRANCH (2020), <http://www.azcourts.gov/cscommittees/Task-Force-on-Countering-Disinformation>.

WOMEN, GENDERED VIOLENCE, AND THE CONSTRUCTION OF THE “DOMESTIC”

DISCUSSION LEADERS

SUSANNE BAER, MARTA CARTABIA, AND JUDITH RESNIK

II. WOMEN, GENDERED VIOLENCE, AND THE CONSTRUCTION OF THE “DOMESTIC”

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RECONCEIVING CONSTITUTIONAL OBLIGATIONS

*“It is estimated that 35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence or sexual violence by a non-partner (not including sexual harassment) at some point in their lives.¹ . . . It is estimated that of the 87,000 women who were intentionally killed in 2017 globally, . . . 58 per cent . . . were killed by intimate partners or family members, meaning that 137 women across the world are killed by a member of their own family every day.³”**

How does constitutional law respond to these facts? This chapter explores answers from courts that have read constitutions to require that law aim to provide protection against and safety from gendered violence.

Such mandates for an active state presence (often through criminalization) contrast with traditional approaches in which courts—invoking liberty, autonomy, privacy, and family life—have insisted that law *not* interfere when acts are marked as private, or intimate, or domestic. We explore the sources that produced the understanding of gendered—as well as racist, homophobic or similarly marked—violence as an inequality. We look at what demands then flow to the state and at the repertoire of remedies deployed when governments work towards achieving substantive equality.

¹ WHO, LONDON SCHOOL OF HYGIENE & TROPICAL MEDICINE & SOUTH AFRICAN MEDICAL RESEARCH COUNCIL, GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE 2 (2013).

³ UN OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 2019 10 (2019).

* Excerpted from *Facts and Figures: Ending Violence Against Women*, UN WOMEN (Nov. 2019), <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.

We start where law did, which was by withholding its protection. Victims of domestic violence have long asked for protection and redress. Yet for centuries, an assumption that gender-based violence was a “private” issue meant that legislatures, law enforcement agencies, and courts were unresponsive. We then map how social movements and critical lawyering reframed gendered violence as one form of subordination that is in fact a marker of inequality, as we provide examples of national and transnational law that debate the bases, contours, and implications of rights to be free from such oppression.

A word on terminology is in order. “Violence Against Women” (VAW) is a shorthand used in many jurisdictions to denote subordination and abuse against those identified by society as female. Yet the law increasingly recognizes that the often-violent enforcement of traditional notions of gender intersect with racism (itself many times coded as nationality, religion, or ethnicity), and with class, social status, age, ability, and more. Within and across such categories, it is women, girls, and people identifying as transgender or non-binary who are vulnerable to systemic and targeted violence.

Today, many courts are seeking to understand and respond to gendered violence, as they debate its contours and implications. The sampling below reflects decisions that explore the bases for protection and for application, in terms of what constitutes a household, the domestic, the private, or a family. Judges have probed the nature of discrimination and inequalities that inform violence, the obligations of governments to provide protection both within their own jurisdictions and across borders, and the kinds of remedies governments create. Criminalization, deployed as one method to stigmatize violent action, has been a dominant response, even as questions abound about its utility and impact. Pressures are mounting to expand the spectrum of remedies to include torts, other civil law protections, and positive state efforts to provide support for victims.

Writing about gendered violence in the spring of 2020 has special poignancy. Many governments issued orders requiring their residents to stay home in response to the COVID-19 pandemic. “Sheltering in place” was the goal. Yet women’s movements in many countries raised their voices to expose the dangers that households pose for women and children with violent partners or parents. Rather than a “shelter,” home can be a dangerous place to be. The pandemic put into high relief the long-term gendered crises of domestic violence that have, for ages, put women and children at risk. Moreover, protests across the United States about police violence targeting Black people served as painful evidence of the impact of racism in the choices made in social control and prosecution.

The disjuncture between formal statements of equal rights and the lived experience of people underscores how impoverished remedial responses have been to date. Some of the judicial decisions and legislative enactments excerpted below mark new understandings of substantive equality that will, we hope, inform better ways to instantiate constitutional protection in people’s lives.

MAKING AND BREAKING THE DOMESTIC BARRIER: VIOLENCE AS INEQUALITY

In the materials below, a range of violent acts—rape, physical abuse, torment and control, and murder—are the subject of judicial debates about the nature and kind of legal wrongs, the constitutional rights implicated, and the judicial capacity to formulate remedies. Courts consider, for example, whether law can convict husbands of raping their wives, whether legislatures can authorize a crime of femicide discrete from homicide, and whether punishments may vary depending on the relationship of victim to perpetrator or the gender of either.

Below, we sketch some of the work of “gender” as a category that historically insulated perpetrators and now has opened up debates about redress, abatement, and remediation. As in other years when this Seminar has focused on equality law, the cases raise questions about the interaction between public and private actors, affirmative obligations of governments, and the utility of “positive discrimination” in responding to entrenched patterns of subordination. Are or should answers to such questions be distinctive because the modality is gendered violence?

Definitions and Criminalization

“The Rule of Love”: Wife Beating as Prerogative and Privacy

Reva B. Siegel (1996)*

. . . Until the late nineteenth century, Anglo-American common law structured marriage to give a husband superiority over his wife in most aspects of the relationship. By law, a husband acquired rights to his wife’s person, the value of her paid and unpaid labor, and most property she brought into the marriage. A wife was obliged to obey and serve her husband, and the husband was subject to a reciprocal duty to support his wife and represent her within the legal system. . . .

As master of the household, a husband could command his wife’s obedience, and subject her to corporal punishment or “chastisement” if she defied his authority. In his treatise on the English common law, Blackstone explained that a husband could “give his wife moderate correction,”

[f]or, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any

* Excerpted from Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE LAW JOURNAL* 2117 (1996).

violence to his wife

. . . [This tradition carried on in U.S. common law where, in the early 1800s,] cases in a number of states, particularly in the southern and mid-Atlantic regions, recognized a husband’s prerogative to chastise his wife. . . .

. . . [T]he antebellum temperance movement . . . first initiated public conversation about wife beating. As temperance advocates demonstrated the social evils of alcohol, they drew attention to the violence that drunken husbands so often inflicted on their families. . . .

. . . [A] very different kind of challenge to wife beating was mounted by the woman’s rights movement that grew out of temperance and abolitionist protests Legislatures and courts began to modify the common law of marital status

. . . [T]he chastisement prerogative figured prominently in the feminist movement’s first challenge to the marital status rules of the common law [as advocates] attacked the chastisement prerogative as a practical and symbolic embodiment of the husband’s authority over his wife. . . .

. . . By the 1870s, there was no judge or treatise writer in the United States who recognized a husband’s prerogative to chastise his wife. . . . In several states, legislatures enacted statutes specifically prohibiting wife beating

But it would be misleading to look to the repudiation of chastisement doctrine as an indicator of how the legal system responded to marital violence. . . . [D]uring the Reconstruction Era, jurists and lawmakers vehemently condemned chastisement doctrine, yet routinely condoned violence in marriage. And when the legal system did prosecute wife beating, it . . . [selected] men for prosecution in ways that suggest that concerns other than protecting women animated the punishment of wife beaters. . . .

As wife beating emerged as a “law and order” issue, class- and race-based discourses about marital violence became even more pronounced. . . . [W]hile members of the social elite were certainly aware of marital violence within their ranks, in the closing decades of the nineteenth century, commentators increasingly depicted wife beating as the practice of lawless or unruly men of the “dangerous classes.” Statistics on arrests and convictions for wife beating in the late nineteenth century suggest that . . . criminal assault law . . . was most often enforced against immigrants and African-American men. . . .

* * *

Constitutional jurisprudence has repeatedly confronted the argument that the failure to criminalize injuries to women is a form of unlawful discrimination and that marriage or other forms of familiar relationships should not be used as sources of

immunity. The constitutional questions include whether such assaults are the same as other criminal acts or different, and if so, as to whom and with what impact.

Judges have addressed the delineation of gendered violence from other forms of violence, as defendants argue either that the category ought not to be distinguished or that evidence of the requisite intent to do harm “because of” gender cannot be established. Some decisions discuss the performative purpose of naming and stigmatizing harms that have long been tolerated. As many cases reflect, however, the pervasive lack of implementation haunts the discussions. And the ongoing widespread incidence of gendered violence has prompted some commentators to question whether the focus on criminalization undermines the safety and well-being of victims.

We examine these issues in cases addressing the constitutionality of marital rape immunities and the prosecution of “femicide” and of the disappearance of women. In some cases, equality arguments have been advanced by men challenging laws making femicide a discrete crime. Yet other cases pose questions about how to define VAW, how to ascertain when “gender-based animus” exists, and the constitutionality of imposing different penalties for crimes animated by gender.

Because the 2002 *Dhungana* decision below relies on national and transnational law when striking a Nepalese law that, like many other jurisdictions, had immunized husbands from the crime of raping their wives, a word of introduction is in order about the Convention on the Elimination of Discrimination Against Women (CEDAW). CEDAW entered into force in 1981 and provides:

Article 1: For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2: States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women[.]*

The Convention then sets out in its thirty articles many applicable domains (such as nationality, political participation, education, health, and family life), provides for “temporary measures” to redress discrimination and stereotyping, calls for States Parties to file reports, and creates a Committee to oversee implementation. The 1981 Convention did not directly address violence as a form of discrimination. In 1991, the CEDAW Committee issued General Recommendation No. 19, which interpreted the

* Excerpted from Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

definition of discrimination against women to include gender-based violence. In 2000, an Optional Protocol that permits individuals to bring claims directly to the Committee went into force. As of 2020, it has been ratified by 114 countries.

Meera Dhungana vs. His Majesty’s Government
Supreme Court of Nepal (Special Bench)
Writ No. 55 (2002)

[The Court, composed of the Honorable Justices Mr. Laxman Prasad Aryal, Mr. Kedarnath Upadhyaya, and Mr. Krishna Kumar Barma, delivered the following judgment:]

. . . [The r]ight to equality is one of the basic premises of any democratic country and [the] backbone of rule of law. . . . [I]nternational instruments like the Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 provide that all human beings are equal and everyone possesses the inherent right to equal protection, . . . that legal provisions depriving, discriminating, excluding and restricting economic, social, cultural, civil rights and human rights . . . must be eliminated through the medium of Constitutional and legal measures and that no laws shall be enacted causing or intending to cause discrimination Nepal has ratified or acceded to those international treaties and conventions without any reservation and has accepted the responsibilities arising out of [them] Section 9(1)* of the Nepal Treaty Act, 1991 has categorically provided that where a provision of a treaty to which Nepal is a party is inconsistent with any provision of a law in force, the provision of the law in force shall, to the extent of such inconsistency, be invalid

. . . No. 1 of the Chapter on Rape in the Country Code 1963** has defined rape as the act of having sexual intercourse with a girl, widow or other’s wife . . . in whatsoever manner either exerting threat, pressure or coercion or with undue influence.

* Section 9(1) of the Nepal Treaty Act of 1991 provides:

In cases where the provisions of a treaty to which the Kingdom of Nepal or HMG has become a party following its ratification, accession, acceptance, or approval by the Parliament conflict with the provisions of current laws, the latter shall be held invalid to the extent of such conflict for the purpose of that treaty, and the provisions of the treaty shall be applicable in that connection as the law of Nepal.

** No. 1 of the Charter on Rape in the Country Code of Nepal provides:

Having sexual intercourse with an unmarried girl, a widow or someone's wife under sixteen years of age with or without her consent and with one above sixteen years of age without her consent by using force or showing threat or even under inappropriate influence is proved to be a rape case.

However, the act of having sexual intercourse with one's own wife by the husband without her consent has not been included in the definition of rape

Article 11* of the Constitution of Kingdom of Nepal, 1990 has guaranteed all citizens . . . equal protection of law and equality before law and Article 12(1)** has guaranteed the right to individual liberty. . . .

[T]he petitioner has requested that as No. 1 of the Chapter on Rape is inconsistent with the right to equality guaranteed under the Constitution of the Kingdom of Nepal, 1990 and also with [several provisions of] the Convention on the Elimination of All Forms of Discrimination against Women, the impugned provision is void

. . . Various international human rights instruments have recognized that marital rape is not only a form of violence against women but it is also a serious violation of women's human rights. . . .

[The] Government . . . pleaded that the Constitution has guaranteed [a] right to equality only amongst equals . . . [and that] married and unmarried women cannot be treated alike. . . .

Rape is an inhuman act [that violates] women's human rights and [causes] serious impact on individual liberty Not only does it cause adverse impact on the physical, mental, family and spiritual life of victim women, it also adversely affects . . . [the] self-respect and existence of women. This offence is not only against victim women, but also against the society as a whole. Murder destroys the physical being of a person but the offence of rape destroys the physical, mental and spiritual position of victim women. Thus, it is a heinous crime. . . . It violates all rights of a woman

. . . [Rape] is the worst [form] of criminal offence under the category of domestic violence against women. . . .

. . . [T]o forcibly compel women to use an organ of her body against her will is a serious violation of her right to live with dignity, right to self-determination and it is an abuse of her human rights. The Constitution has guaranteed the right to privacy. Therefore . . . it cannot be said that marital rape is permissible. Article 1 of [CEDAW] defines the term "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital

* Article 11 of the Constitution of the Kingdom of Nepal (1990) provides:

(1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws. . . .

** Article 12(1) of the Constitution of the Kingdom of Nepal (1990) provides:

(1) No person shall be deprived of his personal liberty save in accordance with law

status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, culture, civil or any other field.” Similarly, Article 6* of CEDAW has provided the right against trafficking of women and exploitation of the prostitution of women. Article 2** of the United Nations Declaration on the Elimination of Violence against Women, 1993 . . . included marital rape as a form of violence against women. Similarly, the Fourth World Women Conference held in Beijing in 1995 has also included marital rape as a form of violence against women and stated that marital rape is [a] violation of women’s human rights. . . .

In . . . light of the . . . spirit of the right to equality guaranteed in the Constitution, various international human rights instruments ratified by Nepal and changing norms and values in criminal law with the pace of time, it is appropriate reasonable and contextual to define marital rape too as a criminal offence. . . .

* * *

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (1994), popularly known as the Convention of Belém do Pará, was one of the first binding transnational obligations to recognize that violence against women constitutes a violation of human rights. Article 7 provides:

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

- a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
- b. apply due diligence to prevent, investigate and impose penalties for violence against women;
- c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
- d. adopt legal measures to require the perpetrator to refrain from

* Article 6 of CEDAW provides:

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

** Article 2 of the U.N. Declaration on the Elimination of Violence against Women provides:

Violence against women shall be understood to encompass . . . marital rape . . .

harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;

e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;

f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;

g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and

h. adopt such legislative or other measures as may be necessary to give effect to this Convention.

Many States Parties to the Convention have responded by enacting statutes that make femicide a crime. As of 2020, according to the Organization for Economic Cooperation and Development's Gender Initiative, eighteen countries in Latin America had qualified femicide as a distinct crime, or provided that it was an aggravated form of homicide. Definitions vary, such as limiting the crime to murder committed by an intimate partner.

In 2014, the Regional Office for Central America of the United Nations High Commissioner for Human Rights (OHCHR) argued the importance of femicide prosecutions as one means to “analyze the connections that exist” between VAW and “the violation of other human rights, including the undermining of the principles of gender equality and non-discrimination. The goal is to identify the elements of a specific, gender-biased criminal intent in the commission of the act, such as misogyny, hate, or contempt for women.”* The constitutionality of such provisions is the subject of the 2016 decision, excerpted below, of the Constitutional Court of Colombia.

* Excerpted from REGIONAL OFFICE FOR CENT. AM. OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, LATIN AMERICAN MODEL PROTOCOL FOR THE INVESTIGATION OF GENDER-RELATED KILLINGS OF WOMEN (2014).

Judgment C-297 of 2016
Constitutional Court of Colombia (Full Chamber)
June 8, 2016*

[The Constitutional Court, composed of Magistrates María Victoria Calle Correa, who presides over it, Luis Guillermo Guerrero Pérez, Alejandro Linares Cantillo, Gabriel Eduardo Mendoza Martelo, Gloria Stella Ortiz Delgado, Jorge Iván Palacio Palacio, Jorge Ignacio Pretelt Chaljub, Alberto Rojas Ríos and Luis Ernesto Vargas Silva . . . delivers the following opinion:]

. . . Juan Sebastián Bautista Pulido . . . challeng[ed] section e) of article 2 (partial) of Law 1761 of 2015 “By which the crime of femicide is created as an autonomous crime and other provisions are issued,” considering that it violates [the principle of legality and the right to due process, set forth in] articles 1** and 29*** of the Constitution. . . . [Law 1761 of 2015 provides:]

“ . . . Whoever causes the death of a woman, due to her condition as a woman or for reasons of her gender identity or where any of the following circumstances has occurred or preceded, shall be incarcerated from two hundred fifty (250) months to five hundred (500) months. [These circumstances include:] . . .

e) That there is a history or indications of any type of violence or threat in the domestic, family, work or school environment by the active subject against the victim or gender-based violence committed by the aggressor against the victim, regardless of whether the fact has been reported or not. . . . ”

The plaintiff maintains that the law . . . [creates] an open criminal category, which is proscribed by the Constitution, since it is not possible to determine unequivocally and clearly that the motivation of the active subject corresponds to the subjective ingredient “for reasons of gender.” . . .

Section e) of article 2 of Law 1761 of 2015 does not violate the principle of legality in the understanding that the antecedents, indications, or threats of violence to

* Translation by Evelin Caro Gutierrez (Yale University, J.D. Class of 2022).

** Article 1 of the Constitution of Colombia provides:

Colombia is a social state under the rule of law, . . . 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 29 of the Constitution of Colombia provides:

Due process will be applied in all cases of legal and administrative measures. . . .

which it refers constitute forms of gender violence as a contextual circumstance to determine the motive: the intention to kill for being a woman. . . .

Gender violence is . . . based on discrimination against women and has serious consequences for the enjoyment of their fundamental rights. . . . [A] fundamental right for women to be free from violence has been recognized, which in turn implies the state duty to adopt all measures to prevent and address violence against them. This framework also imposes the State's due diligence obligation to prevent, address, investigate, and punish violence against women

[T]he duty of due diligence . . . imposes on the State the burden of adopting a gender perspective in the investigation of these crimes and human rights violations. This implies taking into account the inequality that women have suffered as a factor that puts them in a situation of risk and threat of violence, and in this case, verifying if there is a relationship between the victim and the victimizer of discrimination as motivation of the conduct. . . .

The inclusion of contextual circumstances as descriptive elements of the crime . . . seeks to overcome the reality that the intention to kill on the basis of gender (which corresponds to intricate patterns of inequality in society and has the potential of taking so many forms) is extremely difficult to test under traditional schemes that replicate power inequalities. . . . [I]t is not [that] the circumstances refer to a matter of normative relevance, but to one of the possibilities that allow verifying the subjective element of the crime. Thus, it is a matter of the judge evaluating the evidence, the background, and threats in conjunction with all the evidence. . . .

[Guaranteeing] access to justice for women implies a structural change in criminal law that integrates a gender perspective both in the criminal charges that compose it and in their investigation and sanction. This can be materialized . . . in a relaxation of the approach to evidence in femicide crimes that allows the context to lead to evidence of the motive. This does not imply that the assessment of the punishable act as such abandons the assumptions of criminal law, due process, or the principle of legality, but that its assessment has the possibility of recognizing the differences in power that generate systematic discrimination of women which leads to exacerbated violence and takes their lives with impunity.

. . . [T]he modality "any type of violence" admits an open reading that makes the behavior lack precision and clarity, which does not comply with the requirements of the principle of legality, since it does not allow us to know with certainty what is the reproached conduct that has the potential to identify a structural intention in the crime of femicide, the motive. . . .

[But] . . . , the same norm and the references to international human rights law . . . allow us to overcome this possible ambiguity, to specify that necessarily the violence referred to in the law at issue is gender-based violence [P]recision through

a qualified referent gives clarity to the norm and makes it possible to foresee the sanctioned conduct. . . .

[The Court declares] the conditional constitutionality of section e) of article 2 (partial) of Law 1761 of 2015 . . . with the understanding that the violence to which [it] refers is gender violence as a contextual circumstance to determine the subjective element of the crime: the intention to kill for being a woman or for gender reasons. . . .

* * *

A tragic example of women’s “disappearance” comes from *González v. Mexico*, a landmark decision on gender-based violence by the Inter-American Court of Human Rights in 2009. That decision relied in part on previous reports issued by the Inter-American Commission on Human Rights and the CEDAW Committee.

CEDAW empowers the CEDAW Committee to review individual complaints against a government’s practices under the Convention. The Optional Protocol to CEDAW establishes an inquiry mechanism that enables the Committee to investigate and make recommendations related to “grave or systemic violations.” Mexico is a State Party to the Optional Protocol to CEDAW. In 2002, after a series of disappearances and murders in Ciudad Juárez, two NGOs—Equality Now (USA) and Casa Amiga (Mexico)—submitted a request for an inquiry into the matter to the CEDAW Committee. In response, the Committee issued a report in 2005.

Also in 2002, the mothers of two teenage girls and a young woman kidnapped and murdered in Ciudad Juárez lodged three separate petitions with the Inter-American Commission of Human Rights. The petitions alleged violations *inter alia* of articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), and 25 (right to judicial protection) of the American Convention on Human Rights (ACHR) in connection with ACHR articles 1(1)* and 2** and article 7 of the Convention of Belém do Pará. The Commission joined the three proceedings and issued a merits report in

* Article 1(1) of the American Convention on Human Rights provides:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

** Article 2 of the American Convention on Human Rights provides:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

which it found violations of each of these provisions. It made a list of recommendations to the government of Mexico to address these violations.

In late 2007, because the government of Mexico had not implemented the recommendations contained in its merits report, the Commission referred the case to the Inter-American Court of Human Rights.

González v. Mexico (“Cotton Field”)
Inter-American Court of Human Rights
Series C No. 205 (2009)

. . . [The] Inter-American Court of Human Rights . . . , composed of the following judges: Cecilia Medina Quiroga, President; Diego García-Sayán, Vice President; Manuel E. Ventura Robles, Judge; Margarette May Macaulay, Judge; Rhadys Abreu Blondet, Judge; and Rosa María Álvarez González, Judge *ad hoc* . . . delivers this judgment. . . .

114. . . . According to the [Inter-American Commission on Human Rights], “Ciudad Juárez has become a focus of attention of both the national and the international communities because of the particularly critical situation of violence against women which has prevailed since 1993, and the deficient State response to these crimes.” . . .

133. . . . [The CEDAW Committee] stressed that gender-based violence [in Ciudad Juárez] . . . “[is] not [a class of] isolated, sporadic or episodic cases of violence; rather they represent a structural situation and a social and cultural phenomenon deeply rooted in customs and mindsets” and that these situations of violence are founded “in a culture of violence and discrimination.” . . .

[17-year-old Laura Berenice Ramos Monárrez, 20-year-old Claudia Ivette González, and 15-year-old Esmeralda Herrera Monreal each disappeared between September 25 and October 29, 2001. All three were of “humble origins.” Their bodies were discovered in a cotton field on November 6, 2001, along with the bodies of five other women.]

185. . . . [O]n the day the disappearance of the victims was registered, the Judicial Police were asked to investigate. However, no reply of any kind to this request was provided

194. Although the State alleges that it began the search for the victims immediately, . . . the only measures it took before the remains were found were registering the disappearances and preparing the posters reporting them, taking statements, and sending an official letter to the Judicial Police. There is no evidence in the case file that the authorities circulated the posters or made more extensive inquiries into reasonably relevant facts provided by the 20 or more statements taken.

195. . . . [In a report on her 2006 mission to Mexico,] the United Nations Rapporteur on violence against women indicated that “[r]eportedly, the municipal police of Ciudad Juárez does not routinely initiate search actions or other preventive measures as soon as it receives a report about a missing woman. Inexplicably, the police often wait for confirmation that a crime has actually been committed.” . . .

197. The representatives indicated that “the authorities minimized the facts or discredited” the reports by the victims’ next of kin “on the pretext that they were young girls who ‘were out with their boyfriend’ or ‘were out having a good time.’” . . .

210. . . . [T]he bodies of Mss. Herrera, González and Ramos had been subjected to particular brutality by the perpetrators of the killings. The representatives added that “[t]he way in which the bodies [of the three victims] were found suggests that they were raped and abused with extreme cruelty.” . . .

231. . . . Mss. González, Ramos and Herrera, were victims of violence against women according to [Article 5* of] the American Convention [on Human Rights] and [Article 1** of] the Convention of Belém do Pará. . . . [T]he murders of the victims were gender-based and were perpetrated in an acknowledged context of violence against women in Ciudad Juárez. . . .

393. . . . [T]he Tribunal will analyze whether the obligation not to discriminate contained in Article 1(1) of the Convention was fulfilled in this case.

394. . . . In the Inter-American sphere, [the preamble of] the Convention of Belém do Pará indicates that violence against women is “a manifestation of the historically unequal power relations between women and men” and recognizes that the right of every woman to a life free of violence includes the right to be free from all forms of discrimination.

395. [In General Recommendation 19,] CEDAW has stated that the definition of discrimination against women “includes gender-based violence, that is, violence that

* Article 5 of the American Convention on Human Rights provides:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. . . .

** Article 1 of the Convention of Belém do Para provides:

For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

is directed against a woman . . . because she is a woman or . . . that affects women disproportionately.” . . .

400. . . . [W]hen investigating this violence, some authorities mentioned that the victims were “flighty” or that “they had run away with their boyfriends,” which, added to the State’s inaction at the start of the investigation, allows the Tribunal to conclude that, as a result of its consequences as regards the impunity in the case, this indifference reproduces the violence that it claims to be trying to counter, without prejudice to the fact that it alone constitutes discrimination regarding access to justice. The impunity of the crimes committed sends the message that violence against women is tolerated; this leads to their perpetuation, together with social acceptance of the phenomenon, the feeling women have that they are not safe, and their persistent mistrust in the system of administration of justice. . . .

401. . . . Bearing in mind the statements made by the State . . . , the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.

402. . . . [I]n the instant case, the violence against women constituted a form of discrimination, and . . . the State violated the obligation not to discriminate contained in Article 1(1) of the Convention

[The Court orders the following unanimously.]

11. This judgment constitutes *per se* a form of reparation.

12. The State shall . . . conduct the criminal proceeding that is underway effectively and, if applicable, any that are opened in the future to identify, prosecute and, if appropriate, punish the perpetrators and masterminds of the disappearances, ill-treatments and deprivations of life of Mss. González, Herrera and Ramos The investigation shall include a gender perspective [and] undertake specific lines of inquiry concerning sexual violence, which must involve lines of inquiry into the respective patterns in the zone

13. The State shall, within a reasonable time, investigate [and, if appropriate, sanction], through the competent public institutions, the officials accused of irregularities

18. The State shall, within a reasonable time, continue standardizing all its protocols, manuals, prosecutorial investigation criteria, expert services, and services to provide justice that are used to investigate all the crimes relating to the disappearance, sexual abuse and murders of women in accordance with . . . the international standards to search for disappeared persons, based on a gender perspective

Violence Against Women: Normative Developments in the Inter-American Human Rights System

Caroline Bettinger-López (2018)*

. . . *Cotton Field* marked a watershed moment in the Inter-American system. The Court, for the first time, found that states have affirmative obligations to respond to violence against women by private actors, and that those obligations are unequivocally justiciable under article 7 of the Belém do Pará Convention. . . . Additionally, the Court examined the cases at issue in the context of mass violence against women and structural discrimination, found that gender-based violence constitutes gender discrimination, and articulated its most comprehensive definition to date of gender-sensitive reparations designed not only to return victims to their status prior to the violation (individual remedies), but also to transform the preexisting situation (structural remedies). Mexico has undertaken some positive steps to comply with the Court’s order. . . .

The reparations ordered by the Inter-American Court in *Cotton Field* were remarkable. The court ordered Mexico to comply with a broad set of remedial measures

Scholars Ruth Rubio-Marín and Clara Sandoval praise the court’s willingness to embrace a gender-sensitive approach when interpreting Mexico’s due diligence obligations and adopting “transformative reparations.” However, they argue, the court, in rejecting the request by the Commission and Petitioners that the court require a coordinated, long-term national policy, “lost a major opportunity to apply its own concept of transformative reparations to the awards it made.” . . .

Mexico has taken arguably good faith steps to implement the Court’s ruling, but . . . the country is far from full compliance. . . .

* * *

Proving that violence is motivated by gender is one issue; another is defining what constitutes violence. In addition to criminal prosecution, some jurisdictions have sought to provide safe housing and, as discussed later in this chapter, refuge for people crossing borders in search of protection. The appropriateness of different remedies turns in part on the meaning of violence. One answer comes from a 2011 decision by the U.K. Supreme Court addressing whether statutory protection against “violence” encompassed methods of subordination in addition to physical attacks.

* Excerpted from Caroline Bettinger-López, *Violence Against Women: Normative Developments in the Inter-American Human Rights System*, in *THE LEGAL PROTECTION OF WOMEN FROM VIOLENCE: NORMATIVE GAPS IN INTERNATIONAL LAW* (Rashida Manjoo & Jackie Jones eds., 2018).

Yemshaw v. London Borough of Hounslow
Supreme Court of the United Kingdom
[2011] UKSC 3

[Before] Lord Hope, Deputy President, Lord Rodger, Lord Walker, Lady Hale, [and] Lord Brown:

LADY HALE (with whom Lord Hope and Lord Walker agree)

1. The issue . . . is what is meant by the word “violence” in section 177(1)* of the Housing Act 1996. Is it limited to physical contact or does it include other forms of violent conduct? The Court of Appeal, as it was bound to do by the earlier case of *Danesh v Kensington and Chelsea Royal London Borough Council, v. Kensington and Chelsea Royal London Borough Council* [2006] EWCA Civ 1404, [2007] 1 WLR 69] held that it was limited to physical contact The appellant contends that it is not. . . .

16. The appellant is a married woman with two young children [I]n August 2008 . . . she left the matrimonial home in which she lived with her husband, taking the children with her, and (having nowhere else to go) sought the help of the local housing authority. The matrimonial home was rented in her husband’s sole name. In her two interviews with the housing officers, she complained that “her husband hates her and [she] suspects that he is seeing another woman. [She] is scared that if she confronts him he may hit her. [However, her] husband has never actually threatened to hit her.” She went on to complain of his shouting in front of the children, so that she retreated to her bedroom with them, not treating her “like a human,” not giving her any money for housekeeping, being scared that he would take the children away from her and say that she was not able to cope with them, and that he would hit her if she returned home. The officers decided that she was not homeless as her husband had never actually hit her or threatened to do so.

* Section 177(1) of the Housing Act of 1996 provides:

(1) It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against him, or against—

- (a) a person who normally resides with him as a member of his family, or
- (b) any other person who might reasonably be expected to reside with him.

(1A) For this purpose “violence” means—

- (a) violence from another person; or
- (b) threats of violence from another person which are likely to be carried out; and violence is “domestic violence” if it is from a person who is associated with the victim.

19. [This Court held in *Danesh*] that “physical violence” is the natural meaning of the word “violence” I do not accept that it is *the only* natural meaning of the word. It is common place to speak of the violence of a person’s language or of a person’s feelings. . . . When used as an adjective it can refer to a range of behaviours falling short of physical contact with the person

20. The 1996 Act was originally concerned only with “domestic violence,” that is violence between people who are or were connected with one another in an intimate or familial way. By [1996] . . . , both international and national governmental understanding of the term had developed beyond physical contact. . . . [The CEDAW Committee’s] General Recommendation 19 . . . included in its definition of discrimination in relation to gender based violence “acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.” . . .

21. Nationally, in 1993 the House of Commons Home Affairs Committee in its Report on Domestic Violence adopted the definition “any form of physical, sexual or emotional abuse which takes place within the context of a close relationship” The Law Commission [on Domestic Violence and Occupation of the Family Home] gave this explanation of domestic violence . . . :

“The term ‘violence’ itself is often used in two senses. In its narrower meaning it describes the use or threat of physical force against a victim in the form of an assault or battery. But in the context of the family, there is also a wider meaning which extends to abuse beyond the more typical instances of physical assaults to include any form of physical, sexual or psychological molestation or harassment which has a serious detrimental effect upon the health and well-being of the victim.”

The recommendations made in the Law Commission’s Report were embodied . . . in . . . the Family Law Act 1996. . . .

24. . . . [B]y the time of the 1996 [Housing] Act the understanding of domestic violence had moved on from a narrow focus upon battered wives and physical contact. . . .

The 2006 version of the Homelessness Code of Guidance for Local Authorities is explicit . . . :

“The Secretary of State considers that the term ‘violence’ should not be given a restrictive meaning, and that ‘domestic violence’ should be understood to include threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional)”

25. However, it is not for government and official bodies to interpret the meaning of the words which Parliament has used. That role lies with the courts. And the

courts recognise that, where Parliament uses a word such as “violence,” the factual circumstances to which it applies can develop and change over the years. . . .

27. “Violence” . . . is not a term of art. It is capable of bearing several meanings and applying to many different types of behaviour. These can change and develop over time. There is no comprehensive definition of the kind of conduct which it involves in the Housing Act 1996: the definition is directed towards the people involved. . . . In this case the purpose is to ensure that a person is not obliged to remain living in a home where she, her children or other members of her household are at risk of harm. A further purpose is that the victim of domestic violence has a real choice between remaining in her home and seeking protection from the criminal or civil law and leaving to begin a new life elsewhere. . . .

31. The second reason given in *Danesh* for preferring a narrow construction was that, in . . . section 177(1) . . . , violence is defined as violence or threats of violence which are likely to be carried out If the concept of violence already included conduct which puts a person in fear of physical violence there would be no need to refer to threats at all. I am not convinced of this. . . . [S]ome forms of conduct which undoubtedly put a person in fear of violence . . . would not necessarily be described as threats. . . .

32. More importantly, if the concept of violence includes other sorts of harmful or abusive behaviour, then the reference to threats is not redundant. Locking a person (including a child) within the home, or depriving a person of food or of the money to buy food, are not uncommon examples of the sort of abusive behaviour which is now recognised as domestic violence. There is nothing redundant in a provision which refers to threats of such behaviour which are likely to be carried out. . . .

37. I would therefore allow this appeal and remit the case to be decided by the local housing authority. . . .

[Lord Brown and Lord Rodger filed opinions in which they concurred with Lady Hale’s opinion. Lord Rodger emphasized that the Court would “play down the serious nature of psychological harm” if it were to exclude it from the definition of violence. Lord Brown noted his “profound doubt as to whether at any stage of their legislative history the ‘domestic violence’ provisions with which we are here concerned . . . were intended to extend beyond the limits of physical violence.” However, he did “not feel sufficiently strongly as to the proper outcome of the appeal to carry these doubts to the point of dissent.”]

* * *

The interrelationship between economic instability and domestic violence has also prompted calls for understanding gendered violence in broader terms than physical abuse. Mary Osirim explained in her 2003 essay analyzing the rise in violence against women as Zimbabwe’s economy collapsed:

In addition to the very harsh toll that the economic and political problems have had on poor and low-income African women in particular, especially those involved in subsistence agriculture and the micro-enterprise sector, black women in Zimbabwe have also experienced an escalation in violence committed against them, by both individuals and the state. Such violence cannot be solely understood as physical abuse, but as a phenomenon that takes on a myriad of forms, including the economic and the psychological. Domestic violence and rape have deeply-rooted structural explanations in Zimbabwe linked to the long history of colonialism and white minority rule, political transition, economic crisis and adjustment, changes in expected gender roles for women and men, and the political crisis that emerged in the last few years.*

As much of the case law reflects, many courts are addressing the constitutionally acceptable contours of criminal law remedies to gender-based violence. The insistence that gendered violence *is* a crime is one way to mark new understandings of the equality of persons. Yet some commentators have raised concerns that, unless retooled, criminal law may itself be counterproductive to the goal of reducing domestic violence.

Should Domestic Violence Be Decriminalized?

Leigh Goodmark (2017)**

. . . One could make a credible, even a strong, theory-based case for the decriminalization of domestic violence. There is limited to no evidence that criminalization deters domestic violence and reason to believe that criminalization helps to create conditions that stimulate domestic violence. The costs of criminalization, particularly when prosecution leads to incarceration, are quite high. Criminalization undermines the economic and social structures of marginalized neighborhoods, depressing ex-offenders’ employment opportunities and destroying relationships within communities. The traumatic effects of the inhumane conditions and exposure to violence within prisons set into motion a destructive cycle of violence when those who abuse are released into the community and resume their intimate relationships. The costs of incarceration particularly, and criminalization generally, far outweigh the limited benefits criminalization provides. And the focus on criminalization is preventing the

* Excerpted from Mary Johnson Osirim, *Crisis in the State and the Family: Violence Against Women in Zimbabwe*, 7 AFRICAN STUDIES QUARTERLY 153 (2003).

** Excerpted from Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARVARD JOURNAL OF LAW & GENDER 53 (2017). Since writing this piece, Professor Goodmark has changed her views on the subject. For an updated account, see Aya Gruber & Leigh Goodmark, *Domestic Violence Is also a Virus: During the Coronavirus Crisis, We Need the Right Criminal Justice Response to the Crime*, NEW YORK DAILY NEWS (Mar. 26, 2020).

development of alternatives that could provide justice for people subjected to abuse without the harms associated with the carceral system.

But complete decriminalization of domestic violence is unlikely, and probably unwise. Assault is one of the early common law crimes, and assault statutes cover a range of behaviors from minor incidents to serious injuries. It is unrealistic to believe that there would be widespread support for repealing these laws; the ratchet of criminalization tends only to move in one direction. Politicians and many anti-violence advocates are committed to the criminalization of domestic violence and unlikely to turn away from it completely. Arrest and prosecution play an important role in securing safety and justice for some people subjected to abuse. Whatever one thinks of the choice to criminalize as a means of making the private public, or expressing society's interest in stemming intimate partner violence, the message sent by repealing such statutes at this point would be problematic. While the prosecution of each and every individual act of intimate partner violence, however small, may not appreciably benefit society, the need still exists to ensure that serious, repeat offenders (who are not deterred by current sanctions) are prevented from continuing to do harm to their partners. Even those who are most concerned about the detrimental aspects of criminalization have experience with offenders who they believe should be isolated from the greater society.

Instead of decriminalizing domestic violence, then, we could rethink two aspects of the current criminal legal regime. First, the criminal legal system should respond to serious intimate partner violence without doing harm to those it was intended to benefit. Second, the punishment meted out for intimate partner violence should address the harm done without creating the potential for increased violence. Rather than viewing punishment for domestic violence as a binary—a perpetrator is either found guilty and incarcerated or not—we should conceptualize criminalization and punishment as a spectrum, with a range of possible responses. . . .

Using “less costly, less coercive, more respectful” options before resorting to incarceration serves several goals. Restorative approaches engage offenders in thinking about the impact of their actions on their victims, helping to engender empathy; punishment-focused interventions make it difficult for perpetrators to think about anything but avoiding that punishment. Starting with restorative approaches also underscores the importance of treating citizens with dignity and respect. As Braithwaite writes, “[I]f we want a world with less violence and less dominating abuse of others, we need to take seriously rituals that encourage approval of caring behavior so that citizens will acquire pride in being caring and nondominating.” . . .

When incarceration is used, it should be used with a clear understanding of its limitations. Incarceration has only a limited impact on decreasing the rate of serious crime. Keeping those who commit intimate partner violence in prison for long periods of time is unlikely to deter further violence. Studies have found that longer sentences do not have a greater deterrent effect on perpetrators. Moreover, incarceration is unlikely to change the behavior of those who commit intimate partner violence. “Even

the staunchest advocates of incarceration do not argue that prisons are successful [correctional] institutions, only that they punish well.” . . .

Differentiating Penalties Because of Gender

Below, we explore whether different punishments for gender-based violence are prohibited, tolerated, or required as a matter of law in the Spanish constitutional system.

Judgment 59 of 2008 Constitutional Tribunal of Spain May 14, 2008*

The Plenary of the Constitutional Court, made up of Mrs. María Emilia Casas Baamonde, President, Mr. Guillermo Jiménez Sánchez, Mr. Vicente Conde Martín de Hijas, Mr. Javier Delgado Barrio, Ms. Elisa Pérez Vera, Mr. Roberto García-Calvo y Montiel, Mr. Eugeni Gay Montalvo, Mr. Jorge Rodríguez-Zapata Pérez, Mr. Ramón Rodríguez Arribas, Mr. Pascual Sala Sánchez, Mr. Manuel Aragón Reyes and Mr. Pablo Pérez Tremps, magistrates, have delivered the following sentence

The Criminal Court no. 4 of Murcia questions . . . the constitutionality of art. 153.1 of the Penal Code (hereinafter, CP) . . . , as it understands the article to violate art. 14** . . . of the Constitution [(hereinafter, CE)] by establishing discrimination based on sex

. . . [A]rt. 153.1 CP . . . states that “whoever by any means or procedure will cause another mental impairment or injury not defined as a crime in this Code, or will hit or mistreat another without causing injury, when the offended is or has been his wife, or a woman who is or has been linked to him by an analogous affective relationship even without coexistence, . . . he will be punished with a prison sentence of six months to one year.” . . .

. . . [This provision] establishes a different criminal treatment based on the sex of the active and passive subjects of the crime [T]he crime of occasional mistreatment typified in art. 153.1 CP is punishable by imprisonment for six months to one year when the active subject is a man and the passive subject is a woman, while the

* Translation by Evelin Caro Gutierrez (Yale University, J.D. Class of 2022).

** Article 14 of the Constitution of Spain provides:

Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.

same conduct is punished with a prison sentence of three months to one year if the active subject were a woman and the passive subject a man. . . .

The normative differentiation is sustained by the legislator in pursuit of his interest in more heavily sanctioning aggressions that he understands to be more serious and socially reprehensible from the relationship context in which they occur and also from the fact that such behaviors are nothing else . . . but a testament of a latent inequality in the field of domestic relationships of very serious consequence for those who hold a subordinate position in a way that is intolerable under the Constitution.

The general principle of equality of art. 14 CE requires . . . that the differential treatment of the same factual assumptions have an objective and reasonable justification and not have disproportionate consequences in differentiated situations, considering the purpose pursued by such differentiation. . . .

The main objective of the [differentiation] is to prevent aggressions that occur within the couple as a manifestation of the dominance of men over women in such a context; thus, its aim is to protect women in an area in which the legislator appreciates that their basic assets (life, physical integrity and health) and their freedom and dignity are insufficiently protected. Its objective is also to combat the origin of an abominable type of violence that is generated in a context of inequality and to do it with different kinds of measures, including criminal ones. . . .

Both with regard to the protection of life, physical integrity, health, liberty and security of women, which the legislator understands as insufficiently protected in the field of intimate relationships, as well as in relation to the fight against women's inequality in this area . . . , the constitutional legitimacy of the purpose of . . . the penal provision . . . is clear. . . .

The reasonableness of the normative differentiation . . . not only requires justifying the legitimacy of its purpose, but also its adequacy. . . . [I]t is . . . necessary that the . . . penal norm . . . be functional for this purpose as opposed to an alternative that does not differentiate [between the genders of the abusers and the abused]. . . .

[The differentiation] finds a first justification in the greater objective need for protection of certain constitutional interests of women in relation to certain criminal conduct. Such a need is shown by the very high . . . frequency of serious crime that has the woman as victim and the person who is or was her partner as agent. . . .

. . . [T]he aggressions of the male towards the woman who is or who was his affective partner are more serious than any others in the same relational field because they correspond to a deep-rooted type of violence that is “a manifestation of discrimination, a situation of inequality and the power relations of men over women.” . . . [G]reater severity requires a greater sanction that results in greater protection for potential victims. . . .

As the term “gender” contained in the Law . . . intends to communicate, this is not discrimination based on sex. It is not the sex itself of the active and passive subjects that the legislator takes into consideration with aggravating effects, but . . . the especially damaging character of certain events from the relational sphere in which they occur and the objective meaning that they acquire as a manifestation of serious and deep-rooted inequality. . . .

. . . [C]onstitutional legitimation . . . requires, in addition, . . . that it does not lead to disproportionate consequences This analysis . . . will . . . take into account both the reason for the differentiation and its quantification . . . in relation to its purpose.

The challenged norm does not deserve constitutional reproach The differentiation . . . is significantly limited in relation to the transcendence of the intended protective purpose of the norm . . . and in view of the adequacy of the preventive instrument relied on: a prison sentence. . . .

Even considering that the active subject of the questioned subsection of art. 153.1 CP must be a man, the normative differentiation that is challenged . . . is reduced with the mention in that article of the “especially vulnerable person who lives with the author” as the only possible passive subject of the crime. The remaining difference does not violate art. 14 CE, as previously explained, because it is a reasonable differentiation, the result of the wide freedom of choice enjoyed by the criminal legislator, which, due to the limitation and flexibility of the punitive provisions, does not lead to disproportionate consequences. It is a reasonable differentiation because it seeks to increase the protection of the physical, mental and moral integrity of women in an area, that of the couple, in which they are insufficiently protected, and because it pursues this legitimate purpose in an appropriate way in view of . . . the greater severity of the differentiated behaviors, taking into account their objective social meaning and their peculiar threat for the security, freedom and dignity of women. . . .

For these reasons we must dismiss the claim of unconstitutionality raised.

Magistrate Mr. Vicente Conde Martín de Hijas . . . dissented . . . :

. . . The entire Judgment is based on a conceptual basis that . . . [is unjustly taken for granted]: . . . the aggression produced in the field of male-to-female relationships is more objectionable than those produced in that same relationship by women to men. . . .

I cannot accept that starting point, since the value . . . which is protected by the questioned criminal type, cannot be other than that of the dignity, liberty or bodily integrity of the victim, and in relation to these values, it is simply intolerable for me to establish differences based on sex, a criterion of differentiation that directly conflicts with the proscription of art. 14 CE. . . .

The greater frequency of aggressions produced by men with respect to women than those produced by women with respect to men may determine the consequence that

more men should be punished than women; but it does not seem to me constitutionally acceptable that the seriousness of the conduct and the intensity of its punishment are decided based on the sex of the perpetrator and victim of the crime. . . .

Magistrate Mr. Jorge Rodríguez-Zapata Pérez . . . dissented . . . :

. . . The Judgment, perhaps unintentionally, reflects an outdated paternalistic view of criminal law that promotes a conception of women as a “vulnerable subject” who, by the mere fact of initiating an affective relationship with a man, even without coexistence, is situated in a subordinate position that requires a specific criminal protection This approach is unacceptable in today’s society, which does not admit the old role of women as the “weaker sex” that historically placed them in a position equivalent to that of minors and the incapacitated This perspective is contrary to art. 10.1* of the Constitution, which consecrates the dignity of the person as one of the foundations of our constitutional system and whose notion is at the base of the concept of fundamental rights. . . .

Góngora

Supreme Court of Argentina

Causa n° 14.092, Fallos: 336:392 (2013)**

[The Supreme Court of Argentina, composed of Ricardo Luis Lorenzetti, Elena Highton de Nolasco, Carlos S. Fayt, Juan Carlos Maqueda, Carmen M. Argibay, and E. Raul Zaffaroni, delivers the following opinion:]

[Gabriel Arnaldo Góngora was accused of committing the crime of repeated sexual abuse against a woman. The Oral Criminal Court sentenced Góngora to probation, despite the prosecutor’s opposition in favor of a prison sentence. The prosecutor appealed the sentence.]

. . . The appeal . . . calls into question the intelligence of the norms of . . . Article 7 of the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women [(“Convention of Belem do Pará”)] . . . and [whether] the decision of the superior court on the case is contrary to the right that the appellant claimed based on such norms

. . . For the cassation tribunal, the obligation to punish illicit acts that reveal the existence of violence directed against women due to their condition, which the

* Article 10.1 of the Constitution of Spain provides:

The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.

** Translation by Evelin Caro Gutierrez (Yale Law School, J.D. Class of 2022).

Argentine State has assumed by virtue of the “Convention of Belem do Pará” . . . does not prevent judges the possibility of granting the accused . . . probation provided for in . . . the Penal Code. . . .

. . . [T]he decision of the cassation tribunal disregards the context of [Article 7 of the Convention of Belem do Pará], thus contradicting the guidelines for interpretation of article 31, first paragraph, of the Vienna Convention on the Law of Treaties* [T]his is so since for the cassation tribunal the . . . conventional obligation is absolutely separate from the rest of the particular duties assigned to the states parties in pursuit of the fulfillment of the general purposes proposed in the “Convention of Belem do Pará,” namely: to prevent, punish and eradicate all forms of violence against women. . . .

. . . [G]ranted probation to the accused would frustrate the possibility of elucidating at that procedural stage the existence of facts that prima facie have been classified as violence against women, along with the determination of the responsibility of the person who has been accused of committing them and of the sanction . . . that may correspond to him. . . .

. . . [T]he development of the debate is of paramount importance in order to enable the victim to assume the power to appear to effectuate “effective access” to the process . . . in the widest possible way, in order to assert their sanctioning claim, a question that is not part of the substantive and procedural legal framework that regulates the probation process. . . . [The lower court decision contravenes] one of the obligations that the State assumed when approving the “Convention of Belem do Pará” to fulfill the duties of preventing, investigating and sanctioning events such as those considered here. . . . [T]he appealed decision must be annulled. . . .

* * *

Commentators report that implementation of the Supreme Court’s rejection of probation in domestic violence cases has been uneven. For example, in 2017, the National Chamber of Cassation in Criminal and Correctional Matters of Argentina distinguished *Góngora* and imposed a sentence of probation. The Chamber concluded that defendant EJM’s case was “substantially different from the one resolved by the CSJN in ‘Góngora,’ [as] the suspension of probation did not have the prosecutor’s consent at any time and it was [the prosecutor] that brought the case to the highest court.” In this context, it stressed that “the State must act in a context of reasonableness and evaluate the circumstances that arise in each specific case.”

* Article 31(1) of the Vienna Convention on the Law of Treaties provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Amending Constitutions: The Texts and Tests of Violence

We pause to reflect on constitutional law's interaction with gender in general and violence in particular. Ruth Rubio Marín's essay provides a framework for the excerpts that follow, in which national constitutions have taken up VAW. In addition to her focus on different forms of constitutionalism, different modes of constitutional interpretation may, as Vicki Jackson has argued in a chapter entitled *Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, Interpretation* (2007),* alter how courts approach the forms of constitutionalism analyzed below.

On Constitutionalism and Women's Citizenship

Ruth Rubio Marín (2019)**

. . . [There are] four forms [of constitutionalism defined on the basis of the role that constitutional law has played with regard to women's citizenship] that . . . vary in time and sequence among national jurisdictions and that are not, for the most part, mutually exclusive. These are: (1) exclusionary constitutionalism, where constitutional law enforces and legitimates the subordination of women, (2) egalitarian constitutionalism, which instead, takes on board the goal of granting women rights equal to those it recognizes to men, (3) participatory constitutionalism, which is receptive to the idea of women's claims going beyond equal rights and facilitating equal participation in the male-dominated public sphere, and (4) transformative constitutionalism, which is gradually acknowledging the centrality of social reproduction for all and of an egalitarian and democratic family structure, advancing a vision that disentangles the forms of contribution in the public and private spheres from normatively constructed gender roles. . . .

Modern constitutionalism was superimposed on an extractive reproductive family structure that was naturalized and even romanticized. This explains why every attempt to advance toward the affirmation of equal citizenship for women and a more egalitarian family was first resisted as a challenge to the very structure of the constitutional order and not simply celebrated as a natural step in the gradual conquest of the constitutional promise of coexistence among naturally free human beings. Even the conquest of female suffrage was constitutionally resisted, and, when accepted, only threw a wrinkle in the gender order, for it did not question the underlying marital contract. Everywhere, the effects of granting women's political rights were mitigated by the gender bias in women's social citizenship in patriarchal welfare regimes, as well as by women's belated liberation from the head and master laws.

* This chapter appears in *CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW* (Susan H. Williams ed., 2007).

** Excerpted from Ruth Rubio Marín, *On Constitutionalism and Women's Citizenship*, 2019 Gruber Distinguished Lecture in Women's Rights (Sept. 12, 2019).

Yet, since the beginning of constitutionalism, women have engaged in various fights to turn their emancipatory claims into a constitutional reality, relying both on the constitutional interpretation of silent texts and on attempts to bring about constitutional norms. Throughout . . . , women have had to face the challenge of speaking with one voice, not only because of the difficulty of setting a priority order between the competing emancipatory causes of the time and the multiple and intersecting axes of oppression in their existence, but also because of the natural fear about the costs that the project of gender roles disestablishment could entail for women themselves. . . .

Originally built on the political exclusion of women, modern constitutionalism has only begun enabling and even facilitating women’s citizenship in the last quarter of its existence by turning gradually receptive to women’s claims for equal rights first and to equal participation later. Only in the current century, and thanks in part to women and gender dissidents joining the exercise of constitution-making, has it been possible to make significant progress in advancing the constitutional vision of a democratic and egalitarian family structure, both through the rejection of the heteronormative procreative family as the foundational cell of society and through the increasing, though still largely insufficient, valorization of care and domestic work as a domain of citizenship. In the end, the constitutional challenge to gender roles and expectations has brought to the fore the social construction of gender itself and is now opening constitutionalism to the demands of justice of intersex and transgender citizens. . . .

. . . [W]omen around the world have been fighting back and continue to do so. . . . [I]n so doing, women are trying to prevent the loss of historically gained territory but also to finish the job that their ancestors began; namely, that of conquering citizenship as defined in men’s terms and redefining it in their own.

A Sampling of New Constitutional Provisions

In many jurisdictions, decisions on VAW rest on a range of extant constitutional provisions, including rights to be free from discrimination, be free from torture or cruel and unusual punishment, security of person, and protection of family life. In a few countries, constitutional amendments and more recently adopted constitutions have moved gender-based violence explicitly into text, with variations in framing and terms. For example, the Tunisian Constitution as adopted in 2014 provides: “The state shall take all necessary measures in order to eradicate violence against women” (Art. 46).

More detail comes in the Constitution of Nepal, as adopted in 2015, which states: “There shall not be any physical, mental, sexual or psychological or any other kind of violence against women, or any kind of oppression based on religious, social and cultural tradition, and other practices” (Art. 38). The role of culture in perpetuating violence against women is also addressed in the Constitution of Ethiopia as adopted in

1995, which provides: “The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited” (Art. 35).

Other constitutions identify distinctly gendered categories, such as pregnant women, as several of many subcategories of populations at risk. The Constitution of Ecuador, as adopted in 2008, is illustrative.

Article 35: “Elderly persons, girls, children and adolescents, pregnant women, persons with disabilities, persons in prison and those who suffer from disastrous or highly complex diseases shall receive priority and specialized care in the public and private sectors. The same priority care shall be received by persons in situations of risk, victims of domestic and sexual violence, child mistreatment, natural or manmade disasters. The State shall provide special protection to persons who are doubly vulnerable.”

Other constitutions define the government’s duty to protect against domestic violence in terms of preservation of the family, as in the following example from the Constitution of Colombia, as adopted in 1991:

Article 42: “The family is the basic nucleus of society. . . . Family relations are based on the equality of rights and duties of the couple and on the reciprocal respect of all its members. Any form of violence in the family is considered destructive of its harmony and unity, and shall be sanctioned according to law.”

Another illustration comes from the Constitution of Paraguay, as adopted in 1992, which set forth: “The State will promote policies to avoid violence in the family and other causes of family solidarity” (Art. 60).

What practices and what law changes is far from clear. This sampling reflects the impact of efforts to make prohibitions of gendered violence constitutive of rights regimes in constitutional orders. As we discuss throughout, these obligations are being layered on top of long-tolerated and widespread subordinating violence.

Remedial Mandates Within and Across Jurisdictions

We began by looking at decisions punishing (or not) gendered violence and statutes and constitutional texts directing (or not) remedies for violence. Below we turn to issues of inaction by police and prosecution. The questions in the case law are whether equality norms impose obligations on governments to provide ready access to criminal

law to respond to gender-based violence and whether courts can and should impose liability—and on whom—for failures to do so. Lurking questions include why criminal law has been the dominant route by which states express their obligations to effectuate equal treatment, and what other remedies constitutional courts could elaborate.

Opuz v. Turkey
European Court of Human Rights (Third Section)
Application No. 33401/02 (2009)

The European Court of Human Rights (Third Section), sitting as a Chamber composed of: Josep Casadevall, *President*, Elisabet Fura-Sandstrom, Corneliu Birsan, Alvina Gyulumyan, Egbert Myjer, Ineta Ziemele, [and] Işıl Karakaş, *judges*, . . . delivers the following judgment . . . :

. . . 9. On 10 April 1995 [Nahide Opuz (the applicant)] and her mother filed a complaint with the Diyarbakır Public Prosecutor’s Office, alleging that [the applicant’s husband and her mother’s husband,] H.O. and A.O. had . . . beaten them and threatened to kill them. . . .

13. On 11 April 1996, during an argument, H.O. beat the applicant very badly. . . .

18. At a hearing of 13 June 1996, the applicant withdrew her complaint

19. . . . [T]he [Second Magistrate’s Court] found that the offence fell under [an article] of the Criminal Code . . . for which the applicant’s complaint was required in order to pursue the proceedings [and it] discontinued the case

[Over the course of the following six years, H.O. attacked Nahide Opuz and her mother on several more occasions. The violence included running his car over the two women and stabbing Opuz. She reported him to the police several times and then either withdrew the complaint or the prosecutor declined to prosecute for lack of evidence. One prosecution ended with a three-month prison sentence and fine.]

54. On an unspecified date . . . H.O. . . . shot [Opuz’s mother, who] died instantly.

55. . . . [T]he Diyarbakır Public Prosecutor filed an indictment. . . .

57. . . . [After his conviction], the Diyarbakır Assize Court . . . sentenced him to life imprisonment. However, taking into account the fact that the accused had committed the offence as a result of provocation by the deceased and his good conduct during the trial, the court mitigated the original sentence, changing it to fifteen years and ten months’ imprisonment and a fine

74. The [CEDAW Committee] has found that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms

on a basis of equality with men” and is thus prohibited under Article 1 of the CEDAW. . . . Consequently, gender-based violence triggers duties in States. General Recommendation No. 19 sets out a catalogue [including] a duty on States to “take all legal and other measures that are necessary to provide effective protection of women against gender-based violence,” “including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence.” . . .

177. The applicant complained under Article 14* of the Convention . . . that she and her mother had been discriminated against on the basis of their gender. . . .

185. . . . [T]he Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women. . . .

188. The United Nations Commission on Human Rights expressly recognised the nexus between gender-based violence and discrimination

189. Furthermore, the Belém do Pará Convention . . . describes the right of every woman to be free from violence as encompassing, among others, the right to be free from all forms of discrimination.

190. . . . [In its opinion in *Maria da Penha v. Brazil* (2001),] the Inter-American Commission also characterised violence against women as a form of discrimination owing to the State’s failure to exercise due diligence to prevent and investigate a domestic violence complaint.

191. . . . [T]he State’s failure to protect women against domestic violence breaches their right to equal protection of the law and . . . this failure does not need to be intentional.

192. . . . [A]lthough the Turkish law then in force did not make explicit distinction between men and women in the enjoyment of rights and freedoms, it needed to be brought into line with international standards in respect of the status of women in a democratic and pluralistic society. . . .

195. . . . [W]hen victims report domestic violence to police stations, police officers do not investigate their complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint. In this

* Article 14 of the European Convention on Human Rights provides:

The enjoyment of the rights and freedoms set forth in [the] 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.

connection, police officers consider the problem as a “family matter with which they cannot interfere”

198. . . . [T]he applicant has been able to show . . . the existence of a prima facie indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. . . .

199. . . . [T]he criminal-law system . . . did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts . . . against the personal integrity of the applicant and her mother and thus violated their rights under Articles 2* and 3** of the Convention.

200. . . . [T]he violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. . . . [T]he overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors . . . indicated that there was insufficient commitment to take appropriate action to address domestic violence. . . .

202. In view of the above, the Court concludes that there has been a violation of Article 14 of the Convention, read in conjunction with Articles 2 and 3

210. . . . [T]he Court awards the applicant EUR 30,000

* * *

In 2017, the Russian legislature removed language from its Criminal Code that had identified domestic abuse as an aggravated form of the crime of battery. That decision, as well as Russia’s responses to violence before the change, were the subject of Valeria Volodina’s case.

Volodina v. Russia
European Court of Human Rights (Third Section)
Application No. 41261/17 (2019)

The European Court of Human Rights (Third Section), sitting as a Chamber composed of: Vincent A. De Gaetano, *President*, Georgios A. Serghides, Paulo Pinto de

* Article 2 of the European Convention on Human Rights provides:

Everyone’s right to life shall be protected by law. . . .

** 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.

Albuquerque, Dmitry Dedov, Alena Poláčková, María Elósegui, [and] Erik Wennerström, *judges*, . . . [d]elivers the following judgment . . . :

. . . 67. The applicant complained that the domestic authorities had failed to protect her from . . . repeated acts of domestic violence . . . proscribed by Article 3 of the [European] Convention [on Human Rights] and to hold the perpetrator accountable. . . .

73. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. An assessment of whether this minimum has been attained depends on many factors, including the nature and context of the treatment, its duration, and its physical and mental effects, but also the sex of the victim and the relationship between the victim and the author of the treatment. . . .

74. . . . On at least three occasions S. assaulted [the applicant], kicking and punching her in the face and stomach—including when she was pregnant. . . . A particularly heavy kick to her stomach led to the premature termination of her pregnancy. Those incidents . . . reached the required level of severity under Article 3 of the Convention. . . .

76. . . . [T]he Court has to examine whether the State authorities have discharged their positive obligations under Article 1* of the Convention, read in conjunction with Article 3, to ensure that individuals within their jurisdiction are protected against all forms of ill-treatment, including where such treatment is administered by private individuals.

77. These positive obligations, which are interlinked, include:

(a) the obligation to establish and apply in practice an adequate legal framework affording protection against ill-treatment by private individuals;

(b) the obligation to take the reasonable measures that might have been expected in order to avert a real and immediate risk of ill-treatment of which the authorities knew or ought to have known, and

(c) the obligation to conduct an effective investigation when an arguable claim of ill-treatment has been raised. . . .

78. . . . [C]ases involving acts of domestic violence would usually require the domestic authorities to adopt positive measures in the sphere of criminal-law protection. Such measures would include . . . the criminalisation of acts of violence within the

* 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.

family by providing effective, proportionate and dissuasive sanctions. Bringing the perpetrators of violent acts to justice serves to ensure that such acts do not remain ignored by the . . . authorities and to provide effective protection against them. . . .

80. Russia has not enacted specific legislation to address violence occurring within the family context. . . . Domestic violence is not a separate offence under either the Criminal Code or the Code of Administrative Offences. Nor has it been criminalised as an aggravating form of any other offence, except for a brief period between July 2016 and January 2017, when inflicting beatings on “close persons” was treated as an aggravating element of battery

81. The Court cannot agree with the Government’s claim that the existing criminal-law provisions are capable of adequately capturing the offence of domestic violence. . . . [A]ssault on family members is now considered a criminal offence only if committed for a second time within twelve months or if it has resulted in at least “minor bodily harm.” . . . The Court has previously found that requiring injuries to be of a certain degree of severity as a condition precedent for initiating a criminal investigation undermines the efficiency of the protective measures in question, because domestic violence may take many forms, some of which do not result in physical injury [D]omestic violence can occur even as a result of one single incident. . . .

85. . . . [T]he Russian legal framework . . . falls short of the requirements inherent in the State’s positive obligation to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for victims. . . .

103. The applicant complained that the Russian authorities’ failure to put in place specific measures to combat gender-based discrimination against women amounted to a breach of Article 14 of the Convention

123. . . . [O]n the question whether women who are victims of domestic violence have an equal access to justice, . . . victims have had no access to public prosecution of such offences save for a short period between July 2016 and January 2017. . . . The majority of domestic-violence cases have been classified as private prosecution offences in the Russian legal system which placed the onus of prosecution on the victim. . . . [T]hat classification has the effect of disproportionately and adversely affecting the prospects of success for victims seeking access to justice. . . .

128. Despite the high prevalence of domestic violence . . . , the Russian authorities have not to date adopted any legislation capable of addressing the problem and offering . . . protection to women who have been disproportionately affected

132. . . . [T]he continued failure to adopt legislation to combat domestic violence and the absence of any form of restraining or protection orders clearly demonstrate that the authorities’ actions in the present case were not a simple failure or delay in dealing with violence against the applicant, but flowed from their reluctance to acknowledge the seriousness and extent of the problem of domestic violence in Russia and its

discriminatory effect on women. By tolerating for many years a climate which was conducive to domestic violence, the Russian authorities failed to create conditions for substantive gender equality that would enable women to live free from fear of ill-treatment or attacks on their physical integrity and to benefit from the equal protection of the law.

133. There has been a violation of Article 14 of the Convention, taken in conjunction with Article 3. . . .

137. The Court awards the applicant EUR 20,000 in respect of non-pecuniary damage and the amount claimed for legal costs and expenses

* * *

The United States is one of six members of the UN that is not party to CEDAW. In addition to not joining the transnational convention, debates within the United States continue about the power of Congress to provide remedies at the national level and the impact of U.S. constitutional guarantees of equal protection and due process on obligations to provide safety from VAW. Responses have come both from the U.S. Supreme Court and the Inter-American Court of Human Rights, and that interaction has parallels to those among signatories to the European Convention on Human Rights.

A bit of background is requisite before reading the case law. In the context of the worldwide concerns about gender-animated violence, the U.S. Congress enacted the Violence Against Women Act of 1994 (VAWA). In *Federalisms' Forms and Norms*, Judith Resnik explains some of the objections that national legislation would dislodge or intrude on state authority and the resulting political compromises. We then excerpt *United States v. Morrison*, the 2000 U.S. Supreme Court ruling in which a five-person majority held that Congress had exceeded its power when authorizing victims of gender-based violence to bring damage actions in federal court, as well as the Inter-American Court's decision in *Lenahan v. United States*.

Federalism(s)' Forms and Norms Judith Resnik (2014)*

. . . Congress's passage of VAWA in 1994 had great political symbolism as a national response to a growing recognition that targeted violence undermined women's equality. The multi-pronged statute aspired to shift behavior in many locations—police, prosecution, courts, households, the streets, workplaces, college campuses, and Indian reservations. . . .

* Excerpted from Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in *NOMOS LV: FEDERALISM AND SUBSIDIARITY* (James E. Fleming & Jacob T. Levy eds., 2014).

[The federalism “deals” that were struck can be seen from the components.] VAWA was the product of four years of negotiation that resulted in many state-regarding provisions. VAWA created an Office on Violence Against Women in the federal Department of Justice to administer grants flowing to state-based programs (“STOP”—Services, Training, Officers, Prosecutors). In fiscal year 2011, for example, grants totaled more than \$450 million and included a “base award of \$600,000” to each state, followed by additional sums calibrated in relation to populations; law enforcement, prosecution, and victims’ services were each guaranteed at least 25 percent of the funds.

[The statute also created a “civil rights remedy,” which provided that individuals could bring civil lawsuits in federal court for monetary damages if they were victims of “crimes of violence motivated by gender.”] . . . VAWA’s remedial structure was additional evidence that the statute was state-protective. The supplemental federal remedy (adding to, rather than displacing, state claims) did not . . . authorize lawsuits against state actors for failures, such as states’ and localities’ inadequate policing and prosecutions, but rather only against the assailants, when a plaintiff could prove that they had committed gender-motivated crimes.

Participating in the debates before VAWA’s enactment were many state actors, including translocal organizations of government actors [(TOGAs)] The interactions among them underscore another facet of federalism, which is the need to disaggregate subunits to understand the disagreements within, as state actors split on various policy issues—in this instance, on the propriety of “making a federal case” out of what some called “domestic” violence. Lobbying against such a provision was an organization of state court judges—the Conference of Chief Justices, a private group comprised of individuals from each state who hold the position of chief justice. In the early 1990s, the Conference of Chief Justices joined the United States Judicial Conference (a statutory body that includes the chief judges of the federal appellate courts, a few district court judges, and chaired by the chief justice of the United States) in objecting that VAWA’s civil rights remedy, if enacted, would inappropriately relocate “family” disputes in the federal courts and that tens of thousands of cases would come flooding in.

Yet other state actors were enthusiasts. Another TOGA, the National Association of Attorneys General, joined with individual attorneys general from thirty-eight states to register their support. Why were these elected officials proponents? Not only did VAWA provide significant funds for state law enforcement while not targeting states as defendants in lawsuits, it was also politically popular. A worldwide social movement had succeeded in reframing what once had been seen as interpersonal disputes or ad hoc crimes and had demonstrated that violence was a mechanism of subordination, cutting women off from full participation in economic and civic life. Pouring federal resources into violence against women (the statute’s “STOP” grants) and creating a new civil rights remedy, as long as state remedies remained intact, inscribed the wrongfulness of targeted, gender-biased violence.

The formal legal categories Congress invoked to launch the federal initiative mapped onto this understanding. Congress relied on its powers to implement the Fourteenth Amendment,* prohibiting states from denying persons within their jurisdictions equal protection of the laws and due process. Supreme Court case law had long imposed a “state action” requirement for Fourteenth Amendment remedies, and Congress framed its provision as a response to sex-based state action—the history of state licensure, and then toleration, of violence against women. State laws had made “marital rape” an exception in criminal law, immunizing husband-rapists from prosecution. “Chastisement” of wives was also permissible under state laws. Even after most states had revised their statutes, prosecutions remained rare. Congress therefore relied on the extensive documentation—produced at the behest of state judiciaries—of state underenforcement of crimes of violence against women. Congress received many officially commissioned “gender bias” reports, providing “voluminous” evidence of “pervasive bias in various state justice systems against victims of gender-motivated violence” and “unacceptably lenient punishments” for those convicted of “gender-motivated violence.” State action and inaction were therefore the predicates for suits against private actors who targeted women and provided the authority for Congress to act under the Fourteenth Amendment.

Congress also invoked its powers under the Commerce Clause, which appeared at the time to have been a safe haven, used in the 1960s as the basis for the civil rights legislation banning race discrimination in public accommodations. In the aptly named decision of *Heart of Atlanta Motel*, the Supreme Court had agreed, reading the Commerce Clause to sustain regulation of interstate commerce and of activities burdening or having substantial effects on interstate commerce. If African Americans could not readily find lodgings, their capacity to participate in commercial activities across the country was greatly impaired. VAWA’s record seemed to meet that standard; Congress received evidence of the nationwide economic impacts of injuries to women in terms of dollars lost in the workplace and dollars spent on the health care system, as well as the degree to which women tried to organize wage work to avoid heightening the risk of assaults.

The symbolism of opening an avenue to the federal courts was broader than the practical effect. Although federal judges had predicated opposition to VAWA’s civil rights remedy in part on floodgate arguments, fewer than fifty federal cases relying on

* The Fourteenth Amendment to the United States Constitution provides:

Section 1: 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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. . . .

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

VAWA’s civil rights remedy resulted in published decisions between 1994 and 2000, when the Supreme Court heard the constitutional challenge. On the other hand, the *Morrison* decision to close off the access provided by Congress has had a profound impact—taking the federal courts out of national and transnational discussions about the relationship of violence to equality. . . .

United States v. Morrison
Supreme Court of the United States
529 U.S. 598 (2000)

Chief Justice REHNQUIST delivered the opinion of the Court [in which Justices KENNEDY, O’CONNOR, SCALIA, and THOMAS joined:]

. . . Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. . . .

In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that Morrison’s and Crawford’s attack violated § 13981 [of the Violence Against Women Act]. . . . Morrison and Crawford moved to dismiss this complaint on the grounds . . . that § 13981’s civil remedy is unconstitutional. The United States . . . intervened to defend § 13981’s constitutionality. . . .

Section 13981 was part of the Violence Against Women Act of 1994 It states that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.” To enforce that right, subsection (c) declares:

“A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.”

Section 13981 defines a “crim[e] of violence motivated by gender” as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” . . .

Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. . . . Congress explicitly . . . said that [the] “Federal civil rights cause of action” is established “[p]ursuant to the affirmative power of

Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8* of Article I of the Constitution”

Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. . . .

Petitioners . . . seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. . . .

. . . Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. . . .

. . . [T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. . . .

. . . [T]he concern that . . . Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority seems well founded. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce. If accepted, petitioners’ reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. . . .

[Such] reasoning, moreover, will not limit Congress to regulating violence, but may . . . be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. . . .

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. . . .

* Article 1, Section 8 of the United States Constitution provides:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; [t]o borrow money on the credit of the United States; [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes

... [W]e address petitioners’ alternative argument that the section’s civil remedy should be upheld . . . under § 5 of the Fourteenth Amendment. . . .

Petitioners [assert] that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion is supported by a voluminous congressional record. . . . Congress concluded that . . . discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy

... [T]he remedy is simply not corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers. . . . [P]rophylactic legislation under § 5 must have a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is [not] directed . . . at any State or state actor

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress’ findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. . . .

For these reasons, we conclude that Congress’ power under § 5 does not extend to the enactment of § 13981. . . .

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994 . . . exceeds Congress’s power under that Clause. I find the claims irreconcilable and respectfully dissent. . . .

... Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment. . . .

... [T]he legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges. . . .

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in [those cases], in [this case] it did rely on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of \$3 billion in 1990 and \$5 to \$10 billion in 1993. Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, gender-based violence bars its most likely targets—women—from full participation in the national economy. . . .

. . . Violence against women may be found to affect interstate commerce and affect it substantially. . . .

Justice BREYER, with whom Justice STEVENS joins, and with whom Justice SOUTER and Justice GINSBURG join as to [the discussion of the economic nature of violence against women, not reproduced below], dissenting.

. . . I doubt the Court's reasoning rejecting [Section 5 of the Fourteenth Amendment as a] source of authority. . . . [T]he Court [has previously] held that § 5 does not authorize Congress to use the Fourteenth Amendment as a source of power to remedy the conduct of private persons. . . . The Federal Government's argument, however, is that Congress used § 5 to remedy the actions of state actors, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial legislation . . . [that] prohibits conduct which is not itself unconstitutional. . . .

* * *

Morrison engendered a good deal of critical commentary, as have approaches of the U.S. Supreme Court to gender-based discrimination. Illustrative are the concerns raised by Catharine MacKinnon and Kimberlé Crenshaw in their piece entitled *Reconstituting the Future: An Equality Amendment*:

The historical foundations upon which male supremacy rests continue to ground conceptions of gender equality that normalize gender hierarchy and frame departures from it as exceptional. Discrimination based on sex and gender, to the limited extent it has been constitutionally prohibited, has been recognized only very recently and merely by interpretation—not originally, textually, or historically—making its protection particularly thin and vulnerable. Despite some legal progress for (mostly elite) women, male dominance continues to characterize existing laws

and their application. Laws responsive to women’s circumstances and the social order that subordinates them either do not exist or are unenforced. State laws against domestic violence and sexual assault have virtually never been held to equality standards in their design or effect. The federal legislation against violence against women was found to lack constitutional basis. . . . This pervasive social arrangement has been found not to violate existing equality laws. . . . The intersectional effects of race and gender are facilitated within the U.S. sociolegal system, cumulatively stacking the deck against women of color, depriving them of the most basic means to articulate meaningful claims within existing constitutional doctrine.*

* * *

Five years after *Morrison*, the U.S. Supreme Court issued another decision, *Castle Rock v. Gonzales* (2005), which rejected constitutional protection for a victim of gender-based violence. She then brought her claim before the Inter-American Commission on Human Rights, which found that the U.S. had failed to discharge its obligations under the American Declaration of the Rights and Duties of Man, adopted in 1948.

Lenahan v. United States
Inter-American Commission on Human Rights
Report No. 80/11, Case 12.626 (2011)

[The Inter-American Commission on Human Rights, composed of First Vice President José de Jesús Orozco Henríquez, Paulo Sérgio Pinheiro, Felipe González, Luz Patricia Mejía Guerrero, and María Silvia Guillén, delivers the following opinion:]

[Jessica Lenahan, of Native-American and Latin-American descent, lived in Castle Rock, Colorado and was married to Simon Gonzales. Gonzales became abusive towards Lenahan and their three daughters (Leslie, Katheryn, and Rebecca) in 1996. After filing for divorce and living separately from Gonzales, Lenahan obtained a restraining order from Colorado Courts in May 1999. On June 22, 1999, Gonzales allegedly abducted Leslie, Katheryn, and Rebecca. Ten hours after Lenahan called the police, Gonzales parked outside the police station and began shooting at the station. The police returned fire and killed Gonzales and the three daughters.]

. . . 37. . . . Jessica Lenahan filed suit in the United States District Court for the District of Colorado . . . [and alleged] that the City of Castle Rock and several police

* Excerpted from Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, YALE LAW JOURNAL FORUM (Dec. 26, 2019).

officers had violated her rights under the Due Process Clause* of the Fourteenth Amendment, claiming both substantive and procedural due process challenges. . . .

90. . . . [In] 2005, the Supreme Court . . . [held] that under the Due Process Clause of the 14th Amendment of the U.S. Constitution, Colorado’s law on the police enforcement of restraining orders did not give Jessica Lenahan a property interest in the enforcement of the restraining order against her former husband. . . . [A] “well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes,” and . . . the “deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands,” had been previously recognized by the . . . Court. . . .

105. The petitioners . . . contend that the State’s failure to adequately respond to Jessica Lenahan’s calls regarding the restraining order, to conduct an investigation into the death of Leslie, Katheryn and Rebecca Gonzales, and to offer her an appropriate remedy for the police failure to enforce this order, all constituted acts of discrimination and breaches to their right to equality before the law and non-discrimination under Article II** of the American Declaration [of the Rights and Duties of Man]. . . .

109. . . . [T]he right to equality before the law does not mean that the substantive provisions of the law have to be the same for everyone, but that the application of the law should be equal for all without discrimination

110. Gender-based violence is one of the most extreme and pervasive forms of discrimination

145. . . . [T]he State was obligated to ensure that its apparatus responded effectively and in a coordinated fashion to enforce the terms of [the restraining] order to protect the victims from harm. . . . [T]he authorities entrusted with the enforcement of the restraining order were aware of its existence and its terms; . . . understood that a protection order represents a judicial determination of risk and what their responsibilities were in light of this determination; . . . understood the characteristics of the problem of domestic violence; and were trained to respond to reports of potential violations. . . .

160. . . . [E]ven though the State recognized the necessity to protect [Lenahan and her daughters] from domestic violence, it failed to meet this duty with due diligence. The state apparatus was not duly organized, coordinated, and ready to protect these

* The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

No state shall . . . deprive any person of life, liberty, or property, without due process of law.

** Article II of the American Declaration of the Rights and Duties of Man provides:

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

victims from domestic violence by adequately and effectively implementing the restraining order at issue; failures . . . which constituted a form of discrimination in violation of Article II of the American Declaration. . . .

162. . . . [A]ll States have a legal obligation to protect women from domestic violence: a problem widely recognized by the international community as a serious human rights violation and an extreme form of discrimination. . . .

163. . . . States must take into account that domestic violence is a problem that disproportionately affects women, since they constitute the majority of the victims. . . .

164. . . . [T]he failure of the United States to adequately organize its state structure to protect them from domestic violence not only was discriminatory, but also constituted a violation of their right to life under Article I* and their right to special protection as girl-children under Article VII** of the American Declaration. . . . States are not only required to guarantee that no person is arbitrarily deprived of his or her life. They are also under a positive obligation to protect and prevent violations to this right, through the creation of the conditions that may be required for its protection. . . .

165. . . . [T]he Commission knows of no protocols and/or directives that were in place to guide the police officers at hand on how to respond to reports of missing children in the context of domestic violence and protection orders. . . .

168. . . . State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence

172. Article XVIII*** of the American Declaration establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations. . . .

195. . . . [T]he State is obligated to investigate the circumstances surrounding Leslie, Katheryn and Rebecca Gonzales’ deaths and to communicate the results of such an investigation to their family. Compliance with this State obligation is critical to

* Article I of the American Declaration of the Rights and Duties of Man provides:

Every human being has the right to life, liberty and the security of his person.

** Article VII of the American Declaration of the Rights and Duties of Man provides:

All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

*** Article XVIII of the American Declaration of the Rights and Duties of Man provides:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

sending a social message in the United States that violence against girl-children will not be tolerated, and will not remain in impunity, even when perpetrated by private actors.

196. . . . [T]he United States violated . . . Article XVIII, for omissions at two levels. First, the State failed to undertake a proper inquiry into systemic failures and the individual responsibilities for the non-enforcement of the protection order. Second, the State did not perform a prompt, thorough, exhaustive and impartial investigation into the deaths of Leslie, Katheryn and Rebecca Gonzales, and failed to convey information to the family members related to the circumstances of their deaths. . . .

199. . . . [T]he State failed to act with due diligence to protect Jessica Lenahan and Leslie, Katheryn and Rebecca Gonzales from domestic violence, which violated the State's obligation . . . under Article II of the American Declaration. The State also failed to undertake reasonable measures to prevent the death of Leslie, Katheryn and Rebecca Gonzales in violation of their right to life under Article I . . . , in conjunction with their right to special protection as girl-children under Article VII Finally, . . . the State violated the right to judicial protection of Jessica Lenahan and her next-of kin, under Article XVIII of the American Declaration. . . .

201. . . . [The Commission] recommends to the United States . . . [t]o undertake a serious, impartial and exhaustive investigation with the objective of ascertaining the cause, time and place of the deaths of Leslie, Katheryn and Rebecca Gonzales, . . . duly inform their next-of-kin of the course of the investigation, . . . conduct a serious, impartial and exhaustive investigation into systemic failures that took place related to the enforcement of Jessica Lenahan's protection order[, and] . . . offer full reparations to Jessica Lenahan and her next-of-kin

* * *

As the decisions above reflect, much of the focus is on mobilizing the criminal law. Skepticism about that approach comes from commentators questioning both why "due diligence" has been translated as a mandate to criminalize and the distributional consequences of this approach across class, race, and ethnicity.

Due Diligence and Gender Violence

Julie Goldscheid and Debra J. Liebowitz (2015)*

. . . International human rights bodies and some States' national courts now recognize the due diligence principle in their decisions and policy discourse [related to violence against women]. . . . The next challenge is defining the scope and implications of what it would mean for a State to discharge, or to fail to discharge, its due diligence obligation. . . .

* Excerpted from Julie Goldscheid & Debra J. Liebowitz, *Due Diligence and Gender Violence: Parsing its Power and its Perils*, 48 CORNELL INTERNATIONAL LAW JOURNAL 301 (2015).

. . . The notion of State responsibility is important, and is appealing in many ways, particularly when considering the near-universal history of non-responsiveness to, State approval of, and all-too-frequent participation in gender violence. . . . The due diligence obligation’s focus on State responsibility should be viewed with a cautious eye in light of the potential and proved hazards of State involvement. . . .

. . . [A]dvocacy for increased State responsiveness has sometimes led to an over-reliance on criminal justice responses. . . . For many, the State, particularly as embodied by the criminal justice system, is a perpetrator of violence rather than a protector against violence. State criminalization and incarceration policies exacerbate and perpetuate interconnected forms of gender violence, particularly for racial, ethnic, religious, and sexual minorities, and for others from marginalized communities, such as indigenous, immigrant, and disabled survivors. Criminal justice interventions have acute ramifications for women accused or convicted of defending themselves against a violent partner. In other cases, a dysfunctional criminal justice system itself perpetrates many rights violations.

Numerous examples illustrate the harmful ramifications of criminal justice-driven policy responses to gender violence. For example, State efforts to encourage law enforcement responsiveness have led to mandatory interventions, such as mandatory arrests and no-drop prosecutions. Though some advocates support those reforms, the resulting dual arrests and arrests of women who use violence in self-defense raise a number of concerns. Multiple collateral consequences can follow a victim’s arrest. For example, arrest records can jeopardize women’s parental rights, through child-welfare interventions or the use of an arrest record in custody hearings. Battered immigrant women may be reluctant to call the police for fear of harmful immigration-related ramifications. Women who are part of racial or ethnic minority communities face police biases that influence which women are seen as “true” victims and which are not. LGBT survivors may resist criminal justice interventions because of fears that law enforcement either will not respond, will arrest and criminalize both parties, or will respond with homophobic comments that further subject them to abuse. Furthermore, in at least seventy-six countries, laws criminalize some form(s) of private, consensual, same-sex behavior. For LGBT communities in these countries, using the criminal justice system to address gender violence is largely inconceivable.

Unchecked, the due diligence principle’s call for State responsiveness poses the risk of exacerbating these concerns. . . . [T]he due diligence principle’s enumeration of States’ obligations to “prosecute” and “punish” are invitations to expand criminal justice interventions. Indeed, criminal justice-related reforms may be among the most common measures taken to meet international obligations under CEDAW. . . .

. . . [T]he guiding documents are not careful about the limits of State action. As such they open the door to controversial forms of criminal justice intervention without problematizing those remedies. . . .

It is important . . . to acknowledge clearly and consistently that acting with diligence does not mean that the State assumes direct responsibility for private action, but rather that the State’s failure to respond to the situation with diligence creates an additional layer of harm for which the State is responsible. . . . We should expect the State to “take appropriate measures,” but not to be responsible for categorically preventing discrimination by private actors. The elision of this distinction charts an unrealistic concept of the State’s capacity, rests on an inappropriately intrusive role of the State, and implies that all State action with regard to addressing gender violence is constructive and desirable. . . .

. . . [I]nterpretations of due diligence principles should take into account existing critiques of the role of the State. For example, policy-based and judicial interpretations can employ balancing tests that explicitly consider whether a particular decision triggers problems attendant either to over-responsiveness or to under-responsiveness. Interpretations should consider the impact of any intervention on those at the margins, and should take into account the experiences and recommendations of both advocates and survivors. . . .

. . . [A]nalyses of State responses that contemplate fulfilling any of the due diligence obligations should recognize that States may meet their obligations by exercising discretion not to respond or by delegating response to others. This may entail delegating the response to a community-based NGO. In this context, it is more helpful to think of the State’s obligation as State accountability, rather than State responsiveness.

. . . [T]he due diligence principle should explicitly be interpreted in conjunction with other foundational human rights principles—including equality, autonomy, and dignity

. . . [T]he type of State response sought makes a difference. For example, the exercise of State power to punish or to coerce then triggers different concerns than the exercise of State power to distribute resources, or to ensure the comprehensive and accessible delivery of social and legal services. . . . A different set of analyses may be called for in those dissimilar contexts. . . .

* * *

In the first section, the *Yemshaw* decision addressed the definition of violence in the context of housing benefits. *J.D. and A* raises the issue of providing safe housing keyed to gender and the legality of positive discrimination in this context.

J.D. and A v. The United Kingdom
European Court of Human Rights (First Section)
Applications nos. 32949/17 and 34614/17 (2019)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Ksenija Turković, President, Krzysztof Wojtyczek, Aleš Pejchal, Pauliine Koskelo, Jovan Ilievski, Raffaele Sabato, [and] Leona June Dorrian . . . [d]elivers the following judgment . . . :

[Applicant A lives in a three-bedroom house with her son. In the past, A had a brief relationship with a man who violently raped A in her home in 2002. In 2012, the man contacted A again. The police referred A to the “Sanctuary Scheme,” which aims to protect those at risk from severe forms of domestic violence. As provided by the scheme, A’s attic was adapted into a “panic room” where A and her son could retreat in the event of an attempted attack. A received public Housing Benefit to rent her home. A legislative change in 2012 reduced her Housing Benefit by 14% because she had an extra bedroom (3 bedrooms for 2 people). Unable to meet her rent, A applied for Discretionary Housing Payments (DHP) in early 2015. The local authority refused her application and issued a letter threatening her with eviction. The Secretary of State intervened on A’s behalf, and the local authority revised its decision to refuse her application.

The other applicant (J.D.) lived with her adult, disabled daughter in a three-bedroom property, specially designed with accommodations for her daughter. After amendments to regulations governing her housing benefits, the benefits no longer covered the cost of her rent due to having one more bedroom than persons in her household.

In U.K. domestic courts, A and J.D. claimed that the regulation that changed the Housing Benefit was discriminatory in violation of their rights under Article 14 of the European Convention on Human Rights and the UK’s Equality Act. The Supreme Court of the United Kingdom dismissed both A’s and J.D.’s claims. Lady Hale and Lord Carnwath dissented in the case of applicant A. Both applicants brought their case to the European Court of Human Rights, and claimed discrimination based on disability (J.D.) and on the basis of gender (A.) . . .

. . . 57. . . . [T]he cases fall to be examined under Article 14 [of the European Convention on Human Rights] in conjunction with Article 1* of Protocol No. 1. . . .

* Article 1 of Protocol 1 to the European Convention on Human Rights provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

82. . . . [V]ictims of gender based violence may be able to invoke the protection of Article 14 in conjunction with the relevant substantive provisions of the Convention.

83. . . . [A] difference of treatment based on a prohibited ground is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

84. . . . 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. The prohibition deriving from Article 14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different.

85. . . . [A] policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, regardless of whether the policy or measure is specifically aimed at that group. . . . [T]his is only the case, however, if such policy or measure has no objective and reasonable justification.

86. . . . Article 14 does not preclude States from treating groups differently even on otherwise prohibited grounds in order to correct factual inequalities between them. Moreover, in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. . . .

90. . . . [T]he changes made in the Housing Benefit Regulations . . . applied to all beneficiaries under the scheme without any distinction by reference to their characteristics such as disability or gender. . . . Thus, the issue arising in this case is one of alleged indirect discrimination. . . .

92. As regards the effects of the measure, . . . it was an anticipated consequence of the reduction of the Housing Benefit that all benefit recipients who experienced such a reduction could be at risk of losing their homes. . . . [The applicants] were in a significantly different situation and particularly prejudiced by the policy because they demonstrated they had a particular need to be able to remain in their specifically adapted homes for reasons directly related to their status. . . .

93. . . . [B]ecause of their vulnerable status the applicants were significantly less able than other Housing Benefit recipients to mitigate their loss by taking in tenants or by working. . . .

94. . . . [T]he applicants . . . were particularly prejudiced by that measure because their situation was significantly different for reasons of disability . . . and gender

103. . . . [T]he legitimate aim of the present scheme—to incentivise those with “extra” bedrooms to leave their homes for smaller ones—was in conflict with the aim of Sanctuary Schemes, which was to enable those at serious risk of domestic violence to remain in their own homes safely, should they wish to do so.

104. Given those two legitimate but conflicting aims . . . the impact of treating [A], or others housed in Sanctuary Schemes, in the same way as any other Housing Benefit recipient affected by the impugned measure, was disproportionate in . . . not corresponding to the legitimate aim of the measure. The Government have not provided any weighty reasons to justify the prioritisation of the aim of the present scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely. . . . [T]he provision of DHP could not render proportionate the relationship between the means employed and the aim sought to be realised where it formed part of the scheme aimed at incentivising residents to leave their homes, as demonstrated by its identified disadvantages.

105. . . . [T]he imposition of [the new regulation for Housing Benefits] on this small and easily identifiable group has not been justified and is discriminatory. . . . States have a duty to protect the physical and psychological integrity of an individual from threats by other persons, including in situations where an individual’s right to the enjoyment of his or home free of violent disturbance is at stake. . . .

107. There has been a violation of Article 14 in conjunction with Article 1, Protocol 1 of the Convention in respect of [A]. . . .

111. The Court . . . awards [A] ten thousand euros (EUR 10,000) in respect of non-pecuniary damage. . . .

[The Court did not rule in favor of applicant J.D. The Court found that while it would be “extremely disruptive” to move to a new property with the same disability accommodations, without a medical need for the third bedroom, “it would not be in fundamental opposition” to the needs of disabled persons to move to a smaller property.]

Joint Partly Dissenting Opinion of Judges Pejchal And Wojtyczek

. . . 4. . . . [M]any victims of domestic violence require special protection and that a specially adapted home may to a certain extent provide such protection. However, all these legitimate special needs in respect of housing may be satisfied in different homes. . . . [I]t has not been shown that effective protection against a potential aggressor could not be offered in new accommodation. It is therefore difficult to agree with the assertion that “[i]n the case of [A], loss of her home would risk her personal safety.” . . . [I]t is difficult to understand why a particular need to be able to remain in the same home is a special characteristic justifying enhanced protection under the Convention. The relevant characteristic for the purpose of the discrimination test in the instant case should rather be presented as the existence of legitimate special needs in respect of housing—needs exceeding those of an average, ordinary family. . . .

5. . . . [T]he majority take . . . the premise of gender-based differentiation. . . . [T]here are numerous victims of domestic violence who were not affected by the impugned legislative measures. Firstly, domestic violence affects all social classes and not all victims of domestic violence are on low incomes. Secondly, not all victims of domestic violence apply for protection under the Sanctuary Scheme. Thirdly, not all victims of domestic violence who receive Housing Benefit and who have been given protection under the Sanctuary Scheme will be forced to move out. Fourthly, not all victims of domestic violence insist on remaining in the same accommodation. On the contrary, many victims of domestic violence prefer to leave the place where the domestic violence occurred. . . . Fifthly, no evidence based upon statistical data was provided which would show that the impugned legislation affects mainly victims of gender-based violence or, more generally, that it affects, for instance, a clearly higher percentage of women than men. . . .

. . . [W]e cannot agree with the view that [A] was particularly prejudiced because her situation was significantly different for reasons of gender. The impugned legislation appears to be gender-neutral. . . .

* * *

The two cases that follow consider the government's responsibility to provide legal protection against potential abusers in and near the home.

Carmichele v. Minister of Safety and Security
Constitutional Court of South Africa
Case No: CCT 48/00 (2001)

Before: A Chaskalson, President; LWH Ackermann, RJ Goldstone, JC Kriegler, TH Madala, Y Mokgoro, S Ngcobo, AL Sachs, ZM Yacoob. Justices; MR Madlanga and CM Somyalo, Acting Justices[.]

[Francois Coetzee sexually assaulted two of his acquaintances. He was convicted of housebreaking and indecent assault for the first, before later being charged with the second. While awaiting trial, he was unconditionally released, as the Detective Sergeant and prosecutor in charge of his case failed to raise any reason for which he should be denied bail, despite their knowledge of his pattern of sexual assault of his acquaintances. After his release, he returned to live with his mother in the town of Noetzie. The mother of his second victim, ET, warned her friend, Julie Gosling, about Coetzee's attack on her daughter, knowing that Coetzee's mother worked for Gosling.]

[21] [Alix Jean Carmichele, the applicant,] frequently stayed at Gosling's home in Noetzie. [After Coetzee was found snooping around outside the house one morning, Gosling reported him to local prosecutors who told her that they could not help her.] . . .

[23] On . . . 6 August 1995 the applicant went to Gosling’s home . . . and was confronted by Coetzee who had apparently broken in. He immediately attacked her with a pick handle. . . . [S]he managed to escape through a door. . . . Coetzee was charged on a number of counts including one of attempting to murder the applicant.

[24] . . . Coetzee . . . was convicted of attempted rape and sentenced to seven years’ imprisonment. On 13 December 1995 he was prosecuted for the attack on the applicant and was convicted of attempted murder and of housebreaking. . . .

[27] . . . [T]he applicant contended that the relevant members of the South African Police Services and the prosecutors owed her a duty to:

“ . . . ensure that she enjoyed her constitutional rights of *inter alia* the right to life, the right to respect for and protection of her dignity, the right to freedom and security, the right to personal privacy and the right to freedom of movement.”

[28] . . . [Ms. Carmichele’s] counsel relied upon the constitutional obligation on all courts to “develop the common law” with due regard to the “spirit, purport and objects” of the Bill of Rights. . . .

[29] . . . It was . . . contended [that] . . . the Bill of Rights in the interim Constitution (IC) . . . imposed a particular duty on the State to protect women against violent crime in general and sexual abuse in particular. The Court was referred to the following statement of the [Supreme Court of Appeal (SCA)] in *S v Chapman*:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution [in a footnote there is reference, *inter alia*, to sections 10, 11 and 13* of the IC] and to any

* Sections 10, 11, and 13 of the Bill of Rights of the interim Constitution provide:

10. Human dignity—Every person shall have the right to respect for and protection of his or her dignity.

11. Freedom and security of person—

(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment. . . .

defensible civilisation. Women in this country are entitled to the protection of these rights.” . . .

[62] . . . South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.

[63] . . . Klein (the investigating officer in ET’s case) had a clear duty to bring to the attention of the prosecutor any factors known to him relevant to the exercise by the magistrate of his discretion to admit Coetzee to bail. He made a positive recommendation that Coetzee should be released on warning in the clear knowledge that the prosecutor would act on such recommendation.

[64] When Klein informed the prosecutor that Coetzee should be released on warning . . . [h]e was aware of the allegation . . . that Coetzee had a previous conviction for rape. . . .

[66] . . . The issue here is whether, given these facts and the constitutional protection to which the applicant was entitled, Klein’s advice to the prosecutor that Coetzee be released on his own recognisance was unlawful. . . .

[77] . . . The evidence is . . . sufficient to justify a conclusion that if bail had been opposed and if all relevant information pertaining to Coetzee’s background and sexual problems had been placed before the magistrate, bail might have been refused. . . .

[78] [Rather than this Court deciding] if the law of delict should be developed to afford the applicant a right to claim damages if the police or the prosecutor were negligent, . . . this should be left to the High Court or the SCA to determine. . . .

[83] The appropriate order is to uphold the appeal . . . and to refer the matter back to the High Court for it to continue with the trial. . . .

[On remand, the High Court ruled for the plaintiff. The Supreme Court of Appeal affirmed the lower court decision in 2003. The Court noted that Coetzee likely would not have been released on bail, or would have had a bail set too high to be reasonably met, had there been an adequate prosecutor. The Court also noted that on appeal legal

13. Privacy—Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

causation was not challenged, and that the court on remand found that the plaintiff’s loss was not too remote to recover.]

* * *

Another remedy is a “temporary restraining order,” which enjoins individuals from being proximate to people whom they have threatened. Many courts address questions of the scope of the injunction and the process requisite to its issuance.

Garcia v. Drilon
Supreme Court of the Republic of the Philippines
G.R. No. 179267 (2013)

[The Court, composed of Chief Justice Sereno, Justice Carpio, Justice Velasco, Jr., Justice Del Castillo, Justice Bersamin, Justice Villarama, Jr., Justice Perez, Justice Mendoza, Justice Reyes, Justice Leonardo-De Castro, Justice Abad, Justice Leonen, and Justice Perlas-Bernabe, issued the following opinion along with three separate concurrences.]

PERLAS-BERNABE, J.:

. . . [O]n March 8, 2004, after nine (9) years of spirited advocacy by women’s groups, Congress enacted Republic Act (R.A.) No. 9262 R.A. 9262 is a landmark legislation that defines and criminalizes acts of violence against women and their children (VAWC) perpetrated by women’s intimate partners The law provides for protection orders from the barangay and the courts to prevent the commission of further acts of VAWC A husband is now before the Court assailing the constitutionality of R.A. 9262 as being violative of the . . . due process [clause]

[Rosalie Jaype-Garcia (private respondent)] described herself as a dutiful and faithful wife [Jesus C. Garcia (petitioner)], . . . is dominant, controlling, and demands absolute obedience from his wife and children. . . .

Things turned for the worse when petitioner took up an affair Petitioner’s infidelity spawned a series of fights that left private respondent physically and emotionally wounded. . . . Petitioner sometimes turned his ire on their daughter, Jo-Ann, who had seen the text messages he sent to his paramour and whom he blamed for squealing on him. . . .

. . . On December 17, 2005, . . . [Jaype-Garcia] attempted suicide by cutting her wrist. . . . Petitioner . . . fled the house instead of taking her to the hospital. . . .

Private respondent is determined to separate from petitioner but she is afraid that he would take her children from her and deprive her of financial support. . . .

[Jaype-Garcia requested a Temporary Protection Order (TPO) from the Regional Trial Court (RTC) of Bacolod City in early 2006.] Finding reasonable ground to believe that an imminent danger of violence against the private respondent and her children exists or is about to recur, the RTC issued a TPO on March 24, 2006 [It was renewed several times, including some slight amendments requested by Jaype-Garcia. She alleged that Garcia violated the TPO on multiple occasions, including one instance of attempted kidnapping of their son. Garcia challenged the TPO many times, but the RTC found all of his arguments inadequate.] . . .

. . . [P]etitioner filed before the Court of Appeals (CA) a petition for prohibition, with prayer for injunction and temporary restraining order, challenging . . . the constitutionality of R.A. 9262 for being violative of the due process [clause]

A protection order . . . is to safeguard the offended parties from further harm, minimize any disruption in their daily life and facilitate the opportunity and ability to regain control of their life. . . .

The rules require that petitions for protection order be in writing, signed and verified by the petitioner thereby undertaking full responsibility, criminal or civil, for every allegation therein. Since “time is of the essence in cases of VAWC if further violence is to be prevented,” the court is authorized to issue *ex parte* a TPO . . . before notice and hearing when the life, limb or property of the victim is in jeopardy and there is reasonable ground to believe that the order is necessary to protect the victim from the immediate and imminent danger of VAWC or to prevent such violence, which is about to recur.

There need not be any fear that the judge may have no rational basis to issue an *ex parte* order. The victim is required not only to verify the allegations in the petition, but also to attach her witnesses’ affidavits to the petition.

The grant of a TPO *ex parte* cannot, therefore, be challenged as violative of the right to due process. . . . It is a constitutional commonplace that the ordinary requirements of procedural due process must yield to the necessities of protecting vital public interests, among which is protection of women and children from violence and threats to their personal safety and security.

It should be pointed out that when the TPO is issued *ex parte*, the court shall likewise order that notice be immediately given to the respondent directing him to file an opposition within five (5) days from service. Moreover, the court shall order that notice, copies of the petition and TPO be served immediately on the respondent by the court sheriffs. The TPOs are initially effective for thirty (30) days from service on the respondent. . . .

We reiterate here Justice Puno’s observation that “the history of the women’s movement against domestic violence shows that one of its most difficult struggles was the fight against the violence of law itself. If we keep that in mind, law will not again

be a hindrance to the struggle of women for equality but will be its fulfillment.” Accordingly, the constitutionality of R.A. 9262 is . . . sustained. . . .

Gendered Violence as a Device of War

In 1946, the Nuremberg Tribunal found that officials of Nazi Germany had committed the international law crimes of “crimes against humanity” and “genocide.” This was the landmark moment that established individual criminal liability under international law. In the decades since, what falls under those rubrics has been the subject of debate. As special tribunals addressing crimes committed in particular conflicts were constituted and negotiations were under way for what became the 1998 Rome Statute that created the International Criminal Court, transnational feminist movements argued that organized violence against women, often of populations different from the perpetrators, had to be understood in those terms.

In *Sisterhood, Slavery, and Sovereignty*, Judith Resnik describes these movements’ work:

[W]omen’s networks . . . influenced the writing of The Statute of Rome, which, when creating the world’s first ongoing International Criminal Court (ICC), was also “the first international treaty to recognize a range of acts of sexual and gender violence as among the most serious crimes under international law.”

The ICC recognizes women in three roles: as victims, witnesses, and decision-makers. Within its definition of “crimes against humanity” . . . , the Court’s enabling statute specifies harms to women, including “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.” Another such crime, enslavement, is explained with specific reference to trafficking in “persons, in particular women and children.” The crime of persecution is defined as “against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds.” . . .

The debate producing these provisions was intense. Representatives of the Vatican as well as of some countries that are identified with Catholicism or Islam raised concerns that proposed language about “forced pregnancy” could be grounds for seeking rights to abortion. Discord also surrounded whether violence predicated on gender was to be conceived as a subset of rights to personal dignity and against humiliation or whether that harm was to be understood as constituting an

independent wrong. That gender is included specifically in the listing of predicates for persecution was a major victory for feminists. Another tension was whether the term “gender” recognized the rights of gay men and lesbians. The compromise resulted in a provision that, for “the purpose of this Statute,” the term gender referred “to the two sexes, male and female, within the context of society.”*

As finalized in 1998, the Rome Statute of the International Criminal Court provided:

Article 7.1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . .

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; . . .

Article 8.2. For the purpose of this Statute, “war crimes” means: . . .

(b)(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions[.]**

Before and after that enactment, the ad hoc courts for the conflicts in Rwanda, the territories of the former Yugoslavia, and Sierra Leone, as well as some constitutional courts, addressed the kinds of acts (rape, forced marriage, gendered displacement) that fell within the prohibitions of international humanitarian law.

Prosecutor v. Akayesu
International Criminal Tribunal for Rwanda
Case No. ITCR-96-4-T (1998)

[The Trial Chamber, composed of Judge Laïty Kama, Judge Lennart Aspegren, and Judge Navanethem Pillay, delivers the following judgment:]

. . . 4. As bourgmestre [of Taba commune], Jean Paul Akayesu was charged with the performance of executive functions and the maintenance of public order within his

* Excerpted from Judith Resnik, *Sisterhood, Slavery, and Sovereignty: Transnational Antislavery Work and Women’s Rights Movements in the United States During the Twentieth Century*, in *WOMEN’S RIGHTS AND TRANSATLANTIC ANTISLAVERY IN THE ERA OF EMANCIPATION* (Kathryn Kish Sklar & James Brewer Stewart eds., 2007).

** Excerpted from Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

commune He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. . . .

416. Allegations of sexual violence first came to the attention of the Chamber through the testimony of Witness J, a Tutsi woman, who stated that her six year-old daughter had been raped by three Interahamwe [S]he had heard that young girls were raped at the bureau communal. Subsequently, Witness H, a Tutsi woman, testified that she herself was raped in a sorghum field and that, just outside the compound of the bureau communal, she personally saw other Tutsi women being raped Witness H testified initially that the Accused, as well as commune police officers, were present while this was happening and did nothing to prevent the rapes. . . .

422. Witness JJ testified that when they arrived at the bureau communal the women were hoping the authorities would defend them but she was surprised to the contrary. . . .

426. . . . When asked how it was that the Accused had the authority to protect her from rape, Witness OO replied that if he had told the Interahamwe not to take her from the bureau communal, they would have listened to him

449. . . . [T]here is sufficient credible evidence to establish beyond a reasonable doubt that during the events of 1994, Tutsi girls and women were subjected to sexual violence, beaten and killed on or near the bureau communal premises, as well as elsewhere in the commune of Taba. . . .

452. . . . [T]he Chamber finds beyond a reasonable doubt that the Accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated. There is no evidence that the Accused took any measures to prevent acts of sexual violence or to punish the perpetrators of sexual violence. In fact there is evidence that the Accused ordered, instigated and otherwise aided and abetted sexual violence. . . .

596. Considering the extent to which rape constitute[s] crimes against humanity, pursuant to Article 3(g)* of the Statute, the Chamber must define rape, as there is no commonly accepted definition of this term in international law. . . .

597. . . . [T]he central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and

* Article 3(g) of the Statute of the International Criminal Tribunal for Rwanda provides:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds[:] . . .

(g) Rape

Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official

688. The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. . . . Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of “other inhumane acts,” set forth [in] Article 3(i) of the Tribunal’s Statute, “outrages upon personal dignity,” set forth in Article 4(e) of the Statute, and “serious bodily or mental harm,” set forth in Article 2(2)(b) of the Statute. . . .

706. . . . Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, often repeatedly, often publicly and often by more than one assailant. Tutsi women were systematically raped Numerous incidents of such rape and sexual violence against Tutsi women occurred inside or near the Bureau communal. . . . [S]ome communal policemen armed with guns and the accused himself were present while some of these rapes and sexual violence were being committed. . . . [O]n several occasions, by his presence, his attitude and his utterances, Akayesu encouraged such acts

731. . . . [T]he Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole. . . .

733. . . . [T]he acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.

734. . . . [T]he Chamber finds firstly that the acts described supra are indeed acts as enumerated in Article 2 (2) of the Statute, which constitute the factual elements of

the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi. The Chamber is further satisfied beyond reasonable doubt that these various acts were committed by Akayesu with the specific intent to destroy the Tutsi group, as such. Consequently, . . . the Chamber finds Akayesu individually criminally responsible for genocide.

* * *

Three years after this decision from the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia (ICTY) likewise concluded that rape was both a violation of the laws or customs of war under Article 3* of the ICTY Statute and a crime against humanity under Article 5** of the Statute.

Prosecutor v. Kunarac
International Criminal Tribunal for the Former Yugoslavia
Case No. IT-96-23-T & IT-96-23/1-T (2001)

[The Trial Chamber composed of Judge Florence Ndepele Mwachande Mumba, Judge David Hunt, and Judge Fausto Pocar delivers the following judgment:]

. . . 2. . . . [D]uring the armed conflict between Bosnian Serbs and Bosnian Muslims in the spring of 1992, the city and municipality of Foča were taken over by Serb forces . . . Serbian forces arrested Muslim inhabitants of the town and the villages. Muslim women, children, and elderly people were detained

49. The accused Dragoljub Kunarac stipulated that he was the leader of a permanent reconnaissance group of about 15 men[,] . . . part of the local Foča Tactical Group or brigade. . . . [During his time in this group, he is alleged to have raped multiple detained women and girls at local detention centers on multiple occasions. He is also alleged to have removed women and girls from those detention centers for the purpose of keeping them in secluded places for himself and his soldiers to rape.]

* Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia provides:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. . . .

** Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia provides:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: . . .

(g) rape

436. Rape has been charged against the . . . accused as a violation of the laws or customs of war under Article 3 [of the ICTY Statute] and as a crime against humanity under Article 5 of the Statute. The Statute refers explicitly to rape as a crime against humanity within the Tribunal's jurisdiction in Article 5(g). . . .

460. . . . [T]he *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. . . .

585. Through [his] acts, . . . Kunarac not only showed that he knew of the attack and knew that his crimes fitted in with or were part of the attack, but he also clearly showed that he intended them to be so. He demonstrated a total disregard for Muslims in general, and Muslim women in particular. . . . Kunarac used his bravery in combat to gain the respect of his men, and he maintained it by providing them with women. . . .

654. [Kunarac] acted intentionally and with the aim of discriminating between the members of his ethnic group and the Muslims, in particular its women and girls. The treatment reserved . . . for his victims was motivated by their being Muslims, as is evidenced . . . when the accused told women . . . that they would give birth to Serb babies, or that they should "enjoy being fucked by a Serb." The law does not require that the purpose of discrimination be the only purpose pursued by the offender; it is enough that it forms a substantial part of his *mens rea*. Such was the case with . . . Kunarac.

655. The acts of the accused caused his victims severe mental and physical pain and suffering. Rape is one of the worst sufferings a human being can inflict upon another. This was abundantly clear to . . . Kunarac, as he . . . admitted the fact that he had done something terrible

656. . . . Kunarac thus committed the [crime] of . . . rape as a principal perpetrator, and he aided and abetted the other soldiers in their role as principal perpetrators by bringing . . . women [to them to be raped]. . . .

871. The sentence to be imposed on Dragoljub Kunarac is 28 . . . years.

Defining Rape Internationally Catharine A. MacKinnon (2006)*

. . . The statutes of the ad hoc criminal tribunals for Yugoslavia and Rwanda, . . . where sexual atrocities were widely deployed for ethnic destruction, were established to adjudicate international violations of the laws of war and humanitarian law. Rape under these statutes is thus not a free-standing crime but must be charged as an act of war, genocide, or crime against humanity. Expressly defining rape under international law for the first time in 1998, the *Akayesu* decision of Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR) held that rape, there charged as a crime against humanity, is “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” . . . *Akayesu* defined rape as an act of coercion not reducible to narrow bodily description: “The Chamber considers that rape is a form of aggression and that the central elements of rape cannot be captured in a mechanical description of objects and body parts.” Crucially, “coercive circumstances need not be evidenced by a show of physical force” but “may be inherent in certain circumstances,” such as armed conflict or the military presence of threatening forces on an ethnic basis.

Interpreted in light of the distinction between coercion definitions . . . and nonconsent definitions . . . , to be sexually invaded under coercive circumstances, as *Akayesu* terms it, is clearly to be subjected to an unwelcome act, but that did not make nonconsent a matter of proof for the prosecution. Under the conditions of overwhelming force present in a “widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds” that constitute a context of crimes against humanity in acts found to be part of the campaign, inquiry into individual consent was not even worth discussion. . . . [A]rguably for the first time, rape was defined in law as what it is in life. . . .

In the line of cases that followed, the International Criminal Tribunal for the Former Yugoslavia (ICTY) led in tilting the definition of rape for both tribunals away from the *Akayesu* breakthrough resolution and, step by step, back in the direction of nonconsent. . . . In nothing other than the “body parts” definition *Akayesu* had expressly rejected as mechanical and missing the whole point three months earlier, the [ICTY’s] *Furundzija* tribunal required a showing of vaginal or anal penetration by a penis or object, or oral penetration by a penis. “[W]ithout the consent of the victim” crept back in at the same time. Five years later, this regression culminated in the ICTR’s *Semanza* and *Kajelijeli* trial decisions turning rape on nonconsent. . . .

* Excerpted from Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 940 (2006). Professor MacKinnon provides a full critique of consent in rape law in Catharine A. MacKinnon, *Rape Redefined*, 10 HARVARD LAW & POLICY REVIEW 431 (2016).

[The ICTY trial chamber's decision in *Kunarac* was] its first major successful prosecution of rape. . . . [T]he ICTY appellate decision in *Kunarac* . . . concluded that "[s]uch detentions amount to circumstances that were so coercive as to negate any possibility of consent." . . . By ruling thus on the facts, the *Kunarac* appellate chamber, while siding with a coercion-based definition, stopped short of finding consent legally irrelevant on principle in cases where the rapes have a nexus to war, crimes against humanity, or genocide.

Back at the ICTR, . . . one trial chamber [in *Semanza* (2003)], following the lead of the ICTY, reverted to the consent-based rape definition that *Akayesu* had already superseded. . . . Instead of foregrounding the larger (and statutory) context of reality in which the acts took place, proof was now to focus on mechanical interactions of specified body parts of individuals and what individual perpetrators were thinking about what their victims were thinking No other crime against humanity has ever, once the other standards are met, been required to be proven nonconsensual. With sex, it seems, women can consent to what would otherwise be a crime against their humanity, making it not one. . . .

. . . [T]he *Muhimana* trial decision in 2005 marked the ICTR's return to the course *Akayesu* began. . . . It held that "coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape" and that most international crimes "will be almost universally coercive, thus vitiating true consent." . . .

. . . In most legal settings outside recognized zones of conflict, a woman charging rape is still effectively presumed to have wanted the act, an assumption for which consent is a proxy, no matter how much force was involved. This effectively turns the acts back into sex based on specific body part interactions, presumptive consent that she must rebut, often with little more than her word. *Akayesu* in effect reversed this presumption for rapes proven inflicted as part of war, genocide, or crimes against humanity, defining rape in terms of its function in collective crimes. . . . [I]ts definition shifted the focus of proof from individual interactions to collective realities, from proof of defendant subjective psychological state to proof of objective facts inflicted on the complainant with others similarly located. No longer burdened by presumptive consent, *Akayesu* built into its rape definition the context of violent inequality common to the crimes the ad hoc tribunals are statutorily authorized to prosecute. Once a context of coercion was shown, from a crime notoriously stacked against victims, rape became an act provable by prosecutors with relative ease by usual legal means. . . .

* * *

The Special Court for Sierra Leone addressed whether forced marriage of civilian women and girls constituted an inhumane act capable of incurring individual criminal responsibility in international law during times of conflict.

Prosecutor v. Brima
Special Court for Sierra Leone (Appeals Chamber)
Case No. SCSL-2004-16-A (2008)

[The Appeals Chamber, composed of Justice George Gelaga King, Justice Emmanuel Ayoola, Justice Renate Winter, Justice A. Raja N. Fernando, and Justice Jon Moadeh Kamanda, delivers the following judgment:]

. . . 7. On 25 May 1997, members of the [Sierra Leone Army (SLA)] seized power from the elected Government . . . in a coup d’etat, planned and executed by 17 junior rank soldiers. Johnny Paul Koroma was released from prison by the coup plotters and appointed Chairman of a new government, which was called the Armed Forces Revolutionary Council (“AFRC”). The AFRC suspended the 1991 Constitution of Sierra Leone, dissolved the elected Government and banned political parties. . . .

17. Consequent upon the May 1997 coup d’etat, [Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu (the Accused)] became members of the Supreme Council of the AFRC, the highest decision-making body of the military junta. . . .

18. . . . [T]hey remained the three most senior commanders of the AFRC [from December 1998] until the cessation of hostilities in January 2002. . . .

25. The Trial Chamber did not enter convictions under Counts 7 and 8 of the Indictment. Count 7 charged the offence of sexual slavery and any other form of sexual violence. A majority of the Trial Chamber held that the charge violated the rule against duplicity and dismissed it for that reason. Count 8[, which charged Brima, Kamara, and Kanu with “Other Inhumane Acts” including forced marriage,] was dismissed on the ground of redundancy based on the Trial Chamber’s finding that the evidence led in support of that Count did not establish any offence distinct from sexual slavery. . . .

175. . . . [T]he Prosecution challenges the Trial Chamber’s dismissal of Count 8 of the Indictment

176. . . . [T]he Trial Chamber found that Article 2.i [of the Statute of the Special Court for Sierra Leone, which empowers the Court to prosecute crimes including “Other Inhumane Acts,”] must be restrictively interpreted to exclude crimes of a sexual nature, because Article 2.g . . . , which encompasses “[r]ape, sexual slavery, enforced prostitution, forced pregnancy and *any other form of sexual violence*,” exhaustively enumerates sexual crimes. The Trial Chamber found that the Prosecution did not adduce any evidence that forced marriage was a non-sexual crime; that the Prosecution[’s] evidence with respect to forced marriages was . . . subsumed in the crime of sexual slavery; and that there is no lacuna in the law which would necessitate a separate crime of forced marriage as an “Other Inhumane Act.” . . .

178. The Prosecution . . . asserts that forced marriage is distinct from . . . sexual slavery as forced marriage “consists of words or other conduct intended to confer a status of marriage by force or threat of force . . . with the intention of conferring the status of marriage.” Further, the Prosecution contends that forced marriage essentially involves a “forced conjugal association by the perpetrator over the victim” and is not predominantly sexual as victims of forced marriage need not necessarily be subject to non-consensual sex. It further argues that the imposition of a forced conjugal association is as grave as the other crimes against humanity such as imprisonment

184. . . . [T]he determination of whether an alleged act qualifies as an “Other Inhumane Act” must be made on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, the personal circumstances of the victims . . . and the physical, mental and moral effects of the perpetrator’s conduct upon the victims.

185. The Trial Chamber therefore erred in law by finding that “Other Inhumane Acts” under Article 2.i must be restrictively interpreted. . . .

186. Furthermore, [there is] no reason why the so-called “exhaustive” listing of sexual crimes under Article 2.g of the Statute should foreclose the possibility of charging as “Other Inhumane Acts” crimes which may . . . have a sexual or gender component. . . .

190. The trial record contains ample evidence that the perpetrators of forced marriages intended to impose a forced conjugal association upon the victims rather than exercise an ownership interest and that forced marriage is not predominantly a sexual crime. . . . [W]omen and girls were systematically abducted from their homes and communities by troops belonging to the AFRC and compelled to serve as conjugal partners to AFRC soldiers. They were often abducted in circumstances of extreme violence, compelled to move along with the fighting forces from place to place, and coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labour such as cleaning and cooking for the “husband,” endure forced pregnancy, and to care for and bring up children of the “marriage.” In return, the rebel “husband” was expected to provide food, clothing and protection to his “wife,” including protection from rape by other men, acts he did not perform when he used a female for sexual purposes only. . . .

191. The Trial Chamber findings also demonstrate that these forced conjugal associations were often organised and supervised by members of the AFRC or civilians assigned by them to such tasks. A “wife” was exclusive to a rebel “husband,” and any transgression of this exclusivity such as unfaithfulness, was severely punished. . . .

195. . . . [N]o tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery . . . , there are also distinguishing factors. First,

forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, . . . forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequence for breach of this exclusive arrangement. . . .

199. . . . [V]ictims of forced marriage endured physical injury by being subjected to repeated acts of rape and sexual violence, forced labour, corporal punishment, and deprivation of liberty. Many were psychologically traumatised by being forced to watch the killing or mutilation of close family members, before becoming “wives” to those who committed these atrocities and from being labelled rebel “wives” which resulted in them being ostracised from their communities. . . .

200. . . . [Thus,] acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence.

201. . . . [I]n each case, the perpetrators intended to force a conjugal partnership upon the victims, and were aware that their conduct would cause serious suffering or physical, mental or psychological injury to the victims. . . . [T]he perpetrators of these acts could not have been under any illusion that their conduct was not criminal. . . .

202. . . . [S]ociety’s disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an “Other Inhumane Act” capable of incurring individual criminal responsibility in international law.

203. The Appeals Chamber therefore grants . . . the Prosecution’s Appeal. . . .

* * *

In *Decision T-025 of 2004*, the Constitutional Court of Colombia (Second Chamber) declared that the massive, persistent, and systematic violation of human rights of all internally displaced persons (IDPs) in the context of the internal armed conflict amounted to an unconstitutional state of affairs that required the adoption of structural remedies in order to protect the fundamental rights of all IDPs. The Court retained jurisdiction to follow up on the implementation of the decision by the Executive. Since IDP women were not considered in the reports submitted by the Executive, the Court issued the following opinion in 2008 to require a gender-differentiated approach.

Auto N° 092 of 2008
Constitutional Court of Colombia (Second Chamber)
April 14, 2008*

The Second Chamber of the Constitutional Court, composed of Judges Manuel José Cepeda Espinosa, Jaime Córdoba Triviño and Rodrigo Escobar Gil . . . has adopted the present order

. . . [T]he . . . Court adopts comprehensive measures for the protection of the fundamental rights of women displaced by the armed conflict in the country and the prevention of the disproportionate gender impact of the armed conflict and forced displacement. . . . [T]hese measures consist of (i) orders to create thirteen (13) specific programs to fill the existing gaps in public policy to address forced displacement from the perspective of women, . . . [and] (ii) the establishment of two constitutional presumptions that protect displaced women

The factual presupposition of this decision is the disproportionate impact, in quantitative and qualitative terms, of the internal armed conflict and forced displacement on Colombian women. The legal presupposition of this ruling is the character of constitutional protections that displaced women have under the Political Constitution and the international obligations of the Colombian State in matters of Human Rights and International Humanitarian Law. . . .

The starting point . . . of this order is the . . . special constitutional protection for women displaced by the armed conflict. This condition . . . of special protection imposes on the state authorities at all levels, with regard to women victims of forced displacement, special duties of care and safeguarding of their fundamental rights, to which they must pay particular diligence. . . . [S]pecial constitutional protection justifies . . . that with regard to displaced women, measures of positive differentiation may be adopted that attend to their conditions of special frailty, vulnerability and defenselessness and promote, through preferential treatment, materializing the effective enjoyment of their fundamental rights. . . .

The constitutional obligations of the Colombian State regarding the protection of women against all kinds of violence and discrimination are clear and multiple. Article 1 of the Constitution establishes that Colombia is a Social State of Law founded on respect for human dignity. Article 2 establishes as one of the essential purposes of the State to guarantee the effectiveness of the principles, rights and duties enshrined in the Constitution, and unequivocally provides that “the authorities of the Republic are instituted to protect all persons residing in Colombia, in their life, honor, goods, beliefs, and other rights and freedoms, and to ensure compliance with the social duties of the State and individuals.” Article 5 provides that the State “recognizes, without any discrimination, the primacy of the inalienable rights of the person.” Article 13

* Translation by Evelin Caro Gutierrez (Yale University, J.D. Class of 2022).

establishes that “all people are born free and equal before the law, they will receive the same protection and treatment from the authorities and will enjoy the same rights, freedoms and opportunities without any discrimination based on sex,” and obliges the State to promote the conditions for equality to be real and effective, as well as to adopt “measures in favor of discriminated against or marginalized groups.” Article 22 enshrines the right to peace. And Article 43 unequivocally provides that “women and men have equal rights and opportunities,” and that “women may not be subjected to any kind of discrimination,” forcing the State to provide special protection to maternity and women heads of family.

Equally important are the international obligations of the Colombian State in relation to the prevention of discrimination and violence against women, particularly of women victims of the armed conflict These obligations derive mainly from International Human Rights Law and International Humanitarian Law

In the area of International Human Rights Law, the Court recalls the state obligations derived from the right of women to live with dignity, free from all forms of discrimination and violence. These obligations are mainly embodied in (a) the Universal Declaration of Human Rights, (b) the International Covenant on Civil and Political Rights, (c) the American Convention on Human Rights, (d) the Convention on the Elimination of all Forms of Discrimination against Women, and (e) the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women. . . .

The violence exerted in the Colombian internal armed conflict victimizes women in a differential and exacerbated way, because (a) due to their gender condition, women are exposed to particular risks and specific vulnerabilities within the armed conflict, which in turn are causes of displacement, and for the same reason as a whole explain the disproportionate impact of forced displacement on women, namely:

(i) the risk of sexual violence, sexual exploitation, or sexual abuse in the context of the armed conflict; (ii) the risk of exploitation or enslavement to carry out domestic tasks and roles considered female in a society with patriarchal traits, by illegal armed actors; (iii) the risk of forced recruitment of their sons and daughters by illegal armed actors, or other threats against them, which becomes more serious when the woman is the head of the family; (iv) the risks derived from contact or from family or personal relationships . . . with the members of any of the illegal armed groups operating in the country or with members of the Public Force, mainly due to signs or retaliation carried out by the enemy illegal groups; (v) the risks derived from their membership in women’s social, community or political organizations, or from their leadership and promotion of human rights in areas affected by the armed conflict; (vi) the risk of persecution and murder due to the strategies of coercive control of the public and private behavior of the people implemented by the illegal armed groups in large areas of the national territory; (vii) the risk of the murder or disappearance of their economic provider or the disintegration of their family groups and their material and social support networks; (viii) the risk of being dispossessed of their lands and heritage more easily by illegal

armed actors given their historical position regarding property, especially rural real estate; (ix) the risks derived from the condition of discrimination and increased vulnerability of indigenous and Afro-descendant women; and (x) the risk of the loss or absence of their partner or economic provider during the displacement process; and (b) as surviving victims of violent acts who are forced to assume different family, economic and social roles than the usual ones, women must bear material and psychological burdens of an extreme and abrupt nature, which do not affect men in the same way

. . . [T]he Colombian State is under the constitutional and international obligation to resolve in an agile, determined, accelerated, and effective manner the numerous failures and gaps in the official response to the situation of women in the face of forced displacement in the framework of the armed conflict, recognizing and responding to the differential and disproportionate impact that this has on the exercise of their most basic fundamental rights, as well as the different possibilities they have to rebuild their life projects once displacement has been caused. . . . [T]his Order is adopted as a comprehensive response to the situation of displaced women, within the framework of overcoming the unconstitutional state of affairs declared in judgment T-025 of 2004, and as fulfillment of the institutional mission of this Court. . . .

Since [judgment T-025], we [have] ordered that public policy to face the ravages of forced displacement in the country must effectively protect the rights of displaced persons and thus lead to the overcoming of the unconstitutional state of affairs. . . .

Despite the fact that certain advances have been made in the formulation and structuring of said public policy, . . . critical gaps persist, such as those relevant to the prevention of the disproportionate gender impact of forced displacement, and the care of women affected by the various gender facets identified in this providence. . . .

. . . [I]n order to fill these gaps in the expeditious and careful manner required by the Political Charter, it is necessary that thirteen specific gender programs be designed and implemented within the framework of public policy as they pertain to forced displacement

The thirteen programs that Acción Social[, the presidential office responsible for IDPs policies,] must, in the exercise of its powers, design for the purpose of filling the critical gaps in matters of gender in the public policy of attention to forced displacement in the country, are the following: a) The Disproportionate Gender Impact of Displacement Prevention Program, through the Prevention of Extraordinary Gender Risks in the framework of the Armed Conflict; b) The Program for the Prevention of Sexual Violence against Displaced Women and Comprehensive Care for its Victims; c) The Program for the Prevention of Intrafamily and Community Violence against Displaced Women and Comprehensive Care for their Victims; d) The Health Promotion Program for Displaced Women; e) The Program to Support Displaced Women who are Heads of Home, to Facilitate Access to Labor and Productive Opportunities, and to the Prevention of Domestic and Labor Exploitation of Displaced Women; f) The

Educational Support Program for Displaced Women Over 15 Years; g) The Program to Facilitate Access to Land Property for Displaced Women; h) The Program for the Protection of the Rights of Displaced Indigenous Women; i) The Program for the Protection of the Rights of Displaced Afro-descendant Women; j) The Program for the Promotion of the Participation of Displaced Women and for the Prevention of Violence against Women Leaders or those who acquire Public Visibility for their Social, Civic or Human Rights Promotion Work; k) The Program to Guarantee the Rights of Displaced Women as Victims of the Armed Conflict to Justice, Truth, Reparation and Non-repetition; l) The Psychosocial Support Program for Displaced Women; m) The Program to Eliminate Barriers to Access the Protection System for Displaced Women. . . . The competent ministries and national agencies have “autonomy to choose the means” in the design and name of each of these programs and inform the Court within the delay set at the end of this ruling . . . [I]n the design of the programs, basic “rationality requirements” must be met and opportunities for participation should be granted to civil society organizations that advocate or represent IDP women and the results of the implementation of the programs should be measured by “indicators of the effective enjoyment of women’s rights”

. . . [In addition], . . . the National System of Integral Attention to the Displaced Population (SNAIPD)[, composed of members of the ministerial cabinet and other heads of national agencies,] must establish and implement, within their ordinary operating procedures, two constitutional presumptions that protect displaced women as subjects of constitutional protection: a) The constitutional presumption of increased vulnerability of displaced women, for the purposes of their access to the different components of the SNAIPD and of the comprehensive assessment of their situation by the competent officials to attend to them; and b) The constitutional presumption of automatic extension of emergency humanitarian aid in favor of displaced women, until the self-sufficient and dignified conditions of each individual woman are verified.

The Complexity of the Category of “Violence Against Women”

We opened with the reminder that VAW is complex in part because gender binaries are problematic, even as they also have widespread sociological resonance. A growing body of case law takes up whether and how to deploy VAW. One example of the critiques explains:

[The gender-specific VAW frame] inscribes an inaccurate and misleading binary view of gender. The frame is inconsistent with many people’s lived experiences as well as with contemporary medical technology and expertise, which confirm that “sex” is lived on a continuum, rather than through the limited categories of male and female. It normalizes sex/gender hierarchies and stereotypes and

prevents broader understandings of the manifold ways that sex and gender operate as technologies of power and oppression. Framing intimate partner and sexual violence as violence committed by men against women hides the reality of abuse in lesbian and gay relationships. . . .

Critical race, intersectionality, and anti-essentialism theorists contribute to a critique of the gender-specific frame through scholarship surfacing the ways single-identity politics conflate or ignore multiple dimensions of identity. . . . This single axis of focus obscures the complexities of survivors' experiences and fails to take into account the variability in survivors' experiences of abuse based on structural factors other than gender, such as race, immigration status, class, and gender identity. . . .

. . . [T]he gender-specific lens . . . poses a tension with foundational feminist tenets. . . . Theory and advocacy challenging traditional gender roles and stereotypes lie at the heart of legal and other feminist initiatives. . . . It perpetuates a gender stereotype of its own to assume that women always are the targets rather than the perpetrators of violent aggression. Woman-specific framings reinforce gendered stereotypes by enshrining images of the weak female victim who cannot resist male aggression and who requires protections.*

What resides in the use of terms like “gender” as contrasted to “sex” as contrasted to “sex/gender” and how does one assess efforts to degender descriptions of harm? Professor Radosveta Vassileva provides an analysis by looking at the tensions within a ruling of the Bulgarian Constitutional Court responding to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011), which is known as the “Istanbul Convention.”

Bulgaria’s Constitutional Troubles with the Istanbul Convention

Radosveta Vassileva (2018)**

. . . [T]he Istanbul Convention . . . induced a debate of epic proportions which divided Bulgarian civil society. . . . [I]n February 2018, Bulgaria’s Prime Minister . . . withdrew a motion for ratification from Bulgaria’s Parliament. Moreover, 75 Members of Parliament from his Party GERB submitted a request before Bulgaria’s Constitutional Court to establish if the Istanbul Convention contravened the spirit of Bulgaria’s Constitution, including its Article 46(1), which defines marriage as ‘a voluntary union

* Excerpted from Julie Goldscheid, *Gender Neutrality and the “Violence Against Women” Frame*, 5 UNIVERSITY OF MIAMI RACE & SOCIAL JUSTICE LAW REVIEW 307 (2015).

** Excerpted from Radosveta Vassileva, *Bulgaria’s Constitutional Troubles with the Istanbul Convention*, VERFASSUNGSBLOG ON MATTERS CONSTITUTIONAL (Aug. 2, 2018), <https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention>.

between a man and a woman.’ A rather controversial decision was handed down on 27 July [2018]—8 judges ruled the Convention indeed contradicted Bulgaria’s Constitution while 4 judges dissented.

The Istanbul Convention purports to protect the human rights of women but uses the terms ‘gender,’ ‘gender-based violence,’ etc. This ambiguity, from a Bulgarian perspective, provoked more conservative members of Bulgaria’s society to question if the Convention did not introduce the notion of ‘third sex’—people who do not identify as male or female. . . .

The arguments that the judges put forward can roughly be divided into two clusters . . . : 1) the Convention is self-contradictory and has a broader scope than its title suggests, which can compromise the rule of law in Bulgaria; 2) Articles 3(c)* and 4(3)** of the Convention are not compatible with Bulgaria’s Constitution.

. . . The majority held that it was ‘obvious’ that the Istanbul Convention was self-contradictory because its title referred to the protection of women, but most of its provisions used the term ‘gender.’ . . . The majority also emphasized that ‘the meaning implied in the terms, which were used, not only did not promote equality between the sexes, but blurred the differences between them, thus depriving the principle of equality of any meaning.’ Overall, ‘if society lost its ability to differentiate between a woman and a man, combatting violence against women would remain a formal commitment, which was impossible to fulfill.’

These ‘apocalyptic’ and somewhat misguided conclusions seem to be based on assumptions rather than on the text of the Convention itself. . . . [T]he Executive Secretary of the Istanbul Convention at the Council of Europe . . . underscored that the Convention distinguished between ‘sex’ and ‘gender’ for the sake of clarity: ‘. . . gender refers to expected roles for women and men—and how too often these roles are defined by out-dated stereotypes that can make violence against women, intimidation and fear more “acceptable.”’

The majority of Bulgaria’s constitutional judges were particularly troubled by the fact that the Convention did not provide a definition of the term “gender identity.”

* Article 3(c) of the Istanbul Convention provides:

“[G]ender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

** Article 4(3) of the Istanbul Convention provides:

The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.

The judges . . . asserted that there was ‘a link between the Council of Europe’s policy on the prevention and combating of violence against women, such as discrimination against women based on gender, and the protection of certain rights of transgender people.’ . . .

. . . [However, in his dissent,] Judge Dimitrov . . . underscored that transgender people, like all Bulgarian citizens, are protected by Bulgaria’s Constitution and by diverse pieces of national legislation against discrimination. . . .

The second line of reasoning . . . is also striking because of the narrow conception of the social role of women it endorses. The majority held that the notion of gender enshrined in Articles 3(c) and 4(3) of the Convention was not compatible with Bulgaria’s Constitution. It underlined that ‘the Constitution and Bulgaria’s legislation as a whole were built on the understanding of the binary existence of human species.’ . . .

. . . [T]he court proceeded to generalize that ‘[t]raditionally, human society is built on binarism, or the existence of two opposite sexes, each of which has specific biological and social functions and responsibilities. The biological sex is determined by birth and is the basis of civilian sex.’ The court relied on this statement to conclude that ‘the understanding that marriage is a relationship between a man and a woman is deeply rooted in Bulgarian legal consciousness[.]’ . . . [However,] Article 46(2) of Bulgaria’s Constitution, for instance, stipulates that ‘[s]pouses have equal rights and obligations in marriage and in the family’ and does not separate these obligations based on social/biological role.

. . . [T]he court [also] contended that Bulgaria’s legislation contained diverse provisions which allegedly served as evidence of the country’s determination to protect fundamental rights, including the rights of victims of violence, thus implicitly suggesting that the Convention would not strengthen the national legislation. Ironically, many of the examples the judges refer to are transpositions of EU Directives rather than examples of independent national initiatives. It is also difficult to reconcile this statement with the alarming data on violence against women in Bulgaria

. . . [The end result is that] Bulgarian women are deprived of protection which they urgently need. . . .

* * *

As referenced in the *Cotton Field* decision, the Optional Protocol to CEDAW went into effect in 1999. In addition to empowering the CEDAW Committee to initiate inquiries into parties’ claims of violations of rights protected under the Convention, the Protocol allows the CEDAW Committee to formulate general recommendations directed to governments. A 2020 decision by that Committee found insufficient Russia’s response to violence against lesbian women.

O.N. & D.P. v. Russian Federation
Committee on the Elimination of Discrimination Against Women
CEDAW/C/WG/46/DR/119/2017 (2020)

[The Committee on the Elimination of Discrimination Against Women, composed of Gladys Acosta Vargas, Hiroko Akizuki, Tamader Al-Rammah, Gunnar Bergby, Marion Bethel, Esther Eghobamien-Mshelia, Naéla Gabr, Nahla Haidar, Dalia Leinarte, Rosario G. Manalo, Lia Nadaraia, Aruna Devi Narain, Ana Peláez Narváez, Bandana Rana, Rhoda Reddock, Elgun Safarov, Wenyan Song, Genoveva Tisheva and Franceline Toé-Bouda, delivers the following opinion:]

. . . 2.1 The authors [of the communication, O.N. & D.P.,] are a lesbian couple

2.2 On the night of 19 to 20 October 2014, the authors were going home in Saint Petersburg when . . . they noticed two unknown men following them. . . . On their way, the authors openly demonstrated their relationship, hugging, kissing and holding hands. At one point, one of the men attacked the first author from behind, hitting her. He then hit both authors on the head, face and body, shouting homophobic insults and threatening to kill them if he met them again. Meanwhile, the second man filmed the attack with his mobile telephone. Shortly afterwards, the men left.

2.3 . . . On the following day, . . . they reported it [to the police], asking for the matter to be investigated. . . .

2.4 . . . [A]n investigator . . . refused to open a criminal case [T]he decision was overruled by the deputy prosecutor of the Office of the Prosecutor of the Moskovsky district, in his capacity as supervising prosecutor, who ordered a further inquiry into the incident

[The investigator refused several more times to open a case, and each time the supervising prosecutor overruled that decision. After O.N. and D.P brought a lawsuit challenging the investigator’s failure to act as required by the Criminal Procedure Code, the investigator opened a criminal case. As of 2015, O.N. and D.P. had not received updates on the case.]

2.10 . . . [O.N. and D.P] further contended [in their lawsuit] . . . that the legal qualification of the crime against them as simple battery . . . disregarded the homophobic motive of the perpetrators. . . . [T]he Saint Petersburg City Court . . . rejected the authors’ complaint

7.2 With regard to the authors’ submission that the actions and inactions of the investigative authorities were based on gender and sexual orientation stereotypes, in

violation of article 5* of the Convention, the Committee reaffirms that the Convention places obligations on all State organs [T]he full implementation of the Convention requires States parties not only to take steps to eliminate direct and indirect discrimination and improve the de facto position of women, but also to modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and consequence of discrimination against women. Gender stereotypes are perpetuated through various means and institutions, including laws and legal systems, and can be perpetuated by State actors . . . and by private actors.

7.3 . . . [D]iscrimination within the meaning of article 1 of the Convention [includes] gender-based violence against women. . . . States parties may . . . be responsible for private acts, if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence

7.4 . . . [D]iscrimination against women is inextricably linked to other factors that affect their lives, including being lesbian women. Accordingly, because women experience varying and intersecting forms of discrimination, which have an aggravating negative impact, . . . gender-based violence may affect women to different degrees or in different ways, meaning that appropriate legal and policy responses are needed. . . .

7.6 . . . [S]tereotyping affects women's rights to a fair trial and . . . the judiciary must be careful not to create inflexible standards [based on] preconceived notions of what constitutes gender-based violence. . . . States parties are obliged, under articles 2**

* Article 5 of CEDAW provides in part:

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women

** Article 2 of CEDAW provides:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; . . .
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

and 15* of the Convention, to ensure that women have access to the protection and remedies offered through criminal law and that they are not exposed to discrimination within the context of those mechanisms

7.7 . . . [T]he compliance of the State party with its obligations under article 2 (a) and (c)–(e) of the Convention to eliminate gender stereotypes needs to be assessed in the light of the level of gender sensitivity applied in the handling of the investigation into the authors’ case. . . . [T]he domestic authorities failed to conduct an effective and timely investigation and take all necessary measures corresponding to the specific nature of the crime against the authors as lesbian women. . . .

7.8 . . . [B]y failing to investigate the authors’ complaint about the violent attack against them, as lesbian women, promptly, adequately and effectively and by failing to address their case in a gender-sensitive manner, the authorities allowed their actions to be influenced by negative stereotypes against lesbian women. . . .

7.10 . . . [T]he present case shows a failure by the State party in its duty to uphold women’s rights, particularly in the context of violence and discrimination against women on the basis of their sexual orientation and to eliminate the barriers that the authors faced in seeking justice in their case, in particular negative stereotypes against lesbian women, and to ensure that law enforcement officials strictly apply the legislation prohibiting gender-based discrimination against women.

7.11 In the light of the above, the Committee [finds] a violation of the authors’ rights under articles 1, 2 (a) and (c)–(e) and 5 (a) of the Convention. . . .

9. The Committee makes the following recommendations to the State party:

(a) . . . provide appropriate remedies, including monetary compensation and psychological rehabilitation, commensurate with the gravity of the violations of their rights

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise

* Article 15 of CEDAW provides:

1. States Parties shall accord to women equality with men before the law. . . .

SAFETY WITHIN AND ACROSS BORDERS

Victims of gender-based violence may seek refuge by crossing borders. Having explored what affirmative obligations governments have toward their own populations to protect against gendered violence, we turn to consider whether international refugee law, humanitarian law, and jurisdictions' own constitutional law require offering a haven for people escaping gendered violence.

The 1951 Convention Relating to the Status of Refugees is the basic international document providing obligations related to refugees and asylum-seekers and thus, along with regional and national law, has been foundational. The 1951 Refugee Convention defines a refugee as someone who:

owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.*

Since 1967, many States Parties to the 1951 Refugee Convention have also joined a Protocol extending the geographic and temporal scope of the 1951 Refugee Convention's protections. In addition to these documents, several regional treaties, laws, and non-binding instruments shape countries' domestic asylum law. Examples include the Cartagena Declaration on Refugees (1984) in Latin America and the Caribbean, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), and Directives 2004/83/EC and 2011/95/EU of the European Parliament and Council of the European Union relating to the Charter of Fundamental Rights of the European Union.

In 1999, the House of Lords, in its role as the U.K.'s highest court, recognized gender as contributing, with other factors, to making a person a member of a social group within the meaning of the 1951 Refugee Convention.

Islam v. Secretary of State for the Home Department
Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah
House of Lords of the United Kingdom
2 W.L.R. 1015 (1999)

[The House of Lords composed of Lord Steyn, Lord Hoffmann, Lord Hope of Craighead, Lord Hutton, and Lord Millett delivers the following opinion:]

LORD STEYN

* Excerpted from Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 2545.

. . . Both appeals involve married Pakistani women, who were forced by their husbands to leave their homes. They are at risk of being falsely accused of adultery in Pakistan. . . . [P]resently in England[, they] seek asylum . . . as refugees. They contend that, if they are forced to return to Pakistan, they would be unprotected by the state and would be subject to a risk of criminal proceedings for sexual immorality. If found guilty the punishment may be flogging or stoning to death. . . . [B]oth women claim refugee status on a ground specified in article 1A(2) of the Convention [Relating to the Status of Refugees of 1951 (“the Convention”)], namely that they have a well founded fear of being persecuted for reasons of “membership of a particular social group.” . . .

. . . [T]he principal issue before the House is the meaning and application of the words “membership of a particular social group.” . . . Except for [that ground] all the conditions of that provision are satisfied. . . . Do the women satisfy the requirement of “membership of a particular social group?” . . . If so, a question of causation arises, namely whether their fear of persecution is “for reasons of” membership of a particular social group. . . . It is common ground that there is a general principle that there can only be a “particular social group” if the group exists independently of the persecution. . . .

. . . [T]he appellants argued that three characteristics set [them] apart from the rest of society viz gender, the suspicion of adultery, and their unprotected status in Pakistan [and that] this combination of characteristic exists independently of persecution. . . . [The U.N. High Commissioner for Refugees] . . . submitted that individuals who believe in or are perceived to believe in values and standards which are at odds with the social mores of the society in which they live may, in principle, constitute “a particular social group” within the meaning of article 1A(2). Women who reject those mores—or are perceived to reject them—are capable of constituting “a particular social group.” The third way of approaching the matter was suggested in argument by . . . Lord Hoffmann . . . that women in Pakistan are a particular social group. . . .

. . . Relying on an ejusdem generis interpretation the Board [of Immigration Appeals of the United States in 1985] interpreted the words ‘persecution on account of membership in a particular social group’ to mean persecution “that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic.” . . . [T]he shared characteristic might be an innate one “such as sex, color, or kinship ties.” This reasoning covers Pakistani women because they are discriminated against and as a group they are unprotected by the state. Indeed the state tolerates and sanctions the discrimination. . . . [S]ome Pakistani women are able to avoid the impact of persecution, e.g. because their circumstances enable them to receive protection. In such cases there will be no well founded fear of persecution and the claim to refugee status must fail. But this is no answer to treating women in Pakistan as a relevant social group. . . .

. . . [I]t is plain that the admitted well founded fear of the two women is “for reasons” of their membership of the social group. Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic. . . .

In the *Islam* case I would allow the appeal and make a declaration . . . that it would be contrary to the United Kingdom’s obligations for her to be required to leave the United Kingdom. In the *Shah* appeal I would allow the appeal to the extent of setting aside the order of the Court of Appeal and restoring the order . . . remitting her case to the Immigration Appeal Tribunal.

LORD HOFFMANN

. . . Domestic violence such as was suffered by Mrs Islam and Mrs Shah in Pakistan is regrettably by no means unknown in the United Kingdom. [Domestic violence in the United Kingdom] would not however be regarded as persecution within the meaning of the Convention. This is because the victims of violence would be entitled to the protection of the state. . . . What makes it persecution in Pakistan is the fact that . . . the State was unwilling or unable to offer [them] any protection. The adjudicator found it was useless for Mrs Islam, as a woman, to complain to the police or the courts about her husband’s conduct. On the contrary, the police were likely to accept her husband’s allegations of infidelity and arrest her instead. The evidence of men was always deemed more credible than that of women. If she was convicted of infidelity, the penalties could be severe. Even if she was not prosecuted, as a woman separated from her husband she would be socially ostracised and vulnerable to attack, even murder, at the instigation of her husband or his political associates. . . .

. . . Within [the] society [of Pakistan], it seems to me that women form a social group of the kind contemplated by the Convention. . . . It may seem strange that sex (or gender) was not specifically enumerated in the Convention But the Convention was originally limited to persons who had become refugees as a result of events occurring before 1 January 1951. . . . But the time limit was removed by the 1967 New York Protocol and the concept of a social group is in my view perfectly adequate to accommodate women as a group in a society . . . that perceives women as not being entitled to the same fundamental rights as men. . . . I therefore think that women in Pakistan are a social group. . . .

In the case of Mrs Islam, the legal and social conditions which according to the evidence existed in Pakistan and which left her unprotected against violence by men were discriminatory against women. For the purposes of the Convention, this discrimination was the critical element in the persecution. In my opinion, this means that she feared persecution because she was a woman. . . .

I would therefore allow the appeals. . . .

LORD MILLETT

. . . The fact that the appellants have no one to protect them helps to show that their fear of persecution is well founded. But it does not help to define the social group to which they belong. . . .

. . . [P]ersecution is not merely an aggravated form of discrimination; and even if women (or married women) constitute a particular social group it is not accurate to say that those women in Pakistan who are persecuted are persecuted because they are members of it. They are persecuted because they are thought to have transgressed social norms, not because they are women. . . .

. . . The evidence in the present case is that the widespread discrimination against women in Pakistan is based on religious law, and the persecution of those who refuse to conform to social and religious norms, while in no sense required by religious law, is sanctioned or at least tolerated by the authorities. But these norms are not a pretext for persecution nor have they been recently imposed. They are deeply embedded in the society in which the appellants have been brought up and in which they live. Women who are perceived to have transgressed them are treated badly, particularly by their husbands, and the authorities do little to protect them. But this is not because they are women. They are persecuted as individuals for what each of them has done or is thought to have done. They are not jointly condemned as females or persecuted for what they are. The appellants need to establish that the reason that they are left unprotected by the authorities and are liable to be persecuted by their husbands is that they are women. In my opinion they have not done so.

I would dismiss the appeals.

[Lord Hutton agreed that the appeals should be granted, but under the particular social group of women suspected of adultery in Pakistan. Lord Hope of Craighead agreed with the opinions of Lords Steyn and Hoffman on the recognition of the particular social group of women in Pakistan.]

**Secretary of State for the Home Department v. K; Fornah v.
Secretary of State for the Home Department**
House of Lords of the United Kingdom
[2006] UKHL 46

[The House of Lords, composed of Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond, and Lord Brown of Eaton-under-Heywood, delivered the following judgment:]

LORD BINGHAM OF CORNHILL

... 1. ... The only issue in each case is whether the appellant's well-founded fear is of being persecuted "for reasons of . . . membership of a particular social group." ...

2. The first appellant[, K.] is an Iranian citizen. She is married to B B disappeared [and] has since been held in prison The grounds for his detention are not known. [The Revolutionary Guards searched their house twice, and at the second visit raped K.] . . . [T]he Revolutionary Guard [went] to the school [her seven-year-old son attended] to make enquiries about the boy. . . . [K] fled from Iran with her son. . . .

4. The second appellant[, Zainab Fornah, claimed] . . . that, if returned to Sierra Leone, she would be at risk of subjection to female genital mutilation (FGM). . . .

13. . . . First, the Convention is concerned . . . with persecution which is based on discrimination Secondly, to identify a social group one must first identify the society of which it forms part; a particular social group may be recognisable as such in one country but not in another. Thirdly, a social group need not be cohesive to be recognised as such. Fourthly, . . . there can only be a particular social group if it exists independently of the persecution to which it is subject. . . .

17. . . . [A] person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground . . . need not be the only or even the primary reason for the apprehended persecution. . . .

19. The persecution feared by the first appellant was said to be for reasons of her membership of a particular social group, namely her husband's family. . . .

24. . . . [T]he questions here are whether the Adjudicator was entitled to conclude that on the facts the family of the first appellant's husband was such a [particular social] group and, if so, whether the real reason for the persecution which she feared was her membership of that group. . . . [He] reached a tenable conclusion. . . . I would accordingly allow the first appellant's appeal

26. . . . [T]his . . . is consistent with the view taken by the European Parliament, which . . . adopted a resolution (A5-0285/2001) expressing the hope that the European institutions and member states should recognise the right to asylum of women and girls at risk of being subjected to FGM

31. . . . [T]he second appellant submitted that "women in Sierra Leone" was the particular social group of which [she] was a member. . . . [W]omen in Sierra Leone are a group of persons sharing a common characteristic . . . , namely a position of social inferiority as compared with men. . . . That is true of all women, those who accept or willingly embrace their inferior position and those who do not. To define the group in this way is not to define it by reference to the persecution complained of: it is a characteristic which would exist even if FGM were not practised

32. . . . I would . . . allow [Fornah’s] appeal on her preferred basis

LORD HOPE OF CRAIGHEAD

. . . 34. . . . I would allow these appeals I should like however to add a few comments on the issues raised as to what constitutes a “particular social group”

41. . . . [I]t is not necessary to show that all members of the social group in question are persecuted before one can say that people are persecuted for reasons of their membership of that group. But does the fact that the group must be identifiable by a characteristic or attribute common to all members of the group mean . . . that it is necessary that all members of the group should be susceptible to the persecution in question? . . .

54. . . . [In Fornah’s case,] it is not difficult to identify females in Sierra Leone as a particular social group. . . . [T]here is a strong element of sexual discrimination in Sierra Leone where patriarchy is deeply entrenched which serves to identify females in that country as a particular social group. . . . Women in Sierra Leone are discriminated against because the law will not protect them from [FGM]. . . .

56. . . . [O]ne can say, with greater precision, that the particular social group is composed of uninitiated indigenous females in Sierra Leone. . . .

58. . . . [However,] I would avoid attempting to define the class so as to confine it to the persons who are likely to be persecuted. It is enough that it should identify the shared characteristic—the common denominator—within the wider group that reflects the reason why membership of it gives rise to the well founded fear. In Miss Fornah’s case one can say that the wider group is composed of females in Sierra Leone. . . .

BARONESS HALE OF RICHMOND

. . . 86. . . . [T]he world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society. States parties to the Refugee Convention, at least if they are also parties to the International Covenant on Civil and Political Rights and to [CEDAW], are obliged to interpret and apply the Refugee Convention compatibly with the commitment to gender equality in those two instruments. . . .

106. . . . [I]t is clear that the adjudicator was entitled to conclude that Mrs K feared persecution precisely because of her membership of a particular social group, namely her husband’s family. . . . The cohesion and solidarity of a family means that any individual can be got at through the medium of other individuals in the group. Because of the crucial role within the family assigned to women in many societies, the wife and mother may be a particular target for this type of persecution. . . .

112. The stumbling block [in Fornah’s case] seems to have been the fact that FGM is a once and for all event. . . . Thus, it was argued, if many members of the group are no longer at risk, because they have already suffered, it can no longer constitute a group for this purpose. But if the group has to be defined only to include those at risk, it then looks as if the group is defined solely by the risk of persecution

113. . . . Even if the group is reduced to those who are currently intact, its members share many characteristics which are independent of the persecution—their gender, their nationality, their ethnicity. . . . But there is no need to reduce the group to those at risk. . . .

114. . . . [T]he particular social group might best be defined as Sierra Leonean women belonging to those ethnic groups where FGM is practised: then it is quite clear that the reason for the persecution is the membership of that group. . . .

115. I therefore agree that both these appeals should be allowed

[Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood agreed with the rest of the House of Lords that both appeals should be allowed. In Fornah’s case, both preferred narrower definitions of the particular social group. Lord Rodger of Earlsferry defined the group as “uninitiated and intact women who are forced to undergo mutilation.” Lord Brown of Eaton-under-Heywood defined the group as “uninitiated indigenous females in Sierra Leone,” but did not disagree with Lord Bingham’s and Baroness Hale’s wider definitions.]

Status Quo or Sixth Ground?: Adjudicating Gender Asylum Claims Talia Inlender (2007)*

. . . The Convention on the Status of Refugees (hereinafter Refugee Convention) requires those seeking asylum to demonstrate both that they have suffered legally cognizable persecution and that their persecutory treatment was on account of one of five enumerated categories: race, nationality, religion, political opinion, or membership of a particular social group (MPSG). Gender is conspicuously missing from among these categories. On one side of the debate lie those who believe that gender claims can and should be understood within the existing enumerated grounds, in particular, as political opinion and social group claims. On the other side of the debate, proponents argue that the addition of gender as a sixth enumerated ground is both practically and theoretically necessary in order to ensure protection for female (and male) asylum seekers persecuted on the basis of their actual (or perceived) gender. . . .

Women are often persecuted for the same reasons as men. They are targeted because of their political beliefs, harmed as a result of their religious affiliations, and

* Excerpted from Talia Inlender, *Status Quo or Sixth Ground?: Adjudicating Gender Asylum Claims*, in *MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER* (Seyla Benhabib & Judith Resnik eds., 2007).

punished for their ethnic identifications. However, two distinctions may differentiate the persecution of women: its form and its motivation.

With respect to form, women are targeted in particular, *gender-specific* ways including rape, sexual violence, forced abortion, compulsory sterilization, and forced pregnancy. . . . [T]he gender of the victim may dictate the manner of persecution but is not necessarily the reason for the persecutory act itself. . . .

By contrast, the motivation of the persecutor may differ when a woman, rather than a man, is the subject of persecution. In these cases, which I refer to as *gender-based* persecution, there is a “causal relationship between gender and persecution.” . . .

. . . Proponents of the status quo offer several theoretical justifications in support of the incorporation of gender claims into the existing asylum grounds. . . . [T]he problem with the adjudication of gender asylum claims does not lie primarily in the law itself but in “the social and political context in which the claims of women are adjudicated.” As a result, the appropriate solution . . . does not lie in the addition of a new legal definition, but in increasing the sensitization of those who adjudicate asylum claims to women’s persecution . . . by means of sexual violence. . . .

. . . “[T]he addition of ‘gender’ as a new category . . . would bear the risk of reducing diverse female experience to a specific category of gender related persecution which might lead to an even stronger exclusion of women from the traditional refugee definition.” . . .

. . . [S]eparating women’s claims out from the traditional grounds risks “depolitic[izing] women’s lives.” . . . By adjudicating claims of gender persecution within the traditional grounds of political asylum law, women’s stories may be told as stories of political harm rather than as tales of cultural misfortune. . . .

Proponents of adding gender as a sixth ground within the asylum definition . . . argue that . . . it is more effective to create a separate ground that is geared towards and responsive to gender claims than to try to manipulate these claims so that they fit into the existing categories. . . .

. . . [T]he methodology by which gender claims are incorporated into asylum law . . . is not neutral. . . . [A] methodological approach which re-frames asylum law’s orientation towards gender claims by allowing women’s stories to be told as they experience them is preferable to one that constructs women’s claims within the parameters of male dominated categories. . . .

This theoretical justification . . . is more closely aligned with the concerns raised by *gender-based* rather than *gender-specific* claims. Empowering women to “tell their stor[ies]” as they experience them, rather than adapting them to the existing categories makes sense for claims where a woman is persecuted because of her gender. . . . Creating

a sixth ground would do away with the need to manipulate stories that are about gender . . . into stories that are about abstract ‘political opinions’ and ‘social groups.’ . . .

. . . [A]rguments for adding gender as a sixth ground, like those which support using MSPG as a home for gender claims, conceive of women as a coherent group for the purposes of asylum recognition. . . . In order to pursue real remedies to the persecutory treatment of women throughout the world, it is necessary to recognize and address the group-based nature of the harms they suffer. If the notion that women are (or have become) a global, social group has merit, then the addition of a sixth ground which identifies the group . . . makes sense. . . .

. . . The addition of a separate, gender ground may affirm women’s collective identity and be healing in a way that subsuming their stories into male-dominated categories may not. . . .

* * *

In 2014, the Board of Immigration Appeals of the United States issued the precedential decision *Matter of A-R-C-G-*, in which the Board recognized that a woman from Guatemala who fled domestic violence could meet the requirements for asylum, which are grounded in the refugee definition provided by the 1951 Refugee Convention. The Board found that she was a member of the particular social group comprised of “married women in Guatemala who are unable to leave their relationship.” The Board reached this conclusion in interpreting the relevant sections of the Immigration and Nationality Act of 1965 (INA), the United States’s primary law on immigration.

After the election of a new president in 2016, the Department of Justice revised this ruling. In 2014, a citizen of El Salvador, referred to as A-B- in her application, applied for asylum in the United States after fleeing domestic violence at home. Relying on the 2014 *Matter of A-R-C-G-*, the immigration appellate body required consideration of that application. However, the United States Attorney General, as the federal official that oversees the immigration adjudication system within the Department of Justice, has the power to select certain decisions issued by the Board of Immigration Appeals for “certification,” and can create a new precedential decision instead. In 2018, Attorney General Jefferson Sessions certified *Matter of A-B-* in order to issue the following decision.

Matter of A-B-
United States Attorney General
27 I. & N. Dec. 316 (2018)

. . . Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for . . . asylum . . . , in practice such claims are unlikely to satisfy the statutory grounds

for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim. . . .

The respondent claimed that she was eligible for asylum because she was persecuted on account of her membership in the purported particular social group of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common” with their partners. The respondent asserted that her ex-husband, with whom she shares three children, repeatedly abused her physically, emotionally, and sexually during and after their marriage. . . .

To be cognizable, a particular social group *must* exist independently of the harm asserted in an application for asylum or statutory withholding of removal. If a group is defined by the persecution of its members, then the definition of the group moots the need to establish actual persecution. For this reason, [t]he individuals in the group must share a narrowing characteristic other than their risk of being persecuted. . . . A particular social group must not be amorphous, overbroad, diffuse, or subjective, and not every immutable characteristic is sufficiently precise to define a particular social group. . . . Social groups defined by their vulnerability to private criminal activity likely lack the [required particularity] . . . , given that broad swaths of society may be susceptible to victimization. . . .

Particular social group definitions that seek to avoid particularity issues by defining a narrow class—such as “Guatemalan women who are unable to leave their domestic relationships where they have children in common”—will often lack sufficient social distinction to be cognizable as a distinct social group, rather than a description of individuals sharing certain traits or experiences. A particular social group must avoid, consistent with the evidence, being too broad to have definable boundaries and too narrow to have larger significance in society. . . . [T]here is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances. . . .

. . . It can be especially difficult . . . for victims of private violence to prove persecution because [p]ersecution is something a *government* does, either directly or indirectly by being unwilling or unable to prevent private misconduct. . . . An applicant seeking to establish persecution based on violent conduct of a private actor must show more than difficulty . . . controlling private behavior. The applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims. . . .

The Board [of Immigration Appeals] . . . erred when it found that the respondent established the required nexus between the harm she suffered and her group membership. . . .

The Board also erred when it overruled the immigration judge’s finding that the respondent failed to demonstrate that the government of El Salvador was unable or unwilling to protect her from her ex-husband. . . . No country provides its citizens with complete security from private criminal activity, and perfect protection is not required. In this case, the respondent not only reached out to police, but received various restraining orders and had him arrested on at least one occasion. . . .

. . . I do not minimize the vile abuse that the respondent reported she suffered at the hands of her ex-husband or the harrowing experiences of many other victims of domestic violence around the world. . . . But the asylum statute is not a general hardship statute. . . . Nothing in the text of the INA supports the suggestion that Congress intended “membership in a particular social group” to be some omnibus catch-all for solving every heart-rending situation.

I therefore overrule . . . all other opinions inconsistent with the analysis in this opinion, vacate the Board’s decision, and remand to the immigration judge for further proceedings consistent with this opinion.

* * *

Akin to approaches in other countries and in contrast to the current approach of the United States, the Supreme Court of Israel in 2020 recognized that claims of a well-founded fear of persecution based in female genital mutilation (FGM) can qualify for asylum.

**Anonymous v. Population and Immigration Authority,
Ministry of Interior
Supreme Court of Israel
Request for Administrative Appeal 5040/18 (2020)***

The appellants were two parents from the northern area of Ivory Coast and their two minor daughters, who were born in Israel. The appellants requested asylum in Israel stating their fear that the daughters [would] be forced to undergo [female genital mutilation (FGM)]. Their request was denied. . . . The District Court based its opinion on the availability of an internal flight/relocation alternative. Subsequently, a request to appeal to the Supreme Court was submitted. . . .

[The Supreme Court (per Justice Barak-Erez, with whom Justice Grosskopf concurred) agreed with the appellants; Justice Elron dissented.]

The court reviewed the phenomenon of FGM as a basis for asylum, and the scope of openness to review, in other jurisdictions, referencing jurisprudence from the United States, Canada, United Kingdom, Australia and Europe. The court also stressed

* We draw from an English summary of the decision.

the cruelty of the practice of FGM and its harsh physical and emotional consequences. Therefore the court stated that fear of FGM can constitute reasonable grounds for claiming asylum, as long as such fear is factually well-grounded.

The state did not challenge this starting point, but argued that the appellants have a feasible internal flight/relocation alternative, taking into consideration that the parents themselves oppose the practice. . . .

. . . [T]he majority opinion held that there was enough evidence for the argument that a danger of FGM awaits the minor appellants and that the State of Israel [had not provided proof sufficient to support an] alternative relocation exception in Ivory Coast. The persecution agents in this case—extended family members of the appellants—are private entities, rather than the State of Ivory Coast or its officials. There is a probability that these relatives will reach the appellants even if the appellants do not live in the same part of the Ivory Coast. It was not proven that Ivory Coast is capable of giving the minors effective protection against persecution. The . . . mother herself, as well as her sister and the daughter of that sister, had been subjected to forced FGM by her family. The court also accepted the view that failure to disclose fear of FGM in the first encounter with the immigration authorities does not vitiate the claim’s credibility. . . . [F]ear of stigma and rejection [are] factors which could explain the failure to do so. . . . [T]he court accepted the explanation provided by the mother for not mentioning the fear of FGM in her initial request for asylum (addressing her difficulty in sharing this information with the authorities, before she had children who were subject themselves to the risk of FGM). . . .

Sexual Identity, Normativity, and Asylum

Thomas Spijkerboer (2013)*

. . . [Starting around the mid-1970s, a] wave of innovations [regarding the refugee definition] occurred in [the] context . . . of equality. Feminists argued that the refugee definition was . . . biased to the disadvantage of women. In order to do justice to the specificity of the experiences of women fleeing violence, the refugee definition had to be applied without a male bias. This gender-neutral or gender sensitive approach was sometimes thought to require . . . adding a sixth persecution ground being [gender], but . . . quite soon most agreed that membership of a particular social group would suffice. As a consequence, it became possible to base a claim to asylum on sexual violence in the context of an ethnic conflict, in a domestic setting or during interrogations. Sexual violence was reconstituted as something that was public in a normative sense, and not just tough luck. Likewise, women’s activities catering for political activists or fighters, as well as activities relating to their position as women, were reframed as expressions of their political or religious opinions. At an abstract level, one might say that the feminist critique of the public/private distinction was imported

* Excerpted from Thomas Spijkerboer, *Sexual Identity, Normativity, and Asylum*, in *FLEEING HOMOPHOBIA: SEXUAL ORIENTATION, GENDER IDENTITY AND ASYLUM* (Thomas Spijkerboer ed., 2013).

in refugee law. This was made feasible in part by the fact that women's issues were increasingly conceived of as human rights issues while simultaneously the refugee definition was reconceived as being fundamentally about human rights

. . . [T]he conceptual manoeuvre [for LGBT advocates was] similar. . . . A major point . . . is recognition of sexual orientation and gender identity as a persecution ground by using particular social group. . . . Once this hurdle was taken, four new obstacles came into view.

First, decision makers . . . considered the violence against LGBTs as *discrimination* not amounting to persecution. . . . As a consequence of the categorisation as discrimination (and not as persecution), such acts of violence were examined under the more stringent gauge of whether it made a person's life unbearable. Instead of being considered as acts of persecution, LGBT applicants must establish, for example, that such acts of violence are systematic.

A second problem . . . was the idea of *discretion*. . . . [I]n many countries, even those where homosexual or transgender behaviour and/or identity are criminalised, people can live according to their identity without major risks, provided that they behave discreetly. . . . [In certain places,] they can enjoy the privacy rights to which international human rights law entitles them without running excessive risk. Implicitly, the privacy rights which amount to the right to sexual autonomy are often limited to the right to have sex. . . . For many people, this will mean they have to conceal, in most of their social contacts, those parts of their lives that mark them as sexual minorities. And they will have to do so for life. . . . [A] rather successful campaign for abolishing discretion reasoning has been made As with particular social group, the success of this campaign is made possible in part by the clear cut-ness of its demand: ban one particular ground for denying refugee status.

But discretion reasoning turns out to be a many-headed monster For applicants who have not succeeded being discreet in their country of origin and already were in trouble there, the internal flight alternative is one such monster head. They can return to another region in the country of origin, and if they 'abide by the dominant cultural norms' (as decision makers expect they obviously will . . .), they do not have a well-founded fear of being persecuted. Another monster head rephrases discretion reasoning as *sur place* reasoning. This manoeuvre is made in cases where people have succeeded in remaining closeted in the country of origin. Decision makers rule that they have only begun to be openly LGBT in the country of refuge. . . . [T]he concomitant restrictive pieces of doctrine get on board: a purported lack of continuity between behaviour in the country of origin and the country of refuge; the unreasonableness of attracting the attention of the home country authorities before or after return; suspicions about credibility. A third monstrous head holds that some people are voluntarily discreet, and can be expected to behave as they did upon return to the country of origin. . . . [I]t is found to be relevant whether in the country of origin the applicant had been discreet about his or her sexuality 'voluntarily' In such situations, discretion . . . is

held to be a reasonable *factual* prediction For that reason, they do not face a risk of persecution A fourth variety of discretion reasoning occurs in the definition of particular social group. Since 2006, according to some US courts a particular social group must be recognisable, i.e. socially visible. . . . This may well result in denial of asylum to LGBT people who were not out in their country of origin. . . .

A third obstacle for refugee status . . . was the relevance of *criminalisation*. In cases where homosexual or transgender identity or behaviour constituted a criminal offence in the country of origin, decision makers decided that this was insufficient for refugee status. . . . [T]hey required evidence of enforcement of the criminal laws concerned. The burden of proof that enforcement (and sometimes systematic enforcement) took place remains with the applicant, and . . . the fact of criminalisation (itself already a violation of international human rights law) became irrelevant [T]he fact that criminalisation makes people defenceless against extortion or violence from the side of the authorities or fellow citizens is disregarded [T]he permanent fear and anguish which results from criminalisation . . . , even if it is not formally enforced with some frequency, is held to be irrelevant for refugee status. . . .

A final example of the obstacles to refugee status for LGBT claimants is about *credibility*. . . . [W]hen rules are adapted which favour the grant of refugee status to applicants who invoke sexual orientation or gender identity, there is a tendency among decision makers to doubt whether the people invoking such rules actually are LGBT. . . .

. . . While the notion of sexual identity is crucial for formulating claims that seek to combat the exclusion and oppression of sexual minorities, that same notion at the same time is deeply influenced by such exclusion and oppression. It does not only have the potential to liberate, but also to marginalise. . . .

. . . [S]exual identity is an inherently problematic concept. It is not only shaped by sexual minorities themselves in the process of liberating themselves, but also (and very much so) by dominant discourse Sexualities cannot be understood as pre-existing things out there for which we just have to find the right words. Sexualities are made and unmade by people in actions and reactions. Words, including the words of law, are among the actions and reactions that take part in shaping sexualities. Because sexualities are contradictory and contested, what we say about them can hardly be otherwise.

* * *

In Europe, governance of asylum law comes through each country’s own system, and for those who are members of the European Union, from the Charter and the Parliament and Council’s Directives. In addition, the European Convention on Human Rights may have an impact, although it contains no provisions directly addressing asylum. Yet, Convention rights apply to asylum-seekers within the

jurisdiction of Member States. A 2016 publication of the European Court of Human Rights explained:

[M]ember States of the Council of Europe are entitled to determine which asylum-seekers in fact qualify for international protection. And it is not the task of the European Court to decide the merits of individual asylum claims. However, in exercising control of their borders, States must act in conformity with the ECHR standards and with the principles derived from the vast body of the Court’s case-law in order to guarantee the respect of asylum seekers’ human rights.*

For example, the European Court of Human Rights found that Hungary had through detention violated the Article 5 right to liberty and security of person of an asylum-seeker who had fled prosecution for homosexuality in Iran. In its opinion in *O.M. v. Hungary* (2016), the Court wrote:

53. . . . [T]he authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place. In the present case, the authorities failed to do so when they ordered the applicant’s detention without considering the extent to which vulnerable individuals—for instance, LGBT people like the applicant—were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons. . . . [T]he decisions of the authorities did not contain any adequate reflection on the individual circumstances of the applicant[.]

The European Union Charter of Fundamental Rights, proclaimed in 2000 and rendered legally binding by the Treaty of Lisbon in 2009, addresses asylum. Article 18 provides:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.**

In addition, the Council of Europe has issued a series of implementing directions. Directive 2004/83/EC provided a standard reiterated in Directive 2011/95/EU that the Union had “[a] common policy on asylum, . . . [which] is a constituent part of the European Union’s objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances,

* Excerpted from EUROPEAN COURT OF HUMAN RIGHTS, COURTALKS: ASYLUM 7 (2016).

** Excerpted from 2012 O.J. (C 326) 391, 399.

legitimately seek protection in the Union.”* The Council of the European Union further explained, “The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.”

Article 10 of Council Directive 2004/83/EC provides that “a particular social group might include a group based on a common characteristic of sexual orientation.”** Seven years later, Directive 2011/95/EU updated this language to include gender identity. The revised Article 10 provides:

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.***

The European Court of Justice (ECJ) has a body of case law interpreting these and other provisions of EU law on asylum. Shortly after the publication of the Thomas Spijkerboer chapter excerpted above, the ECJ delivered a judgment on the issue of “discretion” in *Minister voor Immigratie en Asiel v. X; Y and Z v. Minister voor Immigratie en Asiel* (2013). The Court determined inter alia that “[w]hen assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin.” The issue of treatment of LGBT+ asylum-seekers arose again in the ECJ in 2018.

F v. Bevándorlási és Állampolgársági Hivatal
European Court of Justice (Third Chamber)
C-473/16 (2018)

THE COURT (Third Chamber), composed of L. Bay Larsen (Rapporteur), President of the Chamber, J. Malenovský, M. Safjan, D. Šváby and M. Vilaras, Judges, . . . gives the following [judgment:]

* Excerpted from 2011 O.J. (L 337) 9, 9.

** Excerpted from 2004 O.J. (L 304) 12, 17.

*** Excerpted from 2011 O.J. (L 337) 9, 16.

. . . 10. Article 4 of [Directive 2011/95 of the European Parliament and of the Council] provides:

‘1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant’s statements and all the documentation at the applicant’s disposal regarding the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection. . . . ’

. . . 20. In April 2015, F submitted an application for asylum to [Bevándorlási és Állampolgársági Hivatal (Office for Immigration and Citizenship, Hungary, “the Office”)].

21. . . . [H]e claimed . . . that he had a well-founded fear of being persecuted in his country of origin on account of his homosexuality.

22. . . . [T]he Office rejected F’s application [It] concluded that F lacked credibility on the basis of an expert’s report prepared by a psychologist . . . [who] concluded that it was not possible to confirm F’s assertion relating to his sexual orientation.

23. F brought an action against the Office’s decision before the referring court, contending . . . that the psychological tests he had undergone seriously prejudiced his fundamental rights and did not make it possible to assess the plausibility of his sexual orientation. . . .

25. . . . [T]he . . . Institute of [Forensic Experts and Investigators] . . . produced an expert report, according to which the methods used during the procedure for examining the asylum application do not prejudice human dignity

27. . . . [F]irst, the referring court asks . . . whether Article 4 of Directive 2011/95 must be interpreted as meaning that it precludes the authority responsible for examining applications for international protection . . . from ordering that an expert’s report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant. . . .

29. . . . [A]lthough it is for the applicant for international protection to identify his sexual orientation, which is an aspect of his personal identity, applications for international protection on the basis of a fear of persecution on grounds of that sexual

orientation may, in the same way as applications based on other grounds for persecution, be subject to the assessment process provided for in Article 4 of [Directive 2011/95].

30. . . . [S]exual orientation is a characteristic which is capable of proving an applicant’s membership of a particular social group

31. . . . [W]hen the Member States assess whether an applicant has a well-founded fear of being persecuted, it is immaterial whether he actually possesses the characteristic linked to the membership of a particular social group which attracts the persecution, provided that such a characteristic is attributed to him by the actor

32. Accordingly, it is not always necessary . . . to assess the credibility of the applicant’s sexual orientation in the context of the assessment of the facts and circumstances laid down in Article 4 of Directive 2011/95.

33. . . . Article 4(5)* of that directive specifies the conditions under which a Member State, applying the principle that it is the duty of the applicant to substantiate his application, must consider that certain aspects of the applicant’s statements do not require confirmation. Those conditions include, in particular, the fact that the applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to his case, as well as the fact that the applicant’s general credibility has been established.

34. . . . [I]t must be held that those provisions . . . do not exclude the use of expert reports

35. Nevertheless, the procedures . . . to an expert’s report, must be consistent with other relevant EU law provisions, and in particular with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in

* Article 4(5) of Directive 2011/95 of the European Parliament and of the Council provides:

Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

. . . (c) the applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant’s case; [and] . . .

(e) the general credibility of the applicant has been established.

Article 1* of the Charter, and the right to respect for private and family life guaranteed by Article 7** thereof. . . .

37. . . . [C]ertain forms of expert reports may prove useful for the assessment of . . . facts and circumstances and may be prepared without prejudicing the fundamental rights of that applicant. . . .

46. . . . Article 4 of Directive 2011/95 . . . does not preclude the authority responsible . . . from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation.

47. [Second], the referring court asks . . . whether Article 4 of Directive 2011/95 . . . [precludes] the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, . . . the purpose of which is . . . to provide an indication of the sexual orientation of that applicant. . . .

50. Article 4 of Directive 2011/95 must . . . be interpreted in the light of Article 7 of the Charter. . . .

53. . . . [E]ven if the performance of the psychological tests on which an expert's report . . . is based is formally conditional upon the consent of the person concerned, . . . that consent is not necessarily given freely, being de facto imposed under the pressure of the circumstances in which applicants for international protection find themselves.

54. In those circumstances, . . . use of a psychologist's expert report . . . constitutes an interference with that person's right to respect for his private life. . . .

59. . . . [T]he seriousness of the interference with the right to privacy [that the report] constitutes cannot be regarded as proportionate to the benefit that it may possibly represent for the assessment of the facts and circumstances

* Article 1 of the Charter of Fundamental Rights of the European Union provides:

Human dignity is inviolable. It must be respected and protected.

** Article 7 of the Charter of Fundamental Rights of the European Union provides:

Everyone has the right to respect for his or her private and family life, home and communications.

63. . . . [T]he seriousness of the interference with private life entailed by the preparation and use of an expert’s report . . . exceeds that entailed by an assessment of the statements of the applicant . . . or recourse to a psychologist’s expert report having a purpose other than that of establishing the applicant’s sexual orientation. . . .

71. . . . Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter, [precludes] the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist’s expert report, such as that at issue in the main proceedings, the purpose of which is . . . to provide an indication of the sexual orientation of that applicant. . . .

RE-GENDERING PRACTICES WITHIN COURTS

The materials above address efforts to create paths to courts—with criticism leveled at police and prosecutors for failures to bring claims, of legal doctrines inhospitable to criminal and civil remedies sought by victims, and of obligations that can flow from recognition of gendered violence. A related body of materials looks at how courts themselves may in their practices as well as in their legal doctrine be sites of inequality. We conclude with brief excerpts of materials addressed to the problems of process and judgment in judiciaries.

Preliminary Injunction Against Rejection of Audio-Visual Witness Examination in a Criminal Trial

Federal Constitutional Court of Germany (Second Senate)

Press Release No. 18/2014 of 28 February 2014

Summarizing Order of 27 February 2014, 2 BvR 261/14*

[The Court, composed of Judge Lübbe-Wolff, Judge Landau, and Judge Kessal-Wulf, delivered the following order:]

. . . The complainant has been summoned to appear on 4 March 2014 as a witness in a criminal trial in the Waldshut-Tiengen Regional Court. The Public Prosecutor’s Office accuses the defendant of having on several occasions secretly slipped consciousness-altering substances into the drinks of women, including the complainant, while on dates with them, and then having sexual intercourse with them against their will. . . .

The complainant has petitioned that the witness examination be carried out via an audio-visual link . . . since otherwise, there would be a risk of serious detriment to her mental well-being. She states that she has suppressed what happened and closed it

* The following excerpt is taken from the Federal Constitutional Court’s English language summary of its decision in *Order of 27 February 2014* (2 BvR 261/14).

off to emotional access. The witness examination by the police has already brought her life into disarray. Initial therapeutic progress may be put at risk, she states, if she is again confronted with the accused in the same room or has to describe the alleged crime—even with the public excluded—in the atmosphere of principal proceedings, and in the direct presence of the persons necessarily present in such proceedings. This would, she states, be tantamount to reliving the experience with spectators. . . .

. . . [T]he Regional Court rejected this petition. The complainant filed a constitutional complaint against this decision, linking the complaint with an application for a preliminary injunction. . . .

. . . [T]he Federal Constitutional Court may deal with a matter provisionally via a preliminary injunction if this is urgently needed to avert serious detriment, prevent imminent violence, or for another important reason urgently needed in the interest of the common good. In general, the reasons claimed for the unconstitutionality of the challenged sovereign act do not come into consideration here, unless the constitutional complaint is from the outset inadmissible or clearly unfounded. If the outcome is open, the Federal Constitutional Court must balance the consequences which would ensue if the preliminary injunction were not granted while the constitutional complaint were successful, against the disadvantages which would accrue if the desired preliminary injunction were granted but the constitutional complaint were rejected.

The constitutional complaint is neither from the outset inadmissible nor clearly unfounded.

It cannot be ruled out that the Regional Court has overlooked the significance and scope of the complainant’s fundamental right to physical integrity under . . . the Basic Law. . . . [T]here is reason to believe that the Regional Court reached its decision by considering the factors in the interests of the accused and of criminal justice, without being able reliably to consider the opposing interests of the complainant. In view of the specific indications of post-traumatic stress disorder as attested by a medical report and a report by the safe house for women and children, which explicitly refers to the risk of “long-term mental destabilisation” in the event of a direct examination, the Regional Court should not have simply referred to what is, in its opinion, the not clearly established risk to the complainant’s mental health. It does not seem unlikely that the court was obliged to remove any doubts regarding the extent of the imminent detriment and the likelihood of its realisation through additional questioning of the attending doctor or by calling on an expert witness, taking into account the complainant’s individual stress factor, so as to be able to make its decision, which requires the balancing of interests, on a sound factual basis.

According to the complainant’s testimony, it also does not seem clearly impossible that there was a violation of the prohibition of arbitrariness. Should the inadequate technical means have affected the court’s discretion in taking the decision, this would constitute an extraneous consideration, which could not be justified.

Culpable conduct of the court would not be necessary. Thus—depending on the specific circumstances of the case—the prospects of success of the constitutional complaint remain open.

In the context of the consequently required balancing, the reasons in favour of granting a preliminary injunction prevail. . . .

Asking About Gender in Courts

Judith Resnik (1996)*

. . . In the 1960s and 1970s, as women’s rights litigators fought for equality, they found some of the pain of discrimination in the very places to which they brought claims—the courts. Local and national efforts by women’s groups coalesced in 1980, when two fledgling organizations . . . created another new entity—the National Judicial Education Program to Promote Equality of Women and Men in the Courts; its purpose was to educate judges.

“Gender bias in the courts” became the shorthand attached to the issue, and gender bias task forces became the primary method for gathering information specific to a particular court system about injuries suffered by women within the justice system. . . . They questioned whether courts provide equal treatment as promised to identifiable categories of individuals. . . .

These task force projects are radical . . . not only in their inquiry but also in their frequent and consistent answer: that despite emblems of equal justice under law, courts are perceived not always as embodying fairness but sometimes as venues of discrimination. . . . [T]hese task force studies provide graphs, tables, charts, and testimonial evidence, containing serious charges about aspects of the legal process. . . . [W]omen seeking redress for “domestic” violence report that they are blamed, accused of provoking their attacks, treated as if their experiences were trivial, or disbelieved. . . .

Although addressing many issues, gender task forces devote much of their discussion of women litigants to two areas: family law and violence. . . .

. . . Task forces’ conventional framing of familial problems are grounds for feminists to pause, if not object. The criticisms are twofold: that the view of families themselves is partial and exclusive, and that reliance on family life to define women reinforces limited and stereotypic roles. Few reports consider the interrelationship between discrimination based on sexual orientation and that based on gender. The families discussed are traditional ones; lesbians’ families are not much in view, nor are the single women receiving state assistance who are so much the target of contemporary

* Excerpted from Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952 (1996).

ire. . . . [W]ithin task force reports, the standpoint of women in families becomes reified and universalized, obscuring the multiplicity that is women.

. . . [A]s many feminists argue, power and subordination—not families—are the place from which to begin considering women’s relation to law. The concerns of feminist theorists, who have identified sexuality and sexualized violence as key instruments of patriarchy, run the gamut from sexuality and violence within the family (misconstrued as “private” encounters) to sexuality and violence in commercial enterprises and/or claimed as expressive of free speech. While task forces share with these theorists concern about violence within the household, task force reports do not embark on major reconfigurations of gender relations or of families. . . .

. . . [T]ask forces attending to heterosexual family life and the victimized woman are both missing many arenas and practices of domination and equating women’s conceptual location with certain forms of family life. The risk is that task forces reflect, rather than question, the conventional definitions and locus of women. While framed largely as projects “about women,” task forces do not examine the variety of roles in which women are disputants. In the state task force reports, one does not read much about women as tenants, consumers, debtors and creditors, recipients of state assistance, defendants charged with neglecting children, prostitutes, owners of businesses, employees, or employers. . . .

Feminist theory—within and outside the law—has moved from early questions (aimed at making women visible and valorizing their activities) . . . to a complex discourse about the relationships among forms of feminism and the impact of postmodern theory on feminist claims. In contrast, task force reports address neither feminism itself nor the reasons for choosing among various feminist approaches. Instead, task forces remain engaged with the first set of issues: Where are the women? What happens to them? Is there discrimination? How is it manifest? . . .

. . . The interaction of gender task forces with the courts underscores the ease with which essentialism is deployed by law. Courts work with individuals (case by case) as well as with categories (such as legislation that varies remedies depending on whether one is a woman or a minority) all to strive for stable, clear criteria. Adjudication has these two modes, that of individual judgment or gross categorization; there is not much in between. The findings announced by task forces—about experiences of women and men or minorities and how these experiences differ by one’s gender or race and ethnicity—have succeeded in gaining attention from the judiciary and in legitimating the perceptions of subordinated groups. By using the quantified experiences of women to expose dominance, however, task forces may well reinforce assumptions of dichotomous gender differences rather than make problematic the association of women and men with particular views and make plain the diversity among women. . . .

. . . [T]ask forces demonstrate that essentialism is neither a strategy nor ideology easily left behind in law. Task forces thus illustrate both the power and the boundaries of contemporary feminist activities within courts.

* * *

Many jurisdictions have aimed to respond to concerns about courts’ inhospitable responses to women litigants and specifically those who have experienced gendered violence. Illustrative, albeit unusual in being hosted by an apex court, is a new office opened in 2008 by the Supreme Court of Argentina. It established the Domestic Violence Office (OVD) as one place to bring allegations of domestic violence. According to materials about OVD provided to the National Association of Women Judges, the office is composed of a team of lawyers, psychologists, social workers, and physicians. The team works to provide guidance to citizens on domestic violence issues, to receive allegations of domestic violence that may result in charges or more immediate separatory remedies, and to provide expert opinions to judges, lawyers, and prosecutors on matters of domestic violence. OVD is open at all hours to those in need of services. The team greets each arriving victim of domestic violence, interviews them, writes a risk assessment report, explains their options, and, if desired, helps them to fill out and submit a formal complaint. Since the office’s opening, the time it takes for a court to issue an injunction based on such a complaint has decreased from a maximum of four months to two days. As of 2020, OVD has helped to open five parallel provincial OVDs, providing similar services in provincial jurisdictions throughout the country. According to the OVD’s Statistical Report for the year 2019, in that year, the national OVD performed intakes in 12,457 individual cases, of which 76% involved women victims.

The idea that courts are supposed to be proactive providers of distinct services for victims of violence is also reflected in the work of the International Criminal Court. As discussed above, the Rome Statute of the ICC was the first international agreement to classify rape as both a war crime and a crime against humanity.

Policy Paper on Sexual and Gender-Based Crimes International Criminal Court (2014)*

. . . 2. Recognising the challenges of, and obstacles to, the effective investigation and prosecution of sexual and gender-based crimes, the Office [of the Prosecutor] elevated this issue to one of its key strategic goals in its Strategic Plan 2012-2015. The Office has committed to integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their

* Excerpted from OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES (2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

families and communities. It will increasingly seek opportunities for effective and appropriate consultation with victims' groups and their representatives to take into account the interests of victims. . . .

16. The Office considers gender-based crimes as those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. . . .

18. Other crimes such as torture, mutilation, persecution, inhuman acts, and outrages upon personal dignity, may also have a sexual and/or gender element.

19. Both sexual and gender-based crimes may be motivated by underlying inequalities, as well as a multiplicity of other factors, *inter alia*, religious, political, ethnic, national, and economic reasons.

20. . . . [T]he Office will apply a gender analysis to all of the crimes within its jurisdiction. This involves an examination of the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. . . . [I]t requires a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities. The approach by the Office will also encompass an understanding of the use of certain types of crimes, including acts of sexual violence, to diminish gender, ethnic, racial, and other identities.

21. The Office will strengthen the concrete steps it has taken to enhance the integration of a gender perspective and expertise . . . : during preliminary examinations; in the development of case hypotheses and investigation and prosecution strategies; in the analysis of crime patterns; in the screening, selection, interview, and testimony of witnesses; at the sentencing and reparation stages; and in its submissions on appeal and witness protection, including after the conclusion of proceedings. The Office will also increase its efforts to ensure that staff have the [necessary] skills, knowledge, and sensitivity

22. The Office will take a victim-responsive approach in its activities. . . . The Office will increasingly seek opportunities for effective and appropriate engagement and consultation with victim groups The Office understands that not all victims have the same interests or concerns

59. In conflict situations, acts of sexual and gender-based crimes rarely occur in isolation from other crimes. The victim's experience should therefore be understood and documented in a comprehensive manner, as well as with a specialised focus on sexual or gender-based crimes, where relevant. . . .

99. The Office will propose sentences which give due consideration to the sexual and gender dimensions of the crimes charged . . . as an aggravating factor and reflective of the gravity of the crimes committed. . . .

100. The commission of a crime with a motive involving discrimination, including on the grounds of gender, or where the victim is particularly vulnerable, in itself constitutes aggravating circumstances.

101. Even where the evidence precluded the inclusion of sexual and gender-based crimes in the charges, the Office will give due consideration to any sexual or gender dimension involved in the crimes charged, which may be treated as an aggravating factor or as part of the gravity factor for the purpose of sentencing. . . .

* * *

Where are the people who are subjected to violence in the decision-making process? Do they have a constitutional role, and if so, what shape does it take?

Gueye & Salmerón Sánchez

European Court of Justice (Fourth Chamber)

C-483/09 & C-1/10 (2011)

THE COURT (Fourth Chamber), composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen (Rapporteur), A. Prechal and E. Jarašiūnas, Judges, . . . gives the following [judgment:]

. . . 7. Article 2(1) of the Framework Decision [of 15 March 2001 on the standing of victims in criminal proceedings (“the Framework Decision”)] . . . provides:

‘Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.’

8. The first paragraph of Article 3 of the Framework Decision . . . provides that ‘[e]ach Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.’

9. Article 8 of the Framework Decision . . . provides:

‘1. Each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families . . . , particularly as regards their safety and protection of their privacy, where the

competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy. . . . ’

19. Mr Gueye and Mr Salmerón Sánchez were separately convicted of crimes of domestic violence . . . and the sentences imposed on them included . . . a prohibition on being within 1 000 metres (Mr Gueye) and 500 metres (Mr Salmerón Sánchez) of their victims or having any contact with them

20. . . . [A]fter the imposition of those ancillary penalties the two offenders resumed living together with their respective victims at the request of those victims. . . .

21. . . . [T]he Juzgado de lo Penal No 1 de Tarragona (Criminal Court No 1 of Tarragona) found Mr Gueye and Mr Salmerón Sánchez guilty of failure to comply with . . . the prohibition on approaching their victims[. They appealed this ruling to the Audiencia Provincial de Tarragona, which referred a question to this Court.] . . .

49. . . . [T]he referring court seeks to ascertain . . . whether Articles 2, 3 or 8 of the Framework Decision must be interpreted as precluding the mandatory imposition of an injunction to stay away for a minimum period . . . on persons who commit crimes of violence within the family, even when the victims of those persons oppose the application of such a penalty. . . .

56. The obligations laid down in Article 2(1) of the Framework Decision are intended to ensure that a victim can effectively and adequately take part in the criminal proceedings, which does not imply that a mandatory injunction to stay away such as that at issue in the main proceedings cannot be imposed contrary to the wishes of the victim.

57. Article 3 of the Framework Decision, while imposing on Member States the obligation to safeguard the possibility for victims to be heard during proceedings and to supply evidence, leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement that objective

58. However, in order not to deprive the first paragraph of Article 3 of the Framework Decision of much of its practical effect or to infringe the obligations stated in Article 2(1) thereof, those provisions imply, in any event, that the victim is to be able to give testimony in the course of the criminal proceedings

59. Thus, to guarantee that the victim can effectively and adequately take part in the criminal proceedings, his or her right to be heard must permit not only the possibility of objectively describing what happened, but also the opportunity to express his or her opinion.

60. That procedural right to be heard under the first paragraph of Article 3 of the Framework Decision does not confer on victims any rights in respect of the choice of form of penalties to be imposed on the offenders . . . nor in respect of the level of those penalties.

61. . . . [W]here a Member State in the exercise of its powers to enforce the law ensures that the criminal law offers protection against acts of domestic violence, the objective is not only to protect the interests of the victim as he or she perceives them but also other more general interests of society. . . .

63. As regards, lastly, Article 8 of the Framework Decision, it is clear from Article 8(1) that the aim is to ensure a ‘suitable level of protection for victims,’ particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a ‘serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.’ . . .

70. . . . Articles 2, 3 and 8 of the Framework Decision must be interpreted as not precluding the mandatory imposition of an injunction to stay away for a minimum period . . . on persons who commit crimes of violence within the family, even when the victims of those crimes oppose the application of such a penalty. . . .

COURTS, CLIMATE CHANGE, AND THE GLOBAL PACT FOR THE ENVIRONMENT

DISCUSSION LEADERS

DANIEL ESTY, LAURENT FABIUS, AND DOUGLAS KYSAR

III. COURTS, CLIMATE CHANGE, AND THE GLOBAL PACT FOR THE ENVIRONMENT

DISCUSSION LEADERS:

DANIEL ESTY, LAURENT FABIUS, AND DOUGLAS KY SAR

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Most of these materials come from a world that had not yet faced the pandemic of COVID-19 or the wave of demonstrations and outrage triggered by the death of George Floyd in May 2020. BLACK LIVES MATTER protests around the world have highlighted profound questions about racial justice and structural inequality—and thus who enjoys the benefits of contemporary life. These concerns have shifted the focus from environmental challenges to public health and economic threats as well as to racism and policing. Yet even as we write, the links between climate change and new diseases are emerging. Moreover, the relationships between racial and environmental justice have been documented for decades, as communities of color and segments of the globe disproportionately bear the burden of these harms. Coping with a “new normal” has to include questions regarding the sustainability of the planet and human well-being broadly conceived.

The risks to the environment, both locally and globally, are as catastrophic as this pandemic. Over the last year, dramatic fires, melting ice, and devastating floods—in addition to the COVID-19 health crisis and related economic distress—have put the inhabitants of this planet in harm’s way in an unprecedented fashion. Courts continue to confront questions about whether and how to respond, as they seek to sort out misinformation from facts, and also confront hostility to expertise and the suppression of scientific information.

This Chapter continues conversations begun at the 2019 Global Constitutionalism Seminar, as awareness of the precarious state of our world becomes all the more acute. We begin with debates about what role courts should play, a question

that intersects with what remedies they can and should provide in response to climate change. The Chapter then turns to issues of knowledge about and accountability for current and future environmental harms. This segment explores how courts determine what information governments and corporations must make public as well as who has the right to access that information and require disclosure.

Recognizing that global problems often inspire calls for global solutions, the Chapter ends with an examination of efforts to constitute a Global Pact for the Environment. The 2015 Paris Climate Change Agreement established an array of policy goals and nationally determined contributions (NDCs) on the part of the 180 signatory nations. The Agreement and the commitments it reflects have served as a foundation for litigation in national courts to ensure follow-through and action to combat climate change. In 2020, environmental experts and national governments are hoping to build upon this foundation to shape broader commitments to a sustainable future with a Global Pact for the Environment.

DEBATING THE ROLE OF COURTS

This section examines conflicts over courts' authority to handle climate change litigation. Our questions include what legal bases authorize courts to exercise jurisdiction over claims of environmental harms, the duties states have under domestic or international law to know and to mitigate harms, and the remedies that can flow from breaches.

We begin with a 2017 advisory opinion from the Inter-American Court of Human Rights, in which the IACHR addressed a question from Colombia about the scope of its duties of environmental protection under regional and international legal instruments.

State Obligations in Relation to the Environment **Inter-American Court of Human Rights** **Advisory Opinion OC-23/17 (2017)**

[Judges Roberto F. Caldas, Eduardo Ferrer Mac-Gregor Poisot, Eduardo Vio Grossi, Humberto Antonio Sierra Porto, Elizabeth Odio Benito, Eugenio Raúl Zaffaroni, and L. Patricio Pazmiño Freire:]

1. . . . [T]he Republic of Colombia . . . presented a request for an advisory opinion . . . concerning State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity The Court was asked to determine “how the Pact of San José [(the American Convention on Human Rights)] should be interpreted when there is a danger that the construction and operation of major new infrastructure projects may have severe effects on the marine

environment in the Wider Caribbean Region and, consequently, on the human habitat that is essential for the full enjoyment and exercise of the rights of the inhabitants of the coasts” In addition, the requesting State asked the Court to determine “how the Pact of San José should be interpreted in relation to other treaties concerning the environment . . . , as well as the respective international obligations concerning prevention, precaution, mitigation of damage, and cooperation between the States potentially affected.” . . .

35. . . . [O]wing to the general interest of its advisory opinions, their scope should not be restricted to specific States. . . . [T]he Court will rule on the State obligations with regard to the environment that are most closely related to the protection of human rights, which is the main function of this Court. . . .

56. . . . [The Inter-American human rights system establishes the right to a healthy environment] in Article 11 of the Protocol of San Salvador:

1. Everyone shall have the right to live in a healthy environment
2. The States Parties shall promote the protection, preservation, and improvement of the environment. . . .

59. The human right to a healthy environment . . . has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. . . .

62. . . . [A]s an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. . . .

64. . . . [D]amage to the environment may affect all human rights, in the sense that the full enjoyment of all human rights depends on a suitable environment. Nevertheless, some human rights are more susceptible than others to certain types of environmental damage. . . .

66. The . . . rights that are particularly vulnerable to environmental impact include the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property, and the right to not be forcibly displaced. . . .

67. The . . . effects on these rights may be felt with greater intensity by certain groups in vulnerable situations . . . [, including] indigenous peoples, children, people living in extreme poverty, minorities, . . . people with disabilities, . . . [and] women. . . .

77. . . . States may not only be found internationally responsible for acts or omissions attributed to them within their territory, but also for those acts or omissions committed outside their territory, but under their jurisdiction. . . .

108. . . . [T]he right to life in the American Convention is essential because the realization of the other rights depends on its protection. . . . Article 4* of the American Convention . . . not only presupposes that no person may be deprived of his or her life arbitrarily (negative obligation) but also . . . requires States to take all appropriate measures to protect and preserve the right to life (positive obligation) of all persons subject to their jurisdiction.

109. In addition, States must . . . create an appropriate legal framework to deter any threat to the right to life; establish an effective system of justice capable of investigating, punishing and providing redress for any deprivation of life by State agents or private individuals, and safeguard the right of access to the conditions that ensure a decent life, which includes adopting positive measure to prevent the violation of this right. . . . Among the conditions required for a decent life the Court has referred to access to, and the quality of, water, food and health, and . . . environmental protection

125. . . . [I]n the context of environmental protection, States must fulfill a series of obligations . . . (1) the obligation of prevention; (2) the precautionary principle; (3) the obligation of cooperation, and (4) the procedural obligations relating to environmental protection in order to establish and determine the State obligations derived from . . . these provisions together with the obligations to respect and to ensure the rights to life and personal integrity

145. The specific measures States must take [to comply with the obligation of prevention] include the obligations to: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred. . . .

175. . . . [T]he precautionary principle refers to the measures that must be taken in cases where there is no scientific certainty about the impact that an activity could have on the environment. . . . [T]he Rio Declaration establishes that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. . . .

* Article 4 of the American Convention on Human Rights provides:

1. Every person has the right to have his life respected. This right shall be protected by law. . . . No one shall be arbitrarily deprived of his life.

181. Article 26* of the American Convention establishes the obligation of international cooperation with a view to the development and protection of economic, social and cultural rights. Several articles of the Protocol of San Salvador also refer to cooperation between States. . . .

186. . . . [T]he duty to cooperate is an obligation between States. International law has defined the following specific duties . . . in relation to environmental matters in order to comply with this obligation: (1) the duty to notify, and (2) the duty to consult and negotiate with potentially affected States . . . as well as (3) the possibility of sharing information established in numerous international environmental instruments. . . .

211. . . . [A] series of procedural obligations exist with regard to environmental matters. . . . In this regard, inter-American jurisprudence has recognized the instrumental nature of certain rights established in the American Convention

212. . . . [These obligations relate to]: (1) access to information; (2) public participation, and (3) access to justice, all in relation to the States' environmental protection obligations. . . .

243. The obligations described above have been developed in relation to the general obligations to respect and to ensure the rights to life and to personal integrity, because these were the rights that the State referred to in its request. . . . However, this does not mean that the said obligations do not exist with regard to the other rights mentioned in this Opinion as being particularly vulnerable in the case of environmental degradation

244. For the above reasons . . . the Court decides unanimously, that: . . .

To respect and to ensure the rights to life and to personal integrity of the persons subject to their jurisdiction, States have the obligation to prevent significant environmental damage within or outside their territory and, to this end, must regulate, supervise and monitor activities within their jurisdiction that could produce significant environmental damage; conduct environmental impact assessments when there is a risk of significant environmental damage; prepare a contingency plan to establish safety measures and procedures to minimize the possibility of major environmental accidents, and mitigate any significant environmental damage that may have occurred

* Article 26 of the American Convention on Human Rights provides:

The States Parties undertake to adopt measures, both internally and through international cooperation, . . . with a view to achieving progressively . . . the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The 2019 Global Constitutionalism Seminar volume highlighted two trial-court decisions—*The State of the Netherlands v. Urgenda Foundation*, C/09/456689 (2015) and *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016). In both cases, judges found that climate change was justiciable and remediable by the judiciary. On appeal, the two cases diverged, as the Supreme Court of Netherlands affirmed and the Court of Appeals for the Ninth Circuit rejected a role for the judiciary. Our question is how the legal frameworks for adjudication in each jurisdiction explain the differences in analyses.

The State of the Netherlands v. Urgenda Foundation
Supreme Court of the Netherlands (Civil Division)
Number 19/00135 (2019)

[Judgement rendered by Vice President C.A. Streefkerk as chairman and justices G. Snijders, M.V. Polak, T.H. Tanja-van den Broek and H.M. Wattendorff:]

[Urgenda Foundation and 900 Dutch citizens sued the Dutch government to reduce the country’s greenhouse gas emissions. The plaintiffs argued that the Netherlands has a duty of care to reduce emissions under *inter alia* Articles 2* and 8** of the European Convention on Human Rights (ECHR). The District Court of The Hague ordered the state to reduce annual greenhouse gas emissions by at least 25% at the end of 2020 compared to emissions in 1990. The Hague Court of Appeal affirmed.]

. . . 5.6.3 . . . The question is whether the global nature of [greenhouse gas] emissions and the consequences thereof [impose a state obligation to reduce emissions under] Articles 2 and 8 ECHR. . . .

5.7.2 . . . [C]limate change is a global problem that needs to be solved globally. Where emissions of greenhouse gases take place from the territories of all countries and all countries are affected, measures will have to be taken by all countries. . . .

* Article 2 of the European Convention on Human Right provides:

1. Everyone’s right to life shall be protected by law. . . .

** 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.
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.

5.7.7 . . . [T]he defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. . . .

5.8 . . . Articles 2 and 8 ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do "their part" to counter [the danger of climate change]. . . .

6.1 . . . However, this does not yet answer the question of what this obligation on the part of the State means in concrete terms. . . .

7.4.2 . . . The State argues that it intends to . . . [accelerate emissions] reductions . . . after 2020 and that it prefers this reduction path over the [25% to 40% reduction in greenhouse gas emissions in 2020 compared to 1990 suggested by the Fourth Intergovernmental Panel on Climate Change Assessment Report]. The question, however, is whether an accelerated reduction of greenhouse gas emissions in the Netherlands after 2020 can indeed achieve the same result. . . .

7.4.3 All greenhouse gas emissions lead to a reduction in the carbon budget still available. . . . [F]or each postponement of emissions reductions, the reduction measures to be taken at a later date will have to be increasingly far-reaching and costly in order to achieve the intended result, and it will also be riskier. . . .

7.4.6 . . . The State has not provided any insight into which measures it intends to take in the coming years . . . [that] would be both practically feasible and sufficient

7.5.2 The State has also argued . . . that it meets its obligations under Articles 2 and 8 ECHR by taking adaptation measures . . . and that it therefore does not have to meet the 25-40% target. . . . [I]t has not been demonstrated or made plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented by such measures. . . .

8.1 The State argues . . . that the District Court's order to reduce Dutch greenhouse gas emissions by at least 25% in 2020 compared to 1990 levels . . . is impermissible for two reasons. The first reason is that the order amounts to an order to create legislation The second reason is . . . that it is not for the courts to make the political considerations necessary

8.2.1 If the government is obliged to do something, it may be ordered to do so by the courts This is a fundamental rule of constitutional democracy

8.2.6 . . . [T]he courts are only not permitted to issue an order to create legislation with a particular, specific content. . . . [C]ourts are [allowed] to issue a declaratory

decision . . . that the omission of legislation is unlawful They may also order the public body in question to take measures . . . to achieve a certain goal, as long as that order does not . . . create legislation with a particular content. . . .

8.2.7 . . . [The District Court’s] order does not amount to an order to take specific legislative measures, but leaves the State free to choose the measures to be taken in order to achieve a 25% reduction in greenhouse gas emissions by 2020. . . .

8.3.1 This brings the Supreme Court to . . . the State’s more general argument that it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions.

8.3.2 . . . [T]he reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound. . . .

8.3.4 This case involves an exceptional situation. . . . [T]here is the threat of dangerous climate change and it is clear that measures are urgently needed. . . . The state is obliged to do ‘its part’ in this context. . . . [T]hat duty follows from Articles 2 and 8 ECHR, on the basis of which the State is obliged to protect the right to life and the right to private and family life of its residents. . . . The policy that the State [has pursued] since 2011 and intends to pursue in the future, . . . whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this

8.3.5 . . . [T]he State is . . . obliged to achieve the aforementioned reduction of at least 25% by 2020.

* * *

Article III of the U.S. Constitution provides that federal courts have jurisdiction over “all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority.” In discussing what constitutes a “Case” over which a federal court has jurisdiction, the U.S. Supreme Court has shaped a three-prong test to determine a plaintiff’s standing to bring a suit. A plaintiff must have (1) suffered a concrete, particularized, and actual or imminent injury (2) that was caused by or has a nexus to the challenged conduct and (3) is likely redressable by a favorable judicial decision. In 2016, the U.S. District Court for the District of Oregon concluded that the plaintiffs (a group of children) in *Juliana v. United States* met this test through their allegations that defendants (the President, the United States, and federal agencies) had failed to control fossil fuel use, which resulted in climate change injuries that violated the plaintiffs’ due process right to a livable environment and breached defendants’ obligations under the public trust doctrine. In 2020, the U.S. Court of Appeals for the Ninth Circuit reversed.

Juliana v. United States
U.S. Court of Appeals for the Ninth Circuit
947 F.3d 1159 (9th Cir. 2020)*

Before: MARY H. MURGUIA and ANDREW D. HURWITZ, Circuit Judges, and JOSEPHINE L. STATON, District Judge. . . .

[Opinion of Circuit Judge Hurwitz:]

. . . The plaintiffs are twenty-one young citizens, an environmental organization, and a “representative of future generations.” . . . The operative complaint accuses the government of continuing to “permit, authorize, and subsidize” fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs. Some plaintiffs claim psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. . . . The plaintiffs seek declaratory relief and an injunction ordering the government to implement a plan to “phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide].” . . .

The government . . . argues that the plaintiffs lack . . . standing [under Article III of the U.S. Constitution] to pursue their constitutional claims. . . .

The district court correctly found the injury requirement met. . . . Jamie B., for example, claims that she was forced to leave her home because of water scarcity Levi D. had to evacuate his coastal home multiple times because of flooding. . . . [A]t least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked. . . .

. . . The causal chain here is sufficiently established. The plaintiffs’ alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation. A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%. . . . About 25% of fossil fuels extracted in the United States come from federal waters and lands, an activity that requires authorization from the federal government. . . .

The more difficult question is whether the plaintiffs’ claimed injuries are redressable [T]heir sole claim is that the government has deprived them of a substantive constitutional right to a “climate system capable of sustaining human life,” and they seek remedial declaratory and injunctive relief.

* After the three-judge circuit panel dismissed the plaintiffs’ claims for lack of standing, the plaintiffs filed a petition for an *en banc* rehearing by the Ninth Circuit. The petition is pending as of June 2020.

Reasonable jurists can disagree about whether the asserted constitutional right exists. . . . But . . . “not all meritorious legal claims are redressable in federal court.” . . . [T]he plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court’s power to award. Redress need not be guaranteed, but it must be more than “merely speculative.”

The plaintiffs first seek a declaration that the government is violating the Constitution. But that relief alone is not substantially likely to mitigate the plaintiffs’ asserted concrete injuries. A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action. . . .

We are therefore skeptical that the first redressability prong is satisfied. But even assuming that it is, the plaintiffs do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court. There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs’ requested remedial plan. . . .

. . . [I]n some circumstances, courts may order broad injunctive relief while leaving the “details of implementation” to the government’s discretion. But, even under such a scenario, the plaintiffs’ request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government’s response to the order, which necessarily would entail a broad range of policymaking. And inevitably, this kind of plan will demand action not only by the Executive, but also by Congress. Absent court intervention, the political branches might conclude . . . that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less robust approach to addressing climate change than the plaintiffs believe is necessary. . . . And, given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government’s compliance with any suggested plan for many decades. . . .

. . . We reluctantly conclude . . . that the plaintiffs’ case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes. . . .

[Dissent of District Judge Staton, sitting by designation]:

. . . My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all of the delicate

foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.

Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation’s willful destruction. So viewed, plaintiffs’ claims adhere to a judicially administrable standard. And considering plaintiffs seek no less than to forestall the Nation’s demise, even a partial and temporary reprieve would constitute meaningful redress. . . .

. . . [M]y colleagues are skeptical that curtailing the government’s facilitation of fossil-fuel extraction and combustion will ameliorate the plaintiffs’ harms. I am not, as the nature of the injury at stake informs the effectiveness of the remedy. . . .

. . . [P]laintiffs have a constitutional right to be free from *irreversible and catastrophic climate change*. . . . [T]he injury at issue is not climate change writ large; it is climate change beyond the threshold point of no return. As we approach that threshold, the significance of every emissions reduction is magnified.

The majority portrays any relief we can offer as just a drop in the bucket. . . . But we are perilously close to an overflowing bucket. These final drops matter. *A lot*. Properly framed, a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm. Accordingly, I conclude that the court could do something to help the plaintiffs before us.

And “something” is all that standing requires. . . .

The majority laments that it cannot step into the shoes of the political branches, but appears ready to yield even if those branches walk the Nation over a cliff. This deference-to-a-fault promotes separation of powers to the detriment of our countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles. . . . [T]he doctrine of judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that we instruct the other branches as to the constitutional limitations on their power. . . .

. . . [T]he majority nonetheless suggests that this case is “special”—and beyond our redress—because plaintiffs’ requested relief requires (1) the messy business of evaluating competing policy considerations to steer the government away from fossil fuels and (2) the intimidating task of supervising implementation over many years, if not decades. I admit these are daunting tasks, but we are constitutionally empowered to undertake them. There is no justiciability exception for cases of great complexity and magnitude. . . .

The majority also expresses concern that any remedial plan would require us to compel “the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change[.]” Even if the operative complaint is fairly read as requesting an affirmative scheme to address all drivers of climate change, however caused, such an overbroad request does not doom our ability to redress those drivers implicated by the conduct at issue here. Courts routinely grant plaintiffs less than the full gamut of requested relief, and our inability to compel legislation that addresses emissions beyond the scope of this case . . . speaks nothing to our ability to enjoin the government from exercising its discretion in violation of plaintiffs’ constitutional rights. . . .

Where is the hope in today’s decision? Plaintiffs’ claims are based on science, specifically, an impending point of no return. If plaintiffs’ fears, backed by the government’s own studies, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little? . . .

Courting Disaster

R. Henry Weaver and Douglas A. Kysar (2017)*

. . . [C]limate change threatens to routinize catastrophe. . . . These catastrophes, in turn, destabilize the normative order established by law. . . . To deny catastrophe’s power—and to avoid a descent into nihilism—law must reframe even these biblical floods as human injustices. . . . [W]e consider the ability of tort law to accomplish that reframing.

In the Anglo-American legal tradition, tort helps to define law’s normative reach. . . . Tort establishes standards of behavior—duties—in a way that makes tort law generalist, majoritarian, and persistent. It is *generalist* in the sense that it is comprehensive: the court must always choose whether to accept or reject a plaintiff’s plea for relief. . . . Even wrongs not yet socially perceived as such may be brought to a court’s attention and the complaining party will be entitled to a response. The pronouncements of tort law are *majoritarian* because tort understands itself to enforce collective standards of conduct, even if courts are not directly responsive to electoral results. Finally, the norms of tort are *persistent* in the sense that they are more resistant to sudden upheaval than many norms established by other legal means. These three characteristics, at least in theory, enable tort to confront catastrophe. . . .

[However, when] presented with claims of massive harm, common-law courts often find their way to a judgment for defendants. In recent years, a variety of self-limiting procedural and jurisdictional doctrines have arisen to effectuate this approach. Even when a court reaches the merits of a disaster lawsuit, it will often read doctrines

* Excerpted from R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME LAW REVIEW 295 (2017). Reprinted with permission. © *Notre Dame Law Review*, University of Notre Dame. The Global Constitutionalism Seminar bears responsibility for any errors that have occurred in reprinting or editing.

narrowly—or ignore them entirely—in order to avoid an enormous recovery for the plaintiff. . . .

The central challenge for a court that seeks to define a duty of care for the climate lies in the remote and attenuated effects of greenhouse gas emissions Since the activities of no one person, entity, or even nation can influence global change . . . no one can be held responsible for the combined effect But the threat of “tipping points” and sudden, nonlinear consequences creates at least an imaginable possibility that “[a single individual’s] contribution was *the one* that pushed the planet over the edge.” Since the probability of such an event is unknowable, and its consequences irreversible, no approach other than precaution seems to respect the rights and interest of future generations. Complex systems . . . demand moral attention to issues that the proponents of risk-utility analysis would discount: precaution, distribution, and intergenerational justice. . . .

But it does not suffice to demonstrate that a duty exists. A climate change plaintiff must also show that the defendant, by its action or inaction, has breached that duty. . . . The focus on the global dimensions of climate change—its breathtaking scale and severity—may undermine the plaintiff’s case at the causation stage. . . . The orthodox principle of “but-for causation” requires that the defendant’s activity was a necessary condition of the plaintiff’s harm. But although the science of climate change is well understood, the sheer complexity of the climate system frustrates most attempts to link particular harms to greenhouse gas emissions. . . .

The claims of climate change plaintiffs challenge the assumptions that undergird traditional understandings of liability and causal attribution. Common-law courts are beckoned to learn to “think ecologically:”

Distances that seemed remote become more intimate, as the natural pathways that connect them are brought into view. Accordingly, it becomes less comfortable to maintain the traditional assumptions that “natural” and “distant” interests are less important than those that are “manmade” and “immediate.”

Thinking ecologically, courts would pay more attention to the reality of complex and catastrophic risks. Where those risks are severe, though uncertain or temporally distant, a judge would not reject the plaintiff’s claim of injury for those reasons alone. . . .

. . . [Even small] victories [for climate change plaintiffs] embody the ways in which litigation can spur urgent and creative responses to complexity and catastrophe. . . . [C]ourts can demand action from other branches of government either through injunctive relief or simple exhortation. . . . In a constitutional scheme of divided but overlapping authority, the judiciary can serve not only to temper excess but also to break up gridlock. . . . [V]iewed through the lens of legal narrative, “the creation of a

new legal claim has power wholly apart from the power of a litigation victory (or litigation loss) or a court decision.” Even in defeat, the climate change plaintiff may inspire new understandings of our confrontation with catastrophe. . . .

. . . Although tort enjoys a preferred position in some respects, given its explicit focus on collective norm articulation, . . . administrative and constitutional adjudication may serve similar ends: to rouse other branches of government to action and to dignify the narratives of individual litigants. . . .

The error of the nihilist judge is to refuse responsibility over the extraordinary and the indeterminate. . . . [C]andidly or covertly, nihilist judges abdicate their duty to decide because of the complex or dramatic nature of a harm and the remedy it seems to necessitate. For instance, judges seem to believe that, short of ordering a wholesale restructuring of the global economy, their only option in climate change litigation is to avoid exercising jurisdiction in the first place. . . . Courts will inevitably fail to mount a complete response to catastrophe, but they must try. And they may find . . . that the trying itself reshapes the normative landscape.

* * *

Even when courts find that a government has a legal duty to mitigate climate change, questions have emerged about whether that duty applies to effects taking place outside a country’s borders. On June 10, 2016, the Norwegian Government issued ten petroleum production licenses. Greenpeace Nordic Association and Nature and Youth argued that the decision violated Article 112* of the Norwegian Constitution. The Oslo District Court concluded that Article 112 imposes a duty on the state to take appropriate measures to protect the environment but that the duty did not include consideration of the environmental effects of exported Norwegian petroleum. The plaintiffs appealed to the Borgarting Court of Appeal.

* Article 112 of the Constitution of Norway provides:

Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. . . .

The authorities of the state shall take measures for the implementation of these principles.

**Greenpeace Nordic Association and Nature and Youth v. Ministry of
Petroleum and Energy**

Borgarting Court of Appeal, Norway

Case No. 18-060499ASD-BORG/03 (2020)*

[Judges Eirik Akerlie, Hedda Remen, and Thom Arne Hellerslia:]

. . . Decisions in cases involving fundamental environmental issues often entail political balancing and prioritisation . . . [that] should be made by popularly elected bodies and not by the courts. Judicial review in this area might juridify topics that are at the centre of the political debate. In this case, this consideration comes to the fore, in that Norway’s most important industry [(petroleum activities)] and what many . . . believe is the most important environmental challenge the world is facing [(climate change)] are arrayed against each other. . . . The environment is fundamental . . . for humans’ living conditions, and . . . it does not seem unnatural to understand Article 112 to mean . . . the courts must be able to set a limit on the Government’s actions. . . .

. . . However, . . . not all environmental harm is covered. . . . The severity of the environmental harm will thus be the key criterion

An initial question is whether the emissions resulting from the decision being challenged are to be assessed in isolation from or together with other emissions that in total contribute to the climate changes. . . . [E]ach individual emission in Norway [and] the total emissions from Norwegian petroleum activities . . . are marginal when compared with the total global emissions. Article 112 of the Norwegian Constitution will lose its function as a limit for this type of emissions if the harmful effects are only assessed in isolation Concern for effective protection therefore indicates that even though the starting point must be emissions resulting from the decision being challenged, the total effect on the climate and how the emissions are included in other emissions must also be examined. . . .

The international aspect of the climate issue leads to another question: Is it only the effects of the climate change in Norway that are relevant, or the global effects as well? . . . The wording—“every person has the right to an environment . . .”—is entirely general in nature. . . . [A]t the same time . . . the Norwegian Constitution does not grant global rights but instead has a limited scope of application—jurisdiction, both personal and territorial. Other provisions in the human rights chapter also use terms such as “every person” and “no person,” while at the same time it is clear that some form of association with Norway is required before the provisions can be invoked [I]t must

* Greenpeace Nordic Association and Nature and Youth filed an appeal of the Borgarting Court of Appeal’s decision before the Supreme Court of Norway. The Supreme Court granted the leave to appeal on April 20, 2020.

be assumed that Article 112 . . . protects against the consequences [of] environmental harm . . . in Norway.

It can be questioned whether the scope of application is expanded for actions that are based in Norway but result in environmental harm in other countries. The international law “no harm” principle means that a state is obliged to prevent environmental harm in neighbouring countries and possibly provide compensation for it. . . . However, the principle has been developed with the intention of assigning responsibility for harmful actions, whereas Article 112 of the Norwegian Constitution involves an individual’s right to an environment. . . . [T]he principle has not been expressed in the wording of Article 112, nor have any clear references been made to the principle in the preparatory works. The key will therefore have to be the effects arising in Norway. . . .

. . . [I]t is uncertain whether the production licences will at all be followed up with production of petroleum and thereby lead to emissions, and in that event how much. If commercially exploitable discoveries are made, the largest emissions will occur through combustion after export. . . . [Even when] the emissions from the combustion are also included, the significance will . . . be marginal in comparison with total global emissions. . . .

The emissions from the combustion must also be assessed in a wider context, against the total emissions. The targets in the Paris Agreement mean that the total global emissions must be reduced dramatically and in the course of a brief time. . . .

. . . [H]owever, a gradual phasing out of Norwegian exports of oil and gas does not necessarily mean that the world’s energy requirements . . . will be covered in a more climate-friendly manner. If gas is replaced by coal, cuts in gas exports will have a negative CO₂ effect. If gas is replaced by alternative energy sources, the effect will be positive. If the gas competes with gas from other suppliers, the effect might be nil. . . . The actual significance of Norwegian exports of oil and gas for global emissions is therefore complicated and controversial

. . . [E]ven if the significance of the global emissions is dramatic, it will be the environmental effects in Norway that are the key issue for the assessment under Article 112 of the Norwegian Constitution The effects in Norway may be serious enough, but they appear to be more limited and of a different nature than the global effects. A number of measures have been put in place to limit the effects in Norway. . . .

. . . [T]he risk of local environmental harm is so low that the decision is not contrary to Article 112 of the Norwegian Constitution. . . .

* * *

Between October 2019 and January 2020, the Constitutional Council of France upheld three measures developed by Parliament as appropriately balancing respect for

constitutional rights with the need to prevent additional harm to the environment. In a sequence of three cases, the Council identified the environment as a factor to be accounted for under French law. In *Total v. Prime Minister*, the Council permitted the levy of a tax incentivizing the use of renewable biofuels. In a second case not excerpted here, the Council for the first time reviewed a nonbinding programming law for compliance with the French Charter for the Environment. In *UIPP v. Prime Minister*, the Council clarified that environmental protection is an “objective of constitutional value” and applies beyond France’s borders. These three decisions can be seen as marking the emergence of a distinctive and new form of “green” jurisprudence.

Total v. Prime Minister
Constitutional Council of France
Decision No. 2019-808 QPC (2019)*

[President Laurent Fabius, Judges Claire Bazy Malaurie, Alain Juppé, Dominique Lottin, Corinne Luquiens, Nicole Maestracci, Jacques Mézard, François Pillet, and Michel Pinault delivered the opinion of the Constitutional Council of France:]

The Council of State brought a constitutional challenge to the Constitutional Council on July 24, 2019. This challenge was posed on behalf of the company Total Raffinage France[, which operates in the petroleum industry.]

1. Article 266 *quindecies* of the code of customs, in the form resulting from the law of December 28, 2018 . . . , instates a tax incentivizing the incorporation of biofuels. The last paragraph under section 2 of section B of paragraph V states: “Products with a base of palm oil are not considered to be biofuels.”

2. The petitioning company challenges the fact that these provisions exclude biofuels produced from palm oil from the favorable tax regime First of all, the petitioners claim that this exclusion, without providing any possibility for demonstration of an absence of environmental toxicity for certain forms of palm oil cultivation, does not match the objective of the legislature of increasing the incorporation of renewable energy in fuels in order to fight against greenhouse gas emissions. Second of all, the petitioning company claims that the contested provisions institute an unjustified difference in treatment between fuels based in palm oil and those issued from other oleaginous plants This would result in a violation of the [principle] of equality

3. . . . In virtue of Article 34** of the Constitution, the legislature determines the rules according to which contributions must be assessed in respect of constitutional

* Translation by Sofea Dil (Yale Law School, J.D. Class of 2021).

** Article 34 of the Constitution of France provides:

Statutes shall determine the rules concerning . . . the base, rates, and methods of collection of all types of taxes

principles and taking into account the characteristics of each tax. In particular, in order to ensure respect of the principle of equality, the legislature must found its assessment in criteria that are objective and rational as they relate to the goals proposed. . . .

5. . . . [R]aw materials that, even though they satisfy the criteria for durability [in the definition of renewable energy], damage the environment under the two cumulative patterns that follow do not count beyond a certain energy threshold: on one hand, the cultivation of these raw materials and their use for the production of biofuels presents an elevated risk of indirectly inducing an increase in greenhouse gas emissions that neutralizes the reduction in emissions that results from the substitution of these biofuels for fossil fuels; on the other hand, the expansion of the farms [for these raw materials] takes place on land that includes a large amount of carbon However, these measures . . . do not apply to biofuels issued from such raw materials where they were produced in “particular conditions” that permit the avoidance of the elevated risk

6. The contested provisions . . . [exclude] all possibility of demonstrating that that oil was produced in [such] particular conditions

7. First, it is clear from the [legislative] preparatory work that, in instituting the tax . . . , the legislature aimed to fight against worldwide greenhouse gas emissions. To this end, it sought to reduce both direct emissions, notably those issued from fossil fuels, and indirect emissions, caused by the substitution of agricultural cultivation that produces biofuels in the place of that which is meant to produce food

8. Second, in adopting the contested provisions, the legislature based its reasoning in the idea that palm oil stands out in the strong development and the impressive extension of the surface of the Earth consecrated to its production, in particular in areas rich with carbon, which results in deforestation and the drying out of wetlands. The legislature thus took into account the fact that palm oil cultivation presents a heightened risk It is not the duty of the Constitutional Council, which does not have a general power of assessment and decision-making of the same nature as that of the Parliament, to reassess the legislature’s judgment of the environmental consequences of the cultivation of the raw materials in question, as that judgment is not, in the present state of knowledge, manifestly inadequate with regard to the pursued general objective of environmental protection.

9. Consequently, . . . the legislature has . . . implemented objective and rational criteria as related to the pursued goal. The grievance . . . must therefore be dismissed.

10. The contested provisions . . . must be declared constitutional.

* * *

Following *Total*, in December 2019, the French Parliament proposed new programming laws, which are specific executive policies that must be reviewed and

approved by the French National Assembly, as required under French administrative law. Although programming laws are not binding on the government, they announce political agendas and intentions. The law at issue called for full decarbonization of the land transport sector by 2050 and set a number of intermediate targets. Prior to the promulgation of the law, some members of parliament requested ex ante constitutional review from the Constitutional Council. The parliamentarians believed the envisioned measures were not ambitious enough and would lead to a violation of Article 1 of the constitutional Charter for the Environment, which provides that “[e]veryone has the right to live in a balanced and healthy environment.”

In prior cases, the Constitutional Council had refused to exercise control over programming provisions because they lack legal force. In its December 2019 decision on the new programming law (Decision No. 2019-794 DC), the Council decided to review the law in light of the Charter for the Environment, thereby ensuring a role for the Council to monitor the fidelity of nonbinding policy pronouncements with the Charter. Here, the Council ruled that the objectives of achieving full decarbonization of the land transport sector by 2050 did not violate Article 1 of the Charter.

One month later, the French Union of Plant Protection Industries (UIPP) and the French Union for Seed Companies (UFS) requested that the Constitutional Council rule on the constitutionality of an amendment to the Rural and Maritime Fishing Code.

UIPP v. Prime Minister
Constitutional Council of France
Decision No. 2019-823 QPC (2020)*

[President Laurent Fabius, Judges Claire Bazy Malaurie, Alain Juppé, Dominique Lottin, Corinne Luquiens, Nicole Maestracci, Jacques Mézard, François Pillet, and Michel Pinault delivered the opinion of the Constitutional Council of France:]

The Council of State submitted this matter to the Constitutional Council . . . for a . . . ruling of constitutionality. The question is whether paragraph IV of Article L.253-8 of the Rural and Maritime Fishing Code, as amended by Law No. 2018-938 of October 30, 2018 . . . , conforms with the rights and liberties guaranteed by the Constitution. . . .

1. Paragraph IV of Article L.253-8 of the Rural and Maritime Fishing Code, as amended by the aforementioned law of October 30, 2018, provides:

As of January 1, 2022, the production, storage, and circulation of phytopharmaceutical products** containing unapproved active substances are prohibited because of their harmful effects on human,

* Translation by Neil Alacha (Yale Law School, J.D. Class of 2021).

** Phytopharmaceutical products are medicines with plant-based active substances.

animal, and environmental health

2. According to the applicant, . . . prohibiting the exportation of [these] products would be . . . contrary to free enterprise.

3. Free enterprise is enshrined in Article 4* of the Declaration of Human and Civic Rights of 1789.

4. The Preamble of the Charter for the Environment provides:

The future and very existence of mankind are inextricably linked with its natural environment; The environment is the common heritage of all mankind; . . . Care must be taken to safeguard the environment along with the other fundamental interests of the Nation; In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardize the ability of future generations and other peoples to meet their own needs.

The protection of the environment, the common heritage of mankind, thus constitutes an objective of constitutional value.

5. According to the eleventh paragraph of the Preamble of the Constitution of 1946, the Nation “shall guarantee to all . . . the protection of health.” Protection of health is thus an objective of constitutional value.

6. It is the role of the legislature to ensure the balance of these objectives with the exercise of free enterprise. As such, the legislature is entitled to consider the extraterritorial effects on the environment of activities carried out in France. . . .

10. In prohibiting French companies from selling these products to the rest of the world, the legislature has . . . mitigated the harms that can result to human health and the environment, even outside the European Union. This restriction on free enterprise aligns with the following objectives of constitutional value: the protection of health and the environment.

11. Moreover, in delaying the entry into force of the prohibition . . . until January 1, 2022, the legislature has allowed the affected companies a period of more than three years to adapt their activity.

* Article 4 of the Declaration of Human and Civic Rights of 1789 provides:

Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. . . .

12. . . . [I]n adopting the provisions at issue, the legislature has ensured a conciliation between free enterprise and the protection of health and the environment that is not manifestly unbalanced. The claim regarding free enterprise is thus dismissed.

13. Paragraph IV Article L.253-8 of the Rural and Maritime Fishing Code . . . must be declared consistent with the Constitution. . . .

* * *

The Constitutional Council deduced “objectives of constitutional value” based on its interpretation of the French Constitution and the Declaration of Human and Civic Rights. In *UIPP*, the Constitutional Council recognized for the first time that the protection of the environment “constitutes an objective of constitutional value.” Thus, environmental protection is now a norm upon which the legislature may place restrictions on other constitutional rights or freedoms. The Council judged that it is up to the legislature to ensure that objectives of constitutional value—including protection of the environment, health, and the right of free enterprise—are appropriately balanced.

The Constitutional Council also relied on the idea that the environment is “the common heritage of all mankind” to empower the French parliament to account for the effects that activities carried out in France may have on the environment abroad. The legislature in this case intended to prevent companies established in France from participating in the sale of the phytopharmaceutical products anywhere in the world and thus, indirectly, in the resulting damage to human health and the environment.

Professor Daniel C. Esty explains the impact in the excerpt below.

Toward a Sustainable Future

Daniel C. Esty (2020)*

. . . The French judiciary has . . . become a driving force for a sustainable future . . . and action on climate change Along with the . . . *Urgenda* case in the Netherlands, courts in Ecuador, Columbia, Pakistan, Britain, Nigeria, and the Philippines have . . . issued decisions holding both governments and private parties to account for violating environmental principles or falling short of sustainability requirements. But judges and justices in other nations, including most notably the United States, have been more circumspect in their approach [I]n the *Juliana* case in Oregon, the trial court held that the youth plaintiffs had met the burden of demonstrating injury from climate change and could proceed with their legal action to have their rights against government inaction vindicated. But the Appeals Court above reversed this decision and dismissed the case, noting that the only remedy lay with the

* Excerpted from a 2020 draft of Daniel C. Esty, *Toward a Sustainable Future: Environmental Jurisprudence from France’s Constitutional Council Breaks New Ground*, ANNUAL REVIEW OF THE FRENCH CONSTITUTIONAL COUNCIL (forthcoming 2020).

legislative or executive branches of government—a conclusion that reflects the lack of any mention of the environment in the U.S. Constitution.

Against this backdrop, the sustainability leadership of the French Constitutional Council stands out all the more. The Council’s clear perspective on the need to move toward a sustainable future and willingness to articulate environmental principles—and thus promote action to combat climate change—has blazed a trail that other courts in other countries will surely follow. Perhaps more importantly, the global scope of the environment that the Council has highlighted as being of concern may have important implications . . . in terms of responsibility for harm to the Global Commons. Indeed, the *UIPP* decision could mean not only that French companies will be held accountable for environmental damage (and even the risk of harm) beyond French territory, but that same vision of global responsibility might also imply that foreign companies operating in France could be called to account for the environmental harm they cause anywhere in the world.

* * *

In addition to domestic constitutional questions, courts also face questions of how to evaluate obligations established by international agreements. In many jurisdictions, this issue has taken on heightened significance in light of the Paris Climate Change Agreement. For example, in late 2015, the government of the United Kingdom began seeking proposals to expand the London airports’ runway capacity. The Secretary of State for Transport established criteria for approving a proposal through the “Airports National Policy Statement” (ANPS). In August 2018, various British NGOs challenged the ANPS, arguing that section 5(8)* of the U.K. Planning Act required the Secretary to account for the U.K.’s commitments under the Paris Agreement and that the Secretary had failed to do so. The Divisional Court determined that the Secretary was not obligated to consider the Paris Agreement in the ANPS and that the Secretary properly considered domestic climate change policies. These plaintiffs appealed to the U.K. Court of Appeal.

* Section 5(8) of the United Kingdom Planning Act of 2008 provides:

The reasons [provided for a national policy statement] must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change.

R v. Secretary of State for Transport
U.K. Court of Appeal (Civil Division)
[2020] EWCA Civ 214*

Lord Justice Lindblom, Lord Justice Singh and Lord Justice Haddon-Cave:

. . . 184. The issues concerning the United Kingdom’s commitments on climate change can conveniently be simplified, and dealt with, under [this heading]: “. . . [D]id the Government’s commitment to the Paris Agreement constitute government policy on climate change, which the Secretary of State was required to take into account?” . . .

186. It is common ground that the Secretary of State did not take the Paris Agreement into account in the course of making his decision to designate the ANPS. . . .

209. In the Government paper, “The Clean Growth Strategy” first published in 2017, the Secretary of State for Energy and Industrial Strategy stated:

“. . . The actions and investments that will be needed to meet the Paris commitments will ensure the shift to clean growth will be at the forefront of policy and economic decisions made by government and businesses in the coming decades.” . . .

213. On 24 March 2016, the Rt. Hon. Amber Rudd MP, then Secretary of State for Energy and Climate Change, said, in answer to an oral question on what steps her department was taking to enshrine the commitment to net zero emissions made at the Paris Climate Change Conference:

“As confirmed last Monday during the Report stage of the Energy Bill, the Government will take the step of enshrining into UK law the long-term goal of net zero emissions, which I agreed in Paris last December. The question is not whether we do it but how we do it.”

214. On 14 June 2018, the Chair and Deputy Chair of the Committee on Climate Change [(CCC)] . . . wrote a letter to the Secretary of State for Transport . . . in the following terms:

“The UK has a legally binding commitment to reduce greenhouse gas emissions under the Climate Change Act. The Government has also committed, through the Paris Agreement, to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C.

* Heathrow Airport and potential runway developer Arora Holdings applied for permission to appeal the Court of Appeal decision to the Supreme Court of the United Kingdom. The Supreme Court granted permission on May 6, 2020, and the appeal is pending as of June 2020.

We were surprised that your statement to the House of Commons on the National Policy Statement on 5 June 2018 made no mention of either of these commitments. It is essential that aviation's place in the overall strategy for UK emissions reduction is considered and planned fully by your Department. . . . ”

The Airports Commission also incorporated the CCC's advice on aviation, concluding that “any change to [the] UK's aviation capacity would have to take place in the context of global climate change, and the UK's policy obligations in that area.” . . .

216. . . . [I]t was the Government's expressly stated policy that it was committed to adhering to the Paris Agreement to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C. . . .

224. . . . [I]t is important to appreciate that the words “Government policy” are words of the ordinary English language. They do not have any specific technical meaning. They should be applied in their ordinary sense to the facts of a given situation. In particular, we can find no warrant in the legislation for limiting the phrase “Government policy” to mean only the legal requirements of the Climate Change Act. The concept of policy is necessarily broader than legislation. . . .

226. . . . [T]he debate . . . about the possible impact of an international agreement on domestic law that has not been incorporated by legislation enacted by Parliament was a distraction from the true issue. That debate . . . did not bear on the proper interpretation of a statutory provision deliberately and precisely enacted by Parliament itself, in the words of section 5(8) of the Planning Act. . . . [T]hose words do not require the Secretary of State to act in accordance with any particular policy; but they do require him to take that policy into account and explain how it has been taken into account. None of that was ever done in the present case.

227. It appears . . . that the Secretary of State received legal advice that not only did he not have to take the Paris Agreement into account but that he was legally obliged not to take it into account at all. . . . [T]hat was a clear misdirection of law and there was, therefore, a material misdirection of law at an important stage in the process. That misdirection then fed through the rest of the decision-making process and was fatal to the decision to designate the ANPS itself.

228. . . . [T]he Government's commitment to the Paris Agreement was clearly part of “Government policy” by the time of the designation of the ANPS. First, this followed from the solemn act of the United Kingdom's ratification of that international agreement in November 2016. Secondly, as we have explained, there were firm statements re-iterating Government policy of adherence to the Paris Agreement

230. Furthermore, it simply requires the executive to take account of its own policy commitments. After all, the acts of negotiating, signing and ratifying an

international treaty are all acts which under the British constitution are entrusted to the executive branch of the State—the Crown. . . . [R]equiring the Crown to comply with what has been enacted by Parliament (in this case the obligations in section 5(8) of the Planning Act) is an entirely conventional exercise in public law. . . .

238. Again, . . . it does not follow from this that the Secretary of State was obliged to act in accordance with the Paris Agreement or to reach any particular outcome. The only legal obligation, in our view, was to take the Paris Agreement into account when arriving at his decision. . . .

246. . . . [N]o matter how wide the margin of judgment to be afforded to the Secretary of State in this context, in our view the Paris Agreement was obviously relevant to the plan or programme under consideration in this case. . . .

254. . . . It will suffice that the preparation and designation of the ANPS will be remitted to the Secretary of State for reconsideration in accordance with the law, during which exercise the Secretary of State can take these further matters into account

* * *

What remedies are available in climate change litigation? In Pakistan, Article 199(1)* of the Constitution empowers Pakistan’s five High Courts to order the government to perform a broad set of legally required actions. Pakistani courts have also fashioned special writs of mandamus that enable the court to continuously monitor whether the government is complying with court orders. In *Sheikh Asim Farooq v. Federation of Pakistan*, the Lahore High Court received a petition under Article 199 asking the Court to order federal and Punjab provincial authorities to take actions to protect Pakistan’s dwindling forests.

Sheikh Asim Farooq v. Federation of Pakistan
Lahore High Court, Lahore Judicial Department, Pakistan
Writ Petition No. 192069 of 2018 (2019)

[Opinion of Judge Jawad Hassan:]

* Article 199(1) of the Constitution of the Islamic Republic of Pakistan, 1973 provides:

Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,—

(a) . . . make an order . . . directing a person performing . . . functions in connection with the affairs of the Federation, a Province or a local authority, to . . . do anything he is required by law to do; . . .

(c) . . . make an order giving such directions to any person or authority, including any Government exercising any power or performing any function . . . as may be appropriate for the enforcement of any of the Fundamental Rights

8. . . . [T]he forests in Pakistan and in Punjab are close to extinction. . . . [F]or decades, there has been no improvement or enlargement of forest areas or plantation of trees in private areas, and . . . Respondents have failed to regulate . . . what type of trees are to be planted in a particular locality that would be environment friendly, provide maximum canopy and produce more oxygen. . . .

20. In the instant public interest petition, the Petitioners have . . . sought directions to the relevant ministries, departments and other authorities of the Provincial or Federal Government under Article 199 of the Constitution to plant, protect, manage, preserve and conserve the trees and forests in Punjab. . . .

22. Public Interest Litigation . . . is a powerful tool for individuals and groups for combating illegalities, injustice and social ills which promotes and protects the larger public interest in case of violation of any fundamental rights. As long as the public interest prayed for is bonafide and not based on any vested interests, the principles of locus standi/aggrieved person are to be interpreted liberally by the Courts. . . . The Respondents are under a Constitutional obligation to protect the Fundamental Rights of the public at large

25. . . . [The international environmental law] Principles of Sustainable Development, Precautionary Principle, Public Trust doctrine, Inter- and Intra-Generational Equity, Water Justice and Food Justice, In Dubio Pro Natura [(when in doubt, favor nature), and] Polluter Pays . . . are part of our jurisprudence developed by our Supreme Court.

26. Article 9* [of the Constitution of Pakistan] guarantees the right to life which includes the right to a clean and healthy environment. Our superior courts have interpreted the right to life to include a number of natural and legal rights under the umbrella of Article 9 such as the right to a clean environment

27. The Interpretation of Fundamental Rights has to be dynamic and progressive and not pedantic. . . . Respondents are bound to formulate policy/law for the protection of the Fundamental Rights of the Citizens, namely the survival, economic and social uplift of the people of Pakistan. . . .

[The court described more than a dozen regional and federal statutes and policies that require the government to protect and replenish Pakistan's forests in light of its constitutional and international legal obligations.]

81. This petition was filed in order to highlight inactions of the Respondents . . . for not implementing the laws, policies and strategies regarding protection of forest of Pakistan and to implement them by passing certain directions . . . to perform their duties

* Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 provides:

No person shall be deprived of life or liberty save in accordance with law.

as per law. . . . Had [the] above-mentioned laws and polices properly been implemented by the Respondents . . . , the forest of Pakistan could have been saved [from] further depletion and deforestation. . . . [E]nvironmental treaties and conventions and various laws and policy have been made to protect the environment, conserve and preserve the forests but in this regard these policies [and] laws have not been implemented

83. . . . [T]his Court allows this writ of *mandamus* under Article 199(1)(a)(i) of the Constitution and direct[s] the Government Departments [to perform] their functions . . . as follows:

(1) All the applicable laws and the relevant directions and judgments of the [Superior Courts] shall be implemented . . . to plant, protect and preserve the forest.

(2) All the Respondents shall take steps to protect, manage and conserve the forests and trees in the Urban Areas . . . [and] enlarge the forests and trees in Pakistan and the Punjab. . . .

(4) Every responsible Ministry, Division, Department and Authority . . . shall publish [an annual report that discusses the expansion of forests, tree planting campaigns in Urban Areas, and actions taken to comply with the law.]

(5) The competent authority is directed to impose the penalty against the relevant officers for omission of their duties

(6) . . . [H]ousing societies and authorities [should be directed to plant two trees in front of each house and to impose penalties for non-compliance.] . . .

(8) . . . [D]ue to the efforts of the Government and other Departments, this year massive tree plantation took place. The same or more effort must be done and monitored by the relevant authorities each year through proper [bookkeeping.]

(9) The [Forestry, Wildlife and Fisheries] Department shall . . . through the media and other means, inform the public and create awareness, including lodging a complaint for any violation of [laws related to deforestation]

(10) . . . [The Local Government, the Parks and Horticulture Authority, the Defense Housing Authority, the Lahore Development Authority, and other relevant authorities] are directed to define a mechanism for urban forestation

(11) A specific officer may be appointed in a designated area to deal with the issues related to the trees and forest If any citizen . . . feel[s] the need of plantation of trees, such relevant officer may address [the grievance by planting trees.]

(12) All the authorities . . . are directed to make and adopt comprehensive policies with respect to plantation of trees in urban areas, . . . immediately start planting

of trees . . . and maintain the same by imposing fine and penalty to the officers of the area or any citizen.

(13) . . . [Schools,] colleges, higher education institutions, hospitals, [and] parking sites . . . are specifically directed to make policy for planting . . . trees in open spaces

(14) The Government of the Punjab through its respective departments shall make laws . . . imposing penalty and heavy fine for cutting, removing and damaging any tree

CORPORATE AND GOVERNMENT OBLIGATIONS

Climate change litigation raises both familiar and new questions about what obligations flow to private corporations or governments when they know about their impact on the climate. One set of questions relates to what is knowable, who knows what, and when they know. Another set of issues involves how courts should respond to the systemic repression of information or can engage with problems regarding the quality of knowledge. These issues gain heightened salience given the prevalence of vehement denials of climate change, sometimes stemming from people in government.

Obligations to Know and to Publicize

The availability of information about polluting activities plays a central role in the public's ability to enforce its environmental rights. Governments and corporations at times shield information about their polluting practices in an effort to avoid restrictions on their activities. Faced with these barriers, members of the public sometimes turn to courts to gain access to information. These legal challenges raise several questions. To what extent does the common right to a healthy environment require access to information? What information must be shared, and who ought to provide it? When must that information be shared, and with whom? And how should courts weigh corporate interests in privacy and their commercial interests when in conflict with environmental rights? The two cases excerpted below, involving Italy and Mexico, explore governments' obligation to share information about the consequences of environmental harms.

Cordella v. Italy

European Court of Human Rights (First Section)

Application No. 54414/13 and 54264/15 (2019)*

The European Court of Human Rights (First Section), sitting as a Chamber composed of: Linos-Alexandre Sicilianos, president, Guido Raimondi, Ledi Bianku, Aleš Pejchal, Krzysztof Wojtyczek, Tim Eicke, Gilberto Felici, judges, . . . delivers the following judgement . . . :

. . . 8. Specializing in the production and transformation of steel, the company Ilva started operating in the steelmaking sector [in Italy] at the beginning of the 20th century The State was its principal shareholder.

9. Its establishment in Taranto (Puglia) began operations in 1965.

10. In 1995, Ilva was privatized, having been purchased by the group Riva. Taking account of its state of insolvency, it was then placed under provisional administration. . . .

12. All production in the zone in question was thus transferred to Taranto. The establishment located in that city constitutes the company’s largest site and the biggest industrial steelworking complex in Europe. . . .

13. The petitioners reside or used to reside in the city of Taranto (which has about 200,000 inhabitants) or in neighboring communities. . . .

14. The impact of the emissions produced by the factory on the environment and on the health of the local population was the subject of many scientific reports. [These reports noted the “high environmental risk” for local populations within Taranto and its vicinity based on empirical evidence of increased frequency of tumors and a higher tumor mortality rate. They linked proximity to emissions sites to the increased development of lung tumors and other health issues.] . . .

35. . . . [B]y the decree n° 196 of November 30, 1998, the President of the Republic approved the plan for depollution. This decree concerned the entire zone labeled as “at high environmental risk.” [The regional council of Puglia and the Minister of the Environment issued a series of measures over the next twenty years enumerating limits on Ilva’s industrial activities designed to preserve the environment around the factory. The first of the measures made by the Minister of the Environment, named Integrated Environmental Authorizations (AIA), was issued in 2011. Despite unsatisfactory engagement with the measures, the regional council also issued a number of decrees over that time delaying requirements for Ilva’s compliance. One such order was challenged before the Italian Constitutional Court, which found it unconstitutional

* Translation by Sofea Dil (Yale Law School, J.D. Class of 2021).

for failing to prioritize the constitutional rights to health and life. Another order was notable for establishing criminal and administrative immunity for measures taken in pursuit of the environmental plan.] . . .

66. Starting in 2016, Ilva was the subject of sales negotiations . . . which are still in process.

67. In the frame of the “Urgent Provisions for the Establishment of a Procedure for the Transfer of Ilva’s Business Activities” planned by the decree n° 98 of June 9, 2016, it was decided that the delay in execution of the environmental plan could be prorogated by the future buyer for a period of no more than eighteen months. It was also decided that the delay would be applied to all other measures of environmental oversight related to Ilva and that it would replace all other delays having not yet expired at the date of the decree’s entry into force.

68. It was equally established that the future buyer . . . could make the offer for purchase dependent on modifications of the environmental plan Finally, . . . the administrative and criminal immunities were extended to the future buyer of the establishment.

69. In application of the decree of the President of the Council of Ministers of September 29, 2017, the delay in execution of the planned measures in the environmental plan was extended to the month of August 2023. . . .

94. . . . [The Court] judges it appropriate to examine the allegations of the petitioners uniquely through the lens of Article 8 of the Convention. . . .

157. . . . [G]rave transgressions of the environment can affect people’s well-being and deprive them of the enjoyment of their home in a manner that harms their private life. . . . [I]n cases where the notion of a threshold of graveness has been specifically examined in the context of the environment, . . . a grievance can be found to be defensible under Article 8 if the ecological risk reaches a level of graveness that notably diminishes the capacity of the petitioner to enjoy their home or their private or family life. The estimation of this minimum level in this type of case is relative and depends on all of the facts submitted, notably the intensity and the duration of the nuisances as well as their physical or psychological consequences for health or the quality of life of the interested person.

158. Article 8 does not limit itself to requiring the State to abstain from arbitrary mismanagement: we can add to this rather negative engagement positive obligations inherent in an effective respect of private life. . . . In both cases, one must have regard to the just balance to be maintained between the competing interests of the individual and the company in the overall result, with the State enjoying in all possible outcomes a certain margin of appreciation.

159. The States have above all a positive obligation, in particular in the case of a dangerous activity, to put in place a set of regulations adapted to the specificities of the said activity, notably in terms of the risk that could result from it. . . .

161. . . . [I]f it is not its duty to determine precisely the measures that the State should have taken in this case in order to effectively reduce the level of pollution, . . . the Court . . . must decide whether the national authorities handled that question with due diligence and whether they took all competing interests into consideration. . . .

163. . . . [S]ince the 1970s, several scientific studies have mentioned the polluting effects of the emissions of the Ilva factory in Taranto on the environment and public health. . . .

167. . . . [D]espite the attempts of the national authorities to facilitate the depollution of the concerned region, the projects that it put in place have not, as of today, produced the effects for which it hoped.

168. The measures . . . recommended . . . in 2012 in the framework of the AIA in order to ameliorate the environmental impact of the factory in the end were never realized In addition, the realization of the environmental plan approved in 2014 was extended to the month of August 2023. . . . [This] reveals an extreme slowness.

169. In the meantime, the government intervened many times through urgent measures in order to guarantee the continuation of the factory's production activities, and this was despite the statement by the competent judicial authorities, founded on chemical and epidemiological expertise, based in the existence of grave risks for health and the environment. Moreover, an administrative and criminal immunity was recognized for the people charged with guaranteeing the respect of environmental regulations

172. The Court must note the prolongation of a situation of environmental pollution that put in danger the health of the petitioners and, more generally, that of the entire population that resides in the zones at risk, a population that remains, currently, deprived of information related to the efforts to clean up the territory at issue

173. . . . [T]he national authorities have omitted to take all necessary measures to ensure the effective protection of the right of the interested parties to the respect of their private life.

174. Thus, the just balance to be maintained between, on one side, the interest of the petitioners in not suffering grave breaches of the environment that could affect their well-being and their private life and, on the other side, the company's interest in its plant, has not been respected. Consequently, there has been a violation of Article 8 of the Convention in this case. . . .

In June of 2017, the Mexican Energy Regulatory Commission (CRE) unilaterally modified official norm NOM-016-CRE-2016. The modification increased the maximum percentage of ethanol allowed in gasoline sold in Mexico from 5.8% to 10%. The move was, largely, an effort to reduce the price of gasoline. Under Article 51* of the Federal Law on Metrology and Normalization (FLMN), a federal agency must follow a prescribed process for changing or repealing official norms unless the agency determines that the “causes that motivated the issuance of the norm no longer exist.” CRE relied on this provision to make the change in ethanol percentage.

The change was challenged through an anonymous *amparo* lawsuit, in which an individual brings an action to remedy violations of individual or collective constitutional rights. The suit alleged that Article 51 of the FLMN violated a human and constitutional right to a healthy environment and that CRE had breached this right when it unilaterally changed the maximum allowed percentage of ethanol in gasoline sold in Mexico. Although the Second Chamber of the Mexican Supreme Court of Justice rejected the constitutional challenge to Article 51, the Court concluded that CRE’s modification of norm NOM-016-CRE-2016 violated Article 51.

Ruling on Modification to Ethanol Fuel Rule
Mexican Supreme Court of Justice (Second Chamber)
Amparo 610/2019 (2020)**

Rapporteur: Minister Alberto Pérez Dayán. Secretaries: Iveth López Vergara and Isiro Muñoz Acevedo.

. . . [C]omplainant argues that [the provision in Article 51 allowing an agency to unilaterally change or repeal an official norm if the conditions that originally led to the adoption of the norm no longer exist] is unconstitutional because it infringes upon the human right to a healthy environment, specifically with regards to the right to citizen participation on that matter, in exempting the agency from observing the regular procedure for modifying Official Mexican Norms.

. . . [T]his challenge is unfounded because . . . a correct interpretation [of Article 51] must reflect the exigencies and burdens, constitutional as well as derived from

* Article 51 of the Mexican Federal Law on Metrology and Normalization provides:

In order to modify Official Mexican Norms, an agency must comply with the procedure for the elaboration of Official Mexican Norms.

When the causes that motivated the issuance of an Official Mexican Norm no longer exist, the relevant agency, on its own initiative or through a request . . . , may modify or repeal the norm in question without following the required procedure for elaborating Official Mexican Norms.

** Translation by José Argueta Funes (Yale Law School, J.D. Class of 2019).

international conventions, imposed upon the Mexican State with regard to the human right to a healthy environment. . . .

. . . [I]n environmental matters, . . . [in order to invoke the relevant provision of Article 51,] it is imperative [that the agency] find itself before truly extraordinary facts or circumstances which enable it to conclude . . . incontrovertibly . . . that the causes which motivated the issuance of the relevant Official Mexican Norm have ceased to exist, such that, under those exceptional circumstances, avoiding the regular procedure for altering Official Mexican Norms would be justified because consulting the citizenry on irrefutable facts would lead to no practical goal.

. . . [W]e will examine the content and reach of the precautionary principle, as well as the right to citizen participation in environmental matters, and we will explain why, in this matter, the reach of [Article 51] . . . must be determined according to those constitutional axioms. . . .

[The precautionary principle] implies that “when an activity generates risks of harm to the health of humans or the environment, precautionary measures must be adopted, even if the causes-effects [of the given activity] have not been absolutely determined by science.” . . .

. . . [I]n *amparo* 365/2018, this Second Chamber established that “the right to public participation in environmental matters is reflected in diverse international instruments related to the environment and sustainable development” And although not all these instruments are binding, they nonetheless “constitute guidelines that enable us to discern the importance of public participation in environmental matters, such that this High Tribunal cannot ignore them, for they constitute guiding criteria that enable the full realization of the human right to a healthy environment, access to information, and citizen participation.” . . .

. . . [T]his Second Chamber held that these . . . international instruments revolve around the fundamental idea that “every person must have adequate access to environmental information, and to the opportunity to participate in the processes for adopting decisions from the earliest stages, in order to secure real influence in the development of measures that might . . . affect their right to a healthy environment.” . . .

. . . [W]e may conclude that the human right to a healthy environment imposes specific obligations upon the State with respect to the protection of the environment. Among these are included the duties to: . . . evaluate environmental impact and make public information related to the environment; . . . facilitate public participation in the making of environmental decisions; and . . . provide access to effective resources for the protection of environmental rights. . . .

. . . [T]he precautionary principle, applied to the modification or repeal of an Official Mexican Norm, demands that the determination on the existence of harm or a risk of environmental harm which initially led to the issuance of the Official Mexican

Norm must be carried out in the most informed way possible, through the plural participation of the members of the relevant National Consultative Committees on Normalizations and through citizen participation [That is, in order to determine whether or not the conditions that led to the norm continue to exist, the precautionary principle] demands that the ordinary procedure for modifying or repealing the given norm be carried out. . . .

. . . [F]ollowing this interpretation of Article 51 . . . , in dealing with the technical regulation of anthropogenic emissions, which have been scientifically considered as harmful or potentially prejudicial for air quality, the exceptional procedures [for modifying or repealing Official Mexican Norms] could only be invoked when manifest, reliable, and incontrovertible evidence arises supporting the conclusion that . . . such human activity presents no risk whatsoever to the environment.

That is, the only way in which it would be possible to unilaterally and summarily modify NOM-016-CRE-2016 . . . would be [if the CRE found itself] before the existence of new scientific evidence that made it possible to conclude . . . incontrovertibly . . . that the causes that motivated the issuance of the Official Mexican Norm have ceased to exist. . . .

[The Court surveyed numerous studies and submissions presented before the CRE detailing the dangers of increasing maximum ethanol percentages allowed in Mexican gasoline. The Court identified several potential harms associated with this increase, including a rise in the ozone levels in Mexican cities. It then reviewed the reasoning of the CRE in modifying the maximum ethanol percentage.]

. . . [A] decision so delicate and complex, from the environmental point of view, as deciding to alter the maximum ethanol percentage in gasoline, emerged from a simple conclusion formulated by the Mexican Petroleum Institute that it “was technically viable to introduce gasolines with up to 10% of ethanol” Of course, these [foundations] are totally . . . unacceptable as justifications for [the CRE] . . . to unilaterally and summarily modify NOM-016-CRE-2016

. . . [T]his case involves a prototypical example demanding the observance . . . of the ordinary procedure for the modification of Official Mexican Norms. . . . [W]hen the magnitude of the harms to air quality which the use of ethanol . . . could contribute to is open to debate, the principle of environmental precaution comes into full force and demands a detailed evaluation regarding the potential risks or uncertainties . . . in order to determine whether it is possible or not to modify or cancel the norm, and to what extent.

* * *

Questions of knowledge arise when corporate, governmental, and public interests in “development” clash with environmental rights. Access to information plays a central role in the public’s ability to monitor the environmental impact of industrial

activities. A Kenyan environmental group raised one such conflict before the National Environmental Tribunal of Kenya at Nairobi in 2016.

Save Lamu v. National Environmental Management Authority

National Environmental Tribunal of Kenya at Nairobi

Tribunal Appeal No. NET 196 of 2016 (2019)

[Judges Mohammed S. Balala, Christine Kipsang, Bahati Mwamuye, Waithaka Ngaruiya, and Kariuki Muigua delivered the following judgment:]

1. As part of a vision of the country’s economic blueprint for development and industrialization . . . the Government of Kenya . . . formulated a power generation program. . . This program included the setting up of the intended 1050 MW coal fired power plant in Lamu to be built, owned and operated by the 2nd Respondent [Amu Power Company Limited], who were the successful bidders following an expression of interest by the Government. . . .

2. The 2nd Respondent engaged Kurrent Technologies Limited, to undertake an Environmental & Social Impact Assessment (ESIA) Study for its coal power plant in Lamu, and, upon completion, presented the same to the 1st Respondent [National Environmental Management Authority (NEMA)] . . . for licensing purposes. . . . NEMA . . . proceeded to issue an Environmental Impact Assessment Licence . . . to the 2nd Respondent

3. The 1st Appellant [(Save Lamu)], a community based organisation representing the interests and welfare of Lamu and whose membership [is] comprised of individuals and several community groups within Lamu[,] . . . filed the present appeal . . . challenging the issuance of the EIA Licence as well as the process in obtaining the same. . . .

16. The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth—all while tackling climate change

21. . . . [T]he legal regime for the issuance of EIA Licenses is anchored in [Article 69(1)(f)* of the Constitution of Kenya, which] requires the State to establish

* Article 69(1)(f) of the Constitution of Kenya provides:

The State shall . . . establish systems of environmental impact assessment, environmental audit and monitoring of the environment

systems of environmental impact assessment, environmental audit and monitoring of the environment. . . .

23. The Appellants have complained about the lack of proper and effective public participation as a ground of appeal and as one of the agreed issues. . . . The foundation of public participation can be found in Principle 10 of the Rio Declaration on Environment and Development, 1992 which states as follows:—

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. . . .”

24. . . . [A]ccess to information for the persons affected is important for meaningful participation by citizens and motivates them to participate in decision and policymaking processes in an informed manner

25. In Constitutional Petition No. 305 of 2012: *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* a three judge bench of the Kenya Constitutional Court set out the minimum basis for adequate public participation as follows:—

“97. . . . [P]ublic participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. . . .

b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. . . .

c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. . . .

d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. . . . A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity. . . .

e. Fifth, . . . there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. . . .

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize

and enrich their views with the views of those who will be most affected by the decision or policy at hand.” . . .

35. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003, required the proponent of a project to seek views of the persons to be affected after approval of the project report and during the process of the study. In particular, Regulation 17 (2) required the proponent to publicize the project and its anticipated effects and benefits

43. . . . [W]e accept that wide public participation had been undertaken during the scoping phase for the project report.

44. However, this [was] all done before the study had been commenced or conducted or the study report prepared. . . .

45. . . . [The meetings held during the scoping phase] were introductory in nature but not structured to share information on the possible effects and impacts of the project on the population and the proposed mitigation measures that the 2nd Respondent would undertake. . . . [P]articipants were given very limited time to ask questions and answers appeared inadequate [M]eetings to explain the project properly and allay the concerns of the residents never took place. . . .

47. . . . Further meetings ought to have been held to give the correct information during the conduct of a proper study and when data on most of the areas identified by the terms of reference had been collected and verified. Lack of accurate information cannot be the basis of proper and effective public participation. . . .

69. . . . A vital condition of public participation is access to information. The information contained in the study report had not been made available in good time to members of the public, or at all, nor had there been an effort to undertake the same level of engagement with the public after the EIA [(Environmental Impact Assessment)] study had been conducted and report published. The seriousness of access to information cannot be overstated. Would members of the public have supported the project if certain information in the possession of the 2nd respondent had been availed to them? For instance, . . . the observations . . . included identification of potential harm to the biodiversity flora and fauna, air quality that was stated to be potentially hazardous and may cause difficulty in breathing and the climate change effect leading to adverse consequences on human health. . . . There well may be mitigation measures to curb these impacts but it was only fair that the people of Lamu were educated on the adverse impacts identified and within the knowledge of the proponent and thereafter have the mitigation measures explained to them in order to make an informed decision That is public participation. . . .

72. . . . This Tribunal cannot permit authorities to deal so nonchalantly with such objections. Such objections need to be taken seriously and need to be considered. Public participation especially when it comes to EIAs are extremely critical and cannot be

treated as a formality or inconvenience. It is at the very core of any EIA exercise. The EIA public participation process cannot be a mechanical exercise but a vibrant and dynamic activity where affected persons are engaged in a fair and reasonable manner.

73. . . . In this case, the report was extremely bulky and purported to capture a lot of information. By all accounts, it was an impressive piece of literal work but devoid of public consultation content, in the manner prescribed by the law, thus rendering it ineffective and at best only of academic value. . . .

75. . . . [W]e have no hesitation in finding and hereby do that the process leading to the preparation of the ESIA Study Report by the 2nd Respondent was not properly conducted, had side-stepped the procedure laid out under the regulations and having done so, there was a failure of effective public participation and the procedure for the issuance of the ESIA Licence by the 1st Respondent was in violation of the elaborate procedure set out in the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya. . . .

156. . . . [A] fresh EIA study report is to be prepared and presented to the 1st Respondent. The 1st Respondent is directed to . . . engage with the lead agencies and the public, in the manner and strict timelines provided for under the said law. The 1st Respondent is to share its memorandum of reasons for reaching its decision whether for or against the project with the relevant parties and publish its decision on the grant or refusal to issue an EIA Licence accompanied with a summary of its reasons within 7 days of its decision. Such publication should be in a newspaper with nationwide circulation. . . .

* * *

In 2014, the Supreme Court of Appeal of South Africa faced similar questions about the purported conflict between environmental rights and industrial development in a dispute between the Vaal Environmental Justice Alliance and ArcelorMittal, a major South African steel company.

**Company Secretary of ArcelorMittal South Africa v. Vaal
Environmental Justice Alliance
Supreme Court of Appeal of South Africa
Case No. 69/2014**

[Judges MS NAVSA, SA MAJIEDT, HK SALDULKER, R MATHOPO, and BC MOCUMIE delivered the following judgment:]

[1] This case is adjudicated against the following backdrop. First, the world, for obvious reasons, is becoming increasingly ecologically sensitive. Second, citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations.

In South Africa, because of our past, the latter aspect has increased significance. The Legislature has rightly seen fit to cater for both aspects in legislation, driven by constitutional imperatives

[2] The present litigation stems from a refusal by the second appellant, ArcelorMittal South Africa Limited (“AM”), one of our country’s major industrial corporations producing 90% of South Africa’s steel products, of two requests by the respondent, the Vaal Environmental Justice Alliance (“VEJA”) . . . for information relating to AM’s past and present activities, including the latter’s documented historical operational and strategic approach to the protection of the environment in the Vanderbijlpark and Vereeniging areas, in each of which they operate a major steel plant.

[3] The present litigation represents . . . two competing interests, namely industrial activity . . . against concerns about the preservation of the environment for the benefit of present and future generations. . . . [T]here is, in addition, the complicating feature of the asserted entitlement to information held in private hands. . . .

[VEJA had requested a copy of AM’s Environmental Master Plan for its steel plant sites in December 2011, along with any implementation-related progress reports. In response, AM asked for a more precise description of the documents sought, referring to their “alleged existence.” VEJA noted that AM had relied on the Master Plan in prior litigation and had referred to the Master Plan in various company reports.]

[52] . . . AM’s industrial activities, impacting as they do on the environment, including on air quality and water resources, [have] an effect on persons and communities in the immediate vicinity and [are] ultimately of importance to the country as a whole. Translated, this means that the public is affected and that AM’s activities and the effects thereof are matters of public importance and interest. . . . AM is a major, if not *the* major, polluter in the areas in which it conducts operations. . . .

[55] It is clear . . . that when [AM’s] Master Plan was being formulated it was seen as a forward looking document, informing action not only in the present but setting out a strategy for the future—a 20 year plan. . . . It also appears to have been of some importance in the acquisition of regulatory approvals.

[56] . . . [T]he Master Plan has importance as a baseline document. Historically extensive data, even disputed standards and testing methodology, must be valuable. The asserted flaws can be examined and/or challenged. The veracity of AM’s justifications can be measured. . . .

[61] . . . AM ignores the fact that . . . reliance was placed by VEJA on three statutes, [one of which was the [the National Environmental Management Act 107 of 1998 (NEMA)]

[65] . . . [S]ection 2(4)(f) of NEMA states the following:

“(f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.”

[66] Of particular importance in relation to [the Promotion of Access to Information Act 2 of 2000 (PAIA)] is what is set out in section 2(4)(k) of NEMA. That section reads:

“(k) Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.”

I accept that this relates principally to the state. However, the same must, in principle, apply to corporate decisions and activities that impact on the environment . . . particularly when their activities require regulatory approval. . . .

[71] . . . [I]n accordance with international trends, and constitutional values and norms, . . . our Legislature has recognised, in the field of environmental protection, *inter alia* the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment. In [*Biowatch Trust v. Registrar for Genetic Resources and Others* (2009)] . . . the Constitutional Court said the following:

“ . . . A perusal of the law reports shows how vital the participation of public-interest groups has been to the development of this court’s jurisprudence. . . . Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but also on the existence of a lively civil society willing to litigate in the public interest. This is expressly adverted to by the National Environmental Management [Act] (NEMA) which provides that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief sought.”

. . . [75] . . . We were urged by Counsel on behalf of AM . . . to not ignore the distinction drawn in [the PAIA] between the obligations of the State in dealing with requests for information, and the obligations of private parties. It was submitted that the obligation on the State to produce information is much more stringent. . . .

[76] The grounds for refusal contained in Chapter 4 of PAIA relate principally to the protection of information related to the privacy, confidentiality and safety of third parties and individuals who are natural persons. There is also protection of information privileged from production in legal proceedings and for certain categories of commercial information. These exclusions are not relevant to the present dispute. . . .

[78] . . . PAIA, in its preamble, recognises that the system of government in South Africa, before the advent of a constitutional democracy, “resulted in a secretive and unresponsive culture in *public and private* bodies which often led to an abuse of power and human rights violations.” . . .

[80] I am mindful of the caveat . . . that one must guard against forcing corporates to throw open their books on claims of alleged minor errors or irregularities. The basis provided by VEJA for its application does not fall into the category of trivial or frivolous. It concerns us all. . . .

[81] . . . AM was disingenuous in claiming ignorance of the existence of its own Master Plan. . . . The disclosure of the information will enable either a verification of AM’s stance or might cause us to have even greater concerns about environmental degradation. That it will be a valuable controlling tool can afford of no doubt. Insofar as the information related to the Vaal Disposal site is concerned, the public is entitled to be assuaged as to the safety of that site.

[82] Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced. . . .

Information Distortion and Suppression

Many of the risks posed to our health by climate change and environmental degradation are not immediately apparent. This section explores the obligations of the private sector, whose behavior affects the climate on a large scale, to investigate and to inform the public of the probable consequences of its practices. We begin with a case brought by the New York State Attorney General alleging that Exxon Mobil had failed to meet its obligations to inform investors about the environmental risks of the company’s behavior. The State Attorney General’s post-trial memorandum and the decision of the state trial court are excerpted below.

**Plaintiff’s Post-Trial Memorandum,
People of the State of New York v. Exxon Mobil**
Supreme Court of the State of New York, New York County
Index No. 452044/2018 (November 18, 2019)

[Letitia James, Attorney General of the State of New York:]

. . . Most of the underlying facts are undisputed. There is no dispute that Exxon did not use the carbon cost figures it publicly disclosed, reaching \$80 per ton by 2040

in developed countries, in projecting future costs associated with its [greenhouse gas (GHG)] emissions from its investments and operations. Instead, Exxon used the publicly disclosed costs in its demand projections only, and used significantly lower figures, or none at all, in its cost projections. . . . And there is no genuine dispute that the figures that Exxon applied—or failed to apply—in its cost projections affected its long-term cash flow projections across a host of decision-making and planning functions, impacting both existing projects and projects in the development pipeline.

. . . [D]id Exxon mislead its investors by representing that it was using the escalating carbon costs it publicly disclosed for purposes of projecting costs associated with its emissions from its investments and operations? . . . [W]ere Exxon’s representations regarding its use of a carbon cost material? . . .

. . . [New York state’s] Martin Act prohibits the use of any “deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise” in connection with the “issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice or distribution” of securities. . . . To establish liability under the Martin Act, the [New York Office of the Attorney General] must demonstrate by a preponderance of the evidence that the defendants’ statements or omissions were materially misleading. . . .

Fraudulent acts that violate the Martin Act also violate [New York state’s] Executive Law § 63(12) when they are repeated or persistent. Executive Law § 63(12) prohibits “repeated fraudulent or illegal acts” and “persistent fraud or illegality in the carrying on, conducting or transaction of business.” . . .

Between December 2013 and the end of 2016, Exxon misleadingly represented that the company used its publicly disclosed carbon costs in projecting costs associated with its emissions The key disclosures stretched across Exxon’s March 2014 *Managing the Risks* and *Energy and Climate* reports, its December 2013 and December 2014 investor presentations in New York City, its Carbon Disclosure Project responses and Corporate Citizenship Reports, and [CEO Rex] Tillerson’s statement at the 2016 shareholder meeting.

Exxon made these statements in response to shareholder concerns that the company’s assets could become stranded in a future with increasingly stringent climate change regulation. Investors wanted to understand the steps the company was taking to minimize that long-term risk. . . .

. . . Exxon emphasized that it recognized that governments will respond to climate change by imposing increasingly stringent carbon costs over the coming decades. . . . And in its 2014 Corporate Citizenship Report, Exxon announced that it was not making “business as usual” assumptions on climate policy. In each of these reports, Exxon stated that it used a cost of carbon, reaching \$80 per ton of emissions in

2040 in developed countries and \$20-\$40 per ton in many non-OECD countries, in its investment decision-making and business planning.

. . . Exxon never disclosed that its internal Dataguide included significantly lower figures, reaching only \$40 in developed countries, and included no cost at all in base economics for non-OECD countries. And Exxon certainly never disclosed that it was assuming that existing legislated carbon costs, however low they may be, were going to remain in place, with no increase, for decades into the future. Exxon also never disclosed that in developed countries without existing legislated costs, it was going to assume that no such costs would be imposed in the coming decades. Nor did Exxon disclose that in its impairment evaluations, it was assuming that no costs associated with GHG emissions will be imposed in the future. Such assumptions are fundamentally contrary to Exxon's representations that it believed that governments will impose increasingly stringent climate policies, and that it applied a cost of carbon to incorporate that risk into its investment decision-making and business planning. . . .

Climate change regulatory risk is a critical risk in the oil and gas industry, and as a consequence, Exxon's misleading statements about its management of that risk are clearly material to investors. The applicable standard is whether there is a substantial likelihood that a reasonable investor would have considered Exxon's representations significant in light of the "total mix of information." . . .

There is no requirement that the topic of a company's disclosure be the most important factor to investors, or that the disclosure have a specific effect on the company's books and records, to be considered material. . . .

. . . [T]he fact that climate change risks to Exxon's business have not yet been fully realized, and that some investors may consider other factors to be more important, are no indication that those risks are immaterial. To the contrary, misleading statements about significant environmental risks are material regardless of whether they have a particular impact on a line item in a company's books and records. . . .

Major financial firms have also emphasized the importance of climate regulatory risk and have called for companies to disclose information about their management of such risks, including through the use of an internal price of carbon. . . .

Exxon has presented no good reason to doubt . . . that "real investors" cared about the company's disclosures concerning its management of climate change risk. . . .

Exxon also observes that nobody knows what carbon costs governments will impose in 2030 or 2040, but that is precisely why Exxon's disclosures about the assumptions it was making were so important. Many investors believe that oil and gas assets may become stranded, not under existing legislation, but under prospective climate legislation over the coming decades, and that companies' decisions and plans today will determine how they fare in the long term. Exxon's management of long-term climate change risks was significant enough for the company to publish two substantial

reports on the topic In short, investors were asking Exxon how it was managing long-term climate regulatory risks, and Exxon responded with multiple, substantial public disclosures. For Exxon to now assert that no one cared is absurd. . . .

People of the State of New York v. Exxon Mobil
Supreme Court of the State of New York, New York County
Index No. 452044/2018 (December 10, 2019)*

[Justice Barry Ostrager:]

. . . The Complaint . . . asserted four claims for relief prefaced by allegations asserting, *inter alia*, that ExxonMobil engaged in a “longstanding fraudulent scheme” “sanctioned at the highest levels of the company,” “[effectively erecting] a Potemkin village to create the illusion that it had fully considered the risks of climate change regulation and had factored those risks into its business operations.” The Complaint further alleges that “in reality [ExxonMobil] knew that its representations were not supported by the facts and were contrary to its internal business practices”

Nothing in this opinion is intended to absolve ExxonMobil from responsibility for contributing to climate change through the emission of greenhouse gases in the production of its fossil fuel products. ExxonMobil does not dispute either that its operations produce greenhouse gases or that greenhouse gases contribute to climate change. But ExxonMobil is in the business of producing energy, and this is a securities fraud case, not a climate change case. . . . [T]he Office of the Attorney General failed to prove by a preponderance of the evidence that ExxonMobil made any material misrepresentations that “would have been viewed by a reasonable investor as having significantly altered the ‘total mix’ of information made available.” . . .

. . . The alleged misrepresentations are principally contained in [*Managing the Risks and Energy and Climate*, two Exxon publications] dated March 31, 2014 The Office of the Attorney General also alleges that misrepresentations were made at two investor presentations in New York City in December 2013 and December 2014, in ExxonMobil’s Carbon Disclosure Project (“CDP”) Responses, in ExxonMobil’s Corporate Citizenship Reports, and by former ExxonMobil CEO Rex Tillerson at the March 25, 2016 ExxonMobil shareholder meeting. . . .

. . . [T]here was no evidence adduced at trial that the publication of the March 2014 Reports had any market impact at the time they were published or that investment analysts took note of the contents of these documents which were widely disseminated

* After the state trial court ruled for Exxon, environmental activists filed a motion to intervene to unseal the judicial documents filed in the case. The motion was denied in February 2020, and subsequent appeals are pending.

. . . [T]here was no proof offered at trial that established *material* misrepresentations or omissions contained in any of ExxonMobil’s public disclosures that satisfy the applicable legal standard. The total mix of information available to ExxonMobil investors during the relevant period included an annual, publicly-filed report . . . , the two March 2014 Reports, ExxonMobil’s Form 10-Ks, ExxonMobil’s annual Corporate Citizenship Reports, and a host of other publicly available information that was not the subject of testimony at trial

ExxonMobil’s disclosures were not intended to enable investors to conduct meaningful economic analyses of ExxonMobil’s internal planning assumptions, and no reasonable investor would have viewed speculative assumptions about hypothetical regulatory costs projected decades into the future as “significantly alter[ing] the total mix of information made available.” . . .

. . . ExxonMobil executives and employees were uniformly committed to rigorously discharging their duties in the most comprehensive and meticulous manner possible. . . . The testimony of these witnesses demonstrated that ExxonMobil has a culture of disciplined analysis, planning, accounting, and reporting. . . .

. . . [T]he Office of the Attorney General failed to prove, by a preponderance of the evidence, that ExxonMobil made any material misstatements or omissions about its practices and procedures that misled any reasonable investor. The Office of the Attorney General produced no testimony either from any investor who claimed to have been misled by any disclosure The publication of *Managing the Risks* had no market impact and was, as far as the evidence adduced at trial reflected, essentially ignored by the investment community. . . .

. . . [T]he claims asserted . . . under the Martin Act and Executive Law § 63(12) are denied, and the action is dismissed with prejudice.

* * *

We conclude the section with an address by Lord Sales of the Supreme Court of the United Kingdom to the Anglo-Australasian Law Society, in which he discussed companies’ increasingly robust obligations to consider and reduce their environmental harms.

Directors’ Duties and Climate Change Lord Philip Sales (2019) *

. . . The climate change emergency . . . is already having impacts on the financial and business worlds. Those worlds also make their contribution to the problem. Do they

* Excerpted from Lord Philip Sales, Justice of the Supreme Court of the United Kingdom, *Directors’ Duties and Climate Change: Keeping Pace with Environmental Challenges*, Address to the Anglo-Australasian Law Society (Aug. 27, 2019).

have the ability to change their activities to lessen that contribution? Does the law in relation to the duties of company directors have a role to play? . . .

The response of company law to the novel and growing challenges presented by climate change and wider environmental issues is still in its infancy in both England and Australia. However, legislative activity in this area has increased since the early 2000s, particularly in England, and this trend is likely to continue. . . .

The position of directors of companies in relation to climate change can be analysed under three heads.

First, they will have obligations to comply with the various regulatory and legal disclosure requirements now being specified.

Secondly, in so far as the law imposes fines in relation to polluting activities or creates tax incentives to encourage a shift to low carbon activity, directors will have a responsibility in the usual way to assess the financial impacts of these on their companies. This is a direct way in which the state can in effect force directors to take account of climate change effects of their companies, through reliance on the duty of directors to safeguard the finances of their companies as part of their obligation to promote the commercial interests of their shareholders.

Thirdly, apart from this regulatory and state action, the general fiduciary obligations of directors owed to their companies—representing as the case may be the interests of shareholders or, in certain circumstances, creditors—may permit directors to have regard to climate change effects as a factor in their decision-making. There is a spectrum of possibilities here. At one end, under directors' fiduciary obligations and obligations to exercise due care in the management of a company's affairs, environmental matters may be something they are permitted to have regard to, if they choose in their discretion to do so. Next, the law may impose an obligation on them to "have regard" to such matters when exercising their managerial powers. But with a "have regard" obligation they would usually be entitled to find that other relevant factors, such as maximising shareholder value, could outweigh climate change considerations. Under certain circumstances, however, their companies' interests may be so implicated by climate change effects that their general fiduciary and due care obligations actually require them to cause their companies to take action to reduce their contribution to climate changing activity.

Since, for the most part, this sort of decision is a permissive rather than obligatory matter so far as the law is concerned, the identity of the directors and their general mind-set and willingness to take into account climate change factors can make a significant difference to the practice of the companies on the ground. . . .

. . . [T]he approach in both [Australia and England] is still driven by risk management, i.e. avoiding negative outcomes for the company. . . . [T]he main relevant legal duty in Australia, the duty of care and diligence . . . , is framed in minimalist terms

which point to that conclusion. As [Noel Hutley SC 2016 Memorandum of Opinion] puts it, “the degree of care and diligence required of a director in any given context will depend upon the ‘nature and extent of the foreseeable risk of harm to the company that would otherwise arise.’” Similarly, the core . . . legal duty in England to promote the success of the company, while couched in more positive terms, certainly does not require directors to be at the vanguard of corporate governance either. In my view, that is not necessarily a major legal impediment to greater action based on taking account of environmental impacts, provided more specific requirements (including on disclosure, reporting, information-gathering and risk analysis) supplement these overarching general directors’ duties. . . .

FORGING A GLOBAL ENVIRONMENTAL PACT

Climate change is a global problem requiring global solutions. As illustrated by the world’s response to COVID-19, global problems can serve as stress tests on subnational, national, regional, and international governance systems. The preceding materials demonstrate how courts responded to climate change litigation largely in the shadow of domestic and regional constitutional provisions. Although the Paris Climate Change Agreement was adopted in December 2015 and has since resulted in various instances of litigation, there is not yet an international climate treaty that interacts with national and regional constitutions. This section explores recent and ongoing efforts to forge a Global Pact for the Environment, with a focus on the players involved, the goals of the Pact, and obstacles to achieving these efforts.

Technological Revolution, Democratic Recession and Climate Change Luís Roberto Barroso (2019)*

. . . Climate change has been identified as the most relevant environmental problem of the 21st century and one of the issues that defines our time. . . . Addressing environmental issues requires cooperation between countries, for natural resources and the factors that affect them are not contained by borders. . . . [T]he planet is warming up and . . . the consequences . . . can already be felt in different parts of the world. These include global warming, ocean warming, ice sheet melting in Greenland and Antarctica, glacial retreat, the loss of snow cover in the Northern Hemisphere, sea level rise, loss in the extent and thickness of the Arctic sea ice, species extinction and increasing numbers of extreme weather conditions (such as hurricanes, floods and heat waves). In the Amazon, the largest biodiversity repository and largest carbon storage in the world, the original forest area has been reduced in a staggering scale and is seriously affected by activities such as agriculture, livestock, timber exploitation and mining. . . .

* Excerpted from a 2019 draft of Luís Roberto Barroso, *Technological Revolution, Democratic Recession and Climate Change*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (forthcoming 2020).

Although voluntary social behavior deriving from environmental awareness is important, it is clearly not enough. Law, with its normative force and mechanisms of incentives and sanctions, will play a decisive role in dealing with the subject. Some of the major initiatives on global warming have [their] origins in international law, starting with the 1992 United Nations Framework Convention on Climate Change (UNFCCC Convention). The purpose of the Convention was “to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic (*i.e.* human-caused) interference with the climate system.” The Framework Convention, which came into force in 1994 and was ratified by 197 countries, established comprehensive principles, general obligations and negotiation processes to be detailed in subsequent conferences between the parties. . . . The Kyoto Protocol and the Paris Agreement came next, completing the UN’s normative regime on climatic changes. . . .

. . . [T]he Paris Agreement is widely recognized as a significant breakthrough The harsh reality . . . is that countries have made promises that they will not be able to honor. . . . [C]ountries have the flexibility to set their own commitments and there are no coercive enforcement mechanisms. In this context, two are the problems that have been detected: emission reduction targets will not be reached, and, in addition, they have proved to be insufficient. . . .

A general evaluation of the results of the Paris Agreement is expected in 2023. There are few doubts that much broader efforts will be needed to achieve the proposed goals. Nothing about this subject is simple [S]hort-term electoral cycles do not favor decisions whose positive consequences are only felt in the long-term. . . . [M]ost people who will be affected by climate change have no voice or vote, either because they are very young or because they have not even been born. . . . [I]ntricate technical and scientific issues rarely attract popular mobilization. . . . [B]ecause it is a global problem, it does not involve strictly national solutions, which makes some nationalist politicians prefer to believe that the problem does not exist. . . .

In a scenario full of asymmetries among countries, marked by globalization, transnational problems and extraterritoriality of solutions, public law lives an important moment and is in search of new horizons. The nineteenth century was the century of private law—the property holder and the contractor. The twentieth century witnessed the rise of public law, the welfare state and the expansion of constitutional jurisdiction. The 21st century coexists with the expectations of a global society, which demands, in relation to specific issues, an equally global law. This is not a philosophical or doctrinal choice, but an inevitable scenario: social networks via the Internet, carbon monoxide and campaigns to destabilize democracy do not respect borders or sovereignties.

A Global Pact for the Environment

Yann Aguila (2020)*

. . . [I]nternational environmental law . . . lacks a fundamental, legally binding document that effectively translates environmental law principles in international and national legal systems. As a result, effective global environmental governance is impeded by fragmentation and gaps in the law. . . . A Global Pact would fill this gap by serving as an “umbrella text” of sorts, and thus reinforce the coherence of international environmental law. Thus, a Global Pact would harmonize the law as well as evolve and expand the legal protections that exist for the global environment.

In 2017, a group of legal experts sought to give shape to this idea by elaborating an initial draft of a Global Pact. This draft is based on two “source principles”, a right and a duty: the right to a healthy environment and the duty to take care of the environment. These source principles are corollaries of one another, as the right to a healthy environment cannot exist without a countervailing responsibility to protect and preserve the environment. These source principles give rise to a set of widely recognized principles of international environmental law: duties of prevention and remediation of environmental harms, the right to information and public participation in environmental decision-making, and polluter-pays. This draft Pact also proposes innovative principles, such as non-regression or *official* recognition of the role of civil society in environmental protection. This Global Pact can be seen as a global environmental constitution

The ambition to develop a Global Pact for the Environment is not new in global environmental governance. The first significant attempt to develop a global framework for environmental protection was the Conference on Human Environment in Stockholm in June 1972, now widely regarded as the “constitutional moment” of international environmental law. Yet despite its fundamental political importance, the conference’s resulting declaration was a soft-law instrument devoid of legal force. . . .

. . . [T]he 1992 Rio Declaration on Environment and Development . . . set forth constitutional principles for global environmental governance. . . . Many of these environmental principles have catalyzed the development of customary norms and have been transposed into a wide range of global treaties and instruments. However, it is also important to note that these examples highlight the limitations of “soft-law” instruments like the Rio Declaration, in that they establish principles without legal force that *may*, and often in piece-meal fashion, crystallize into customary norms or be adopted into binding agreements. . . .

Inspired by the 1992 Rio Declaration, the International Union for the Conservation of Nature (IUCN) released the first of consistently updated drafts of an

* Excerpted from Yann Aguila, *A Global Pact for the Environment: The Logical Outcome of 50 Years of International Environmental Law*, 12 SUSTAINABILITY 5636 (2020).

International Covenant on Environment and Development in 1995. Further developments pointing to a Global Pact include the 2012 Rio Summit on Sustainable Development, the 2015 Addis Ababa Action Agenda on Financing for Development, the Agenda for Sustainable Development with its Sustainable Development Goals (SDGs) in 2015, and, finally, the adoption of the Paris Agreement in December 2015.

In November 2015, the legal think-tank *Club des Juristes* released a report recommending the adoption of a Universal “Pact” to unify international environmental law in a binding instrument that would (i) impose environmental obligations on states and non-state actors; (ii) confer environmental rights to citizens; and (iii) create an invocable legal instrument in national courts. The adoption of the Paris Agreement inspired high-level international support and led to the 2017 convening of an international network of over 100 environmental law experts from more than 40 countries who redacted a draft text for a Global Pact in June 2017. . . .

In September 2017, over 40 heads of state expressed their support at the “Summit on a Global Pact for the Environment.” In May 2018, the UN General Assembly adopted the enabling resolution “Towards a Global Pact for the Environment,” with 143 states voting to adopt the resolution and only five voting against it (the United States, Russia, Syria, the Philippines, and Turkey); the latter were broadly unconvinced that a Global Pact is a priority and necessary. . . . The enabling resolution called on the UN Secretary-General to prepare a report and to set up a working group to make recommendations to the UN General Assembly on the matter, including the possibility to convene an intergovernmental conference to adopt an international instrument.

The Secretary-General’s November 2018 report found that international environmental law could indeed be strengthened “through a comprehensive and unifying international instrument that gathers all the principles of environmental law.” The Pact’s working group met at the UN Environment’s Nairobi headquarters for three substantive meetings during 2019, resulting in a recommendation to states to adopt a “political declaration” on the matter in 2022, in the context of the 50th anniversary of the Stockholm Conference. While this delays the Pact’s adoption, supporters of the Pact remain hopeful that continued mobilization might see the formal adoption of a Global Pact in 2022. . . .

Draft Global Pact for the Environment International Group of Experts for the Pact (2017)

The Parties to the present Pact . . . [h]ave agreed as follows:

Article 1. Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment.

Article 2. Every State or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels to the conservation, protection and restoration of the integrity of the Earth's ecosystem.

Article 3. Parties shall integrate the requirements of environmental protection into the planning and implementation of their policies and national and international activities, especially in order to promote the fight against climate change, the protection of oceans and the maintenance of biodiversity. They shall pursue sustainable development. . . . [T]hey shall ensure the promotion of public support policies, patterns of production and consumption both sustainable and respectful of the environment.

Article 4. Intergenerational equity shall guide decisions that may have an impact on the environment. Present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs.

Article 5. The necessary measures shall be taken to prevent environmental harm. The Parties have the duty to ensure that activities under their jurisdiction or control do not cause damage to the environments of other Parties or in areas beyond the limits of their national jurisdiction. They shall take the necessary measures to ensure that an environmental impact assessment is conducted prior to any decision made to authorise or engage in a project, an activity, a plan, or a program that is likely to have a significant adverse impact on the environment. In particular, States shall keep under surveillance the effect of an above-mentioned project, activity, plan, or program which they authorise or engage in, in view of their obligation of due diligence.

Article 6. Where there is a risk of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing the adoption of effective and proportionate measures to prevent environmental degradation.

Article 7. The necessary measures shall be taken to ensure an adequate remediation of environmental damages. Parties shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Parties shall promptly cooperate to help concerned States.

Article 8. Parties shall ensure that prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their originator.

Article 9. Every person, without being required to state an interest, has a right of access to environmental information held by public authorities. Public authorities shall, within the framework of their national legislations, collect and make available to the public relevant environmental information.

Article 10. Every person has the right to participate, at an appropriate stage and while options are still open, to the preparation of decisions, measures, plans, programmes, activities, policies and normative instruments of public authorities that may have a significant effect on the environment.

Article 11. Parties shall ensure the right of effective and affordable access to administrative and judicial procedures, including redress and remedies, to challenge acts or omissions of public authorities or private persons which contravene environmental law, taking into consideration the provisions of the present Pact.

Article 12. The Parties shall ensure that environmental education, to the greatest possible extent, is taught to members of the younger generation as well as to adults, in order to inspire in everyone a responsible conduct in protecting and improving the environment. The Parties shall ensure the protection of freedom of expression and information in environmental matters. They support the dissemination by mass media of information of an educational nature on ecosystems and on the need to protect and preserve the environment.

Article 13. The Parties shall promote, to the best of their ability, the improvement of scientific knowledge of ecosystems and the impact of human activities. They shall cooperate through exchanges of scientific and technological knowledge and by enhancing the development, adaptation, dissemination and transfer of technologies respectful of the environment, including innovative technologies.

Article 14. The Parties shall take the necessary measures to encourage the implementation of this Pact by non-State actors and subnational entities, including civil society, economic actors, cities and regions taking into account their vital role in the protection of the environment.

Article 15. The Parties have the duty to adopt effective environmental laws, and to ensure their effective and fair implementation and enforcement.

Article 16. The Parties shall take necessary measures to maintain and restore the diversity and capacity of ecosystems and human communities to withstand environmental disruptions and degradation and to recover and adapt.

Article 17. The Parties and their sub-national entities refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law.

Article 18. In order to conserve, protect and restore the integrity of the Earth's ecosystem and community of life, Parties shall cooperate in good faith and in a spirit of global partnership for the implementation of the provisions of the present Pact.

Article 19. States shall take pursuant to their obligations under international law all feasible measures to protect the environment in relation to armed conflicts.

Article 20. The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special attention. Account shall be taken, where appropriate, of the Parties' common but differentiated responsibilities and respective capabilities, in light of different national circumstances.

Article 21. A compliance mechanism to facilitate implementation of, and to promote compliance with, the provisions of the present Pact is hereby established. This mechanism consists of a Committee of independent experts and focuses on facilitation. It operates in a transparent, non-adversarial and non-punitive manner. The committee shall pay particular attention to the respective national circumstances and capabilities of the Parties. One year after the entry into force of the present Pact, the Depositary shall convene a meeting of the Parties which will establish the modalities and procedures by which the Committee shall exercise its functions. Two years after the Committee takes office, and at a frequency to be determined by the meeting of the Parties, not exceeding four years, each Party shall report to the Committee on its progress in implementing the provisions of the Pact. . . .

* * *

The UN General Assembly adopted Enabling Resolution 72/277, titled *Towards a Global Pact for the Environment*, in May 2018. The Resolution tasked the UN Secretary-General with preparing a report on the existing gaps in international environment law. The UN Secretary-General released the report in November 2018.

**Gaps in International Environmental Law
and Environment-Related Instruments**
United Nations Secretary-General (2018)*

. . . 24. The involvement of a large number of States with diverse national circumstances and priorities in treaty negotiations leads to the fact that multilateral environmental agreements often serve multiple objectives which are not always easily reconciled or mutually enhancing, but arise out of political compromises struck between different interests. Without these compromises, and their often deliberate constructive ambiguities and gaps, however, the likelihood of agreement on international environmental treaties would be significantly diminished, undermining the prospect for global cooperation on urgent environmental issues.

25. Broad participation also relies on workable notions of fairness, including the concepts of equitable burden and effort-sharing. Multilateral environmental agreements therefore often contain provisions that take into account differing circumstances. . . .

* Excerpted from U.N. Secretary-General, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment*, U.N. Doc. A/73/419 (Nov. 30, 2018).

[B]ecause the national circumstances and capabilities of States differ significantly, the future development of international environmental law is likely to require more, rather than less, differentiation and flexibility. . . .

77. The structure of international environmental governance is characterized by institutional fragmentation and a heterogeneous set of actors. Although States remain the primary actors, international environmental governance is a multi-actor governance system that includes international institutions, treaty bodies, non-governmental organizations, the scientific community and the private sector.

78. A multiplicity of global and regional international institutions participate in the task of international environmental law-making and implementation. They comprise entities of the United Nations system and treaty bodies established by multilateral environmental agreements. . . .

79. After the Stockholm Conference, international environmental law-making saw the proliferation of multilateral environmental agreements and the emergence of treaty-based bodies. According to the Environmental Law Information Service (ECOLEX), there are currently more than 500 multilateral environmental agreements, and it has been estimated that some 200 or so treaty-based institutions were established in the two decades after the Stockholm Conference. . . .

80. The proliferation of multilateral environmental agreements and the resultant distinct and separate mandates ignore the unity, interconnectedness and interdependence of the Earth's ecosystem. They also create potential for overlap and conflict, institutional and policy incoherence and increased financial and administrative burdens on States parties. Significant efforts, however, are made to ensure mutual supportiveness among such agreements either in their texts . . . or in the way they are further developed and implemented More efforts could be made to establish or strengthen mechanisms to harness interlinkages and promote synergies for more effective implementation. . . .

82. Enhanced coordination might be necessary not only within the field of international environmental law, but also between multilateral environmental agreements and other instruments that directly or indirectly affect the environment, such as trade law, investment law and intellectual property rights regimes.

83. Institutional fragmentation and weak coordination between treaties can be addressed through various means, such as: (a) creating clusters and synergies between conventions; (b) mapping existing global and regional action plans and agreements to create an overview of coverage and identify interlinkages; (c) avoiding duplication of reporting and/or monitoring processes by using the same reporting channels and not creating additional burdens (“integrated reporting”); (d) sharing lessons learned and best practices; (e) developing implementation guidelines for multilateral environmental agreements; and (f) sharing information among the different scientific bodies that

support the work of related multilateral environmental agreements. Potential conflicts between treaty regimes can be managed by using legal means, including conflict clauses, mutual supportiveness or the application of the general rule of treaty interpretation contained in . . . the Vienna Convention on the Law of Treaties.

84. The trend in international environmental governance is increasingly towards broadening the range of actors recognized as having a legitimate role in governance. . . . However, . . . [v]ery few regimes provide for public participation in the non-compliance procedures established to monitor, review and verify compliance with international obligations. . . . [C]ompared to the international human rights mechanisms there exists a significant gap in international environmental law regarding effective participation by non-State actors in international law-making and implementation. . . .

86. The lack of effective implementation of many multilateral environmental agreements has been identified as a major gap in addressing environmental challenges. . . . Implementation deficits arise for different reasons, including knowledge gaps; a lack of adequate means of implementation, such as finance, capacity-building or technology; the need for facilitation for compliance; a lack of coordination between relevant government departments as well as with other sectors; insufficient monitoring and law enforcement; a lack of political will; and the inadequate engagement of different stakeholders, such as civil society and women's organizations. . . .

92. Compliance mechanisms and procedures established within a multilateral environment agreement provide a multilateral avenue for addressing party-specific compliance challenges. . . . While some treaties have established mechanisms to monitor compliance and address cases of non-compliance, overall there remains a need to strengthen these procedures in order to promote the effective implementation of international environmental law. In addition, gaps in this context may be viewed in participatory terms, inasmuch as non-compliance bodies do not generally permit non-State actors to raise complaints.

93. Gaps also persist in the enforcement of rights and obligations regarding the global commons and shared natural resources, such as the high seas, Antarctica and outer space. In terms of disputes concerning natural resources which do not originate from environmental treaties, practices under international trade and investment regimes also reveal gaps in the implementation and effectiveness of environmental norms. Such gaps in regime interaction may also arise insofar as many environmental treaties do not address their relationships with economic treaties, which may give rise to distinct sources of applicable law or jurisdiction in a given dispute.

94. . . . [A] liability and redress regime for transboundary environmental harm serves several policy objectives: first, it serves as an instrument for the internalization of the environmental costs of polluting activities by making the polluters pay; second, it incentivizes compliance with international environmental norms and standards and ensures the implementation of the precautionary and preventive principles; and finally,

it ensures the redress of environmental damage through the implementation of restorative measures. Whereas there has been a remarkable proliferation of multilateral environmental agreements since the Stockholm Conference, there has been only limited development in the area of liability and redress for transboundary environmental harm. . . .

96. The rules of State responsibility may need to be further developed if they are to play any significant role as a tool for redressing transboundary environmental harm. Currently there are some important constraints. In particular, the “due diligence” standard of care implies a demonstration of fault on the part of the State concerned since it denotes an obligation of conduct and not of result. . . .

98. There have been remarkable developments in treaty law relating to civil liability for transboundary environmental damage. Issue-specific treaty regimes cover diverse areas such as nuclear energy, oil pollution, the transport of dangerous goods and substances, living modified organisms and industrial accidents. . . .

99. There exist some notable deficiencies with respect to these regimes. . . . [T]he valuation of environmental damage and its reparation has proved problematic. While it is agreed that, for liability to arise, environmental damage should exceed a *de minimis* threshold, there is no agreed international standard for that threshold. . . . Most of the civil liability regimes restrict compensation to “costs of measures of reinstatement of the impaired environment undertaken or to be undertaken.” A number of courts and tribunals have, however, awarded compensation for pure environmental damage. In many cases, environmental damage in areas beyond the limits of national jurisdiction is not covered. . . .

113. Building upon the creative approaches that States have thus far adopted to protect the environment, it is essential that States and the United Nations work together to address gaps in international environmental law. We must collectively seize the opportunity to use international environmental law in new and dynamic ways to provide a strong and effective governance regime with a view to better safeguarding the environment for future generations.

* * *

After the release of the UN Secretary-General’s report, the Global Pact Working Group met three times in Nairobi over the first half of 2019. Instead of calling for immediate adoption of a binding international treaty, the Working Group recommended the adoption of a “political declaration” in 2022. For some commentators, the Working Group recommendations sounded the Global Pact’s death knell. For others, the delay represents an opportunity to revisit and continue strengthening the principles undergirding the Pact. The excerpts below reflect this range of attitudes towards the future of the Pact.

**There Will Be No Global Environmental Constitution
(at Least Not Now)**

Jesse Reynolds (2019)*

. . . [T]he UN General Assembly appointed an ad hoc working group to discuss possible options to address possible gaps in international environmental law and environment-related instruments

Notably, this statement of task did not reference a “global pact” per se. . . . [T]he working group . . . negotiated and agreed upon a two page document whose thirteen substantive objectives are a far cry from bold. . . .

. . . [T]he working group encourages the relevant actors in international and national environmental governance to continue what they are doing and to increase their ambition. There is no mention of a possible new instrument, much less a quasi-constitutional Global Pact for the Environment. . . .

What happened? . . . First, one should not expect international agreements with both wide participation and deep commitments, as states’ preferences vary and international law is based on their consent. Second, states’ current (non)participation in multilateral agreements presumably reflects their preferences. After all, they’ve had fifty years to ratify the agreements that they wish to, and little has substantively changed in recent years to alter that calculus. Third, the original draft Global Pact for the Environment that some international legal scholars (mostly from developed countries, especially the French Club des Juristes) was tone-deaf to developing countries’ interests. . . .

[Another reason] for the Pact’s failure . . . regards the identity of the Pact’s original proponents [L]egal scholars, especially those who operate in international and environmental domains, too often fail to realize . . . that multilateral agreements typically reflect states’ diverse interests, not vice versa. . . . The proponents repeat “We demand a binding environmental treaty from States!” Setting aside the question of who are they to demand particular action from states (including where they neither live nor vote), if an agreement is reached, it will not have both near-global participation and substantially deep commitments.

* Excerpted from Jesse Reynolds, *There Will Be No Global Environmental Constitution (at Least Not Now)*, LEGALPLANET (June 18, 2019).

International Environmental Law's Lack of Normative Ambition

Louis J. Kotzé (2019)*

. . . [International Environmental Law (IEL)] is not sufficiently ambitious to deal with the increasingly assertive and destructive *Anthropos* (understood here to refer to a small and particularized, but powerful and privileged, subset of the past and present global human population), and with the myriad socio-ecological injustices arising from such human domination of the Earth system and of the vulnerable living order. . . .

. . . IEL must entrench ambitious ecological norms to address its “unmentionable gaps.” These “unmentionable gaps” relate to those norms that have not yet been agreed by the international community. . . . Some examples are the rights of nature, Earth system integrity, the principle of *in dubio pro natura* [(when in doubt, in favor of nature)], and ecological sustainability; all of which have the potential to push for a radically different and more ambitious normative framework to address the systemic challenges inherent in IEL and in global environmental governance. . . .

. . . There seems to be general agreement that IEL has achieved many victories since its birth in the early 1970s. But there are likewise many valid views suggesting that IEL has not been able to confront head on the ever-deepening socio-ecological crisis that is engulfing the living order. . . .

First, ambitious climate laws are seen to inhibit economic growth . . . , while some of the more ambitious, and certainly innovative, law-making occurs in the areas of global investment law in an effort to stimulate global economic growth. . . .

Second, States have deliberately ensured that anthropocentric sustainable development is *the* cornerstone principle of IEL. But as deceptively simple and environmentally oriented an idea as sustainable development seems to be . . . [c]ritical legal scholars have shown that it is rather a convenient, fictitious ideological palliative that IEL underwrites and that legitimizes and helps rationalize anthropocentric Earth system altering practices. . . .

And third, IEL still consciously pursues voluntarism when it comes to corporate responsibility. It is failing as a result to reign in corporate exploitation and in creating stringent standards to regulate the many eco-destructive activities of corporations. . . .

The most recent and still ongoing initiative to reform IEL, is the Global Pact The Pact was drafted by a Group of Experts of which I was a member [T]he ambition of the Global Pact presumably lies in its pursuit to be the first binding framework instrument of IEL; in its vision to codify environmental principles; and in its pursuit to be the first global instrument that entrenches higher order global

* Excerpted from Louis J. Kotzé, *International Environmental Law's Lack of Normative Ambition: An Opportunity for the Global Pact for the Environment?*, 16 JOURNAL FOR EUROPEAN ENVIRONMENTAL & PLANNING LAW 213 (2019).

environmental constitutional norms in the form of rights. It therefore clearly wants to be ambitious. If it actually succeeds is an altogether different matter

. . . The Group of Experts was notably not constrained by the usual potentially inhibitive inter-State politics, exceptionalism and posturing; it could be as creative and *ambitious* as it wished to be and it could mention the “unmentionable gaps.” . . . [T]he Pact’s . . . preamble mentions the World Charter for Nature, the need for ecosystem resilience, respect for the balance and integrity of the Earth’s ecosystem, and the need to respect human rights obligations.

More importantly, article 1 says: “Every person has the right to live in an *ecologically sound environment* adequate for their health, well-being, dignity, culture and fulfilment.” . . . [N]o IEL instrument, hard or soft, currently provides for an environmental right. . . . The inclusion of such a “constitutional” right in a binding global instrument will therefore not only fill a normative gap in IEL, it could also potentially raise that instrument’s level of normative force and status to that equalling a global “constitution.” . . . [T]he Pact’s formulation . . . also ambitiously recognises *ecological soundness* as a threshold for transgression, and not the more generally encountered and anthropocentrically inclined “human health and well-being.”

. . . [A]rticle 2 provides for a duty of care This is a provision one is more likely to encounter in domestic regimes and its inclusion here, alongside the broadening of the scope of this duty to non-state actors and its reference to Earth system integrity, is both innovative, and I would suggest, ambitious. In fact, such a provision could also usefully form the basis of a norm holding corporations to account for their socio-ecological destruction. . . .

Articles 3-7 simply restate the well-known general principles of IEL including: integration and sustainable development, intergenerational equity (and strangely not also intra-generational or interspecies equity), prevention, precaution, remediation of environmental damages and polluter pays. A similar regurgitation occurs with respect to provisions on education and training, research and innovation, the role of non-state actors and subnational entities, cooperation, armed conflicts (from which provisions on ecocide are notably absent) and diversity of national situations. . . .

It is only towards the end of the draft text that there is again an attempt to be more ambitious. Article 15 states: “The Parties have the duty to adopt effective environmental laws, and to ensure their effective and fair implementation and enforcement.” Both in terms of the level and scope of obligation it requires and in terms of its purpose and possible practical implications, this is arguably one of the most ambitious norms of the draft text. Then follows a provision on resilience which provides “The Parties shall take necessary measures to maintain and restore the diversity and capacity of ecosystems and human communities to withstand environmental disruptions and degradation and to recover and adapt.” . . . While a strong case could be made . . . that IEL must . . . more ambitiously *improve* Earth system stability and integrity and

promote restoration, article 17 at least provides for the principle of non-regression: “The Parties and their sub-national entities [must] refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law.”

On balance then, the extent to which the draft Global [Pact] pursues normative ambition is a mixed bag. In some instances it innovatively offers ambitious norms that have not yet been taken up in the current body of IEL, and this is encouraging. But in other instances it simply restates several existing norms which cannot by any measure [be] said to be ambitious. It has shied away from being overtly “ecological” by shunning provisions such as the rights of nature, the principles of *in dubio pro natura* and inter-species justice. . . .

Despite the recent recommendations of the *ad hoc* working group to the [UN General Assembly] not to adopt a binding IEL instrument in the foreseeable future, the Global Pact initiative continues to offer an important opportunity to rethink the ways in which we respond juridically to an increasingly erratic Earth system and how we address the underlying drivers that cause, exacerbate and perpetuate the Anthropocene. I believe the Pact’s value lies specifically in how it admirably manages to raise awareness of global socio-ecological decline; how it attempts to seek broader consensus that something needs to be done soon; and for the momentum it is creating that could possibly culminate in the type of “global environmental constitutional moment” that the Anthropocene ultimately demands. . . .

. . . The disappointingly uninspiring recommendations of the *ad hoc* working group should serve as motivation to everyone involved with promoting the Global Pact to become much more “hostile” to the *status quo*, despite, or hopefully even consequent on, sustained radical critique that is aimed at bolstering this important initiative.

Prospects for 2020-2022 Maria Antonia Tigre (2020)*

. . . While . . . the exercise done [by the UN working group] in Nairobi to identify further challenges and options to improve the effectiveness of international environmental law . . . provide[s] a blueprint for the progressive development of international environmental law, it is important not to lose sight of the role of the codification of principles. . . .

. . . A Global Pact has the potential to clarify, consolidate, and legalize principles of international environmental law that now appear in hundreds of agreements and declarations. . . . [I]t also promises normative coherence for the international legal

* Excerpted from MARIA ANTONIA TIGRE, GAPS IN INTERNATIONAL ENVIRONMENTAL LAW: TOWARD A GLOBAL PACT FOR THE ENVIRONMENT 197-205 (2020).

system as a whole. If the Global Pact evolves into a treaty, it will clarify which principles are binding law and which are soft law. . . .

A binding and widely ratified Global Pact for the Environment [(GPE)] could provide clearer direction for treaty-interpreters to achieve systemic integration in public international law, due both to its ongoing crystallization of custom and to its potential status as a binding treaty. Questions that remain open or unaddressed by international instruments, such as the issue of plastics in marine environments, could rely upon a Global Pact. . . .

. . . [Principles can also] have a normative effect despite [their] non-legally binding effect. . . . The GPE, even if it does not become a treaty, could similarly carry significant normative weight in state and nonstate practice. Detailed application of the broad principles set forth . . . could then be provided through commentaries and model laws to assist with implementation and incorporation of the principles into domestic law.

By establishing the right of every person to “live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfillment,” the Global Pact offers a new way for environmental protection to be achieved through adjudication by national and international courts and tribunals. The codification of the right to the environment further contributes to the justiciability of environmental principles. . . . First, recognition [of the right to a healthy environment] would “raise awareness of and reinforce the understanding that human rights norms require protection of the environment and that environmental protection depends on the exercise of human rights”

Second, it would crystallize and integrate the human rights norms relating to the environment Third, the recognition would place greater attention on those most vulnerable to the effects of environmental harm. To further increase the protection, the Pact could strengthen individual or collective citizens’ rights, including the protection of environmental rights defenders and whistleblowers, the rights of environmentally displaced persons, the victims of sudden- or slow-onset disasters. Issues related to environmental justice, the rights of indigenous peoples, access to justice and to administrative documents for citizens and NGOs, and the rights of stakeholder groups in international negotiations could also be covered by specific provisions. Fourth, the recognition will raise “the profile and importance of environmental protection” and provide a basis for the enactment of stronger environmental laws, standards, regulations and policies [T]hese benefits do not depend on the recognition of the Global Pact as a binding treaty.

Additionally, a universal instrument on the general principles of environmental law would highlight innovative principles while helping to achieve the Sustainable Development Goals, consistent with their universality and indivisibility. The Global Pact provides a unique opportunity to develop a new approach to international standards

and contribute to the implementation of the 2030 Agenda. It could provide coordinating guidance for existing treaties, including on the guiding principles and concepts already contained in international instruments. Finally the role of the civil society needs to be reinforced. The Pact also imposes a duty to take care of the environment on “every person, natural or legal, public or private,” thus broadening the range of actors responsible for the environment. It enforces the vital role of subnational entities . . . and urges states to encourage their implementation of the Pact.

Given the advantages of the codification of principles, it is essential that the discussion continues. Moving forward, the focus should be on how, not if, to clarify the principles of international environmental law with normative values that facilitate consistency of interpretation and implementation in the context of sustainable development. . . .

Following a rights-based approach, the Pact could identify new environmental rights, further emphasizing the link between human rights and the environment. New rights such as granting rights to nature . . . could be adopted in the Pact, solidifying a trend followed recently by several countries. Recent developments in procedural rights should also be noted. As suggested by some delegates from Latin America, the discussions should consider the recently adopted Escazú Agreement on environment and human rights, signed on 4 March 2018 within the framework of the Economic Commission for Latin America and the Caribbean. A human rights approach would help support stronger compliance mechanisms open to the public, as well as calls for new agreements on procedural access rights, such as the Aarhus Convention and the Escazú Agreement

Concepts such as *buen vivir* (“living well” or “well-being”) and ecological solidarity are worth discussing with a view to their possible inclusion in the Pact. These facilitate the bringing together of environmental protection and an alternative development model that is more inclusive and mutually supportive. The Pact could adopt a “holistic” concept of the environment advocated by climate justice, encompassing all relevant elements (biodiversity, land use, exploitation of natural resources, protection of the seas and oceans, but also the agricultural and food issue). . . . The Pact could include principles such as ecological solidarity, non-regression or international liability for environmental damage. These are a few options on new developments in comparative environmental law, which could be included in a debate on the text of a political declaration. The next year invites such a debate with multiple options on which answers can properly address current and future challenges in environmental protection. It is essential that a new agreement presents a workable menu of answers providing emerging environmental principles to address the challenges of the Anthropocene.

SURROGACY, AUTONOMY, AND EQUALITY

DISCUSSION LEADERS

DOUGLAS NEJAIME, REVA SIEGEL, AND DAPHNE BARAK-EREZ

IV. SURROGACY, AUTONOMY, AND EQUALITY

DISCUSSION LEADERS:

DOUGLAS NEJAIME, REVA SIEGEL, AND DAPHNE BARAK-EREZ

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Surrogacy has become a relatively common practice around the world, with an increasing number of couples and individuals turning to surrogacy to have children. The vast majority undertake gestational surrogacy, in which the woman serving as the surrogate bears a child to whom she is not genetically related. Instead, donor eggs or the eggs of the intended mother are used in the *in vitro* fertilization (IVF) process. The

sperm usually comes from the intended father, though donor sperm may be used in some cases.

For some different-sex couples, gestational surrogacy provides an opportunity to have a child genetically related to both the intended mother and father. A woman who has viable eggs, but cannot carry a pregnancy, can create an embryo with her own eggs and her partner's sperm—and then have the embryo transferred to a woman serving as a surrogate. Even when different-sex couples use donor eggs, surrogacy usually offers the opportunity to have a child genetically related to the intended father.

Surrogacy also affords a path to parenthood for same-sex couples and single people. When male same-sex couples have children through surrogacy, they usually use sperm from one of the men. Some couples create multiple embryos, some with the sperm of one of the men and some with the sperm of the other, so that each has a genetic child. Some couples combine their sperm so that they do not know to which man the child is genetically related. Procedures such as these reveal some of the tensions that surrogacy, as it is practiced today, presents. Surrogacy offers the opportunity to have a genetic child. Yet it regularly involves donor gametes. The practice seems at once to solidify and destabilize the priority of genetic ties.

Laws that prohibit or regulate surrogacy present a variety of constitutional questions. Do courts enforcing contracts for surrogacy violate women's rights, or do women have liberty or equality rights to engage in surrogacy? Are women's interests protected by banning surrogacy, or by allowing and carefully regulating the practice? (Is there one answer to that question, or might it vary over time, or by class, or culture?) What are the autonomy and privacy interests of those seeking to have children through surrogacy? Does a government that permits surrogacy have a constitutional obligation to provide equal access—so that unmarried people and same-sex couples as well as married couples can have children through surrogacy? When people travel across borders to enter into surrogacy arrangements, whose law determines the status of the parties involved?

Surrogacy is like and unlike other forms of assisted reproduction. It uniquely involves another woman gestating the child for nine months. For this reason, it has garnered more controversy than practices of gamete donation and IVF. The fact that a woman deliberately gestates a child she does not intend to raise creates unease, as it so fundamentally violates the role-expectations for pregnant women, who are understood to have duties as mothers. That a woman may choose to carry a child for another *for money* creates special concern, including urgent questions of human rights. Is reproductive labor a commodity which a woman can sell like most other forms of labor—or is it more akin to sex, which most still believe should not be commodified? Is compensation for surrogacy for the surrogate's services or instead for the child, and if so, might the transaction amount to baby-selling? (For some, restricting *commercial*, or compensated, surrogacy, and allowing only *altruistic* surrogacy mitigates concerns

about the appearance of women profiting from care work and the legitimacy of financial transactions involving parentage or children.)

Others see women as capable of making their own personal and economic choices under appropriate background conditions, and surrogacy as potentially empowering, because it enables women to enter into altruistic and remunerative relationships that may enrich their lives and their families' lives. Others may wish to give women some measure of control over the compromises they make in the struggle to support themselves and their families. Even for those who see surrogacy as degrading, why should women be prohibited from serving as surrogates yet allowed to engage in various forms of degrading, low-wage work? With appropriate regulation, should women be given the choice to serve as surrogates?

These questions raise competing views of women's status and autonomy, and thus present concerns of constitutional dimension. Should we allow women to decide whether and when to bear a child, including whether and when to enter into surrogacy agreements, just as we might with respect to contraception and abortion? Is the decision to enter such agreements, against traditional role-expectations for women, an expression of a woman's privacy, role-autonomy, and equality? Or, does surrogacy degrade women by taking advantage of poor women's destitution and treating them as "reproductive vessels"? Is the woman's consent to serve as a surrogate, in all cases, uninformed and coerced? Or is the prohibition of surrogacy an expression of paternalism that reinscribes traditional views about women's roles and decisional competence, symbolically and practically entrenches women's subordination, and threatens their emancipation in other contexts?

Can the woman who acts as a surrogate truly appreciate the experience of surrendering the child such that her consent to the arrangement is informed and voluntary? How could a woman acting as a surrogate not form an attachment with the child that is parental in nature? Are these concerns mitigated by the practice of gestational surrogacy, which unlike traditional (or "genetic") surrogacy does not involve the egg of the surrogate? Is the child a gestational surrogate carries not "her child" because she has no genetic connection? Can a surrogacy agreement be regulated in ways that take account of these concerns—or do they count as reasons, on balance, to ban the practice? In weighing the case for and against different forms of surrogacy, note how many of the underlying social judgments rest on norms and beliefs that are in flux. In what ways are social judgments about peoples' reasons for entering into the arrangements evolving, and why?

Consider this dynamic from another vantage point. Can jurisdictions with young children in need of adoption ban the practice of surrogacy? Or should these jurisdictions nonetheless allow the practice because they respect a potential parent's wish to have a child genetically related to themselves or their partner?

What kinds of families does surrogacy make possible? In what ways does surrogacy reproduce the “natural family,” and in what ways does surrogacy disturb the “natural family”? Does the practice affirm the importance of men’s bloodlines, or does it present new, emancipatory opportunities for “families we choose”? Or might it do both?

Will the practice of surrogacy persist even if banned—with women laboring and families formed outside the shadow of the law—and if so what bearing does that have on the question of regulation?

Which way do children’s interests point? Are children harmed by surrogacy? Do they suffer psychological harm, and if so, why? Because their existence arose from a commercial transaction? Because they have been separated from their “birth mother”? Do the interests of children justify banning the practice? If would-be parents evade such bans to have children through surrogacy in other jurisdictions, how should the resulting child’s interests be weighed? Does the child now have independent interests in citizenship, family recognition, and parental relationships that outweigh the government’s interest in restricting surrogacy?

Concerns about autonomy, equality, child welfare, commodification, and coercion will depend on how surrogacy is structured and regulated, and thus shape the social meanings of the practice.

Courts, legislatures, and human rights tribunals have faced these concerns in disputes over surrogacy. Judges have considered whether bans on surrogacy safeguard or undermine constitutional and human rights; whether forms of regulation that governments have undertaken comply with constitutional requirements and human rights principles; and how the practice of surrogacy across borders implicates state sovereignty, constitutional principles, and human rights norms.

Across legislative enactments and judicial decisions, we see that jurisdictions across the globe have responded to surrogacy in various ways. Some criminalize the practice. Criminalization may entail punishing third-party brokers, punishing those commissioning surrogates to have children, or punishing the women acting as surrogates. What are the practical effects of banning the practice? How do individuals determined to have children respond to such bans?

Other jurisdictions prohibit surrogacy not as a criminal but as a civil matter, thus refusing to recognize such arrangements in their family law systems or to treat surrogacy contracts as enforceable. In some of these jurisdictions, if all parties abide by the arrangement, they may be able to achieve their ends by having the woman who gives birth to the child relinquish her rights and allow the intended parent(s) to adopt the child. But if the woman who serves as the surrogate changes her mind, the law may offer the intended parents no recourse.

Many countries have retreated from such restrictive approaches. Today, many jurisdictions, including a growing number of states in the United States, allow and regulate surrogacy (namely, gestational surrogacy). They provide clear guidance on who may enter a surrogacy arrangement, what the arrangement must entail, and what parentage determinations follow from a compliant surrogacy arrangement.

Regulation varies along the following dimensions, raising questions of autonomy and equality for the women who act as surrogates and the individuals who seek to have children through surrogacy:

- whether surrogacy can be compensated or only altruistic;
- the role of genetics—including the forms of surrogacy permitted (must the surrogate be genetically unrelated to the child?), as well as the requirements imposed on would-be parents (must one of the intended parents contribute genetic material?);
- the status-based criteria that govern those who can have children through surrogacy—for example, whether the practice is limited to only married different-sex couples or also includes same-sex couples and single people;
- the healthcare decision-making authority of the woman serving as surrogate, including the right to terminate the pregnancy;
- the parentage determinations that follow from surrogacy—whether the woman who serves as the surrogate is the legal mother or whether the intended parents are the legal parents by operation of law; and
- the degree to which the state is willing to subsidize this process or related IVF procedures.

The forms of regulation are relevant to considering whether and how surrogacy promotes or undermines autonomy, privacy, and equality.

While many countries have acted either expressly to restrict or expressly to allow and regulate surrogacy, many other countries have done very little. They maintain neither criminal or civil prohibition, nor a permissive system of regulation. In some of these countries, surrogacy thrives as an industry.

Many who live in countries where surrogacy is banned or severely restricted evade the law. Those seeking to have children engage surrogates in more permissive jurisdictions—either where the practice is heavily regulated or scarcely regulated at all. The movement across borders for surrogacy (what some term “reproductive tourism”) has raised important questions of law and policy. How should courts and legislatures assign citizenship and family statuses to persons in surrogacy relationships formed

outside the country to evade domestic law? Does the child's citizenship run with the woman who acted as a surrogate or with the intended parents? Who are the legal parents—the woman who gave birth or the intended parents? Which jurisdiction's law matters in making such determinations—the jurisdiction where the child was born or the jurisdiction to which the intended parents return with the child? To what degree should the state take into consideration the ability or inability of citizens to have access to surrogacy in other countries? Recognizing, and denying, these parental relationships present multifaceted constitutional questions. They also squarely present the rights and interests of the children born through surrogacy. And they implicate critical questions of sovereignty for jurisdictions that continue to prohibit the practice.

We begin with perspectives on surrogacy across borders, and we return to these questions at the end of the chapter. The intervening sections focus on the shifting social meaning and legal status of surrogacy and the forms of regulation that have developed to address the practice—regulation that implicates constitutional guarantees and human rights.

SURROGACY AS A TRANSNATIONAL PHENOMENON

Many jurisdictions ban surrogacy—or allow some individuals (e.g., married, different-sex couples) but not others (e.g., same-sex couples, unmarried couples, and single people) to form families through surrogacy. Individuals and couples seeking to have children through the banned practice then travel to jurisdictions where it is allowed to evade the constraints of law. Others may travel across borders for financial, rather than legal, reasons. Even when the home country permits surrogacy, costs of the practice may be far lower abroad. This dynamic presents questions of exploitation, inequality, and geopolitics. The following excerpts provide various perspectives on surrogacy across borders. The excerpts illustrate how a once rare practice has become increasingly widespread and may call for new forms of judicial response.

The Baby Business Booms

Carolyn Schurr (2018)*

For 50,000 US\$, you can either go through four cycles of *in vitro* fertilization (IVF) in a U.S.-American fertility clinic or 10 IVF cycles in an Ukrainian clinic catering to reproductive tourists, buy yourself the oocytes of an Ivy-League egg donor, or travel to Mexico for a surrogate baby gestated by a Mexican surrogate laborer. . . . [E]conomic *geographies* underwrite the global fertility market. The consumption of the same reproductive technologies and services has not only a different cost in different places. Some technologies and services are only legal at certain places; other places restrict the

* Excerpted from Carolyn Schurr, *The Baby Business Booms: Economic Geographies of Assisted Reproduction*, 12 GEOGRAPHY COMPASS e12395 (2018).

access to certain reproductive technologies to particular populations, denying, for example, single or homosexual people access to IVF treatment, oocyte donation, or surrogacy. Access to assisted reproductive technologies is highly unequal both within and between nation states. In general, wealthier, urban, heterosexual, married, and White(r) people living in the Global North have better access to assisted reproductive technologies than poorer, rural, homo- and transsexual, single, and non-White people in the Global South and the Global East and ethnic minorities in the Global North. . . .

. . . The more recent history of the global surrogacy market is characterized by fast changes: In the last 5 years, the major global surrogacy hotspots such as India, Thailand, Nepal, Mexico, and Cambodia have all faced comprehensive legislative changes to contract a surrogate, resulting in either a total ban of commercial surrogacy (Thailand, Nepal, and Cambodia) or severe restrictions limiting the legal options to married and heterosexual national citizens (India and Mexico). . . .

Discussions about whether to conceptualize surrogate mothers' and oocyte donors' reproductive service as an altruistic act or a form of labor . . . intermingle in complex ways . . . according to the context in which the surrogacy arrangement takes place. [Empirical studies of surrogacy in various locations highlight this complexity.] In the . . . United States, . . . financial and altruist motivations to donate oocytes or gestate a baby are co-constitutive. Unlike U.S. surrogates, who can be rejected from surrogacy programs if they are not financially secure, . . . surrogates in Israel state unapologetically that money is their primary goal in pursuing surrogacy in order to supplement their income to pay off huge debts and provide for their children's basic needs. Nevertheless, they often transform their contractual relationship into a gift relationship during the surrogacy process. Surrogate workers in Mexico have deeply incorporated the industry's rhetoric of altruism and gift while openly admitting that economic needs are the main driver to engage in surrogacy. . . . Russian surrogates consider any affective involvement . . . as dangerous and hence prefer to "do it business style." . . . [M]etaphors of gift giving are absent from the narratives of Indian surrogates as the surrogates emphasize surrogacy as "majboori" (something we have to do to survive). . . . [H]owever, . . . affective ties and exchanges of gifts of food, medication, and money characterize the relationship between the Indian surrogates, the recruiting agent who is usually known to the women, and the hospital staff. . . . Framing surrogacy either as an altruistic act or as a new form of labor has important implications not just for the way it is perceived socially but also with regard to the women's rights to reclaim their wage . . . as well as their capacities to fight for their labor rights and working conditions including health and social securities. . . .

The racialized geographies of clinical labor are . . . more complex than often suggested by media when it comes to the gestational surrogates. . . . [I]n the United States . . . , for example, . . . despite early warnings that surrogacy could result in the exploitation of women of color, this appears not to be the case . . . , as surrogacy is "largely the terrain of white women." . . .

In the last decade, mostly non-White women have catered to the international and national clients consuming in South Asia's surrogacy hotspots in India, Nepal, Thailand, Cambodia, and Laos. Since the increasing regulation and closure of many of the South Asian hotspots after 2015, however, it is mainly White Caucasian women in Ukraine, Georgia, and Russia who carry the global babies to term. Experts estimate that demand for surrogacy alone in Ukraine has increased by 1,000% in the last 2 years. My own research in Ukraine has revealed that many women are drawn into surrogacy as a result of the rapid fall in living standards in consequence of the deep recession resulting from the ongoing conflict in Eastern Ukraine with Russia. This last example highlights once more that there is a particular geography to the global surrogacy market in which surrogacy hotspots do not emerge randomly but as a result of wider geopolitical constellations. . . .

100 Babies Stranded in Ukraine After Surrogate Births

Andrew E. Kramer (2020)*

The babies lie in cribs, sleeping, crying or smiling at nurses, swaddled in clean linens and apparently well cared for, but separated from their parents as an unintended consequence of coronavirus travel bans. Dozens of babies born into Ukraine's booming surrogate motherhood business have become marooned in the country as their biological parents in the United States and other countries cannot travel to retrieve them after birth. For now, the agencies that arranged the surrogate births care for the babies.

Authorities say that at least 100 babies are stranded already and that as many as 1,000 may be born before Ukraine's travel ban for foreigners is lifted. "We will do all we can to unite the children with their parents," Albert Tochilovsky, director of BioTexCom, the largest provider of surrogacy services in Ukraine, said in a telephone interview. . . . Ukraine does not tally statistics on surrogacy, but it may lead the world in the number of surrogate births for foreign biological parents, Mr. Tochilovsky said. His company alone is awaiting about 500 births. Fourteen companies offer the service in Ukraine.

Ukraine is an outlier among nations, though not alone, in allowing foreigners to tap a broad range of reproductive health services, including buying eggs and arranging for surrogate mothers to bear children for a fee. The business has thrived largely because of poverty. "The cheapest surrogacy in Europe is in Ukraine, the poorest country in Europe," BioTexCom's website explains. Surrogate mothers in Ukraine typically earn about \$15,000. . . . The business has depended on the careful choreography of births and travel, disrupted now by the virus. For a time at least, the babies in their cribs are citizens of no country. Under Ukrainian law, the newborns share the citizenship of their

* Excerpted from Andrew E. Kramer, *100 Babies Stranded in Ukraine After Surrogate Births*, NEW YORK TIMES (May 16, 2020).

biological parents, but the parents must be present for foreign embassies to confirm that status. . . .

Mr. Tochilovsky said doctors and caregivers now live at a company-owned hotel in Kyiv together with the babies, feeding them formula, taking them for walks and showing them to parents in video calls, all while in quarantine to protect against infection. As of Saturday, 60 babies were at the hotel. The parents of 16 of them were also present, having arrived before the lockdowns or having found a way in afterward. . . . “We know a lot of you are sitting at home with the same anxiety and worries that we had,” Maria Tangros, a Swedish mother who managed to get to Kyiv on a private plane, said in another video published on BioTexCom’s website. Parents, she said, are “panicking how to get here.” The babies’ parents are now in the United States, Italy, Spain, the United Kingdom, China, France, Romania, Austria, Mexico and Portugal, the company said.

Lyudmila Denisova, a human rights ombudsman for Ukraine’s Parliament, said the stranded babies underscore a pressing need for the country to bar foreigners from hiring Ukrainian women as surrogate mothers. . . . Olha Pysana, an official with one company, World Center of Baby, said that surrogacy is safe and provides an irreplaceable service to infertile couples. “We believe people are searching for a scandal out of nowhere,” Ms. Pysana said. “All the children are genetically linked to the parents. Unfortunately, because of Covid, the parents are just not here in Ukraine.”

* * *

After failing to have a child through assisted reproduction and foreign adoption, Italian nationals Donatina Paradiso and Giovanni Campanelli pursued gestational surrogacy. Because surrogacy is banned in Italy, Paradiso traveled to Russia with Campanelli’s semen. According to Paradiso, a gestational surrogate gave birth to a child conceived with a donor egg and her husband’s sperm. Back in Italy with the child, Paradiso and Campanelli applied to their municipal authority to register the birth. The authorities refused after the intended mother conceded the child was born through a surrogacy agreement, and a DNA test showed that the intended father was not actually the genetic father of the child—presumably because of the Russian clinic’s error. The Italian authorities removed the child and placed him with a foster family.

In 2015, the Second Section of the European Court of Human Rights (ECtHR) determined that the Italian authorities had violated Paradiso and Campanelli’s right to family life protected by Article 8* of the European Convention on Human Rights

* Article 8 of the European Convention on Human Rights provides:

1. Everyone has the right to respect for his private and family life
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

(ECHR). But in 2017, in the decision excerpted below, the Grand Chamber overruled the decision of the Second Section.

Paradiso and Campanelli v. Italy
European Court of Human Rights (Grand Chamber)
No. 25358/12 (2017)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Luis López Guerra, *President*, Guido Raimondi, Mirjana Lazarova Trajkovska, Angelika Nußberger, Vincent A. De Gaetano, Khanlar Hajiyev, Ledi Bianku, Julia Laffranque, Paulo Pinto de Albuquerque, André Potocki, Paul Lemmens, Helena Jäderblom, Krzysztof Wojtyczek, Valeriu Griţco, Dmitry Dedov, Yonko Grozev, Síofra O’Leary, *judges*[:]

. . . 141. The provisions of Article 8 do not guarantee either the right to found a family or the right to adopt. The right to respect for “family life” does not safeguard the mere desire to found a family; it presupposes the existence of a family, or at the very least the potential relationship

148. . . . The Court accepts, in certain situations, the existence of *de facto* family life between an adult or adults and a child in the absence of biological ties or a recognised legal tie, provided that there are genuine personal ties. . . .

151. It is therefore necessary . . . to consider the quality of the ties, the role played by the applicants *vis-à-vis* the child and the duration of the cohabitation between them and the child. . . . [T]he applicants had developed a parental project and had assumed their role as parents *vis-à-vis* the child. They had forged close emotional bonds with him in the first stages of his life, the strength of which was . . . clear from the report drawn up by the team of social workers following a request by the Minors Court.

152. . . . [T]he applicants and the child lived together for six months in Italy, preceded by a period of about two months’ shared life between the first applicant and the child in Russia. . . .

156. Although the termination of their relationship with the child is not directly imputable to the applicants . . . , it is nonetheless the consequence of the legal uncertainty that they themselves created . . . by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child. The Italian authorities reacted rapidly to this situation by requesting the suspension of parental authority and opening proceedings to make the child available for adoption

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.

157. Having regard to the above factors, namely the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Court considers that the conditions enabling it to conclude that there existed a *de facto* family life have not been met. . . .

161. . . . [T]here is no valid reason to understand the concept of “private life” as excluding the emotional bonds created and developed between an adult and a child in situations other than the classic situations of kinship. This type of bond also pertains to individuals’ life and social identity. In certain cases involving a relationship between adults and a child where there are no biological or legal ties the facts may nonetheless fall within the scope of “private life.” . . .

163. . . . [T]he applicants had a genuine intention to become parents, initially by attempts to conceive via *in vitro* fertilisation, then by applying for and obtaining formal approval to adopt, and, lastly, by turning to ova donation and the use of a surrogate mother. A major part of their lives was focused on realising their plan to become parents, in order to love and bring up a child. . . . [W]hat is at issue is the right to respect for the applicants’ decision to become parents, and the applicants’ personal development through the role of parents that they wished to assume *vis-à-vis* the child. . . .

177. . . . The Court regards as legitimate under Article 8 § 2 the Italian authorities’ wish to reaffirm the State’s exclusive competence to recognise a legal parent-child relationship—and this solely in the case of a biological tie or lawful adoption—with a view to protecting children. . . .

194. . . . [T]he facts of the case touch on ethically sensitive issues—adoption, the taking of a child into care, medically assisted reproduction and surrogate motherhood—in which member States enjoy a wide margin of appreciation

202. . . . [I]n Italian law descent may be established either through the existence of a biological relationship or through an adoption respecting the rules set out in the law. [The Italian government] argued that . . . the Italian legislature was seeking to protect the best interests of the child as required by Article 3* of the Convention on the Rights of the Child. . . . [B]y prohibiting private adoption based on a contractual

* Article 3 of the UN Convention on the Rights of the Child provides:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. . . .

relationship between individuals and restricting the right of adoptive parents to introduce foreign minors into Italy to cases in which the rules on international adoption have been respected, the Italian legislature is seeking to protect children against illicit practices, some of which may amount to human trafficking.

203. . . . [Surrogacy] raises sensitive ethical questions on which no consensus exists among the Contracting States. By prohibiting surrogacy arrangements, Italy has taken the view that it is pursuing the public interest of protecting the women and children potentially affected by practices which it regards as highly problematic from an ethical point of view. This policy is considered very important . . . where . . . commercial surrogacy arrangements are involved. That underlying public interest is also of relevance in respect of measures taken by a State to discourage its nationals from having recourse abroad to such practices which are forbidden on its own territory. . . .

208. . . . [T]he child is not an applicant in the present case. In addition, the child was not a member of the applicants' family within the meaning of Article 8 of the Convention. This does not mean however, that the child's best interests and the way in which these were addressed by the domestic courts are of no relevance. . . . Article 3 of the Convention on the Rights of the Child requires that "in all actions concerning children . . . the best interests of the child shall be a primary consideration," but does not however define the notion of the "best interests of the child."

209. . . . [T]he domestic courts . . . had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*, or taking measures with a view to providing the child with a family in accordance with the legislation on adoption. . . .

215. . . . Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Court accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case.

216. It follows that there has been no violation of Article 8 of the Convention. . . .

Joint Concurring Opinion of Judges de Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov[:]

. . . 3. . . . [T]he links between the applicants and the child were established in violation of Italian law. . . . The applicants concluded a contract commissioning the conception of a child and his gestation by a surrogate mother. . . . It is not acceptable to

invoke detrimental effects resulting from one's own illegal actions as a shield against State interference. . . .

7. . . . According to the Committee on the Rights of the Child, surrogacy without regulation amounts to the sale of the child.

. . . [R]emunerated gestational surrogacy, whether regulated or not, amounts to a situation covered by Article 1* of the Optional Protocol to the Convention on the Rights of the Child and is therefore illegal under international law. We would like to stress . . . that almost all European States currently ban commercial surrogacy.

More generally, . . . gestational surrogacy . . . is incompatible with human dignity. It constitutes degrading treatment, not only for the child but also for the surrogate mother. Modern medicine provides increasing evidence of the determinative impact of the prenatal period of human life for that human being's subsequent development. Pregnancy, with its worries, constraints and joys, as well as the trials and stress of childbirth, create a unique link between the biological mother and the child. From the outset, surrogacy is focused on drastically severing this link. The surrogate mother must renounce developing a life-long relationship of love and care. The unborn child is not only forcibly placed in an alien biological environment, but is also deprived of what should have been the mother's limitless love in the prenatal stage. Gestational surrogacy also prevents development of the particularly strong bond which forms between the child and a father who accompanies the mother and child throughout a pregnancy. Both the child and the surrogate mother are treated not as ends in themselves, but as means to satisfy the desires of other persons. Such a practice is not compatible with the values underlying the [European] Convention [on Human Rights]. Gestational surrogacy is particularly unacceptable if the surrogate mother is remunerated. We regret that the Court did not take a clear stance against such practices.

Concurring Opinion of Judge Dedov[:]

. . . There could be many arguments in favour of surrogacy, based, for example, on the concepts of a market economy, diversity and solidarity. Not everyone is capable of using their intellect, as this requires considerable intellectual efforts and life-long learning It is much easier to earn money using the body, especially if one takes into account that strong demand exists for bodies for the purpose of surrogacy This could help to resolve unemployment problems and to reduce social tensions. . . .

However, we face a millennial dilemma here: human beings will survive through natural adaptation, requiring compromise with human dignity and integrity, or they will

* Article 1 of the Optional Protocol to the Convention on the Rights of Child on the Sale of Children, Child Prostitution, and Pornography provides:

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

try to achieve a new quality of social life for all, which would overcome the need for such compromise. The concept of fundamental rights and freedoms requires implementing the second option. . . .

. . . Surrogacy would not be a problem at all if it were used on rare occasions, but we know that it has become a big and lucrative business for the “third world.”

. . . I do not believe in surrogate motherhood as a voluntary and freely-provided form of assistance for those who cannot have children

The statistics and the facts of the surrogacy cases examined by this Court demonstrate that surrogacy is carried out by poor people or in poor countries. The recipients are usually rich and glamorous. Moreover, the recipients usually participate in or decisively influence the national parliament. Moreover, it is extremely hypocritical to prohibit surrogacy in one’s own country in order to protect local women, but simultaneously to permit the use of surrogacy abroad.

Again, this is another contemporary challenge for the concept of human rights: either we create a society which is divided between insiders and outsiders, or we create a basis for worldwide solidarity; we create a society which is divided between developed and undeveloped nations, or we create a basis for the inclusive development and self-realisation for all; we create a basis for equality or we do not. The answer is clear. . . .

Joint Dissenting Opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev[:]

. . . 11. . . . We do not intend to express any opinion on the prohibition of surrogacy arrangements under Italian law. It is for the Italian legislature to state the Italian policy on this matter. However, Italian law does not have extraterritorial effects. . . . [W]e have some difficulty with the majority’s view that the legislature’s reasons for prohibiting surrogacy arrangements are of relevance in respect of measures taken to discourage Italian citizens from having recourse abroad to practices which are forbidden on Italian territory. . . . [T]he relevance of these reasons becomes less clear when a situation has been created abroad which, as such, cannot have violated Italian law. . . . [I]t is also important . . . that the situation created by the applicants in Russia was initially recognised and formalised by the Italian authorities through the consulate in Moscow. . . .

12. . . . [T]oo much weight has been attached to the need to put an end to an illegal situation (in view of the laws on inter-country child adoption and on the use of assisted reproductive technology) and the need to discourage Italian citizens from having recourse abroad to practices which are forbidden in Italy. These interests were simply not those that the [Italian] Court of Appeal sought to pursue.

Transnational surrogacy arrangements often involve an agreement between intended parents from the Global North and surrogates from the Global South. In response to issues raised by surrogacy across borders, a number of countries, such as India, Nepal, and Mexico, have taken measures to ban commercial surrogacy and restrict the practice to their nationals.

In 2014, controversies over the practice of surrogacy in Thailand emerged. An Australian couple contracted with a surrogate in Thailand to carry and deliver children. During the course of the pregnancy, the parties involved learned that one of the twin babies (Baby Gammy) would be born with Down syndrome. Although the Australian parents brought Baby Gammy's twin sister home to Australia, they left Baby Gammy in Thailand. This caused immense hardship for the surrogate and the child, and resulted in international outcry. Partially in response to this controversy, Thailand passed the Protection of a Child Born by Medically Assisted Reproductive Technology Act.

**Protection of a Child Born by Medically Assisted
Reproductive Technology Act
Thailand (2015)**

... CHAPTER III SURROGACY

Section 21[:] . . . [A]n operation of surrogacy shall at least comply with the following conditions;

(1) lawful husband and wife, when a wife is unable to carry [a] pregnancy, intending to have a child by surrogacy, shall hold Thai nationality. In the case where a husband or a wife does not hold Thai nationality, the registration of their marriage shall not be less than three years; . . .

(3) a surrogate mother shall be [a] blood relative of the lawful husband or wife under (1), in the case where there [is] no blood relative of the lawful husband or wife, other woman may undergo the surrogacy

Section 22[:] An operation of surrogacy under this Act may proceed with [the] two following methods;

(1) to use an embryo formed from sperm of [the] lawful husband and an oocyte of [the] lawful wife intending to undertake the surrogacy;

(2) to use an embryo formed from [the] sperm of [the] lawful husband or an oocyte of [the] lawful wife intending to undertake the surrogacy and [a donor's] oocyte or sperm; provided that an oocyte of a surrogate mother shall not be used. . . .

Section 24[:] No person shall operate the surrogacy for commercial benefits. . . .

Section 27[:] No person shall act as an intermediary or an agent and demand, accept or agree to accept any property or benefit as a remuneration for arranging or suggesting to undertake the surrogacy. . . .

CHAPTER VI PENALTIES . . .

Section 48[:] Any person who violates section 24 shall be liable to imprisonment for a term not exceeding ten years and to a fine not exceeding two hundred thousand baht [(about 6150 USD)].

Section 49[:] Any person who violates section 27 . . . shall be liable to imprisonment for a term not exceeding five years and to a fine not exceeding one hundred thousand baht [(about 3075 USD)] or to both. . . .

EARLY CONCEPTIONS OF SURROGACY

Conflict over surrogacy in the United States erupted in the late 1980s when a surrogacy dispute from New Jersey, *In re Baby M*, 537 A.2d 1227 (N.J. 1988), captured the nation's attention. A married couple, William and Elizabeth Stern, had arranged to have Mary Beth Whitehead be inseminated with William's sperm and deliver a baby that the Sterns would raise. (Elizabeth Stern had been diagnosed with multiple sclerosis, and William Stern, a Holocaust survivor, felt compelled to have a biological child.) When Whitehead changed her mind and refused to surrender the child, the courts got involved. While the trial court found the surrogacy agreement valid, the New Jersey Supreme Court disagreed and ruled that such agreements were unenforceable as against public policy. Accordingly, William Stern was the legal father and Mary Beth Whitehead was the legal mother, so each would have claims to custody and visitation. Elizabeth Stern, without a biological connection to the child, would remain a legal stranger, even though she would essentially be parenting the child with the legal father, as the child's stepmother. While the court found that Whitehead was the legal mother, it gave primary custody of the child to the Sterns. The court explained its conclusion:

We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women. Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the "surrogate" as the mother of the child.

As *Baby M* demonstrates, at this early time, the paradigmatic scene of surrogacy involved a married heterosexual couple in which the wife was infertile. The woman serving as a surrogate would be inseminated with the husband's sperm. She would thus give birth to her own genetic child—an arrangement called *genetic* or *traditional* surrogacy. The agreement contemplated that she would relinquish her parental rights and cooperate in the biological father establishing his parentage and the wife engaging in a stepparent adoption.

Focusing on this paradigmatic scene, some feminists argued against surrogacy. They found common cause with social and religious conservatives opposed to the practice—an alliance that worried some feminist supporters of surrogacy. Of course, feminists and conservatives could oppose surrogacy for very different reasons. Some feminists criticized surrogacy for fetishizing “natural” family relations—by attaching undue significance to the perpetuation of men's bloodlines. But some religious conservatives criticized surrogacy for defying “natural” relations—separating sex from procreation and detaching the social role of motherhood from the biological fact of maternity.

Still, feminists and conservatives shared some arguments in common. Both worried about the commodification of women's reproductive labor, the sale of children, and the exploitation and coercion of vulnerable women. For some, surrogacy was inherently coercive. Harold Cassidy, an attorney representing the surrogate in *Baby M*, argued that women's “nature” prevents them from agreeing to carry and give up a child:

A woman's sense of personhood is grounded in the motivation to make and enhance relatedness to others. Women tend to find satisfaction, pleasure, effectiveness and a sense of worth if they experience their life activities as arising from and leading back into a sense of connection with others. . . .

As a woman's sense of self comes from her relationships and attachments to others, a death or surrender of a child for adoption shatters a woman's sense of identity. The mother will never be able to recon[s]titute herself as the individual she was before and will never regain her original identity.*

According to Cassidy, validating a surrogacy contract would result in “grave psychological and social damage to the surrogate mother.”

Cassidy has long opposed not only surrogacy but abortion. As Reva Siegel describes in *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument* (2008) and in *Dignity and the Politics of Protection* (2008), Cassidy is a pioneer of the argument that abortion harms women. In the 1990s,

* Excerpted from Brief for Defendants, *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (No. FM25314-86E).

shortly after *Baby M*, Cassidy played a role in recruiting Norma McCorvey, the original plaintiff in *Roe*, to sue to reopen her case, with affidavits gathered from 1,000 women attesting to abortion regret—affidavits so widely disseminated in state legislative testimony and in amicus filings that Justice Anthony Kennedy cited them in *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

In developing woman-protective antiabortion arguments, Cassidy helped forge modern ways to talk about the right to life and the role morality of motherhood in the idiom of late twentieth-century America. In Cassidy's own words:

It took the experimentation with abortion to disprove the central fundamental question or fundamental assumption of *Roe*, and the fundamental assumption that there can be a known, there can be a voluntary, there can be an informed waiver of the mother's interest. It took the experience of millions of women, who now have come forward, and said, "I didn't know what I was doing. I wasn't told the truth."

Walk away from it, and live with it, and forget about it. She can't forget, she can't live with it, and it's not just an unnatural act, it is an unnatural, evil act. And for the men of this nation, and the seven male judges who created this, who think that women can deny that they are women, they can deny that they are mothers, without consequence, is not only ignorant, it's cruel.*

Is coercion in a surrogacy relationship fact-dependent or role-dependent? Does the coerciveness of a surrogacy agreement depend on the context and terms of the agreement, or is coercion intrinsic in the relationships? Does the question of women's coercion depend on the way in which surrogacy is practiced and regulated? For example, if concern focuses on the ways surrogacy is embedded in a highly class, race, and gender-stratified market, can regulation address these concerns? Or is the concern that surrogacy is inherently coercive because relinquishing a child she has carried is contrary to a woman's instincts such that no court could enforce such an agreement, in any part, over a woman's objections?

The following excerpts sample feminist perspectives at the time of *Baby M*.

* Excerpted from Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE LAW JOURNAL 1694, 1781 (2008). For Cassidy's role in recruiting McCorvey and the role of the abortion-harms-women affidavits in state legislatures and in federal courts, see Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE LAW JOURNAL 1641 (2008). Just before her death, Norma McCorvey gave an interview in which she disclaimed her prolife conversion and affirmed women's autonomy—leaving a legacy that will be debated for years.

Is Women's Labor a Commodity?

Elizabeth S. Anderson (1990)*

. . . Proponents of commercial surrogacy have denied that the surrogate industry engages in the sale of children. . . . The payment to the surrogate mother is not for her child, but for her services in carrying it to term. The claim that the parties to the surrogate contract treat children as commodities, however, is based on the way they treat the *mother's* rights over her child. . . . [T]he natural father . . . would not pay her for the "service" of carrying the child to term if she refused to relinquish her parental rights to it. . . .

The primary distortions which arise from treating women's labor as a commodity—the surrogate mother's alienation from loved ones, her degradation, and her exploitation—stem from a common source. This is the failure to acknowledge and treat appropriately the surrogate mother's emotional engagement with her labor. Her labor is alienated, because she must suppress her emotional ties with her own child, and may be manipulated into reinterpreting these ties in a trivializing way. She is degraded, because her independent ethical perspective is denied, or demoted to the status of a cash sum. She is exploited, because her emotional needs and vulnerabilities are not treated as characteristics which call for consideration, but as factors which may be manipulated to encourage her to make a grave self-sacrifice to the broker's and adoptive couple's advantage. These considerations provide strong grounds for sustaining the claims of women's labor to its "product," the child. The attempt to redefine parenthood so as to strip women of parental claims to the children they bear does violence to their emotional engagement with the project of bringing children into the world. . . .

. . . [W]hat position should the law take on the practice? At the very least, surrogate contracts should not be enforceable. Surrogate mothers should not be forced to relinquish their children if they have formed emotional bonds with them. Any other treatment of women's ties to the children they bear is degrading.

But I think these arguments support the stronger conclusion that commercial surrogate contracts should be illegal, and that surrogate agencies who arrange such contracts should be subject to criminal penalties. . . .

* Excerpted from Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 *PHILOSOPHY & PUBLIC AFFAIRS* 71 (1990).

Privacy, Surrogacy, and the *Baby M* Case

Anita L. Allen (1988)*

. . . [C]onstitutional privacy prohibits the validation and enforcement of irrevocable surrogacy agreements. My conviction is two-fold: 1) childless men and couples do not have privacy rights that entitle them to state enforcement of surrogacy agreements; and 2) by contrast, would-be surrogate mothers have constitutional privacy rights so strong as to limit their own capacities for alienating their procreative and traditional parental prerogatives. . . .

A woman's security may be tied to the fate of her offspring in at least two distinct and evident ways. First, her security can be undermined by the feeling that she has lost control of a vulnerable being whom she has helped create and set loose into the world. A woman may come to regard her voluntary loss of control as a failure of responsibility and as deeply regrettable. . . . Second, women often identify strongly with their children. This sense of identity can stem from awareness of the physical connection that characterizes the latter stages of pregnancy. It also can stem from knowledge of a genetic link. . . .

Because women's security can be so tied to the fate of their offspring, there is at least one good reason to treat parental privacy rights as commercially inalienable. A more permissive rule, one that allowed parental rights to be commercially alienated but subject to revocation as a matter of law, would have an analogous justification. This more permissive rule would preserve surrogacy as an option, at least nominally. . . .

Surrogate Motherhood

Lori B. Andrews (1988)**

. . . In the past two decades, feminist policy arguments have refashioned legal policies on reproduction and the family. A cornerstone of this development has been the idea that women have a right to reproductive choice—to be able to contracept, abort, or get pregnant. . . . Another hallmark of feminism has been that biology should not be destiny. The equal treatment of the sexes requires that decisions about men and women be made on other than biological grounds. . . .

The legal doctrine upon which feminists have pinned much of their policy has been the constitutional protection of autonomy in decisions to bear and rear one's biological children. Once this protection of the biologically related family was acknowledged, feminists and others could argue for the protection of non-traditional,

* Excerpted from Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 *GEORGETOWN LAW JOURNAL* 1759 (1988).

** Excerpted from Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 *JOURNAL OF LAW, MEDICINE & HEALTH CARE* 72 (1988).

non-biological families on the grounds that they provide many of the same emotional, physical, and financial benefits that biological families do.

. . . [T]he very existence of surrogacy is a predictable outgrowth of the feminist movement. Feminist gains allowed women to pursue educational and career opportunities once reserved for men But this also meant that more women were postponing childbearing, and suffering the natural decline in fertility that occurs with age. Women who exercised their right to contraception, such as by using the Dalkon Shield, sometimes found that their fertility was permanently compromised. Some women found that the chance for a child had slipped by them entirely and decided to turn to a surrogate mother.

Feminism also made it more likely for other women to feel comfortable being surrogates. Feminism taught that not all women relate to all pregnancies in the same way. . . . Reproduction was a condition of her body over which she, and no one else, should have control. . . . [But some feminists oppose] surrogacy because of the potential psychological and physical risks that it presents for women. Many aspects of this argument, however, seem ill founded and potentially demeaning to women. They focus on protecting women against their own decisions because those decisions might later cause them regret, be unduly influenced by others, or be forced by financial motivations.

Reproductive choices are tough choices, and any decision about reproduction—such as abortion, sterilization, sperm donation, or surrogacy—might later be regretted. The potential for later regrets, however, is usually not thought to be a valid reason to ban the right to choose the procedure in the first place. With surrogacy, the potential for regret is thought by some to be enormously high. This is because it is argued (in biology-is-destiny terms) that it is unnatural for a mother to give up a child. . . .

Perhaps recognizing the dangers of giving the government widespread powers to “protect” women, some feminists do acknowledge the validity of a general consent to assume risks. They argue, however, that the consent model is not appropriate to surrogacy since the surrogate’s consent is neither informed nor voluntary. It strikes me as odd to assume that the surrogate’s consent is not informed. The surrogacy contracts contain lengthy riders detailing the myriad risks of pregnancy

. . . [A] strong element of the feminist argument against surrogacy is that women cannot give an informed consent until they have had the experience of giving birth. Robert Arenstein, an attorney for Mary Beth Whitehead, argued in congressional testimony that a “pre-birth or at-birth termination, is a termination without informed consent. I use the words informed consent to mean full understanding of the personal psychological consequences at the time of surrender of the child.” The feminist amicus brief in *Baby M* made a similar argument. . . .

The consent given by surrogates is also challenged as not being voluntary. Feminist Gena Corea . . . asks, “What is the real meaning of a woman’s ‘consent’ . . . in

a society in which men as a social group control not just the choices open to women but also women's motivation to choose?" Such an argument is a dangerous one for feminists to make. It would seem to be a step backward for women to argue that they are incapable of making decisions. That, after all, was the rationale for so many legal principles oppressing women for so long, such as the rationale behind the laws not allowing women to hold property. . . .

Feminists are taking great pride that they have mobilized public debate against surrogacy. But the precedent they are setting in their alliance with . . . groups like the Catholic church is one whose policy is "protect women, even against their own decisions" and "protect children at all costs" (presumably, in latter applications, even against the needs and desires of women). . . .

Market-Inalienability Margaret Jane Radin (1987)*

. . . [I]s women's personhood injured by allowing or by disallowing commodification of sex and reproduction? The argument that commodification empowers women is that recognition of these alienable entitlements will enable a needy group—poor women—to improve their relatively powerless, oppressed condition, an improvement that would be beneficial to personhood. If the law denies women the opportunity to be comfortable sex workers and baby producers instead of subsistence domestics, assemblers, clerks, and waitresses—or pariahs (welfare recipients) and criminals (prostitutes)—it keeps them out of the economic mainstream and hence the mainstream of American life.

The rejoinder is that . . . commodification will harm personhood by powerfully symbolizing, legitimating, and enforcing class division and gender oppression. . . . But the surrejoinder is that noncommodification of women's capabilities under current circumstances represents not a brave new world of human flourishing, but rather a perpetuation of the old order that submerges women in oppressive status relationships, in which personal identity as market-traders is the prerogative of males. We cannot make progress toward the noncommodification that might exist under ideal conditions of equality and freedom by trying to maintain noncommodification now under historically determined conditions of inequality and bondage.

. . . If we now permit commodification, we may exacerbate the oppression of women—the suppliers. If we now disallow commodification—without . . . large-scale redistribution of social wealth and power—we force women to remain in circumstances that they themselves believe are worse than becoming sexual commodity-suppliers. Thus, the alternatives seem subsumed by a need for social progress, yet we must choose

* Excerpted from Margaret Jane Radin, *Market-Inalienability*, 100 HARVARD LAW REVIEW 1849 (1987).

some regime now in order to make progress. This dilemma of transition is the double bind.

The double bind has two main consequences. First, if we cannot respect personhood either by permitting sales or by banning sales, justice requires that we consider changing the circumstances that create the dilemma. We must consider wealth and power redistribution. Second, we still must choose a regime for the meantime, the transition, in nonideal circumstances. To resolve the double bind, we have to investigate particular problems separately; decisions must be made (and remade) for each thing that some people desire to sell. . . .

Perhaps the best way to characterize the present situation is to say that women's sexuality is incompletely commodified. Many sexual relationships may have both market and nonmarket aspects: relationships may be entered into and sustained partly for economic reasons and partly for the interpersonal sharing that is part of our ideal of human flourishing. . . . The issue thus becomes how to structure an incomplete commodification that takes account of our nonideal world, yet does not foreclose progress to a better world of more equal power I think we should now decriminalize the sale of sexual services in order to protect poor women from the degradation and danger either of the black market or of other occupations that seem to them less desirable. At the same time, . . . we should prohibit the capitalist entrepreneurship that would operate to create an organized market in sexual services even though this step would pose enforcement difficulties. . . .

The question of surrogate mothering seems more difficult. . . . Paid surrogacy involves a potential double bind. The availability of the surrogacy option could create hard choices for poor women. In the worst case, rich women, even those who are not infertile, might employ poor women to bear children for them. It might be degrading for the surrogate to commodify her gestational services or her baby, but she might find this preferable to her other choices in life. But although surrogates have not tended to be rich women, nor middle-class career women, neither have they (so far) seemed to be the poorest women, the ones most caught in the double bind.

Whether surrogacy is paid or unpaid, there may be a transition problem: an ironic self-deception. Acting in ways that current gender ideology characterizes as empowering might actually be disempowering. Surrogates may feel they are fulfilling their womanhood by producing a baby for someone else, although they may actually be reinforcing oppressive gender roles. It is also possible to view would-be fathers as (perhaps unknowing) oppressors of their own partners. Infertile mothers, believing it to be their duty to raise their partners' genetic children, could be caught in the same kind of false consciousness and relative powerlessness as surrogates who feel called upon to produce children for others. Some women might have conflicts with their partners that they cannot acknowledge, either about raising children under these circumstances instead of adopting unrelated children, or about having children at all. These

considerations suggest that to avoid reinforcing gender ideology, both paid and unpaid surrogacy must be prohibited. . . .

Perhaps a more visionary reason to consider prohibiting all surrogacy is that the demand for it expresses a limited view of parent-child bonding [I]t is unclear why we should assume that the ideal of bonding depends especially on genetic connection. Many people who adopt children feel no less bonded to their children than responsible genetic parents; they understand that relational bonds are created in shared life more than in genetic codes. We might make better progress toward ideals of interpersonal sharing—toward a better view of contextual personhood—by breaking down the notion that children are fathers’—or parents’—genetic property.

In spite of these concerns, attempting to prohibit surrogacy now seems too utopian, because it ignores a transition problem. At present, people seem to believe that they need genetic offspring in order to fulfill themselves; at present, some surrogates believe their actions to be altruistic. To try to create an ideal world all at once would do violence to things people make central to themselves. This problem suggests that surrogacy should not be altogether prohibited.

Concerns about commodification of women and children, however, might counsel permitting only unpaid surrogacy (market-inalienability). . . . [I]f we wish to avoid the dangers of commodification and . . . recognize that there are some situations in which a surrogate can be understood to be proceeding out of love or altruism and not out of economic necessity or desire for monetary gain, we could prohibit sales but allow surrogates to give their services. We might allow them to accept payment of their reasonable out-of-pocket expenses—a form of market-inalienability similar to that governing ordinary adoption.

Fear of a domino effect* might also counsel market-inalienability. At the moment, it does not seem that women’s reproductive capabilities are as commodified as their sexuality. Of course, we cannot tell whether this means that reproductive capabilities are more resistant to commodification or whether the trend toward commodification is still at an early stage. Reproductive capacity, however, is not the only thing in danger of commodification. We must also consider the commodification of children. The risk is serious indeed, because, if there is a significant domino effect, commodification of some children means commodification of everyone. Yet, as long as fathers do have an unmonetized attachment to their genes (and as long as their partners tend to share it), even though the attachment may be nonideal, we need not see children born in a paid surrogacy arrangement—and they need not see themselves—as fully commodified. Hence, there may be less reason to fear the domino effect with paid surrogacy than with baby-selling. . . .

* The domino theory assumes that anytime market and nonmarket understandings coexist, it is inevitable that the market understanding will prevail. For more on the domino theory, see MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

The other possible choice is to create an incomplete commodification similar to the one suggested for sale of sexual services. The problem of surrogacy is more difficult, however, primarily because the interaction produces a new person whose interests must be respected. In such an incomplete commodification, performance of surrogacy agreements by willing parties should be permitted, but women who change their minds should not be forced to perform. The surrogate who changes her mind before birth can choose abortion; at birth, she can decide to keep the baby. . . .

We should be aware that the case for incomplete commodification is much more uneasy for surrogacy than for prostitution. The potential for commodification of women is deeper, because, as with commissioned adoption, we risk conceiving of all of women's personal attributes in market rhetoric, and because paid surrogacy within the current gender structure may symbolize that women are fungible baby-makers for men whose seed must be carried on. Moreover, as with commissioned adoption, the interaction brings forth a new person who did not choose commodification and whose potential personal identity and contextuality must be respected even if the parties to the interaction fail to do so. . . .

. . . If, on balance, incomplete commodification rather than market-inalienability comes to seem right for now, it will appear so for these reasons: because we judge the double bind to suggest that we should not completely foreclose women's choice of paid surrogacy, even though we foreclose commissioned adoptions; because we judge that people's (including women's) strong commitment to maintaining men's genetic lineage will ward off commodification and the domino effect, distinguishing paid surrogacy adequately from commissioned adoptions; and because we judge that that commitment cannot be overridden without harm to central aspects of people's self-conception. . . . In my view, a form of market-inalienability similar to our regime for ordinary adoption will probably be the better nonideal solution. . . .

* * *

Notice that Radin articulated her position in 1987, a time when surrogacy as a practice was still in its infancy in the United States. Radin's position is heavily fact-dependent—requiring what she describes as “pragmatic judgments” in “our nonideal world.” Facts on the ground contribute to the distinction she draws between prostitution and surrogacy. Given dramatic shifts in the prevalence and meanings of surrogacy, would Radin now support some form of commodification—a system of regulation rather than prohibition?

CHANGING CONCEPTIONS OF SURROGACY

At the time of *Baby M* and the feminist perspectives above, a woman serving as a surrogate would be genetically related to the resulting child. The vast majority of

surrogacies today, however, involve *gestational surrogacy*, in which the woman who serves as the surrogate bears a child to whom she is not genetically related. Through IVF, an embryo is created with sperm (either donor sperm or sperm of the intended father) and egg (either a donor egg or the egg of the intended mother) and transferred to the woman serving as the surrogate.*

Five years after *Baby M*, the California Supreme Court addressed a surrogacy conflict in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). But unlike *Baby M*, the situation involved gestational surrogacy, and the intended mother was also the genetic mother. The court recognized the intended mother as the legal mother over the objection of the woman who served as the surrogate:

We conclude that although the [California Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law. . . .

In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy.

Gestational surrogacy—and its separation of gestation from genetics—contributed to dramatic changes in popular and legal perspectives on surrogacy in the United States, as the following excerpt explores.

Surrogacy and the Politics of Commodification

Elizabeth S. Scott (2009)**

. . . Political philosophers offer two objections to the commodification of certain transactions. The first focuses on coercion; exchanges that are driven by severe inequality, ignorance, or dire economic necessity are problematic. The second objection focuses on corruption and holds that the market has a degrading effect on certain goods

* Reliable data on the prevalence of gestational and genetic surrogacy do not exist. Still, anecdotal evidence suggests that all but a small percentage of surrogacy arrangements today involve gestational, rather than genetic, surrogacy. The limited data that do exist show that the number of children born through gestational surrogacy arrangements has increased dramatically over the course of the twenty-first century. *See, e.g.,* Kiran M. Perkins et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 *FERTILITY & STERILITY* 435 (2016); S. A. Grover et al., *Analysis of a Cohort of Gay Men Seeking Help with Third-Party Reproduction*, 98 *FERTILITY & STERILITY* (Supplement) S48 (2012).

** Excerpted from Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 *LAW & CONTEMPORARY PROBLEMS* 109 (2009).

and practices. As the *Baby M* case unfolded, both objections were aimed at surrogacy, effectively framing the transactions as illicit commodification. . . .

. . . Today [surrogacy] is seldom framed as baby selling and exploitation; instead, the discourse emphasizes the service provided by surrogates to couples who otherwise could not have genetically related children. Moreover, the legislative goal of discouraging and punishing a pernicious practice largely has been replaced by the pragmatic objective of providing certainty about parental status and protecting all participants, especially children. . . . In the absence of statutory authority, numerous courts have directed that intended parents, and not the surrogate, be named on the birth certificate in gestational arrangements. Moreover, the new Uniform Parentage Act* and most of the surrogacy statutes enacted since 2000 deal exclusively with requirements for enforcement of gestational-surrogacy agreements

. . . As couples eager to have children have increasingly shown themselves ready to turn to surrogates, even when the agreements are of uncertain legality, lawmakers have recognized the potential harms posed by the lack of regulation. In a legal vacuum, and even when surrogacy contracts are prohibited, a host of legal problems can arise regarding the rights and obligations of the participants toward the child. Along with the risk of acrimonious custody litigation between the surrogate and the intended parents, costly uncertainty can result when the intended parents divorce or decline to accept the child, perhaps because the baby is born with a medical condition or disability. . . .

. . . [F]amiliarity with surrogacy arrangements alleviated public fears because many predictions of harmful consequences made by opponents in the midst of the *Baby M* controversy proved to be exaggerated or wrong, undermining the characterization of commercial-surrogacy contracts as exploitative, baby-selling transactions. . . . Most American surrogates are not as wealthy as the intended parents, but few are poor. Many report using the money they receive to enhance their families' welfare in conventional ways, often indicating that they value the ability to earn money while staying home with their children. Further, few surrogates report reluctance to relinquish the child, and a very small percentage express regret about having served in the role. Contrary to the claim that surrogacy degrades motherhood and pregnancy, the available evidence suggests that surrogates view themselves as performing a service of great social value for the benefit of others. Further, little evidence indicates that children born of surrogacy arrangements suffer psychological or physical harm because of the circumstances of their birth, or that surrogates' other children fear that they too will be relinquished. . . .

* Uniform Acts are model state laws written and proposed by the non-profit Uniform Law Commission for consideration and adoption by U.S. states. The Uniform Parentage Act provides a legal framework aiming to standardize the rules for establishing parentage across all U.S. states. Article 8 of the more recent Uniform Parentage Act, promulgated in 2017, allows and regulates both genetic and gestational surrogacy, safeguards surrogate's decision-making during the pregnancy, and ensures access for intended parents without respect to gender, sexual orientation, marital status, or genetic connection.

The prevalence of gestational surrogacy in recent years has been a very important factor in dismantling the commodification frame and in changing the way many people, including lawmakers and lobbyists, view these arrangements. Today, ninety-five percent of surrogacy contracts involve IVF, so most surrogates are not the genetic mothers of the children they bear. . . . [S]everal contemporary laws limit access to procedures for efficiently establishing intended parent's rights to gestational-surrogacy contracts, and courts typically give intended parents' claims more weight when the surrogate is not the child's genetic parent. . . .

The move to gestational surrogacy has facilitated the change in the social meaning of surrogacy from a mother's sale of her baby to a transaction involving the provision of gestational services. It is telling that gestational surrogates are often described as "carriers," rather than as "mothers." . . . The relatively positive response to gestational surrogacy suggests that gestational motherhood is devalued when it is separated from genetic parenthood—and perhaps that surrogates who are not also genetic mothers, unlike traditional surrogates, might be expected not to form a maternal bond with a child who "belongs" to others. This widespread reaction goes some distance toward explaining the reframing of surrogacy, but it has some troubling implications. . . . [I]t raises questions about the value of pregnancy relative to other dimensions of motherhood and the extent to which the mother-child bond formed during this period is assumed to be a product of the genetic tie rather than of the nurturing relationship. It also recalls a long-rejected notion that parents have a property-like interest in their children based on biology. Nonetheless, it seems clear that the supplanting of traditional surrogacy by gestational contracts has contributed to public acceptance of surrogacy arrangements. . . .

Among the most notable changes in the political landscape of surrogacy in recent years has been the absence of feminist voices, women's groups, and civil-liberties organizations. Although it is difficult to find direct evidence of a change of heart on this issue or an explanation of why it happened, it seems likely that changes in the politics of abortion may have played an important role. . . . [A]rguments against surrogacy based on the threat of coercion and regret have become untenable for most feminists because anti-abortion advocates have invoked similar arguments. Recognizing that many people were offended by their standard "baby killing" argument, abortion opponents began to shift to what Reva Siegel calls a "women-protective" rationale for banning abortion. . . .

The women-protective argument includes two distinct but related claims: First, abortion opponents argue that boyfriends, family, and clinic staff coerce and mislead women to obtain abortions that they would never voluntarily obtain Second, and for the same reason, opponents argue that many women deeply regret their abortions, suffering from psychological trauma which puts them at risk for severe depression and "post-abortion syndrome," a form of post-traumatic stress disorder. . . .

After feminist interest in surrogacy waned, opposition was limited to religious and social conservatives, and even for this group, surrogacy likely was a minor issue

compared to abortion, gay marriage, or divorce reform. This may explain the relative lack of controversy in the recent law-reform initiatives. . . .

This is not to say that concern about commodification in this context is altogether assuaged or that any normative consensus exists about surrogacy. The growing number of individuals who satisfy powerful urges to form families and have children through commercial transactions continues to be a source of concern for ethicists, particularly given the recent trend to “outsource” the contracts to India and other countries where surrogates may indeed be poor women who have few other income options. Moreover, some scholars are concerned that the expense of gestational surrogacy effectively limits this family-formation option to high-income couples and individuals. However, the goal of assisted reproduction is relatively benign, and the emerging view among lawmakers seems to be that regulation is a better means of minimizing the costs than a legal vacuum. . . .

. . . The contemporary pragmatic approach to regulating surrogacy, in my view, is superior to the crusade-like urgency of early reformers. . . . [W]ell-designed regulation can greatly mitigate most of the potential *tangible* harms of surrogacy, and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists.

* * *

The social meaning and legal status of surrogacy has shifted not only in the U.S. but in other jurisdictions across the globe.

In the United Kingdom, the 1985 Surrogacy Arrangements Act prohibits commercial surrogacy and bans advertisements indicating that anyone might be willing to enter into a surrogacy arrangement or be looking for a surrogate. The 1990 Human Fertilisation and Embryology Act amended the Surrogacy Arrangements Act and stipulates that “[n]o surrogacy arrangement is enforceable by or against any of the persons making it,” which enables surrogates in the United Kingdom to cancel their contractual obligations. Despite the restrictiveness of the U.K. regime, laws, regulations, and norms have shifted over time. In 2008, the U.K. Parliament passed another Human Fertilisation and Embryology Act that permits non-profit organizations to advertise and initiate surrogacy negotiations. Government and public attitudes towards surrogacy have also grown more permissive over time.

In 2020, the Supreme Court of the United Kingdom determined that a plaintiff could be awarded tort damages to be used towards a commercial surrogacy arrangement abroad. Responding to arguments that this would be contrary to U.K. public policy, the Court described how understandings of surrogacy have changed dramatically over time.

Whittington Hospital NHS Trust v XX
United Kingdom Supreme Court
[2020] UKSC 14

[Before Lady Hale, Lord Reed, Lord Kerr, Lord Wilson, and Lord Carnwath]

LADY HALE: (with whom Lord Kerr and Wilson agree)

[Between 2008 and 2012, the claimant had multiple cervical smears and biopsies performed at Whittington Hospital. The hospital negligently mis-reported the results of these tests, and the claimant was diagnosed with advanced cervical cancer in 2013. The claimant then underwent surgery and chemotherapy that damaged her womb such that she could not bear children herself. The claimant and her partner would like to have four children, preferably through the use of commercial gestational surrogacy arrangements in California.]

6. . . . In relation to surrogacy [trial judge Sir Robert Nelson] held that he was bound by the decision of the Court of Appeal in *Briody v St Helen's and Knowsley Area Health Authority*, first, to reject the claim for commercial surrogacy in California as contrary to public policy, and second, to hold that surrogacy using donor eggs was not restorative of the claimant's fertility. Non-commercial surrogacy using the claimant's own eggs, however, could be considered restorative of the claimant's fertility. . . .

7. The claimant appealed against the denial of her claim for commercial surrogacy and the use of donor eggs. . . . The Court of Appeal . . . allowed the claimant's appeal on both points Public policy was not fixed in time Attitudes to commercial surrogacy had changed since *Briody*; perceptions of the family had also changed and using donor eggs could now be regarded as restorative.

8. The hospital now appeals to this court. . . .

9. UK law on surrogacy is fragmented and in some ways obscure. In essence, the arrangement is completely unenforceable. The surrogate mother is always the child's legal parent unless and until a court order is made in favour of the commissioning parents. Making surrogacy arrangements on a commercial basis is banned. The details are more complicated. . . .

[The Court explained the process for commissioning parents seeking a parental order. UK courts balance a number of factors, such as whether the surrogate mother has a partner, how old the child is, who the child is living with at the time, the conscionability of the contract, and the types of compensation involved. The Court also described the complex web of restrictions placed on UK surrogacy agencies with regards to arranging and advertising surrogacy services.]

23. [In *Briody*], the claimant underwent a sub-total hysterectomy when aged around 19 Her ovaries were left intact. Many years later, she brought proceedings claiming damages for, among other things, the cost of a Californian surrogacy. . . .

24. By the time the case reached the Court of Appeal, . . . [t]he claimant was now proposing two cycles using her own embryos and if that failed up to four more cycles using the surrogate’s eggs and if successful three more to have a second child. All of this would be arranged, not commercially abroad, but here [in the UK]

26. On the Californian proposals . . . , I had no difficulty in agreeing . . . that they were “contrary to the public policy of this country, clearly established in legislation, and that it would be quite unreasonable to expect a defendant to fund it.” As to the new proposals, I also agreed with the judge that it would not be reasonable to expect the defendant to pay for the implantation of the claimant’s embryos when this had [a 1%] chance of success. As to a surrogacy using donor eggs, . . . this was “not in any sense restorative of Ms Briody’s position before she was so grievously injured. It is seeking to make up for some of what she has lost by giving her something different. Neither the child nor the pregnancy would be hers.” . . .

28. This Court is not . . . bound by the ratio of *Briody*. But the persuasiveness of that ratio is inevitably affected by the developments in law and social attitudes which have taken place since then. . . .

30. . . . Traditionally, families were limited to those related by consanguinity (blood) or affinity (marriage). Hence at first only opposite sex married couples could apply for parental orders. Now they have been joined by same sex married couples, by same sex and opposite sex civil partners, and by couples, whether of the same or opposite sexes, who are neither married nor civil partners, but are living together in an enduring family relationship. They have also been joined by single applicants. All of these would be regarded as family relationships within the meaning of article 8 of the [European Convention on Human Rights]. . . .

35. Another change which has taken place . . . since the Surrogacy Arrangements Act was passed in 1985 is the progress of the medicine and science of assisted reproduction . . . and increasing public familiarity with and acceptance of such methods of founding a family. . . . [N]ew techniques have been developed, success rates have improved, and people who are experiencing problems in conceiving or bearing children, or who are in same sex relationships, increasingly turn to assisted reproduction rather than to adoption in order to fulfil their desire to have a family. . . .

37. As to changes in the attitudes of society in general to surrogacy arrangements, the Law Commissions say this:

“Whilst we acknowledge that there is a lack of public attitudinal research in this area, the research that exists suggests that public attitudes to surrogacy also now stand in stark contrast to the prevailing hostile

attitudes at the time of the [Surrogacy Arrangements Act] 1985. The available research reflects the fact that the legislation is now out of step with attitudes towards surrogacy.” . . .

39. . . . [T]here is a spectrum of surrogacy arrangements. At one end of the scale there are desperately poor women who are induced to sell one of the few things they have for sale, their wombs, and are often grossly exploited At the other end . . . are altruistic women who enjoy being pregnant and are happy to make a gift of their child-bearing capacity to people who need it. It is no longer thought that women should not have the right to choose to use their bodies in this way. But it is thought that both they and the commissioning parents should be protected from exploitation and abuse. It is also thought that surrogacy arrangements, whether altruistic or commercial, should guard against any possibility that children are being bought and sold. . . .

44. The first question [in this case] . . . is whether it is ever possible to claim damages for the cost of surrogacy arrangements, even where these are made on a lawful basis in this country and using the claimant’s own eggs. It might once have been possible to argue that the law should not facilitate the bringing into the world of children who would otherwise never have been born. But the acceptance and widespread use of assisted reproduction techniques, for which damages are payable, means that this is no longer possible. . . .

45. The next question is whether it is possible to claim damages for UK surrogacy arrangements using donor eggs. In *Briody*, I expressed the view that this was not truly restorative of what the claimant had lost. . . . [I]t was probably wrong then and is certainly wrong now. . . .

48. This view is reinforced by the dramatic changes in the idea of what constitutes a family which have taken place in recent decades I would therefore hold that, subject to reasonable prospects of success, damages can be claimed for the reasonable costs of UK surrogacy using donor eggs.

49. That leaves only the most difficult question: what about the costs of foreign commercial surrogacy? Surrogacy contracts are unenforceable here. . . . UK courts will not enforce a foreign contract which would be contrary to public policy in the UK. Why then should the UK courts facilitate the payment of fees under such contracts by making an award of damages to reflect them? . . .

51. . . . It has never been the object of the [Surrogacy Arrangements Act 1985] to criminalise the surrogate or commissioning parents. The only deterrent is the risk that the court hearing an application for a parental order might refuse retrospectively to authorise the payments. . . . [T]here is no evidence that that has ever been done. . . .

52. . . . [Since *Briody*,] courts have bent over backwards to recognise the relationships created by surrogacy, including foreign commercial surrogacy. The government now supports surrogacy as a valid way of creating family relationships,

although there are no plans to allow commercial surrogacy agencies to operate here. The use of assisted reproduction techniques is now widespread and socially acceptable. The Law Commissions have provisionally proposed a new pathway for surrogacy which, if accepted, would enable the child to be recognised as the child of the commissioning parents from birth, thus bringing the law closer to the Californian model, but with greater safeguards. While the risks of exploitation and commodification are heightened in commercial surrogacy, they are not thought an insuperable ethical barrier to properly regulated arrangements.

53. . . . I conclude that it is no longer contrary to public policy to award damages for the costs of a foreign commercial surrogacy. . . . There are some important limiting factors. First, the proposed programme of treatments must be reasonable. . . . Second, it must be reasonable for the claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK. This is unlikely to be reasonable unless the foreign country has a well-established system in which the interests of all involved, the surrogate, the commissioning parents and any resulting child, are properly safeguarded. Unregulated systems where both surrogate and commissioning parents are at the mercy of unscrupulous agents and providers and children may be bought and sold should not be funded by awards of damages in the UK. . . . Third, the costs involved must be reasonable. . . .

54. With those caveats, therefore, I would dismiss this appeal.

LORD CARNWATH: (dissenting) (with whom Lord Reed agrees)

. . . 56. . . . I differ only on the last issue: damages to fund the cost of commercial surrogacy arrangements in a country . . . where this is not unlawful. . . .

63. It seems clear . . . that the issue is seen as one of “legal policy,” to be determined by the courts. . . . In the present context I find most helpful Lord Millett’s emphasis on maintaining “the coherence of the law.” . . .

66. . . . [T]he objective is consistency or coherence between the civil and criminal law within a particular system of law. The fact that the laws of other jurisdictions and other systems may reflect different policy choices seems . . . beside the point. It would . . . be contrary to that principle for the civil courts to award damages on the basis of conduct which, if undertaken in this country, would offend its criminal law.

67. It is true that there have been striking developments in society’s approach to many issues affecting family life, including surrogacy, as the Law Commission’s comprehensive report demonstrates. There has however been no change to the critical laws affecting commercial surrogacy Nor does the Law Commission propose any material change in that respect. It is also apparent from recent studies that public attitudes remain deeply divided. So long as that remains the state of the law on commercial surrogacy in this court, it would not in my view be consistent with legal coherence for the courts to allow damages to be awarded on a different basis. . . .

* * *

The number of surrogate births in the United Kingdom continues to grow, and efforts are being made to update the United Kingdom's laws to match evolving societal attitudes on surrogacy. Noting that the current laws governing surrogacy date back to the mid-1980s, the Law Commission of England and Wales and the Scottish Law Commission have assembled a series of recommendations for legal reforms to address the practical issues that have arisen in modern surrogacy.* These reforms would make the intended parents of children born through surrogacy the legal parents at birth by operation of law. The recommendations also include creating regulated surrogacy organizations to oversee surrogacy agreements and developing a register for children born of surrogacy to access their genetic information. The Law Commissions are awaiting stakeholder input before establishing specific recommendations to regulate commercial surrogacy; still, the drafted recommendations indicate a desire to establish a legal structure for the co-existence of both altruistic and commercial surrogacy.

* * *

While Scott noted in 2009 that feminists largely were absent from contemporary debates over surrogacy in the United States, more recently feminist activists and organizations have become important voices in surrogacy reform. In the U.S. state of Washington, feminists joined legislative efforts to repeal the state's ban on commercial surrogacy. In 2018, Washington passed legislation allowing and regulating compensated gestational surrogacy. In the following excerpt, Sara Ainsworth, an attorney with the leading women's rights group in the state, explains why her organization became a leader in the surrogacy reform effort. Ainsworth observes how the practice of surrogacy can, and does, harm women who serve as surrogates. But she views the need for regulation—against the backdrop of the fact that surrogacy arrangements are happening—as a feminist imperative. She echoes many of the concerns with surrogacy voiced in the excerpts in the preceding section before developing a justice-centered framework that respects the interests of women serving as surrogates as well as intended parents.

Bearing Children, Bearing Risks

Sara L. Ainsworth (2014)**

. . . Legal Voice, founded in 1978 as the Northwest Women's Law Center and a leading voice on women's issues in Washington State's courts and legislature, was missing from the debate during the state's first legislative response to surrogacy. In

* LAW COMMISSION OF ENGLAND & SCOTTISH LAW COMMISSION, BUILDING FAMILIES THROUGH SURROGACY: A NEW LAW, SUMMARY OF CONSULTATION PAPER (2019).

** Excerpted from Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASHINGTON LAW REVIEW 1077 (2014).

1989, the year after the notorious *Baby M* decision in New Jersey, Washington State banned compensated surrogacy. The Washington Legislature did not reconsider the issue—and women’s rights advocates never raised it—until a gay legislator lawyer, the father of children born to a woman acting as surrogate, proposed lifting the ban in 2010.

Just as the practice of compensated surrogacy had evolved, so had Legal Voice’s willingness to engage with the issue. In 2010, the organization recognized the imperative of bringing a progressive, feminist voice to the legislative arena—a voice informed as much as possible by the experience of women acting as surrogates. . . .

. . . What I seek to add to the discussion is a call to feminist law reform projects to develop a shared agenda for ensuring reproductive justice in the context of assisted reproductive technologies, and, most importantly, to take leadership in the field of surrogacy regulation. The risks of compensated surrogacy arrangements are primarily borne by the women acting as surrogates, who typically hold less power than other parties to these arrangements and are more likely to be subject to economic exploitation. Progressive feminists thus must meet the challenge of addressing surrogacy’s complexity in the legislatures and the courts. This work should focus on ensuring the humanity and dignity of the women whose interests are most at stake in the surrogacy debate. . . .

Women acting as surrogates in the United States tend to be white, of varying income, and define themselves as Christian. Media in the United States have reported that a significant number of women acting as surrogates were married to men who are enlisted in the military, and act as surrogates while their husbands are deployed overseas. Women acting as surrogates are frequently motivated by altruism; they have consistently explained that they want to help someone who desperately wants to have children, and that they view surrogacy as an opportunity to do something meaningful with their lives. Some women act as surrogates for a close friend or relative, and in states like Washington, where compensated surrogacy is banned, women nonetheless decide to act as surrogates out of this sense of altruism.

In both United States and British studies, women acting as surrogates indicate that they appreciated the emotional bond with the intended parents—or were unhappy if that was lacking—and that they were comfortable, even happy, giving the baby to the intended parents after the birth. They describe feeling like this pregnancy is akin to caring for someone else’s child, unlike the bonding they experienced with pregnancies with children they intended to keep. This was true even when they were genetically related to the children they carried This is not a surprising finding given that the vast majority of women who have had abortions describe feelings of relief, rather than sorrow, after the termination of their pregnancies. These studies demonstrate that women experience a pregnancy differently depending on their intentions in relation to it. . . .

. . . Legal Voice reached out to individual women acting as surrogates in other states, sought the guidance of reproductive justice organizations, and evaluated the available empirical evidence regarding women's experiences of surrogacy—including the experiences of women from other countries acting as surrogates for United States couples. . . . [W]hatever the feminist debate over surrogacy, the practice is currently happening and its unregulated state is what is harmful right now. And additional potential harm will be borne by those with the least economic resources and the least power—including women in other countries, where legal protections for women acting as surrogates may be insufficient to ensure their health, dignity, and safety. . . .

. . . Legal Voice determined that it is preferable to regulate surrogacy in Washington State, encouraging people to engage in these transactions locally, under a robust regulatory scheme. . . . Legal Voice determined that local regulation should be informed by a set of principles, based in pragmatic and anti-essentialist feminism. The principles guiding such regulation are humanity, equality of power, reproductive autonomy and health, non-discrimination, clarity, and justice. . . .

A primary feminist objection to commercial surrogacy is that by commodifying reproduction, such transactions reduce women's bodies to mere vessels. Surrogacy regulation should ensure, within the context of the compensated transaction, the human dignity of all its participants. The challenge is moving this principle from semantics, in a world that remains highly stratified by race, class, and yes, gender, to a meaningful legislative principle. Moreover, claiming such humanity does not necessarily address the arguments of feminists who would ban or discourage surrogacy. . . . [T]he point is not to answer the critiques and resolve them, but as pragmatists, to recognize that surrogacy arrangements are a reality with which we must engage if we are to ensure the humanity of the people who bring children into the world through surrogacy.

The commodification concern is echoed in the exploitation concern: that women, especially women of color, who still earn lower wages than men for comparable work in the United States, and whose earning power has been increasingly depressed by, among other things, this pay gap and wealth inequality, are more vulnerable to economic pressures. . . . One way to address this through a regulatory framework is to attempt . . . to craft provisions that elevate the power of the woman acting as surrogate, so that she and the intended parents approach each other on equal footing. The hope is that this equality of power in such agreements will help avert the risks of coercion once the agreement is entered into. . . .

The principle that the woman acting as surrogate retains her constitutional and human rights to medical decision-making, reproductive decisions, and control over her daily life regardless of whether she is pregnant serves the first two principles. . . .

. . . In some jurisdictions, despite the significant legal gains of recent years, lesbian and gay parents are still denied the right to adopt children or to engage in otherwise legally recognized surrogacy contracts. . . . A feminist principle of anti-

discrimination in this setting would look carefully at any exclusions from participation in surrogacy and consider whether the exclusion either serves or undermines equality and anti-subordination. Those that undermine or further serve to subordinate groups of people should be eliminated from a regulatory scheme. . . .

Legal Voice determined . . . supporting surrogacy legislation that unequivocally recognizes the parental rights of the intended parent immediately upon the birth of the child, with no revocation period for the woman acting as surrogate. . . .

. . . [T]he rights of all parties, including the child, are better protected when the law is unequivocal about parental rights and responsibilities upon the child's birth. The child is never left parentless; the intended parents are both assured of and required to assume their parental obligations; and the woman acting as surrogate knows in advance exactly what will happen when she agrees to act as a surrogate, and is never left with parental responsibility for a child she did not intend to raise. . . .

Arguably, regulating surrogacy in the states will also help increase justice for women in other countries, by encouraging surrogacy to take place locally. . . . But it is not surrogacy that is at the root of Global North exploitation of Global South countries, people, and women's bodies. Reproductive tourism is but a highly visible symptom of a much greater problem—a problem that is also a feminist and progressive imperative to address.

Finally, there is a local injustice that local surrogacy regulation can readily address: the problem of third party brokers, who, with few exceptions, are entirely unregulated. . . . [T]his has led to situations in which brokers have stolen from or made false assurances to people, putting women's health at risk. Progressive legislation should require government regulation of third party brokers in order to decrease their economic incentives and limit their ability to exploit the parties to these arrangements. There are several ways to accomplish this: prohibiting payment to third parties, licensing them in the manner of adoption agencies, or regulating their conduct short of licensing. . . .

REGULATING SURROGACY

As governments move to allow surrogacy in some form, questions of how to regulate become critical. As U.S. law professor Courtney Joslin observes:

By continuing to focus on the permit/ban issue, the existing discourse hides and in turn *discourages* consideration of other questions, including *the ways in which* states permit and regulate surrogacy, as well as the implications of those variations. . . . [T]hese details hold profound consequences, both from the perspective of the individual and from the

collective.*

According to Joslin, the details of regulation “implicate the scope and meaning of fundamental liberty interests, including the right to form families of choice and reproductive autonomy.” Jurisdictions may regulate surrogacy in ways that “challenge family law rules that long have excluded families that departed from gender- and biology-based norms about the nature of motherhood and fatherhood.”

The materials in this section probe whether “principles of equality and liberty are furthered” in surrogacy legislation by considering a few key dimensions: (1) whether the woman serving as surrogate can be compensated?; (2) who has access to surrogacy for family formation?; and (3) what authority the woman serving as surrogate possesses over decisions about her pregnancy?

Compensated or Altruistic?

As we have seen, attitudes toward surrogacy have been evolving over the last several decades, and a number of jurisdictions have begun to legalize the practice, at least in part. Some jurisdictions have begun to allow certain forms of fee exchange associated with surrogacy.

Questions abound. Can surrogacy be compensated? Does the regulatory regime allow both commercial and altruistic surrogacy? May only family members or friends be allowed to act as surrogates for intended parents? May women serving as surrogates be reimbursed only for reasonable expenses (e.g., healthcare costs, employment loss)? Or may they receive compensation beyond that? Are third parties allowed to coordinate the transaction?

The Parliament of Canada passed the Assisted Human Reproduction Act in 2004 to provide a comprehensive regulatory framework for assisted human reproduction and related research. As part of the regulations, the Act criminalized a range of reproductive activities, including commercial surrogacy (Section 6), and reimbursements for sperm or egg donation, or for expenditures incurred by a surrogate (Section 12). The Attorney General of Quebec challenged the Act as an unconstitutional overreach of the federal criminal power. In a 4-4-1 decision, the Supreme Court of Canada upheld some of the challenged provisions but not all.

* Excerpted from a 2020 draft of Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIFORNIA LAW REVIEW (forthcoming 2021).

Reference re Assisted Human Reproduction Act
Supreme Court of Canada
3 S.C.R. 457 (2010)

[The Reasons of McLachlin C.J. and Binnie, Fish, and Charron JJ. were delivered by The Chief Justice:]

[1] . . . [H]istorically, every generation has turned to the criminal law to address [unique moral issues]. Among the most important moral issues faced by this generation are questions arising from technologically assisted reproduction—the artificial creation of human life. Parliament has passed a law dealing with these issues under its criminal law power. The question on appeal is whether this law represents a proper exercise of Parliament’s criminal law power. I conclude that it does.

[2] Since time immemorial, human beings have been conceived naturally. . . .

[3] This changed in the latter part of the 20th century, with the development of technology that allowed ova and sperm to be captured and united to form a zygote outside the human body. . . .

[21] The issue is as follows: Is the *Assisted Human Reproduction Act* properly characterized as legislation to curtail practices that may contravene morality, create public health evils or put the security of individuals at risk, as the Attorney General of Canada contends? Or should it be characterized as legislation to promote positive medical practices associated with assisted reproduction, as the Attorney General of Quebec contends? . . .

[110] Section 12* prohibits reimbursing donors for expenditures incurred in the course of donating sperm or ova, for the maintenance or transport of an *in vitro* embryo, or for expenditures incurred by a surrogate mother—except in accordance with the regulations and a licence. The section also prohibits reimbursement for expenditures without receipts, and the reimbursement of surrogate mothers for the loss of work-

* Section 12 of Canada’s Assisted Human Reproduction Act provides:

(1) No person shall, except in accordance with the regulations, (a) reimburse a donor for an expenditure incurred in the course of donating sperm or an ovum; (b) reimburse any person for an expenditure incurred in the maintenance or transport of an *in vitro* embryo; or (c) reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy.

(2) No person shall reimburse an expenditure referred to in subsection (1) unless a receipt is provided to that person for the expenditure.

(3) No person shall reimburse a surrogate mother for a loss of work-related income incurred during her pregnancy, unless (a) a qualified medical practitioner certifies . . . that continuing to work may pose a risk to her health or that of the embryo

related income without medical certification that work may pose a risk to her health or that of the embryo. . . .

[111] The question is whether s. 12 has a criminal law purpose. Section 12 is complementary to ss. 6* and 7**, which are conceded to be valid criminal law. Sections 6 and 7 prohibit the commercialization of reproduction. These prohibitions are based on the Baird Report, which stated: “To allow commercial exchanges of this type . . . would undermine respect for human life and dignity and lead to the commodification of women and children.” Section 12 addresses the related issue of permitted expenses. It seeks to ensure that credited expenses are confined to actual outlays, and do not cross the line into commercialized reproductive activities. This is the line that prohibits that which is considered inappropriate commodification and permits that which is considered acceptable reimbursement. The act of drawing this line raises fundamental moral questions. Though there are differing views on where the line should be drawn, it is difficult to argue that the criminal law power does not permit Parliament to prohibit that which falls on the wrong side of it.

[112] I conclude that s. 12 is rooted in the same concerns as ss. 6 and 7 and is valid criminal law. . . .

[The reasons of LeBel, Deschamps, Abella and Rothstein JJ. delivered by LeBel and Deschamps JJ.:]

[157] In 2001, Health Canada estimated that every 100th baby in the industrialized world was being conceived through the application of some kind of assisted human reproduction technology. The popularity of assisted human reproduction was bound to increase, as it corresponded to a need. The same department reported in 2009 that one in eight Canadian couples experienced problems related to infertility. This appeal does not concern the appropriateness or wisdom of the decision to regulate

* Section 6 of Canada’s Assisted Human Reproduction Act provides:

- (1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid. . . .
- (2) No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.
- (3) No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it. . . .

** Section 7 of Canada’s Assisted Human Reproduction Act provides:

- (1) No person shall purchase, offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor.
- (2) No person shall (a) purchase, offer to purchase or advertise for the purchase of an *in vitro* embryo; or (b) sell, offer for sale or advertise for sale an *in vitro* embryo.

assisted human reproduction, or even the validity of the *Assisted Human Reproduction Act (AHR Act)* as a whole. Rather, the dispute relates to the connection between certain provisions of the *AHR Act* and the federal criminal law power. . . .

[238] . . . In establishing the basis for Parliament’s action, the Chief Justice relies heavily on the purpose of upholding public morality. In her view, to justify having recourse to the criminal law by relying on morality, Parliament need only have a reasonable basis to expect that its legislation will address a concern of fundamental importance. . . . This approach in effect totally excludes the substantive component that serves to delimit the criminal law. Not only does it go far beyond morality, which as a result serves only as a formal component, but it inevitably encompasses innumerable aspects of very diverse matters or conduct, such as participation in a religious service, the cohabitation of unmarried persons or even international assistance, which, although they involve moral concerns in respect of which there is a consensus that they are important, cannot all be considered to fall within the criminal law sphere. . . .

* * *

In June 2020, Health Canada issued regulations on Reimbursement Related to Assisted Human Reproduction. The regulations permit reimbursement for groceries and telecommunication costs. The reimbursement must be directly related to the assisted reproduction, such as the food costs attributable to the increased calories consumed by the pregnant woman. Meanwhile, Members of Parliament continue to introduce proposed revisions to the 2004 law in order to allow compensated surrogacy.

Report on the Sale and Sexual Exploitation of Children

United Nations Special Rapporteur (January 15, 2018)*

. . . 24. Surrogacy, in particular commercial surrogacy, often involves abusive practices. Furthermore, it involves direct challenges to the legitimacy of human rights norms, as some of the existing legal regimes for surrogacy purport to legalize practices that violate the international prohibition on sale of children, as well as other human rights norms. . . .

38. One definition of commercial surrogacy, also known as “for-profit” or “compensated” surrogacy, focuses on the contractual and transactional—rather than gratuitous—relationship between the intending parent(s) and the surrogate mother. Hence, commercial surrogacy exists where the surrogate mother agrees to provide gestational services and/or to legally and physically transfer the child, in exchange for remuneration or other consideration. . . .

* Excerpted from U.N. Special Rapporteur on the Sale and Sexual Exploitation of Children, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography, and Other Child Sexual Abuse Material*, U.N. Doc. A/HRC/37/60 (Jan. 15, 2018).

68. . . . [I]t is not accurate that regulated commercial surrogacy systems avoid the sale of children. . . . [T]he Committee on the Rights of the Child stated . . . that it was “. . . particularly concerned about the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage.” The Committee’s concern is directly applicable to regulated commercial surrogacy jurisdictions in the United States, which generally have enacted legislation making commercial surrogacy contracts enforceable and determinative as to parentage.

69. In theory, a truly “altruistic” surrogacy does not constitute sale of children. . . . However, the development of organized surrogacy systems labelled “altruistic,” which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries, may blur the line between commercial and altruistic surrogacy. . . .

Who Has Access?

Genetic Ties

What role do genetics play in the regulation of surrogacy? Genetic ties are relevant both to the status of the woman serving as the surrogate and to the status of the intended parents. Does regulation reach only gestational surrogacy? Or does it also include genetic surrogacy, in which the surrogate’s own eggs are used? If only gestational surrogacy is permitted, can the intended parents use donor egg or sperm? Must at least one of the intended parents have a genetic connection to the child? These questions raise concerns regarding the normative force of genetics in parent-child relationships and thereby implicate the status of families—such as those formed by same-sex couples—that necessarily depart from this norm.

Most jurisdictions that have allowed surrogacy limit the practice to gestational surrogacy, in which the woman serving as the surrogate is not genetically related to the child. Courtney Joslin offers this description of U.S. law:

Intuitions about the importance (or not) of genetic connections also animate statutes that limit enforceable agreements to gestational surrogacy. . . . The majority of permissive states only allow gestational surrogacy arrangements. Only five of the 22 jurisdictions . . . expressly permit genetic surrogacy. And even among this group, all except Arkansas treat gestational and genetic surrogacy differently in some

respects.*

While the lack of genetic connection between the woman serving as the surrogate and the child has mattered to many authorities' assessment of surrogacy, others reject the distinction as meaningful. According to the 2018 U.N. Special Rapporteur's Report, excerpted above:

In some jurisdictions, the law defines a genetically unrelated surrogate mother as a mere "gestational carrier." If a valid pre-embryo transfer contract is entered into, the law regards the "gestational carrier" as not being the mother of the child at birth. . . . Proponents of this kind of approach contend that no sale of children occurs in this legal context, even where commercial surrogacy is concerned, because the "gestational carrier" cannot transfer a child that has never been hers. . . .

This perspective relies on the controversial premise that a woman who gestates and gives birth to a child is no more of a mother than a childcare worker is. Such perspectives also rely on the claim that the gestational surrogate mother is never a mother because she is genetically unrelated.

The intended parents' genetic connections to the child also matter to assessments of surrogacy. With IVF, an intended mother can use her own eggs and thus be the genetic mother. In U.S. states that ban surrogacy, courts have found that such laws cannot be constitutionally applied so as to preclude the parental recognition of the intended mother. As a U.S. federal district court reasoned in *J.R. v. Utah*, 261 F. Supp. 2d 1286 (D. Utah 2002):

Resort to the adoption process to gain legal recognition of . . . parental rights, effective though it might be, still fails to account for the parent-child relationship that already exists in fact between [the intended mother and father] and the twin children they conceived, and thus continues to burden [their] fundamental parental rights.

For many different-sex couples who engage in gestational surrogacy to have a child, the intended mother is not the genetic mother and instead a donor egg is used. What if the couple also uses donor sperm? Is it permissible for neither to have a genetic connection? What about a single person who relies on donor gametes?

* Excerpted from a 2020 draft of Courtney G. Joslin, (*Not*) *Just Surrogacy*, 109 CALIFORNIA LAW REVIEW (forthcoming 2021).

AB v. Minister of Social Development
Constitutional Court of South Africa
CCT 155/15 (2016)

[Justice Nkabinde, delivered the judgment of the court, joined by Justices Mogoeng, Moseneke, Bosielo, Jafta, Mhlantla, and Zondo.]

[The majority concluded that South Africa’s law prohibiting individuals to enter into surrogacy agreements unless at least one of the intended parents had a genetic connection to the child was constitutionally permissible. The Court held that: “The requirement [of a genetic link] . . . serves a rational purpose . . . of creating a bond between the child and the commissioning parents or parent. The creation of a bond is designed to protect the best interests of the child-to-be born so that the child has a genetic link with its parent(s).” The Court emphasized that “clarity regarding the origin of a child is important to the self-identity and self-respect of the child.” The Court concluded that:

[The Constitution] does not give anyone the right to bodily integrity in respect of someone else’s body. If this were so, that begs the question, how then does [the law] impair the right to bodily integrity of someone who is unable to produce gamete? In my view, while the donor gamete decision is an important exercise of a prospective parent’s autonomy, it does not entail a decision regarding the commissioning parent’s bodily integrity. It entails the body of a surrogate “host” mother.]

[Justice Khampepe, joined by Justices Cameron, Froneman, and Madlanga dissented.]

8. . . . AB has admirably persevered in distressing circumstances. Between 2001 and 2011, she underwent 18 *in vitro* fertilisation (IVF) cycles which were all unsuccessful in helping her fall pregnant. . . .

9. [A doctor] recommended that AB look into surrogacy as a means to have a child. Through the surrogacy programme . . . she was put in touch with a potential surrogate mother, who agreed to act for her. As a single woman unable to donate her own ova, the only way for AB to proceed was to use both donor ova and donor sperm, as she had done over the course of the last 14 of the total of 18 IVF cycles she had undergone.

10. [An attorney informed AB] that she could not enter into a surrogacy agreement without contributing a gamete to the surrogacy process. Specifically, AB was made aware that she, as a single woman incapable of donating a gamete, could not legally enter into a surrogacy agreement [under South African law]

65. . . . [T]he lessons of our past have taught us that freedom means more than just physical liberty. Section 12(2)* [of the Constitution] thus protects “the right to bodily and psychological integrity.” There is a close connection between the freedoms protected by our Constitution and “integrity.” The Constitution enjoins us to actively turn away from indifference and move towards respect, empathy and compassion. The protection section 12(2) provides is grounded in these ideals. When interpreting the provisions of the Constitution, it is therefore incumbent on us to enhance the integrity of those who seek to rely on it. . . .

73. [The law] forbids a court from sanctioning a surrogate agreement unless the gamete of at least one commissioning parent is used in the conception of the child. An implication of this is that a prospective parent who is both conception and pregnancy infertile, and who does not have a relationship partner who is able to donate a gamete of their own or carry a pregnancy to term, is precluded from considering surrogacy as an option in order to have a child. . . .

86. . . . [I]nfertility is an unenviable and psychologically harmful condition. It is harmful both because it prevents people from having children of their own, and because it results in serious social exclusion and stigma. Where possible, our state should therefore look to alleviate these harmful effects. . . . This responsibility includes the negative obligation to avoid placing additional hurdles in the way of an infertile person’s attempts to temper the consequences of infertility. Infertility is as much a social as a physical condition. The state should avoid standing in the way of decisions that people take to mitigate the socio-psychological harm of this condition, including reproductive decisions on how to have a child using modern reproductive technologies.

87. Because infertility is experienced differently by women and men, and because social stigma plays a role in determining the psychological effects it has, infertility may be a phenomenon independent of bearing children. . . . Stripping a person of this choice has far-reaching personal and social ramifications. Infertility is thus harmful partly because it removes the ability to elect to have a child; a decision almost universally considered important. . . .

89. . . . [M]uch of the harm infertility brings has to do with the forced deprivation of choice in an area of life that humans consider particularly significant. Infertility cruelly dispossesses a person of the capacity to decide whether or not to have a child; where making this decision has extensive social implications. . . .

108. The Constitution’s understanding of dignity . . . is rooted in a recognition that indifference to the concerns of other members of society leads to “a culture of retaliation and vengeance.” Thus, our Constitution acknowledges that protecting and

* Section 12(2) of the South Africa Constitution of 1996 provides:

Everyone has the right to bodily and psychological integrity, which includes the right . . . a. to make decisions concerning reproduction; b. to security in and control over their body

promoting diversity of thought and action is a requirement for human flourishing, and for community building. . . .

110. [The law] strips Classes of persons, including those who are both conception and pregnancy infertile, of the power to choose to have a child using available reproductive technology. . . .

117. The Constitution values alternative forms of family life for good reason. Because of the diversity that characterises our society, there is no one correct version of the family against which others can be assessed. Therefore, it would be presumptuous and arbitrary to define what an acceptable family entails. In a legal culture based on justification, capricious restrictions on something as important to human beings as the family cannot be countenanced. This will harm the dignity of those directly affected, as well as our society in general.

118. Moreover, by requiring the existence of a “genetic link” between parent and child, [the law] is problematically disparaging of forms of family life that have already been constitutionally sanctioned, including adoption. . . .

180. There are important psychological differences between becoming a parent through adoption, and having a child through surrogacy. While the end result of both processes is that a person becomes the parent of a child genetically unrelated to them, the nature of the relationship between parent and child is substantially different. In the case of double-donor surrogacy, an emotional link develops between commissioning parent and child through the choices that the commissioning parent makes before conception, at conception, and during pregnancy. While an emotional link no doubt develops between parent and adoptive child, it is of an entirely different nature. We must show equal respect to these different mechanisms of forming a family. . . .

* * *

In 2017, in *Paradiso*, excerpted in the first part of this chapter, the European Court of Human Rights concluded that no violation of the European Convention on Human Rights occurred when Italian authorities removed a child from the home of intended parents who engaged in gestational surrogacy abroad. The fact that neither intended parent was genetically related to the child was critical to the Court’s decision. In the wake of the decision, the Italian Constitutional Court reviewed the ban on parental recognition for intended parents who had engaged in surrogacy and bore no genetic relationship to the child.

Judgment no. 272 of 2017

Constitutional Court of Italy (November 22, 2017)

[The Constitutional Court of Italy, composed of: President Paolo Grossi and Justices Giorgio Lattanzi, Aldo Carosi, Marta Cartabia, Mario Rosario Morelli, Giancarlo

Coraggio, Giuliano Amato, Silvana Sciarra, Daria de Pretis, Nicolò Zanon, Augusto Antonio Barbera, Giulio Prosperetti, and Giovanni Amoroso, delivered the following judgment:]

1. . . . [T]he constitutionality of Article 263* of the Civil Code . . . has been contested insofar as it does not provide that a challenge to the [parental] recognition of an underage child on the grounds that he was not in actual fact the biological child may only be accepted where this reflects the child's best interests. . . .

2. . . . [T]he remedy sought by the referring court seeks an acknowledgement of the ability to assess the child's best interest, when deciding on the challenge to recognition. Were that possibility to be denied, the acceptance of the claim would be conditional only upon a finding that the fact of recognition did not reflect the actual parentage. . . . [T]he question objects that the automatic mechanism within the decision-making process that precludes a consideration of the interests in play is unreasonable. The constitutional review referred to this Court is thus limited to a verification of the constitutional basis for the contested decision-making mechanism, without making any inference concerning the discretionary choices reserved to the legislator.

3. . . . [T]he proceedings before the referring court concern an application seeking a ruling that there is no parent-child relationship with regard to a child born abroad through recourse to a surrogate mother. However, the proceedings do not concern the legitimacy of the prohibition on [surrogacy] pursuant to Article 12(6)** of Law no. 40 of 19 February 2004

4.1. Whilst it is necessary to acknowledge a marked preference expressed by the legal order that the status of an individual should reflect the actual circumstances of his or her procreation, it cannot be asserted that the establishment of the biological and genetic parentage of an individual is a value of absolute constitutional significance, as such immune to any balancing operation.

Indeed, the current legislative and systemic framework, under both internal and international law, does not require within actions seeking de-recognition of filiative status, that such a finding should have absolute priority over all other interests at stake. In all cases in which genetic identity may differ from legal identity, the requirement to

* Article 263 of Italy's Civil Code provides:

The acknowledgment [of parentage] may be attacked on grounds of mendacity by the person who made the acknowledgement, by the person who has been acknowledged, or by any other interested party. The acknowledgment may be attacked even after the legitimation. . . .

** Article 12(6) of Italy Law no. 40 of 19 February 2004 provides:

Anyone who in any form realizes, organizes, or advertises the marketing of gametes or embryos or the substitution of maternity is punished with imprisonment from three months to two years and a fine of 600,000 to one million euros.

strike a balance between the need to establish the truth and the best interests of the child is apparent from the evolution of the law over time. This requirement also applies with regard to the interpretation of the provisions that must be applied in the case under examination. . . .

4.1.2. . . . Article 9* of Law no. 40 of 2004 provided that a spouse or cohabitee who had consented to the recourse to heterologous medically assisted reproduction techniques could not bring an action for de-recognition or challenge recognition pursuant to Article 263 of the Civil Code.

. . . [T]his Court held that it was possible “to confirm both that any action seeking de-recognition of paternity [. . .] and any challenge pursuant to Article 263 of the Civil Code will be inadmissible, and that birth as a result of heterologous MAR [medically assisted reproduction] will not result in the establishment of legal relations of parentage between the gamete donor and the newly born child, as the key aspects of the legal status of the latter will thus be regulated.”

Also in such cases, in the event of a discrepancy between genetic parentage and biological parentage, the balance struck by the legislator affords priority to the principle of the conservation of the parent-child relationship, or the *status filiationis*. . . .

4.1.5. It must also be recalled that, in line with the principles set forth in the case law of the [European Court of Human Rights], Law no. 173 of 19 October 2015 (Amendments to Law no. 184 of 4 May 1983 on foster children’s right to affective continuity) has afforded primary importance to the interests of the child in maintaining affective bonds, which without doubt apply irrespective of blood relations, by granting legal significance to *de facto* relations established between a child who has been declared eligible for adoption and the foster family.

On the other hand, a discrepancy between genetic identity and legal identity is a premise specifically for the legislation governing adoption (Law no. 184 of 4 May 1983 on the “Right of the child to a family”), as an expression of the principle of responsibility of any person who chooses to become a parent, thus giving rise to a legitimate expectation in the continuity of the relationship.

4.1.6. . . . [T]he legislative and systemic evolution of the concept of family, which has been such as to confirm the legal significance of the parent-child relationship as a social fact, even where it does not coincide with biological parentage, also features

* Article 9 of Italy Law no. 40 of 2009 provides:

(1) Where reference is made to medically assisted procreation techniques of [a prohibited] heterologous type . . . , the spouse . . . can not perform the action of disavowal of paternity in cases covered by . . . an appeal under Article 263 of the [Civil] Code.

express recognition by this Court that “the issue of genetic origin is not an essential prerequisite for the existence of a family.”

4.2. It is in the light of these principles, which are inherent also within the changed legislative and systemic context, that the question concerning the constitutionality of Article 263 of the Civil Code has arisen.

. . . [T]he need to give specific consideration to the child’s best interests within all decisions affecting him or her is strongly rooted within both national and international law, and this Court has long contributed to this degree of consolidation.

It is consequently not apparent why, when confronted with an action pursuant to Article 263 of the Civil Code, with the exception of those brought by the child him- or herself, the court should not assess: whether the applicant’s interest in giving effect to the truth should prevail over that of the child; whether that action is genuinely capable of realising that interest (as is the case under Article 264 of the Civil Code); whether the interest in the truth also has a public aspect (for example insofar as it relates to practices that are prohibited by law, such as surrogacy, which causes intolerable offence to the dignity of the woman and profoundly undermines human relations) and requires that the child’s best interests be protected insofar as consistent with that truth.

There are also cases in which a comparative assessment of the interests is carried out by the law directly, as is the case for the prohibition on de-recognition following heterologous fertilisation. In other cases, on the other hand, the legislator imposes a mandatory requirement to acknowledge the truth by imposing prohibitions such as the ban on surrogacy. However, none of this entails the negation of the child’s best interests. . . .

* * *

In 2020, the Italian Constitutional Court considered Article 263 once again. In Judgment no. 127, the court explained that an individual who has attained parental recognition knowing that he is not the biological parent can subsequently challenge such recognition in light of the biological truth. Nonetheless, the Constitutional Court held that the reviewing court must consider other constitutional values, including “the child’s right to personal identity, which is not linked to biological truth alone but also to affective and personal ties that have developed within the family.”*

* *Press Release of 25 June 2020*, PRESS OFFICE OF THE CONSTITUTIONAL COURT.

Status-Based Criteria

Who will the state allow to enter into agreements for surrogacy to have children? Only married different-sex couples? Different-sex and same-sex couples? Married and unmarried couples? Single people? Single people who will rely on donor egg and sperm? These questions raise important equality concerns—implicating gender, sexual orientation, and marital status—as well as with autonomy concerns relating to reproductive decision-making and family formation.

(Not) Just Surrogacy

Courtney G. Joslin (2020)*

. . . [T]hree factors—restrictions on the identity of intended parents, medical need requirements, and genetic connection requirements—concern the inclusiveness (or lack thereof) of the intended parent eligibility criteria. [Four U.S. states] . . . limit enforceable agreements to those in which the intended parents are married. . . . Two of the four . . . limit enforceable agreements to those in which both married spouses provided gametes. In practice, this requirement limits the process to different-sex married couples.

But the strong trend is in favor of statutes to permit any intended parents regardless of sex, sexual orientation, or marital status. Thirteen of the twenty-two permissive states have intended parent rules that expressly include all intended parents. . . .

Medical need requirements also impact who is recognized and protected as a parent of the resulting child. Older statutes are more likely to require proof that the intended parents have a “medical need” for surrogacy. By contrast, most of the more recently enacted schemes jettison this requirement. The elimination of the medical need requirement is also a means of opening up surrogacy to a wider range of potential intended parents.

. . . [M]edical need requirements create barriers for male same-sex couples. . . . Even when medical need requirements do not screen out entire classes of people based on their identity, some advocates oppose them on the ground that they unnecessarily intrude on and interfere with choices about reproduction and family creation. . . .

* Excerpted from a 2020 draft of Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIFORNIA LAW REVIEW (forthcoming 2021).

Law No. 25 of 2016 (Third Amendment to Law No. 32 of 2006)
Portugal (August 22, 2016)*

. . . Article 8° Surrogate pregnancy

1 - “Surrogate pregnancy” means any situation in which the woman is willing to endure a pregnancy on behalf of another person and to surrender the child after delivery, renouncing the powers and duties of motherhood.

2 - The conclusion of legal transactions for surrogate pregnancies is only possible in exceptional cases, and without involving financial compensation, in cases of absence of uterus, injury or disease of this organ that absolutely and definitively prevents the woman’s pregnancy or in clinical situations that justify it.

3 - The surrogate pregnancy can only be authorized through a medically assisted procreation technique using the gametes of at least one of the respective beneficiaries, and the surrogate pregnant woman cannot, under any circumstances, be the donor of any oocyte used in the proceeding. . . .

4 - The execution of surrogate pregnancy legal transactions requires prior authorization from the National Council for Medically Assisted Procreation, that supervises the entire process, which is always preceded by a hearing by the Order of Doctors and can only be granted in the situations provided for in paragraph 2.

5 - Any type of payment or the donation of any good or amount from the beneficiaries to the pregnant woman is prohibited, except for the amount corresponding to the expenses resulting from the health care actually provided. . . .

7 - The child born through the use of a substitute pregnancy is considered to be the child of the respective beneficiaries. . . .

10 - The execution of legal transactions for the purpose of surrogacy is made through a written contract, established between the parties, supervised by the National Council for Medically Assisted Procreation. . . .

11 - The contract referred to in the preceding paragraph may not impose restrictions of behavior on the surrogate pregnant woman, nor impose rules that violate her rights, freedom and dignity. . . .

* * *

Some courts have begun to recognize the rights of same-sex couples to access surrogacy on equality grounds. In Israel, the Supreme Court found that the exclusion of same-sex couples and single men is discriminatory and violates the rights to equality

* Translation by Professor Miguel Maduro.

and parenting. In the U.S. state of Utah, the state’s Uniform Parentage Act required intended mothers to demonstrate a medical need before entering a surrogacy agreement. The Supreme Court of Utah invalidated the requirement for discriminating against same-sex intended parents. Both judgments are excerpted below.

Judgment in Case 781/15

Supreme Court of Israel (February 27, 2020)*

[Before: The Honorable President E. Hayut, The Honorable Deputy President H. Metlzer, The Honorable Justice N. Hendel, The Honorable Justice A. Fogelman, The Honorable Justice Y. Amit]

[Hon. President E. Hayut:]

1. Should same sex couples and single men with a genetic relationship to the newborn be allowed access to an Embryo Carrying Agreement in accordance with the Embryo Carrying Agreements Law (Approval of Agreements and Status of the Newborn), 1996 (Hereinafter: the Agreements Law)? . . .

2. . . . The Embryo Carrying Agreement Law (Approval of Agreements and Status of the Newborn) (Amendment No. 2), 2018 . . . extended the circle of those eligible to a surrogacy arrangement under the Agreements Law, by redefining the term “intended parents” in the law to also include single women with medical conditions that prevent them from conceiving and carrying a pregnancy or women whose health would be significantly endangered by pregnancy. The term “intended parents” was however not redefined in a manner that grants same sex couples and single men the ability to use of the arrangement. . . .

7. The provisions of the Agreements Law relevant to our discussion divided the definition of “*intended parents*” in Section 1 into two separate parts: “*intended parents who are a couple*,” defined as “*a man and a woman who are a couple, who jointly enter a contract with a carrying mother for the purpose of reproduction*” and “*a single intended mother*,” who is “*a woman without a partner, who enters a contract with a carrying mother for the purpose of reproduction.*” . . .

11. The Petitioners, two male couples, argue that the arrangements created by the Agreements Law and the Egg Donation Law infringe upon their right to parenthood and family life, upon their right to equality and upon the freedom of contract given to them as a “*constitutional right derived from the right to Human Dignity*” In their opinion, no relevant difference exists, regarding access to surrogacy arrangements according to the Agreements Law, that would justify different treatment of single men and of non-heterosexual couples. . . . [T]he Petitioners believe that the surrogacy arrangement set by the Agreements Law should be interpreted in a manner that sustains

* Translation by Elazar Weiss (Yale Law School, LL.M. Class of 2020).

human rights and also allows single men and same sex couples to file requests for approval to the Approval Board. Alternatively, if such interpretation proves impossible, the Petitioners request a constitutional remedy of “reading into the law” (Reading-in) provisions that will allow extending the regulatory arrangement to single men and same-sex couples, or an integrative remedy of both sustainable interpretation and “reading into the law.” As another alternative, the Petitioners ask the court to invalidate the definitions in the Agreements Law and the Egg Donation Law that exclude them, and to complete the lacunae that would be created as a result

12. The Approval Board and the Knesset [Israel’s legislature] argue . . . that while the Petitioners’ yearning for the realization of their right to parenthood through the use of an Embryo Carrying Agreement and egg donations is understandable, it does not justify judicial interference in primary legislation of the Knesset. In their opinion, the case before us does not amount to an infringement of a constitutional right, since the infringement on the right to parenthood doesn’t pertain to the “core of the right,” but rather to certain aspects at the “periphery” of it. . . .

14. The central fundamental rights the Petitioners believe to be infringed are the right to parenthood and the right to equality. They argue that the constitutional right to parenthood includes also the right to realize the right within a specific family unit and by a specific reproductive technique. . . . In the Petitioners’ opinion, the right to equality in its essence implies that we must examine an individual’s will and desire to become a parent without taking one’s gender or sexual orientation into account, and that access to a surrogacy arrangement cannot be limited by narrowing its objective to a purely medical one.

Conversely, the Respondents believe that the Israeli surrogacy arrangement does not infringe upon the Petitioners’ constitutional right to parenthood, as it doesn’t affect the right’s core, but rather peripheral aspects of it, namely the ability to choose the *manner* in which the right to parenthood is realized. . . . As for equality, the Respondents claim that in the case before us a relevant difference does exist between women with medical conditions that prevent them from carrying pregnancy and men who wish to enter into a surrogacy arrangement, and that this distinction is not based on gender, but rather on “*anatomical-physiological differences between women and men.*” . . .

15. . . . I accept the Petitioners’ claim that the provisions of the Agreement Law as well as those of the Egg Donation Law, in as much as they are intertwined with them, which leave single men and same sex couples outside their scope, infringe upon their right to parenthood and their right to equality.

. . . [T]he right to parenthood—deriving from the right to family life and from the right of every human being to dignity—“*includes all the various medical techniques that assist reproduction; among them, it includes the ability to become a parent through surrogacy.*” . . . It is given to every person regardless of their gender or sexual

orientation, and regardless of the question of whether they choose to live solely or in a relationship, and with whom. . . .

16. . . . The discussion will . . . focus upon this two-pronged discrimination claim: first, discrimination against men, compared with women, and second, discrimination against same sex couples, compared with heterosexual couples.

17. The Respondents argue that a medical condition that prevents women from conceiving or carrying a pregnancy constitutes a relevant difference between them and single men that justifies their different treatment. This claim is based upon the physiological differences between women and men, namely the fact that women, by nature, are capable of carrying pregnancies and bearing children, while men are incapable of doing so. Is this difference indeed relevant to the question of allowing access to surrogacy arrangements?

Personally, I would answer this question negatively.

. . . In the 2018 amendment of the law the problem of single women . . . was indeed addressed, and the path was paved for these women to become mothers through surrogacy arrangements, provided that a genetic relationship between them and the newborn existed, and the rest of the law's conditions were met. The remainder of the petition before us is now beseeching us to take one step further towards the realization of the right to parenthood, and to derive from it, and from the right to equality, granting single men access to surrogacy arrangements.

. . . There are certainly countries . . . that allow men access to surrogacy arrangements, adopting the approach that use of this arrangement should not be limited to women with medical conditions, and that it should be applicable in other situations as well. . . . The advocates of this approach believe that narrowing access to a surrogacy arrangement down to people with medical conditions alone constitutes an unjustifiable limitation and ignores the social acceptance of the importance of parenthood in general, and genetic parenthood specifically, to the self-realization of the individual.

18. This approach has a certain amount of support in Israeli law. For instance, every individual who conducted a surrogacy arrangement abroad, in a state that legally recognizes the procedure, will be recognized in Israel as the newborn's parent (subject to the existence of a genetic relationship . . .). It seems irrefutable that the Agreements Law creates in this context a distinction between those eligible to use a surrogacy arrangement within Israel and those who are required to turn to surrogacy abroad in order to realize their right to parenthood. . . . As long as this distinction is based on the existence or lack of a medical condition, it constitutes an infringement of the rights of men seeking to enter surrogacy arrangements by using an egg donation to be fertilized by their sperm. In my opinion, if the issue at hand is that of utilizing fertility and birth technologies in the name of helping childless people realize their right to genetic parenthood, there is no basis for the claim that the natural physiological differences

between men and women create a relevant reason for distinguishing between them. . . . The flaws of this view [and] . . . the rationales on which it is based are likely to lead also to discrimination against women

19. The starting point, therefore, is that limiting the right to access surrogacy arrangements in Israel in a manner that narrows the application of the Agreements Law only to women with medical conditions which prevent them from conceiving or carrying a pregnancy, and excludes the entire population of men who are capable of creating a genetic relationship to a newborn infringes the right of these men to equality in realizing their right to parenthood. This infringement is enhanced in this context with regard to the subgroup of homosexual men, as surrogacy is in many ways the only way in which they are capable to achieve genetic parenthood. . . .

The sweeping exclusion of homosexual men from the scope of the surrogacy arrangement appears to be a “suspect” discrimination, which attributes to this group a lower status, and thus creating an additional, critical and humiliating infringement upon human dignity on the basis of gender or sexual orientation. . . .

37. . . . The complexity of this matter necessitates comprehensive, meticulous, and holistic regulation, that corresponds with the entire body of laws dealing with reproduction and fertility. Therefore, the preferable alternative is that the Legislator would consider the judicial criticism detailed in this judgment and would amend and supplement the Agreements Law This additional required amendment should express commitment to the rights to Equality and Parenthood of single men and same sex couples, especially with regard to the definitions section, the provision dealing with the approval of arrangements according to the Agreements Law, as well as with regard to and in the relevant provisions of the Egg Donation law that limit egg harvest, and their allocation and implantation. Considering the circumstances of the case and the complexity of this issue, it seems this alternative is the one that best fulfils the joint responsibility of all the branches of government vis-à-vis the protection of human rights, and it is compatible with the general approach of this Court, which is based on the dialogic theory of constitutional remedies.

. . . [D]ue to the serious and longstanding infringement of the right to equality and the right to parenthood of single men and same sex couples, and considering . . . that this petition has been pending before the court since 2015, as well as the fact that a partial judgement was already given prior to the statutory amendment of 2018, I suggest it be decided that insofar as the provisions of the law are not amended within 12 months from today, a supplementary judgement will be given by us, in which we will order an operative remedy

In re Gestational Agreement
Supreme Court of Utah
449 P.3d 69 (2019)

[Before: Chief Justice Durrant, Associate Chief Justice Lee, Justice Himonas, Justice Pearce, and District Court Judge Direda sitting by designation.]

Chief Justice Durrant, opinion of the Court:

. . . Petitioners N.T.B. and J.G.M. (Intended Parents) are a married same-sex male couple. Petitioners D.B. and G.M. are an opposite-sex married couple who entered into a written gestational surrogacy agreement with the Intended Parents. The four individuals filed a joint petition requesting that the district court validate their agreement, in accordance with the statutory scheme contained in Utah Code sections 78B-15-801 through 809 . . . dealing with gestational agreements. . . . [T]he district court issued an order denying the petition.

In its order, the district court expressed “concern[] about the language of” Utah Code section 78B-15-803(2)(b), which requires, as a prerequisite to court approval, the court to find that “medical evidence shows that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child.” . . .

. . . Because a plain reading of section 78B-15-803(2)(b) works to deny certain same-sex married couples a marital benefit freely afforded to opposite-sex married couples, we hold the statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment*

In *Obergefell [v. Hodges]*, the United States Supreme Court held as follows: “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” . . .

While the *Obergefell* Court did not address at length how state laws should be implemented in light of same-sex couples’ right to marry, the Court did hold that the Constitution “does not permit the State to bar same-sex couples from marriage on the *same terms* as accorded to couples of the opposite sex.” . . .

A valid gestational agreement is undoubtedly a benefit linked to marriage. Obtaining a valid gestational agreement is, in many cases, one of the most important benefits afforded to couples who may not be medically capable of having a biological

* The Fourteenth Amendment to the United States Constitution provides:

. . . 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 . . .

child. Such an agreement works to secure parental rights to an unborn child and bestows rights and benefits upon the intended parents. The State has explicitly conditioned this benefit on a petitioner's marital status; no unmarried couple may obtain one. It is therefore unquestionably linked to marriage.

Application of section 78B-15-803(2)(b) results in disparate treatment of similarly situated same-sex male marriages. The statute requires that medical evidence be presented to the court, showing that the intended mother is medically incapable of bearing a child or to do so would otherwise harm her or the child. It is impossible for married same-sex male couples to meet this requirement since neither member is a "mother" under the statute. Requiring one of the two intended parents to be female precludes married same-sex male couples from entering into a valid gestational agreement—a benefit explicitly conditioned on marriage. The statute therefore treats married same-sex male couples differently than married opposite-sex couples. . . .

. . . [M]arried same-sex couples, whether male or female, are entitled under the Constitution to the same terms and conditions as married opposite-sex couples. In other words, same-sex couples must be afforded all of the benefits the State has linked to marriage and freely grants to opposite-sex couples. Because Utah Code section 78B-15-803(2)(b) works to deny certain same-sex couples a marital benefit freely accorded to opposite-sex couples, it is unconstitutional

* * *

Those who live in jurisdictions that ban surrogacy or that allow only different-sex couples to enter into surrogacy agreements may engage in surrogacy in other jurisdictions.

One Baby, Two Fathers

Lin Qiqing (2019)*

. . . Li [Yang], a chatty 34-year-old with dyed brown hair, and his 28-year-old partner Wang Jie are gay. Although same-sex sexual activity was decriminalized in 1997, and homosexuality was removed from the official list of mental illnesses in 2001, it's still extremely difficult for same-sex couples in China to have children. . . .

Until recently, the main options for gay men wanting to have children were marriages of convenience with lesbians, or duping straight women into a relationship. An estimated 40 million people in China are in marriages in which one partner is straight and the other is gay. Domestic surrogacy was banned in 2001. Adopting a healthy child from charity centers means waiting in long lines for years, and gay or single men tend to stay at the bottom of the candidate list. In recent years, with more information

* Excerpted from Lin Qiqing, *One Baby, Two Fathers: The Rise of Gay Men Turning to Surrogacy*, SIXTH TONE (Jan. 14, 2019), <https://www.sixthtone.com/news/1003427/one-baby%2C-two-fathers-the-rise-of-gay-men-turning-to-surrogacy>. This article originally appeared on Sixth Tone (www.sixthtone.com).

available and more money in their pockets, some gay male couples have started to look overseas where surrogacy is possible. But the process remains costly and time-consuming—and the challenges continue once the child is born. . . .

[After failing to have children through altruistic surrogacy and a marriage of convenience with a lesbian couple in China, Li and Wang turned to overseas gestational surrogacy.] . . . [T]he couple opted for Thailand, where having a child through surrogacy would cost 500,000 yuan [(about 70,500 USD)]. In February 2017, Li and Wang flew to Bangkok and met with the egg donor they'd selected via a Thai surrogacy agency. They asked about her health, hobbies, and if she'd had plastic surgery, and decided that she would be their baby's genetic mother. . . .

The following month, 16 eggs were removed from Li and Wang's chosen egg donor. Only two years earlier, in 2015, Thailand had banned commercial surrogacy for foreigners. To skirt the rules, Li and Wang's chosen Thai surrogate went to neighboring Cambodia in May to have the fertilized embryos inserted. Finally, in February 2018, Mumu was born. . . . [Li had kept an online journal] throughout the whole process, hoping it [would] help other gay couples—and also explain Mumu's beginnings to her when she's old enough. . . .

In 2015, [Eric] Li and [George] Zeng heard about surrogacy. Previously, the couple . . . thought they'd have to always live in secret. "It was mind-blowing, this idea of a future life in which the two of us could have a kid and live independently," recalls Li, a 35-year-old Shanghai native. "We craved that kind of life." The following year, the couple went to California and used eggs from the same donor and surrogate mother to have two children: a boy related to Li, and a girl related to Zeng. In total, the whole process—including agency fee—cost them around 1.3 million yuan [(about 183,000 USD)]. In December 2017, the couple welcomed Luke and Geneva into the world. . . .

Li and Zeng's families still haven't completely accepted their sons' sexual orientation, but the twins have no shortage of love. Both sets of parents have been helping raise Luke and Geneva since the beginning. . . . Zeng's parents see the couple as traditional husbands, the family breadwinners who shouldn't do any housework. . . . On the contrary, Li's mother urges them both to fulfill the traditional mothering role, telling them to put their children first and not work too late. . . .

Ted Zhou is 32, gay, and single. But he's not letting that stop him from becoming a father. There's already an embryo fertilized with his sperm in America, waiting to be implanted into a surrogate's womb this year. . . . Three years ago, Zhou learned about surrogacy for gay men. "My friends, a gay couple, got married and had a baby in the U.K. Suddenly, I felt it wasn't just something that happened in newspapers or on TV. If my friends could do it, maybe I could, too," Zhou says. . . . Zhou works for a medical software company, often travels to Silicon Valley, and speaks fluent English—and found he could save around 30 percent of the cost by pursuing surrogacy independently.

He's now trying to turn his expertise into an online surrogacy platform which will connect Chinese clients with overseas institutions.

In the past few years, a number of businesses have sprung up to help match Chinese couples with overseas surrogates. . . . Last summer, an American nonprofit called Men Having Babies organized their first event in the Chinese mainland, a low-key talk in a central Shanghai hotel's meeting room. Gay fathers from the U.S. and Taiwan shared their experiences, while two dozen participants eagerly quizzed them. Li Lin, the CEO of Shanghai-based surrogacy agency True Baby, estimates that around 500 gay Chinese couples seek surrogacy in America each year, although there is no official number. . . . Since it started in 2014, True Baby has helped deliver 240 babies, and around 30 percent of the agency's surrogacy clients are gay.

But with the cost of having a child through surrogacy often stretching into the hundreds of thousands of yuan, it's still not an option for everyone. True Baby's clients—who pay \$160,000 to have a baby via an American surrogate—are usually well-educated, aged between 30 and 45, from big cities, and with good jobs.

Even once the baby is born, the challenges—from access to education, to avoiding prejudice—don't stop. . . . Li and Zeng were unable to register Geneva's *hukou* [(household status)], because the police weren't happy that the mother's name was left blank By a stroke of luck, they were able to register baby Luke at another station, after Li faked emails to show he'd had a one-night stand with an American woman. Although the Beijing couple had no trouble registering baby Mumu, they face different challenges. Wang doesn't have a genetic connection to Mumu, and he can't marry Li Yang, so in the eyes of the law, he isn't her dad at all. "If she has an accident at school in the future, I can't show up as her legal guardian," Wang says quietly, when the rest of the family is out of earshot. . . .

Meanwhile, Zhou . . . has a pricey backup plan. He'll try to get his baby a *hukou* in Shanghai, but if that doesn't work out, he'll move to America. . . . Zhou plans to tell the whole story to his kid once they're old enough. He'll say: "Dad loves kids, but Dad can't have babies by himself, so he asked two good friends to help. It's not that you don't have a mother. You have two, and they live in America."

* * *

In response to concerns with reproductive tourism and its implications, some countries have constricted the range of individuals eligible to have children through surrogacy. India, once a leading site of international surrogacy, now imposes numerous status limitations on who can enter into surrogacy agreements. The ban on commercial surrogacy applies not only to foreigners, but also to members of the LGBTQ community.

Governing Surrogacy in India

Prabha Kotiswaran (2018)*

. . . India is unique in that the state has adopted a range of policy positions towards surrogacy from a liberal, contract-based model in the late 1990s to a prohibitionist, carceral model in 2016. Law has thus been a site of intense political, social and economic contestation over the status of women's reproductive labour. . . .

The [Indian Council for Medical Research (ICMR)] sought to regulate surrogacy from the late 1990s to 2008; I term this the medico-liberal phase. . . . The ICMR Guidelines permitted commercial gestational surrogacy and allowed for the compensation of gamete donors to facilitate ART. The ICMR Guidelines (Clauses 3.9.2, 3.10.3 and 3.5.3) forbade the ART Bank and clinic from facilitating monetary aspects of the surrogacy transaction leaving this negotiation to the surrogate and commissioning parents. Although the leading ART clinics claimed compliance with the ICMR Guidelines, they in fact determined levels of remuneration and matched the surrogate with the commissioning parents based on the former's financial needs. . . .

Between 2008 and 2012, various business models emerged to provide surrogacy services primarily to international commissioning parents. There were full-service clinics . . . which offered comprehensive package deals—from identifying the egg donor and surrogate to performing *in vitro*-fertilisation (IVF) treatment, to maintaining a surrogate hostel, to delivering the baby to facilitating local travel and sometimes even obtaining the exit visa. . . .

As business boomed, the ICMR went back to draft the [Assisted Reproductive Technology (ART)] Bill. The ART Bill 2008 was very similar to the ICMR Guidelines. The Bill introduced offences, placed restrictions on egg donation and reiterated that ART was available to all, irrespective of marital status. . . . The 2010 Bill changed the definition of the term 'couple' to cover two persons living in India and having a sexual relationship that was legal in India. Surrogacy was available to all single persons, married couples and unmarried couples. The Bill added requirements for foreign commissioning parents to ensure that there were no stateless babies

The ART Bill 2014 confirmed earlier restrictions by explicitly excluding LGBT commissioning parents. It also excluded foreign commissioning parents. . . . Even as the federal government refined its proposed Bill, Jayasree Wad, a lawyer, filed a public interest petition in 2015 in the Supreme Court praying that it prohibit commercial surrogacy and the import of embryos into the country, given the rampant subordination, exploitation and commodification of women and children. However, on the appointed

* Excerpted from Prabha Kotiswaran, *Law's Paradoxes: Governing Surrogacy in India*, in CROSS-CULTURAL COMPARISONS ON SURROGACY AND EGG DONATION 127 (Sayani Mitra, Silke Schicktanz & Tulsi Patel eds., 2018).

day for answering questions in court, the government decided to ban commercial surrogacy for foreigners. . . .

The policy framework for surrogacy in India has gone from a medico-liberal model in 2005 to a socially conservative prohibitionist model in 2016. Through these years, the categories of who could avail of commercial surrogacy progressively narrowed excluding gay, lesbian and transgender individuals and couples in 2012, then foreigners, including even those of Indian origin in 2015. The 2016 [Surrogacy Regulation Bill (SRB)] went a step further to prohibit commercial surrogacy and replace it with a familial model of altruistic surrogacy, wherein the surrogate had to be a close relative of the commissioning parents. . . .

Yet there has been considerable criticism of the SRB. While liberals object to depriving single men and women and gay and lesbian couples from resorting to surrogacy, feminists worry about the undue pressure that the familial altruistic model will place on women. . . . All these concerns resonated with the Parliamentary Standing Committee which sought to reverse key proposals of the SRB often harking back to the more measured drafting of the ART Bill 2014 and proposing yet another policy option—that of the compensated surrogacy model heavily regulated by the state. Whether the government will in fact heed this proposal is yet to be seen. But what is clear is that the law and governance of India’s surrogacy sector is far from settled even while the sector itself may be unable to regain its place in the highly dynamic transnational commercial surrogacy market.

* * *

The situation regarding legal regulation of surrogacy in India is dynamic. The 2016 Surrogacy Regulation Bill was referred to a second parliamentary committee, and a new version is likely to be presented when Parliament reconvenes at some point in 2020.

The Rights of Women Serving as Surrogates

When states permit surrogacy, what rights of the surrogate should they protect? The right to make decisions about her healthcare? The right to refuse implantation of multiple embryos (a higher-risk procedure)? The right to decide whether to terminate the pregnancy? Even after the question of whether or not a woman may serve as a surrogate, significant issues of liberty, privacy, and equality are at stake.

As feminists in some jurisdictions have turned attention to regulating, rather than banning, surrogacy, important questions about the rights of women serving as surrogates have moved to the fore. In the United States, surrogacy contracts frequently included

“abortion clauses” that give the intended parents the right to make termination decisions.* As the following excerpt explains, some U.S. jurisdictions have acted to restrict terms of this kind as well as others that limit the decisional authority of the woman serving as surrogate.

(Not) Just Surrogacy
Courtney G. Joslin (2020)**

. . . [K]ey issues regarding people acting as surrogates relate to their ability to make decisions about their bodies and their behavior during the course of pregnancy. Some advocates argue that “[e]nsuring that a woman retains reproductive decision-making should be a key aspect of any regulatory scheme regarding compensated surrogacy.” This position is reflected in some, but far from all, permissive surrogacy regimes. . . .

A few . . . jurisdictions expressly protect the right of the person acting as a surrogate to make a wider range of health care decisions during her pregnancy. Washington State law, for example, provides that the surrogacy agreement must permit the person acting as a surrogate “to make *all health and welfare decisions regarding herself and her pregnancy*, and not withstanding any other provisions in this chapter, provisions in the agreement to the contrary are void and unenforceable.” This language ensures that the person acting as a surrogate gets to make all medical decisions during her pregnancy. This would include, even where not otherwise expressly protected, the person’s choice of doctor. In addition to that choice, this kind of protection also protects the right to make many other decisions that may arise during the course of the pregnancy, such as whether to have a particular invasive test or a cesarean section. . . .

Three other states . . . have statutes with somewhat more limited language regarding general medical decision making. Maine law, for example, provides that “the agreement may not limit the right of the [person acting as a surrogate] to make decisions to safeguard her health or the health of an embryo.” This language clearly protects the right of the person acting as a surrogate to make at least some medical decisions during her pregnancy. It is possible, however, that a court could interpret the “safeguard” language in way that allows for enforcement of some provisions related to medical decisions that do not impose any risks to the health of the person acting as a surrogate. Under this interpretation, a court might, for example, approve the inclusion of contract clauses under which the person acting as a surrogate agrees not to engage in a range of behaviors such as smoking or drinking, or maybe even strenuous exercise. . . .

* Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 FAMILY LAW QUARTERLY 29 (2015).

** Excerpted from a 2020 draft of Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIFORNIA LAW REVIEW (forthcoming 2021).

Another group of permissive statutory schemes take a very different approach. The laws in these jurisdictions permit contract clauses that *limit* or *override* the medical decision-making authority of the person acting as a surrogate with respect to her own body. For example, Oklahoma law expressly allows for the inclusion of agreement clauses that require the person acting as a surrogate to “undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the physician providing care to the gestational carrier during the pregnancy.” . . .

The schemes in other permissive regulatory jurisdictions . . . do not expressly address contract clauses regarding the decision-making authority of the person acting as a surrogate. . . . Evidence suggest that attorneys in at least some of these jurisdictions routinely include such clauses in their agreements.

These kinds of clauses have been included in surrogacy agreements from the early days. Despite some early predictions to the contrary, they remain basic features of the contracts today. Their continued presence is due at least in part the express condonation of them by a number of states. . . .

. . . Some scholars argue in favor of “full contractual” enforcement of surrogacy agreements, including provisions about invasive medical treatment and abortions. Others, in contrast, argue that, at a minimum, clauses that require the person acting as a surrogate to have an abortion or that preclude her from having an abortion are unenforceable. Some also argue that clauses about other medical interventions during the pregnancy are likewise unenforceable.

. . . [L]aws that even purport to allow these kinds of contract provisions are deeply troubling. In the context of individual surrogacy arrangements, such clauses diminish the rights and interests of pregnant people and allow their bodies and their lives to be subordinated to the wishes and interests of others. Moreover, that person may experience the effects long after the arrangement has ended. If, for example, a person acting as [a surrogate] is forced to undergo an unwanted cesarean section, she might experience reduced fertility or other complication of the surgery throughout her lifetime.

. . . Applied more broadly, such an approach inhibits women’s ability to achieve full equality. Viewed through this lens, these types of surrogacy rules can be seen as contributing to efforts to curtail women’s bodily autonomy and reproductive freedom[,] . . . impact[ing] all aspects of women’s lives. . . .

* * *

Some feminist activists in the United States continue to reject surrogacy. In 2019, feminist icon Gloria Steinem, who opposed surrogacy at the time of *Baby M*, opposed a bill to allow commercial gestational surrogacy in New York:

The danger here is . . . the state legalizing the commercial and profit-

driven reproductive surrogacy industry. As has been seen here and in other countries, this harms and endangers women in the process, especially those who feel that they have few or no economic alternatives.

Under this bill, women in economic need become commercialized vessels for rent, and the fetuses they carry become the property of others. The surrogate mother's rights over the fetus she is carrying are greatly curtailed and she loses all rights to the baby she delivers.*

Other feminists supported the legislation and worked to include specific protections for women acting as surrogates. In 2020, New York legalized and regulated commercial gestational surrogacy and included in the law a Surrogates' Bill of Rights.

Surrogates' Bill of Rights

N.Y. Assembly Bill No. A09506B (enacted 2020)

. . . § 581-601. Applicability. . . . Except as otherwise provided by law, any written or verbal agreement purporting to waive or limit any of the rights in this part is void as against public policy. . . .

§ 581-602. Health and welfare decisions. A person acting as surrogate has the right to make all health and welfare decisions regarding themselves and their pregnancy, including but not limited to whether to consent to a cesarean section or multiple embryo transfer, to utilize the services of a health care practitioner of their choosing, whether to terminate or continue the pregnancy, and whether to reduce or retain the number of fetuses or embryos they are carrying. . . .

§ 581-604. Health insurance and medical costs. A person acting as surrogate has the right to have a comprehensive health insurance policy that covers preconception care, prenatal care, major medical treatments, hospitalization and behavioral health care for a term that extends throughout the duration of the expected pregnancy and for twelve months after the birth of the child . . . to be paid for by the intended parent or parents. . . .

§ 581-605. Counseling. A person acting as surrogate has the right to obtain a comprehensive health insurance policy that covers behavioral health care and will cover the cost of psychological counseling to address issues resulting from their participation in a surrogacy and such policy shall be paid for by the intended parent or parents. . . .

* Excerpted from *Gloria Steinem Calls Upon New York Gov. Cuomo to Not Legalize Commercial Surrogacy*, CENTER FOR BIOETHICS AND CULTURE (2019), <https://mailchi.mp/cbc-network.org/gloria-steinem-calls-upon-new-york-gov-cuomo-to-not-legalize-commercial-surrogacy>.

The United States-based Center for Reproductive Rights, which participated in the New York efforts, has offered a human rights framework for surrogacy laws.

Baseline Guiding Human Rights-Based Principles on Compensated Gestational Surrogacy in the United States
Center for Reproductive Rights (2019)*

Personal and Bodily Autonomy

1. Every person has the right to make decisions about their reproductive life. As is consistent with human and constitutional rights, a person acting as gestational surrogate controls all decisions about their body throughout a compensated gestational surrogacy arrangement, including during attempts to become pregnant, pregnancy, delivery, and post-partum. . . . [T]his right cannot be waived, should be affirmatively acknowledged by all parties from the beginning of a matching process, and must be expressly included in any contract governing a compensated gestational surrogacy arrangement. The potential for a breach of contract, unique to this circumstance, is a separate issue and its potentiality should not override the gestational surrogate's fundamental right to reproductive decision-making authority.

Equality and Non-Discrimination

2. Laws and policies regarding compensated gestational surrogacy must not discriminate against people on prohibited grounds, such as race/ethnicity, gender, sex (including sex stereotypes, gender identity, gender expression, and sexual orientation), marital status, nationality, religion, and/or disability. Additionally, laws and policies must not result in differential treatment based on such distinctions or reflect particular beliefs about motherhood or parenthood that exclude or discriminate against individuals seeking to enter into a compensated gestational surrogacy arrangement, particularly with regards to single individuals, same-sex couples, people who are transgender, and people with disabilities. . . .

Rights of the Child

6. Rights protections adhere at birth. Human rights do not apply prior to birth and laws and policies concerning compensated gestational surrogacy do not grant pre-natal rights protections to an embryo or fetus. States may not use the regulation of compensated gestational surrogacy as a mechanism by which to apply human rights protections to an embryo or a fetus. . . .

Privacy and Family Life

* Excerpted from *Baseline Guiding Human Rights-Based Principles on Compensated Gestational Surrogacy in the United States*, CENTER FOR REPRODUCTIVE RIGHTS (July 1, 2019).

8. The right to private and family life includes the right to decide whether or not to become a parent. Pre-birth parentage orders in compensated gestational surrogacy arrangements help establish legal clarity by establishing who the future child's legal parents will be if and *once the child is born*. The process to petition for and to receive a judicial pre-birth parentage order must include affirmative participation by the person acting as gestational surrogate or their independent legal representation and by the intended parent(s). Pre-birth parentage orders neither grant fertilized eggs, embryos or fetuses the status of persons under the law nor grant any party parental rights over them. . . .

PARENTAL RECOGNITION

Who are the parents of the resulting child? Is the woman who acts as a surrogate a parent? Are the intended parents the legal parents by operation of law? At the moment of the child's birth? Is only a genetic intended parent the legal parent? Must a non-genetic intended parent adopt the child?

Questions of parental recognition implicate the constitutional interests of the intended parents, as well as the woman serving as the surrogate. Does one or the other have a superior right to parentage? Questions of parental recognition also implicate equality interests, given that men may have paths to parentage that are not available to women, different-sex couples may have access to parentage that same-sex couples are denied, and married couples may be recognized as parents in ways that unmarried couples and single persons are not. Questions of parental recognition also implicate the rights of the child—including the generalized interest in children's welfare that would shape an approach to parentage, the more specific interest of a particular child born through a surrogacy arrangement, and the potential interest in knowing the identity of the woman who served as the surrogate or donated the egg.

The following materials address parental recognition, first as a question of domestic law (i.e., is the person a parent under the law of the jurisdiction where the surrogacy occurred?), and then as a transnational question (i.e., how should the intended parents be treated under the law of their home jurisdiction after evading that jurisdiction's law to engage in surrogacy in a permissive jurisdiction?).

Parental Rights and Recognition Under Domestic Law

Soos v. Superior Court

897 P.2d 1356 (Ariz. Ct. App. 1994)*

[Before: Judges John L. Claborne, Ruth V. McGregor, and Rudolph J. Gerber]

* The Arizona Supreme Court denied the petition for review on July 11, 1995.

CLABORNE, PRESIDING JUDGE. . . .

. . . The Father and his then wife, Pamela J. Soos (“the Mother”), entered into a surrogate parentage contract with Debra Ballas (“the Surrogate”) because the Mother was unable to have children because of a partial hysterectomy. Eggs were removed from the Mother and fertilized *in vitro* . . . by sperm obtained from the Father. Pursuant to a “Host Uterus Program” at the Arizona Institute of Reproductive Medicine, the fertilized eggs were implanted in the Surrogate. The Surrogate became pregnant with triplets.

During the pregnancy of the Surrogate, the Mother filed a petition for dissolution of marriage requesting shared custody of the unborn triplets. The Father responded to the petition, alleging that he was the biological father of the unborn triplets, and that pursuant to A.R.S. section 25-218 (1991), the Surrogate was the legal mother of the triplets. The Father further alleged that since the Surrogate was the legal mother of the triplets, the Mother had no standing to request custody.

In September of 1993, the Surrogate gave birth to triplets. The Father and the Surrogate filed a request for order of paternity with the Maricopa County Superior Court. An order was entered naming the Father as the natural father of the triplets, and the Father took custody of the triplets.

The Mother responded by . . . attack[ing] the constitutionality of A.R.S. section 25-218(B) declaring the Surrogate to be the legal mother. The trial court in its minute entry said:

THE COURT FINDS that there is not a compelling state interest that justifies terminating the substantive due process rights of the genetic mother in such a summary fashion.

The current law could leave a child without any mother, as a gestational mother may have no desire to do more than she was hired to do, which is to carry and give birth to a child. The current law also ignores the important role that generations of genetics may play in the determination of who a child is and becomes. The current law does not consider what is in the best interest of each individual child.

THE COURT FINDS A.R.S. § 25-218(B) to be unconstitutional.

. . . We agree with the trial court and the Mother that A.R.S. section 25-218(B) is unconstitutional because it violates the Mother’s equal protection rights.

A.R.S. section 25-218 provides in relevant part:

A. No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.

B. A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child.

C. If the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child. *This presumption is rebuttable. . . .*

The question before us is whether the State's reasons for enacting the surrogate parentage contracts statute are sufficient to withstand constitutional scrutiny under the due process, equal protection, and privacy rights guaranteed by the United States and Arizona Constitutions. We must keep in mind that we are dealing with a custody issue between the biological mother and biological father and the constitutional issues surrounding their competing interests. This is *not* a case of the surrogate mother versus the biological mother. We are *not* dealing with the constitutional questions that arise when the surrogate mother wishes to keep the child she bore. Thus, we limit ourselves to the question of whether the statute withstands constitutional scrutiny when it affords a biological father an opportunity to prove paternity and gain custody, but does not afford a biological mother the same opportunity. . . .

. . . A parent's right to the custody and control of one's child is a fundamental interest guaranteed by the United States and Arizona Constitutions. . . .

A.R.S. section 25-218(C) allows a man to rebut the presumption of legal paternity by proving "fatherhood" but does not provide the same opportunity for a woman. A woman who may be genetically related to a child has no opportunity to prove her maternity and is thereby denied the opportunity to develop the parent-child relationship. She is afforded no procedural process by which to prove her maternity under the statute. The Mother has parental interests not less deserving of protection than those of the Father. "By providing dissimilar treatment for men and women who are thus similarly situated," the statute violates the Equal Protection Clause . . . of the United States and Arizona Constitutions. . . .

GERBER, Judge, specially concurring. . . .

. . . I agree with the trial court's reason for holding the statute unconstitutional, namely that it imposes the burden of motherhood on a surrogate mother who almost certainly does not wish it and did not contract for it. Her contract is to carry the child, not to nurture and raise it. The statute thrusts these burdens on her as a duty well beyond her contract.

The Nature of Parenthood

Douglas NeJaime (2017)*

. . . Within the contemporary parentage regime, those who believe they are parents on social grounds, including those who have been parenting their children for many years, may be denied parental status. . . . [I]t is difficult to imagine a system that satisfies all those who make claims to parental recognition. But it is especially troubling that the law rejects claims in ways that preserve longstanding forms of inequality. . . .

As a practical matter, lack of parental recognition shifts individuals out of the ordinary parentage regime and into the adoption scheme. . . . The process can be “lengthy and costly” and may be prohibitively expensive for some parents. . . . The process itself can be intrusive, subjecting those who have coparented for many years to invasive home studies. . . .

Many of those who believe they are parents on social grounds but are denied legal recognition will successfully navigate the adoption process and emerge, eventually, with legal rights to their children. The harms of the adoption process, though, are not only material but also dignitary. . . . Resort to adoption is based on the notion that “a child who is born as the result of artificial reproduction is somebody else’s child from the beginning.” . . . Adoption requirements thus intervene in ways that reproduce normative distinctions between biological and nonbiological parents. . . .

The harms of nonrecognition are not only practical but expressive. Courts routinely term those who serve as parents but lack biological ties “non-parents”—casting them as third parties who are otherwise strangers to the family. . . . [T]hose parents lacking legal status not only experienced “less validation and support from the outside world,” but also reported feeling “insecure about [their] role in the family.” They found nonrecognition “demeaning” and reported frustration with “being the invisible dad.”

. . . [T]he burdens imposed on social parent-child bonds are not distributed evenly. Those who break from traditional norms governing gender, sexuality, and family—by not marrying, by separating motherhood from biological ties, or by forming a family with a same-sex partner—are channeled into adoption or denied parental status in ways that others are not. . . .

Approaches to . . . gestational surrogacy . . . suggest that, even as courts and legislatures liberalized motherhood and recognized same-sex parenting, they sustained biologically grounded, gender-differentiated views of parenthood. Nonbiological mothers in different-sex couples and non-biological fathers in same-sex couples struggle for parental recognition, *even when they are married to the biological parent*. If these parents fail to adopt their children, they may be deemed legal strangers even after raising

* Excerpted from Douglas NeJaime, *The Nature of Parenthood*, 126 YALE LAW JOURNAL 2260 (2017).

the children. These dynamics may reflect judgments about women who separate motherhood from biological connection, as well as men who fill roles traditionally demanded of women.

Those who are invested in gender-based family roles *and* their biological basis often oppose surrogacy regardless of its form. Both traditional and gestational surrogacy challenge the connection between the physical fact of pregnancy and the social role of motherhood. Through this lens, surrendering the child, even when the woman is not genetically related, “is contrary to the natural instincts of motherhood.” But most states have departed from this view and instead have increasingly accommodated gestational surrogacy where the intended mother is the genetic mother. That woman is the legal mother, and the gestational surrogate is not.

Gestation and birth—the sex-based reproductive features that licensed legal distinctions between motherhood and fatherhood—no longer inevitably produce the social role of motherhood. Genetics—itself not a sex-based reproductive difference—can ground legal motherhood. Yet in [many] states, the surrogate’s nonrecognition occurs *only* when the intended mother is the genetic mother. With egg-donor gestational surrogacy, birth reemerges as necessarily producing legal motherhood—with no change in the surrogate’s role or in the intentions of the parties. . . .

If the biology of reproduction can be detached from the social role of motherhood, it is difficult to maintain distinctions between the two forms of gestational surrogacy. The law’s differential treatment of genetic intended mothers and nonbiological intended mothers suggests that biological connection generally—whether gestation or genetics—creates maternal attachments. At stake is the maintenance of motherhood as a biological status—not the specific relationship between pregnancy and motherhood.

The act of surrogacy challenges the “maternal instinct,” and instead suggests that a mother’s attachment is constructed. The genetic intended mother, whom law recognizes, can maintain a connection between the biological and social aspects of motherhood, even if not through pregnancy. The nonbiological intended mother, in contrast, renders maternal attachment the product of social arrangements, rather than biology. The surrogate and the nonbiological intended mother reveal the mother-child bond to be in important ways like the father-child bond—volitional and constructed.

Through this lens, the law of parental recognition may reflect stereotypes that view the social role of motherhood as flowing naturally from biological ties. A mother’s biological tie to her child—established most often through gestation but also through genetics—both defines and limits her parental status. While the legal status of motherhood derives solely from biological connections, biological connections may, but need not, determine the legal status of fatherhood. . . .

The law’s construction of parenthood situates women as biologically connected not only to reproduction but also to child-rearing—itsself a form of uncompensated labor that drastically shapes a woman’s life opportunities. While biological fathers can be displaced by men and women who lack biological ties, the law attempts to ensure the biological mother’s presence. From this perspective, women—naturally, inevitably—bear the burdens of child-rearing. . . .

Gay men engaging in surrogacy challenge the centrality of the mother-child relationship in ways that different-sex couples engaging in surrogacy do not. Their parental recognition, and the corresponding production of “motherless” families, threatens gender differentiation—not merely biological sex differentiation. . . . Genetic intended mothers had emerged since *Baby M*’s rejection of traditional surrogacy as viable candidates to supplant the surrogate. But fathers engaging in egg-donor gestational surrogacy simply could not replace the mother. . . .

These results are troubling. They make paths to parenthood more difficult and fraught for those who break from norms that have traditionally structured family life, and they reiterate views about motherhood and fatherhood that harm both women and men. . . .

Raftopol v. Ramey
Supreme Court of Connecticut
12 A.3d 783 (Conn. 2011)

[Before: Chief Justice Rogers and Justices Norcott, Katz, Palmer, Vertefeuille, Zarella, and McLachlan]

McLACHLAN, J.

This appeal raises the question of whether Connecticut law permits an intended parent who is neither the biological nor the adoptive parent of a child to become a legal parent of that child by means of a valid gestational agreement. . . .

. . . The plaintiffs [(Raftopol and Hargon)], who were domestic partners living in Bucharest, Romania, entered into a written agreement . . . with Ramey, in which she agreed to act as a gestational carrier for the plaintiffs. . . . [E]ggs were recovered from a third party egg donor and fertilized with sperm contributed by Raftopol. Three of the resulting frozen embryos were subsequently implanted in Ramey’s uterus. . . . Ramey gave birth to two children

Prior to the expected delivery date, the plaintiffs brought this action, seeking a declaratory judgment that the gestational agreement was valid, that the plaintiffs were the legal parents of the children and requesting that the court order the department to issue a replacement birth certificate reflecting that they, and not Ramey, were parents of the children. . . . [T]he trial court issued a ruling declaring that: (1) the gestational

agreement is valid; (2) Raftopol is the genetic and legal father of the children; (3) Hargon is the legal father of the children; and (4) Ramey is not the genetic or legal mother of the children. [The Department of Public Health appeals.] . . .

. . . We conclude that § 7-48a* allows an intended parent who is a party to a *valid* gestational agreement to become a parent without first adopting the children, without respect to that intended parent’s genetic relationship to the children. . . .

. . . What is clear from the text of the statute is that if the birth is subject to a “gestational agreement” and if a court of competent jurisdiction orders the department to do so, the department is both authorized and required to issue a replacement birth certificate in accordance with that order. . . .

. . . [I]t is unclear from the text of § 7-48a (1) which types of gestational agreements are intended to be included within the statutory phrase “gestational agreement”; (2) whether a court may order the department to issue a replacement birth certificate naming an intended parent as the parent, despite the fact that the intended parent is the parent neither by conception nor adoption; and (3) whether the statute creates a new means by which persons may become legal parents.

. . . The department’s contention that the legislature expressed an intent, via the plain language of § 7-48a, that only a biological intended parent may gain parental status absent adoption proceedings . . . leads to the not very remote possibility of a child who comes into the world with no parents Suppose an infertile couple who desire to have children but cannot supply the womb, the eggs, or the sperm These intended parents would need to rely on third party egg and sperm donors to produce embryos that are implanted in a gestational carrier pursuant to a gestational agreement. If § 7-48a confers parental status only on biological intended parents, the intended parents are not the parents of any resulting child, nor are the gestational carrier, any spouse she may have, the gamete donors, or any spouses each may have. Every possible parent to the child would be eliminated as a matter of law, yielding the result of a child who is born parentless The legislature cannot be presumed to have intended this consequence The mere fact, however, that the department’s proposed interpretation of § 7-48a leads to an absurd result does not necessarily lead to the conclusion, based on the language of the statute, that § 7-48a confers parental status on Hargon by virtue of the

* Connecticut General Statutes Section 7-48a provides:

. . . (b) If the birth is subject to a gestational agreement, the Department of Public Health shall create a replacement certificate of birth immediately upon: . . . Receipt of a certified copy of an order of a court of competent jurisdiction approving a gestational agreement and issuing an order of parentage pursuant to such gestational agreement The department shall prepare the replacement certificate of birth for the child born of the agreement in accordance with such order. The replacement certificate of birth shall include all information required to be included in a certificate of birth . . . except that the intended parent or parents under the gestational agreement shall be named as the parent or parents of the child. . . .

gestational agreement. . . . In light of the many remaining ambiguities, we turn to extratextual sources in order to discern the intent of the legislature. . . .

. . . [The removal of more specific statutory language and comments from a legislator suggesting that the statute may help intended parents avoid adoption proceedings in Probate Court] clarifies that § 7-48a does not merely provide for a ministerial order by a court, but rather, has effected a substantive change in the law and has created a new way by which persons may become legal parents. . . .

With respect to whether this substantive change in the law was intended to include nonbiological intended parents, . . . the legislative history is inconclusive, but we already have rejected, on the basis of our plain language analysis, the department’s contention that only biological intended parents may acquire legal parentage solely by virtue of a valid gestational agreement. . . . [W]e conclude that the legislature intended § 7-48a to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent’s genetic relationship to the children. Such intended parents need not adopt the children in order to become legal parents. They acquire that status by operation of law, upon an order by a court of competent jurisdiction pursuant to § 7-48a. . . .

. . . Parentage . . . is not an issue that should be addressed in a “piecemeal” fashion. . . . [O]ur existing statutes provide few answers and raise many questions. . . .

We highlight some of the issues that remain unresolved in our current statutory scheme by looking to the laws of other jurisdictions [I]t appears that there are three general approaches to the determination of legal parentage. Those three approaches define parentage based on: (1) the intent of the parties; (2) the genetic relatedness of the parties; or (3) giving birth.

How a state defines parentage is merely the starting point. Additional issues that some states have addressed, for example, include whether to recognize compensated gestational agreements, whether to limit the availability to married couples, infertile intended parents, age limitations, what protections to put in place to safeguard the gestational carrier’s right to make decisions regarding healthcare and termination of the pregnancy until the child has been delivered, whether to require that the spouse of the gestational carrier either consent or be made a party to the contract, what measures to put in place to safeguard the legal rights of the parties, who should be required to obtain health insurance coverage, whether to require that at least one intended parent contribute genetic material, and whether to require mental and physical health evaluations and home studies.

Further guidance may be provided by article eight of the Uniform Parentage Act of 2000. Among the provisions included in the act are: specific procedural requirements for the hearing to validate the gestational agreement, including a residency requirement; joinder of the spouse of the gestational carrier, if she is married; a required finding by

the court that the intended parents meet the standards of suitability applicable to adoptive parents and a finding of voluntariness as to all parties to the gestational agreement; procedures upon termination of the gestational agreement; procedures upon the birth of the child, including the issuance of a court order declaring parentage and directing the responsible agency to issue a birth certificate naming the intended parents as parents to the child; the effect of a subsequent marriage of the gestational carrier; and the effect of a nonvalidated gestational agreement.

We emphasize that the legislature is the appropriate body to make the public policy determinations implicated by these issues. Because of the uncertainties created by the existing statutory scheme, we respectfully would suggest that the legislature consider doing so. . . .

* * *

In the following judgments from the Constitutional Court of Colombia and the Family Division of the United Kingdom High Court, the courts were asked to determine whether a surrogacy agreement exists and how to assign custodial rights to the child in light of that determination. In both cases, the courts conducted child-centered analyses.

Judgment T-968 of 2009

Constitutional Court of Colombia (Second Review Chamber)

December 18, 2009*

The Second Review Chamber of the Constitutional Court, composed of Magistrates María Victoria Calle Correa, Luís Ernesto Vargas Silva and Gabriel Eduardo Mendoza . . . offers the following Judgment. . . .

[Sarai, a 22-year-old Colombian woman, and Salomón, a 54-year old American man, conceived twins, Samuel and David, through IVF. Originally, Sarai entered into a gestational surrogacy agreement with Salomón and his wife, Raquel. However, after several IVF attempts failed, Sarai alleged that the parties regarded the agreement as terminated. According to Sarai, Salomón remained in contact and even visited her in Colombia, over time developing a relationship with her. She allegedly agreed to have a child with him on the condition that he would not separate her from the child and would support her and the child. Salomón denied these events, alleging that the gestational surrogacy agreement turned into a genetic surrogacy agreement. Sarai and Salomón went to a new IVF clinic presenting themselves as husband and wife, where four embryos were implanted in Sarai’s womb. On March 21, 2006, she gave birth to twins and registered them as extramarital children. Salomón alleged that Sarai reneged on the agreement in November of 2005, after he had paid her close to \$14,208,750.]

* Translation by José Argueta Funes (Yale Law School, J.D. Class of 2019).

After the registration of the minors as extramarital children, without a known father, . . . began a torturous process of confrontation, complaints, and lawsuits which culminated in the assignation of provisional custody to the father, followed by the removal of the children [to the United States] on September 5, 2008, authorized by a judgment from the Tenth Family Judge of Cali, which is the subject of the present action of *tutela*.*

Against this authorization the mother presented an action of *tutela*, which was awarded to her by the Family Chamber of the Superior Tribunal for the District of Cali. The Tribunal . . . ordered the Tenth Family Judge to issue a new order within fifteen . . . days. . . . The Judge . . . issued a new order . . . , against which Salomón lodged an action of *tutela* alleging a violation of due process. He was granted the protection sought, and the Tenth Family Judge issued a new order, which was revoked by the Civil Cassation Chamber of the Supreme Court of Justice. . . . [T]o date, the order issued by the Family Chamber of the Superior Tribunal for the District of Cali . . . has not been materially observed, such that the violation of the fundamental rights of the minors Samuel and David to have a family and to care and love . . . persist. . . .

There are no express prohibitions against or requirements for [surrogacy agreements] within Colombian jurisprudence. However, our doctrine has long considered assisted reproduction techniques, including surrogacy, juridically supported through constitutional article 42-6, which provides that “Children within or outside marriage, adopted or conceived naturally or with scientific assistance, have equal rights and duties.” . . . [A] normative vacuum . . . has set in motion facts and decisions with harmful and irreparable consequences to the fundamental rights of the minors involved.

Our doctrine has come to see surrogacy as a positive mechanism to solve a couple’s infertility problems and has highlighted the urgent need to regulate the matter in order to avoid, for example, for-profit mediation of surrogacy agreements, endangerment of the rights and interests of newborns, treatment of human bodies in ways contrary to law, and great conflicts that arise when disagreements between the parties involved develop. . . .

This Chamber must note . . . that the process that resulted in the birth of the minors Samuel and David did not constitute a surrogate pregnancy, for Sarai is the biological mother of the minors. Furthermore, even if her initial intention was to be a surrogate mother, Salomón’s own declarations make clear that, at least since November of 2005, she made known to him her intentions to raise the children. . . .

Upon reviewing the . . . orders of the Tenth Family Judge, this Chamber must conclude that [the Judge] . . . based these orders on an assumption about the moral, affective, and economic ineptness of the mother, and that it was precisely this *ex ante*

* A *tutela* is a writ that enables any person whose fundamental rights are being threatened or violated to request that a judge with territorial jurisdiction protect that person’s fundamental rights. The Colombian Constitutional Court has the authority to review any *tutela* judgment issued by the lower courts.

bias that has impeded the superior interest of the minors and their right not to be separated from their mother and live under her protection and care.

For the Tenth Family Judge, Sarai unjustifiably reneged on her verbal contract to surrender her children after the birth. Economic considerations were her primary considerations in deciding to conceive children, and her economic constraints prevent her from providing her children the wellbeing and opportunities they enjoy with their father, who, according to the order “. . . has a better right to have the children than . . . Sarai, for the simple reason that he was the one who sought out any means through which he could have a son, fought for it, looked to science for assistance, and has sacrificed himself in coming constantly to this city to fight for his kids, so that they are not taken from him, so that he may be by their side.”

In this way, both the Constitution and the constitutional precedent that clearly establishes judicial criteria for determining the superior interest of the minor were completely ignored. We are concerned specifically with (i) the guarantee of integral development for minors, (ii) the guarantee of conditions for the exercise of their fundamental rights, (iii) and the balance between the rights of children and the rights of parents, where the rights of the minor prevail.

Furthermore, even if we might argue that the mother has a lesser right to her children than the father because she initially agreed [to act as a gestational surrogate] . . . , this does not per se make the mother unable to demand observance of the rights of her children. . . . The Judge forgets that this woman has undertaken a constant fight before the courts to recover her children, and that perhaps she has sacrificed more despite her economic situation in order to recover them. . . .

[T]his Chamber concludes that no circumstances exist which constitute sufficient reason to separate . . . Samuel and David from the maternal family environment

[The Court upheld the judgment entered by the Civil Cassation Chamber of the Supreme Court of Justice, itself upholding the judgment of the Family Chamber of the Superior District of Cali reversing the authorization to remove the children from Colombia. The Court further ordered that the father was to bring the children to Colombia three times per year until courts settled the custody of the children. Finally, it ordered the Colombian Institute of Family Wellbeing to supervise the return of the children to their mother and to provide her with psychological services that might be required to reestablish her relationship with her children.]

H & B v. S

U.K. High Court of Justice, Family Division
[2015] EWFC 36

The Honourable Ms Justice Russell DBE:

1. This case is about the future arrangements for an infant girl (M) who was born on 27th January 2014. M was born as the result of artificial or assisted conception and of an agreement, the basis of which is highly contested, between S (the 1st Respondent and the mother) and H (the 1st Applicant and the father) and B (the 2nd Applicant) his partner. H is in a long-term and committed relationship with B and was at the time of conception. H and B contend that they had an agreement with S that she would act as a surrogate and that H and B would co-parent the child but that S would continue to play a role in the child's life. S says that she and H entered an agreement that excluded B that H would be, in effect, a sperm-donor and that she would take on the role of M's main parent and carer. . . .

2. Very sadly this case is another example of how "agreements" between potential parents reached privately to conceive children to build a family go wrong and cause great distress to the biological parents and their spouses or partners. The conclusions this court has made about the agreement between the parties which led to the conception and birth of this child will inform the basis of future decisions the court has to make about the arrangements for the child. The lack of a properly supported and regulated framework for arrangements of this kind has, inevitably, lead to an increase in these cases before the Family Court. . . .

49. . . . [T]he agreement leading to M's conception and birth . . . has been referred to by Miss Isaacs QC, counsel for the Applicants as a "failed surrogacy" agreement. As the Applicants on their own case have always accepted that S was to play a continuing role in the child's life, that description is not quite accurate. . . .

50. . . . The dispute about the agreement is largely based on S's assertion that she and H decided to parent a child together, and that B was to play no part other than as the child's father's "boyfriend"; to use her word. S has sought to present herself throughout the proceedings as a victim and someone whose "rights" as a mother and as a woman have been trampled over and abused. . . . She describes H and B in an openly disparaging and dismissive way

51. S repeatedly made allegations, wholly unsupported by any objective evidence, about H and B; about their relationship and about their lifestyles. . . . [S]he repeatedly relied on stereotypical views on the nature of their relationship suggesting that she knew "*they have an open relationship, what gay people call it, have sex in groups.*" There is no foundation to this claim which I consider to be a reflection of her deliberate attempt to discredit H and B in a homophobic and offensive manner. . . .

54. . . . It is . . . inconceivable that B was not aware of what was going on In this as in much else I do not accept the evidence of S. Her later use, in evidence, of the term "sperm donor" is completely at odds with the tone and contents of her emails in February. It is not possible to accept both from what H told her in the emails and from the obviously close relationship of H and B (which I have seen at close quarters throughout the trial) that S could have ever thought that she was having a child with H

to the exclusion of B; she says so herself in her emails. I conclude that she must have either deliberately misled the Applicants about her intentions or changed her mind as the pregnancy progressed.

55. On the balance of probabilities, and for the reasons set out above and in the following paragraphs of this judgment, I find that S deliberately misled the Applicants in order to conceive a child for herself rather than changing her mind at a later date. Having at first encouraged H to be involved S was already trying to exclude H not long before M was born from involvement with the birth and with the child. . . . It [is] highly unlikely that S could ever have thought H, who had told her he so desperately wanted a child in his emails, would decide to act as a sperm donor for her, there was no reason for him to do and it would have been entirely at odds with his own plans and wishes.

56. S has consistently done all she can to minimise the role that H had in the child's life and to control and curtail his contact with his daughter. Far from being a child that she conceived with her good friend, as she describes it, her actions have always been of a woman determined to treat the child as solely her own. . . .

57. . . . It is not in the interests of any child to use breast-feeding, or co-sleeping, to curtail that child's interaction with another parent or to deny her an opportunity to develop a healthy relationship with that parent. I have little doubt that that is what S set out to do, at least in part, and it was an action which was contrary to M's best interests and emotional well-being. . . .

112. The guardian recommended that M should live with H and B and that her contact with S should be reduced to once a month and that it should be supervised. In her oral evidence the guardian was concerned about S's negative view of B and how that would affect M, with whom she has formed an attachment and who is and will remain an important figure in M's life. She was concerned, and with good reason, that continued conflict, S's negative estimation of H and B and her rancorous attitude towards their relationship would affect M causing her emotional harm and confusion about her identity. The guardian told me that her concern was that S could not prioritise M's needs over her own. . . .

116. . . . I have used the welfare checklist as the basis for my decision because I am concerned with how to best provide for M's physical, emotional and educational needs Although M is not yet at school it is more likely than not that the parent who can best meet all her other needs and is most likely to be able to provide her with a secure home and stable upbringing with room to grow emotionally for the remainder of her infancy is more likely to meet her educational needs [and] fulfil her potential in the future. The latter requires that M is afforded the scope to grow up in an environment where conflict is at a minimum. . . .

122. While to move a young child from her mother is a difficult decision and is one which I make with regret as I am aware that it will cause S distress I conclude that

H is the parent who is best able to meet M's needs both now and in the future. It is he who has shown that he has the ability to allow M to grow into a happy, balanced and healthy adult and it is he who can help her to reach her greatest potential. I accept the evidence of the guardian that H and B have had a child-centred approach throughout. . . .

123. H thought carefully about having a child and his discussions with S in the emails that they exchanged in February 2012 are an illustration of his awareness of the difficulties that would be encountered as well as a clear expression of his very great desire to have a child; and to have that child with B. . . .

124. The best that can be said for S is that she deluded herself about the nature of the agreement she was reaching first with H and later with H and B. It is very unlikely that such an obviously astute and determined woman would have left anything to chance when it came to having a baby. . . . The emails that she sent were deliberately misleading and S continued in the deceit, allowing H to believe that he and B would be the main carers for the baby until pregnancy was well advanced.

125. It is not the function of this court to decide on the nature of the agreement between H, B and S and then either enforce it or put it in place. It is the function of the court to decide what best serves the interests and welfare of this child throughout her childhood. It is, however, a fact that M was not conceived by two people in a sexual relationship. The pregnancy was contrived with the aim of a same-sex couple having a child to form a family assisted by a friend, this was ostensibly acquiesced to by all parties at the time the agreement was entered into and conception took place. . . .

126. M should live with her father H and his partner B as it is in her best interests to do so; I reach that conclusion having had regard throughout to the welfare checklist and to M's interests now and in the long term. . . .

Parentage Across Borders

Commercial Surrogacy—Some Troubling Family Law Issues

Mary Keyes and Richard Chisholm (2013)*

. . . [W]hat is the right approach to making orders that will benefit the applicants and the particular children before the court, but may also give effect to criminal actions, and by rewarding criminal arrangements may put at risk the human rights of other children, as well as birth mothers and egg donors in Third World countries?

* Excerpted from Mary Keyes & Richard Chisholm, *Commercial Surrogacy—Some Troubling Family Law Issues*, 27 AUSTRALIAN JOURNAL OF FAMILY LAW 105 (2013).

The courts must assess these matters in the light of the available evidence in each case. What do they have? The cases show that there is always some evidence of the surrogacy arrangement and of the suitability of the applicants to have parental responsibility for the child. In some cases the birth mother is a party and has filed a document consenting to the orders, and an affidavit to the effect that she intends to relinquish all her rights and obligations in relation to the children and that she consents to the proposed orders.

The amount of information, especially about the surrogacy arrangements and the position of the birth mother, varies from case to case. At one extreme is *Ellison*, where as a result of Justice Ryan's initiative in appointing an independent children's lawyer and seeking the intervention of the Australian Human Rights Commission, the court obtained a family report and fairly detailed information. As a result, there was evidence that identified the children and their paternity, and thus excluded the possibility that it was a case of child trafficking. There was evidence from the birth mother, who consented to the orders. . . .

In some other cases, the evidence does not go much further than establishing the surrogacy arrangements, the mother's consent to the proposed orders and the suitability of the applicants. There is rarely evidence about the circumstances leading up to the surrogacy arrangements, or such matters as the mother's ability to give informed consent, or the availability of counselling, although in some cases there was evidence that someone had explained the legal issues to her and had translated the court documents. . . .

In some cases the mother is not a consenting party at all, and the application proceeds on an undefended basis. . . . [I]n these cases there is always evidence that persuades the court that it is in the child's interests to make the parenting orders sought. This is hardly surprising, given that the applicants' evidence is uncontradicted, that no-one else is claiming the role of parent or offering to care for the children, and that the applicants have had the care of the children for some months before the matter comes to court. As we have seen, in some cases it is unclear whether the mother had given an informed consent, and even, in at least one case, whether the child was indeed the child of the alleged surrogacy arrangement. Yet in all the cases, even where the evidence did not exclude improper pressure on the mother and/or egg donor, the court made the requested parenting orders.

Was it wrong to do so? Answering this question takes us back to legal principle. The court can either make or refuse to make the parenting orders. Refusing to make the parenting orders would deny legal support to the only people in a position to care for these children. Even if the courts suspected or believed that the mother's consent had been coerced, or, perhaps, even if it suspected that the children had been trafficked, refusing to make the parenting orders would presumably leave the applicants looking after the children without legal authority, or have the children taken from the only people they knew as parents, and placed with the state child protection authorities,

perhaps then becoming state wards, going into foster care, or being adopted by somebody else.

. . . In *Ellison*, the court accepted as ‘demonstrably correct’ the following submission by the [Human Rights Commission]:

the court is faced with having children in front of it and needs to make orders that are in the best interests of those children, and at that stage it’s probably too late to ask whether—or to inquire into the legality of the arrangements that had been made

. . . How should we understand the court’s acceptance of the submission that it was ‘too late’ to inquire into the legality of the arrangements? If it is ‘too late’ to inquire into the legality of the arrangements, and if the proposed orders would benefit the children, must the court make the orders regardless of the circumstances of the surrogacy? If so, it would seem that much of the evidence so carefully obtained in *Ellison* . . . might be legally irrelevant. The logic of the submission seems to be that if the proposed orders will benefit the children before the court, the orders must be made regardless of the criminality of the arrangement, and regardless of whether the mother and egg donor were subjected to duress or fraud. Indeed, if in fact the children were not surrogate children at all, but victims of child trafficking, the court would still be ‘faced with having the children in front of it.’ Even then, on the basis of the Commission’s successful submission, would it not still be ‘too late’ to do anything other than make the orders that would benefit the children?

* * *

The 2018 Report of the U.N. Special Rapporteur, excerpted earlier in this chapter, viewed current practices of commercial surrogacy as violating principles against “the sale of children”:

Amidst the demand for governing law, the demand for children, and the influence of a wealthy and growing surrogacy industry, there is a risk that the governing law that is adopted will undermine fundamental human rights. The demand that domestic parentage orders be recognized globally without appropriate restrictions and without consideration of human rights concerns raises the related risk that a minority of jurisdictions with permissive approaches to commercial surrogacy, and with regulations that fail to protect the rights of vulnerable parties against exploitation, could normalize practices globally that violate human rights.

In 2019, the Special Rapporteur issued a new report taking a more measured approach and suggesting the need for frameworks that deal with the reality of transnational surrogacy.

Report on the Sale and Sexual Exploitation of Children
United Nations Special Rapporteur (July 15, 2019)*

. . . 18. The primary consideration of the best interests of the child born from a surrogacy arrangement should be the starting point of any analysis of the international legal framework. No matter whether the State in question adopts a prohibitive, tolerant, regulatory or free-market approach to surrogacy arrangements, the child’s best interests must always form the basis of decision-making. . . . [B]est-interests assessments must balance protection factors, which may limit or restrict rights, and empowerment measures, which enable the full exercise of rights. . . . [T]he child’s best interests is a threefold concept, including a substantive right; a fundamental, interpretative legal principle; and a rule of procedure.

19. . . . Major issues arise in the context of jurisdictions where surrogacy contracts are null and void, unenforceable or even subject to criminal sanctions, with grave repercussions for the child born from an international surrogacy arrangement.

20. It is therefore imperative that States put in place clear frameworks for the protection of children and for ensuring the primacy of their best interests, in the context of surrogacy arrangements. In light of the global demand for surrogacy, even the most domestically prohibitive States must deal with the consequences of surrogacy arrangements, and it is therefore in the best interests of children to ensure that there is a clear decision-making framework in place to provide clarity and certainty.

21. Consistent with the general principles of the Convention on the Rights of the Child, it is crucial to ensure that laws, policies and practices in relation to surrogacy comply with the principles of non-discrimination, the best interests of the child, the right to life, survival and development, as well as the right of children to express their own views. In the case of international surrogacy arrangements, it is of particular importance that different national legal frameworks do not lead to discriminatory situations. . . .

22. . . . [T]he Committee on the Rights of the Child highlights that young children “may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values,” and recalls the responsibility of States parties “to monitor and combat discrimination in whatever forms it takes and wherever it occurs—within families, communities, schools or other institutions.” . . .

25. Article 7** of the Convention on the Rights of the Child . . . protects the right of the child to identity, which includes the right to birth registration, the right to a name,

* Excerpted from U.N. Special Rapporteur on the Sale and Sexual Exploitation of Children, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography, and Other Child Sexual Abuse Material*, U.N. Doc. A/HRC/74/162 (July 15, 2019).

** Article 7 of the UN Convention on the Rights of the Child provides:

the right to acquire a nationality, and the right, as far as possible, to know and be cared for by his or her parents. . . .

28. The obligations contained in article 7 are of fundamental importance for the rights of the child born of surrogacy. The obligation to register births is essential to prevent abduction, sale of or traffic in children, while the right to acquire a nationality requires States to prevent statelessness of children as part of the right to identity. . . . In the context of international surrogacy arrangements across countries with different legislation or regulation, there is a real risk that a child will be unable to receive the nationality either of his parents or of the State where he or she was born. . . .

31. . . . [T]he Convention on the Rights of the Child establishes the obligation, through article 8, to “respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” States parties also have the obligation to provide a remedy in case of illegal deprivation “of some or all of the elements of his or her identity.”

32. Although surrogacy changes the constitutive elements of identity, by breaking the link between genetic, gestational and social parenthood, the fundamental rights of the child remain the same. . . . In particular, the Special Rapporteur notes that a refusal to grant legal recognition to children born through surrogacy arrangements by prohibitionist States can be detrimental to children’s best interest and lead to violations of the rights of the child. . . .

38. . . . [T]he Special Rapporteur wishes to emphasize that a blanket enforcement of anonymity for gamete donors, and/or the surrogate, including by only recording the intending parents on the birth certificate, will prevent the child born from a surrogacy arrangement from having access to his or her origins. This is a particularly common violation of the rights of the child and is amplified in the case of international surrogacy arrangements. . . .

74. . . . [T]he Special Rapporteur reiterates the urgent need for holistic regulation of surrogacy, in particular when it comes to international surrogacy arrangements. The existence of oversight mechanisms is of vital importance in order to prevent any sale and exploitation of children in the context of surrogacy. . . .

91. The Special Rapporteur has observed that the prohibition of surrogacy arrangements carried out abroad is problematic as domestic laws prohibiting surrogacy will often be sidestepped. States will inevitably be confronted with surrogacy

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights . . . , in particular where the child would otherwise be stateless.

arrangements carried out abroad, leading to issues surrounding, inter alia, rights to identity, access to origins and the family environment for the child. Such surrogacies should neither be automatically rejected nor accepted, the only valid consideration being the best interests of the child.

92. A pragmatic response on the part of prohibitionist jurisdictions is necessary and should be in line with human rights standards, including sufficient safeguards to deal with commonly observed violations of the rights of the child. . . .

93. . . . [J]urisdictions allowing surrogacy should verify that intending parents coming from abroad will be able to return to their countries of origin with their surrogate-born child, and that legal parentage will be recognized by the authorities of their country of origin

94. . . . [E]ven though the best interests of the child are extensively mentioned in most legislation reviewed, there is often a lack of detail as to the constitutive elements of such determinations, although, in the specific context of surrogacy, assessments and determinations regarding the best interests of the child are fundamental. The question as to whether the determination of the best interest of surrogate-born children should be carried out through judicial or administrative proceedings is the discretionary decision of the State and depends on the circumstances of the case. . . .

Mennesson v. France

European Court of Human Rights (Fifth Section)

No. 65192/11 (2014)

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of: Mark Villiger, *President*, Angelika Nußberger, Boštjan M. Zupančič, Ganna Yudkivska, Vincent A. De Gaetano, André Potocki, and Aleš Pejchal, *judges*[:]

. . . 7. The first and second applicants[, the Mennessons,] are husband and wife. They were unable to have a child of their own because the second applicant is infertile.

8. After a number of unsuccessful attempts to conceive a child using *in vitro* fertilisation (IVF) with their own gametes, the first and second applicants decided to undergo IVF using the gametes of the first applicant and an egg from a donor with a view to implanting the fertilised embryos in the uterus of another woman. Accordingly, they went to California, where the process is legal, and entered into a gestational surrogacy agreement.

. . . [I]n accordance with Californian law, the “surrogate mother” was not remunerated but merely received expenses. [The applicants] added that she and her husband were both high earners and therefore had a much higher income than the applicants and that it had been an act of solidarity on her part.

9. On 1 March 2000 the surrogate mother was found to be carrying twins and, in a judgment of 14 July 2000, the [California court], to which the first and second applicants and the surrogate mother and her husband had applied, ruled that the first applicant would be the “genetic father” and the second applicant the “legal mother” of any child to whom the surrogate mother gave birth within the following four months. The judgment specified the particulars that were to be entered in the birth certificate and stated that the first and second applicants should be recorded as the father and mother. . . .

11. [The surrogate gave birth to twins and] . . . the first applicant went to the French consulate in Los Angeles to have the particulars of the birth certificates entered in the French register of births, marriages and deaths and the children’s names entered on his passport so that he could return to France with them. . . .

18. . . . [The] public prosecutor instituted proceedings against the [Mennessons] . . . to have the entries [of parentage] annulled He observed that an agreement whereby a woman undertook to conceive and bear a child and relinquish it at birth was null and void in accordance with the public-policy principle that the human body and civil status are inalienable. He concluded that, as the judgment of the [California court] . . . was contrary to the French concept of international public policy and of French public policy, it could not be executed in France and that the validity of civil-status certificates drawn up on the basis of that judgment could not be recognised in France. . . .

26. . . . [On appeal before the Court of Cassation, the Advocate General] observed that the third and fourth applicants[, the twins,] had been living in France for ten years and “[were being] brought up there by genetic and intended parents in a *de facto* family unit in which [they were receiving] affection, care, education, and the material welfare necessary to their development” and that this effective and affective family unit—fully lawful in the eyes of the law of the country in which it had originated—[was] “legally clandestine,” “the children having no civil status recognised in France and no parent-child relationship regarded as valid under French law.” . . .

27. . . . [O]n 6 April 2011 the Court of Cassation . . . gave judgment dismissing the appeal [as contrary to French public policy]. . . .

60. The Government [explained] that the reason for the refusal to record the particulars of the US birth certificates in the French register of births, marriages and deaths was that this would have given effect to a surrogacy agreement, which was formally forbidden under a domestic public-policy provision and constituted a punishable offence if performed in France. French law accordingly reflected ethical and moral principles according to which the human body could not become a commercial instrument and the child be reduced to the object of a contract. . . .

68. The applicants . . . observed that the measure in question had “grossly disproportionate consequences” for the situation of the third and fourth applicants: without recognition of a legal parent-child relationship with the first two applicants, they did not have French nationality, did not have a French passport, had no valid residence permit (even if, as minors, they could not be deported), and might find it impossible to obtain French nationality and thus be ineligible to vote and ineligible for unconditional leave to remain in France; they could also be prevented from inheriting under the first two applicants’ estate. Furthermore, in the event of the first applicant’s death or should the first two applicants separate, the second applicant would be deprived of any rights in respect of the children, to their and her own detriment. . . .

72. The Government stressed that in the interests of proscribing any possibility of the human body becoming a commercial instrument, guaranteeing respect for the principle that the human body and a person’s civil status were inalienable, and protecting the child’s best interests, the legislature—thus expressing the will of the French people—had decided not to permit surrogacy arrangements. The domestic courts had duly drawn the consequences of that by refusing to register the particulars of the civil-status documents of persons born as the result of a surrogacy agreement performed abroad; to permit this would have been tantamount to tacitly accepting that domestic law could be circumvented knowingly and with impunity and would have jeopardised the consistent application of the provision outlawing surrogacy.

. . . [The] failure to register the legal father-child relationship . . . was due to the fact that the first and second applicants had entered into the surrogacy arrangement as a couple and that the respective situations of each person in that couple were indissociable. They also considered that, having regard to the various different ways in which the legal parent-child relationship could be established under French law, giving priority to a purely biological criterion “appear[ed] highly questionable.” Lastly, they submitted that “in terms of the child’s interests, it seem[ed] preferable to place both parents on the same level of legal recognition of the ties existing between themselves and their children.” . . .

78. . . . [T]here is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad. . . .

79. This lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. It also confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorise this method of assisted reproduction but also whether or not to recognise a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents.

80. However, regard should also be had to the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned.

The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced. . . .

99. . . . [Non-recognition] also affect[s] the children themselves, whose right to respect for their private life—which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship—is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the children’s best interests, respect for which must guide any decision in their regard.

100. This analysis takes on a special dimension where . . . one of the intended parents is also the child’s biological parent. . . . [I]t cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof. Not only was the relationship between the third and fourth applicants and their biological father not recognised when registration of the details of the birth certificates was requested, but formal recognition by means of a declaration of paternity or adoption or through the effect of *de facto* enjoyment of civil status would fall foul of the prohibition established by the Court of Cassation in its case-law in that regard. . . .

101. Having regard also to the importance to be given to the child’s interests when weighing up the competing interests at stake, the Court concludes that the right of the third and fourth applicants to respect for their private life was infringed. . . .

* * *

In response to the European Court of Human Rights’ decision in *Mennesson*, France considered different ways to establish a legal parent-child relationship between the intended parents and the twins born from the surrogacy arrangement. While the biological intended father can now be designated as the father on the children’s birth certificates, French law still prohibits this designation for the non-biological mother. France’s Court of Cassation requested an advisory opinion from the European Court of Human Rights on two questions:

1. By refusing to enter . . . the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the ‘intended mother’ as the ‘legal mother,’ while accepting registration in so far as the certificate designates the ‘intended father,’ who is the child’s biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? . . .
2. In the event of an answer in the affirmative . . . , would the possibility for the intended mother to adopt the child of her spouse, the biological

father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?

In the U.S. context, as *Raftopol* suggested, adoption is seen as a harm—i.e., the non-biological intended parent should not have to adopt the child. On this view, parentage by operation of law provides the remedy. In contrast, the French Court, in the following excerpt, views adoption as the remedy to an otherwise restrictive domestic surrogacy regime.

Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Agreement Abroad and the Intended Mother
European Court of Human Rights (Grand Chamber)
Request No. P16-2018-001 (2019)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Guido Raimondi, *President*, Angelika Nußberger, Linos-Alexandre Sicilianos, Robert Spano, Vincent A. De Gaetano, Jon Fridrik Kjølbro, André Potocki, Faris Vehabović, Iulia Antoanella Motoc, Branko Lubarda, Yonko Grozev, Carlo Ranzoni, Georges Ravarani, Pauliine Koskelo, Tim Eicke, Péter Paczolay[, and] Lado Chanturia, *judges*, . . . [d]elivers the following opinion . . . :

. . . 32. Firstly, [the Court] will address the question whether the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement, which requires the legal relationship between the child and the intended father, where he is the biological father, to be recognised in domestic law, also requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, who is designated in the birth certificate legally established abroad as the “legal mother,” in a situation where the child was conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognised in domestic law.

33. Secondly, if the first question is answered in the affirmative, it will address the question whether the child’s right to respect for his or her private life . . . requires such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used, such as adoption of the child

37. In order to determine . . . whether Article 8 of the Convention requires domestic law to provide a possibility of recognition of the relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, two factors will carry particular weight: the child’s best interests and the scope of the margin of appreciation available to the States Parties. . . .

40. The lack of recognition of a legal relationship between a child born through a surrogacy arrangement carried out abroad and the intended mother . . . has a negative impact on several aspects of that child's right to respect for its private life. . . . [I]t places [the child] in a position of legal uncertainty regarding his or her identity within society. In particular, there is a risk that such children will be denied the access to their intended mother's nationality . . . ; it may be more difficult for them to remain in their intended mother's country of residence . . . ; their right to inherit under the intended mother's estate may be impaired; their continued relationship with her is placed at risk if the intended parents separate or the intended father dies; and they have no protection should their intended mother refuse to take care of them or cease doing so.

41. The Court is mindful . . . that, in the context of surrogacy arrangements, the child's best interests . . . include other fundamental components that do not necessarily weigh in favour of recognition of a legal parent-child relationship with the intended mother, such as protection against the risks of abuse which surrogacy arrangements entail and the possibility of knowing one's origins.

42. Nevertheless, in view of the considerations outlined at paragraph 40 above and the fact that the child's best interests also entail the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment, the Court considers that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests

43. As regards the [member state's margin of appreciation], . . . despite a certain trend towards the possibility of legal recognition of the relationship between children conceived through surrogacy abroad and the intended parents, there is no consensus in Europe on this issue.

44. However, . . . where a particularly important facet of an individual's identity was at stake, such as when the legal parent-child relationship was concerned, the margin allowed to the State was normally restricted. . . .

45. . . . Other essential aspects of [the children's] private life come into play where the matter concerns the environment in which they live and develop and the persons responsible for meeting their needs and ensuring their welfare. This lends further support to the Court's finding regarding the reduction of the margin of appreciation.

46. In sum, given the requirements of the child's best interests and the reduced margin of appreciation, . . . the right to respect for private life . . . of a child born abroad through a gestational surrogacy arrangement requires that domestic law provide a

possibility of recognition of a legal parent-child relationship with the intended mother

48. The second issue concerns the question whether the right to respect for private life of a child born through a gestational surrogacy arrangement abroad, in a situation where he or she was conceived using the eggs of a third-party donor, requires such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used

51. The Court notes that there is no consensus in Europe on this issue: where the establishment or recognition of a legal relationship between the child and the intended parent is possible, the procedure varies from one State to another. The Court also observes that an individual's identity is less directly at stake where the issue is not the very principle of the establishment or recognition of his or her parentage, but rather the means to be implemented to that end. Accordingly, the Court considers that the choice of means . . . falls within the States' margin of appreciation.

52. In addition . . . , Article 8 of the Convention does not impose a general obligation on States to recognise *ab initio* a parent-child relationship between the child and the intended mother. . . .

53. . . . Depending on the circumstances of each case, other means may also serve those best interests in a suitable manner

54. What is important is that . . . an effective mechanism should exist enabling that relationship to be recognised. Adoption may satisfy this requirement provided that the conditions which govern it are appropriate and the procedure enables a decision to be taken rapidly, so that the child is not kept for a lengthy period in a position of legal uncertainty as regards the relationship. . . .

55. In sum, given the margin of appreciation available to States as regards the choice of means, alternatives to registration, notably adoption by the intended mother, may be acceptable in so far as the procedure laid down by domestic law ensures that they can be implemented promptly and effectively, in accordance with the child's best interests. . . .

* * *

Commercial surrogacy is unlawful in Australia, but altruistic surrogacy is generally permitted and has been the subject of recent law reform at the state level. Many Australian couples travel abroad to engage in commercial surrogacy. When they return home, who is the parent? In *Berneires & Dhopal*, the Family Court of Australia sustained a judgment refusing to grant parentage to the non-biological intended parent, but urged the legislature to address this problem.

Bernieres & Dhopal
Family Court of Australia
[2017] FamCAFC 180

[Bryant CJ, Strickland and Ryan JJ:]

[The appellants, Ms. and Mr. Bernieres (Australian citizens and residents) entered into a gestational surrogacy agreement with respondents Ms. Dhopal and her husband Mr. Kesai (Indian citizens and residents). Mr. Bernieres donated his sperm to fertilize an ovum belonging to an anonymous donor. The child was born in India in 2014 and was issued an Australian Certificate of Citizenship and passport. Upon returning to Australia, the intended parents sought parenting orders and a declaration of parentage in relation to the child from the Family Court of Australia. The Trial Judge denied their claim, and the intended parents appealed.]

. . . 9. [The Trial Judge (His Honour)] first noted that the appellants sought “parenting orders and a declaration of parentage in relation to [the child]” and that the respondents . . . had not “filed a response to the application, nor [did] they seek any orders and by implication [supported] the orders sought by the [appellants].” . . .

12. His Honour subsequently turned to the commercial surrogacy arrangement. First, his Honour noted that the current arrangement could be described as “gestational surrogacy” pursuant to which the birth mother had no genetic link with the child and the second appellant had donated his sperm. Thus, the only genetic relationship was between the child and the second appellant. . . .

14. His Honour summarised the issues for determination and explained that the “principal submission of the [appellants was] that a declaration of parentage should be made in their favour notwithstanding that the first [appellant] is not the biological progenitor of [the child].” His Honour noted that the appellants relied upon s 69VA* of the [Family Law] Act in this regard and that there was an assumption throughout the submissions that “it is axiomatic that the second [appellant] will be entitled to a declaration arising from the biological connection, but that the focus and complexity of the legislative matrix dealing with parentage focusses on the first [appellant].” . . .

16. His Honour turned to the definition of “parents,” and noted that there was no general definition of a parent

21. Further, his Honour explained that the use of “the power by the Family Court is limited to situations where the application is incidental to the determination of another

* Section 69VA of the Australia Family Law Act provides:

As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth.

matter within Commonwealth power” which could create “difficulties for the applicants in circumstances where a parent may be seeking a declaration of parentage for the purposes of obtaining a passport for a child that is not ‘incidental to the determination of any other matter within the legislative powers of the Commonwealth’ before the court.” . . .

28. The appellants had argued that the expression “child of the marriage” . . . was ambiguous and that the definition of “child of the marriage” provided for in s 60F(1)* of the Act was not exhaustive. The appellants supported this proposition by reference to art 3.2 of the *United Nations Convention on the Rights of the Child* (“the Convention”) and asserted that “such an interpretation would ensure that children with an intended parent who cannot be declared a parent under s 69VA will receive the care and protection that is necessary for their wellbeing” and would “enable the court to allocate the full range of parental responsibilities and provide appropriately for the welfare of the child.” His Honour rejected this argument as he was not satisfied there was any ambiguity in the term “child of the marriage” and thus there was no need to consider the Convention. His Honour therefore found that the child was not a child of the marriage

32. His Honour then discussed the problems and tensions arising in respect of surrogacy agreements such as this. In particular, his Honour noted that the “potentially onerous obligations as set out in the [surrogacy] agreement, despite their almost certain lack of enforceability, may nonetheless represent a powerful and persuasive element weighing heavily upon the [birth] mother.” Further, his Honour found that although the “legislation has not kept pace with the reality of international surrogacy arrangements . . . it cannot be assumed that the only approach is to revert to the biological connection as an alternative definition of ‘parent.’” Rather, his Honour considered that care “must be taken in respect of any approach which has as its heart a determination based purely on a genetic connection without more being considered.” Thus, in conclusion his Honour found that as the state legislation did not provide for the circumstances of the child’s birth, the second appellant was not the parent of the child

35. In conclusion, his Honour summarised the policy considerations surrounding international commercial surrogacy and explained that he could “well understand the dismay of the [appellants] that they are not able to secure for all purposes that which they fervently seek namely, recognition and a declaration of parentage.” His Honour thus noted the need for “urgent legislative change” in this regard. . . .

* Section 60F(1) of the Australia Family Law Act provides:

. . . [A] child is . . . a child of a marriage if: (a) the child is the child of both parties to the marriage, whether born before or after the marriage; or (b) the child is adopted after the marriage by both parties to the marriage, or by either of them with the consent of the other.

65. There is no question that the father is the child’s biological father, but that does not translate into him being a parent for the purposes of the Act. Further, the mother is not even the biological mother, and thus is even less likely to be the “legal parent.” . . .

96. Having found no merit in . . . [the appeal, it] must be dismissed. . . .

* * *

As Keyes and Chisholm explained in the excerpt that began this section, other family courts in Australia have provided relief to intended parents who engaged in surrogacy abroad. As Australian expert Jenni Milbank explains:

The Australian approach to legal parentage is particularly complex in the context of trans-national surrogacy arrangements. Australian law does not recognise parental status granted in other jurisdictions unless specifically prescribed under legislation for particular purposes. Overseas commercial surrogacy arrangements are also excluded from specifically enacted domestic surrogacy laws that enable transfer of legal parentage in certain circumstances. In the absence of Australian parentage the child would, in some circumstances (such as birth in India), be both stateless and parentless; in others the child would have the citizenship of the birth country (United States, Thailand) but no parents (California, British Columbia); or only a mother there (Thailand).

Thus Australian administrators and judges have had to grapple with the claims of Australians trying to return to Australia with a foreign born child with whom they usually have a genetic link and a primary caregiving role, but no legally recognised relationship. Recognition has occurred through ad hoc liberalisation of interpretations of ‘parent’ and ‘child’ in particular pieces of legislation, which has left parents in a state of ambiguous, labyrinthine and ‘limping’ legal parentage. In recent years many hundreds of intended parents have returned to Australia under a process which accords citizenship by descent to the child but does not allow for legal parentage to be regularised more broadly. While it is entirely understandable for decision-makers to try to ‘find’ a parent in order to avoid outcomes such as leaving children stateless orphans abroad, this result also flies in the face of clear legislative wording and intent of domestic assisted reproduction and surrogacy laws.*

In 2019, in *Masson v. Parsons*, [2019] HCA 21, the High Court of Australia issued an important ruling, outside of the context of surrogacy, on the meaning of “parent” in the law. The case considered whether a man who provided sperm for assisted

* Jenni Milbank, *Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy*, 27 AUSTRALIAN JOURNAL OF FAMILY LAW 135 (2013).

reproduction by the woman who gave birth—when that woman was in a *de facto* partnership with the other intended parent—could be a parent of the child. The court determined that the claimant could be a parent because he provided his sperm with the expectation of being a parent, he was listed on the birth certificate as a parent, he provided care and financial support to the child, and others considered him the child’s father. In so ruling, the court held:

Although the Family Law Act contains no definition of “parent” as such, a court will not construe a provision in a way that departs from its natural and ordinary meaning unless it is plain that Parliament intended it to have some different meaning. Here, there is no basis in the text, structure or purpose of the legislation to suppose that Parliament intended the word “parent” to have a meaning other than its natural and ordinary meaning. To the contrary, s 4(1) provides that, when used in Pt VII, “parent,” “in relation to a child who has been adopted, means an adoptive parent of the child.” That implies that there is an accepted meaning of “parent” which, but for the express inclusion of an adoptive parent, would or might not extend to an adoptive parent. Section 61B, which defines “parental responsibility” by reference to the legal duties, powers, responsibilities and authority of parents; s 69V, which provides for evidence of parentage; and s 69W, which provides for orders for carrying out parentage testing procedures, are also consistent with a statutory conception of parentage which accords to ordinary acceptance. Section 60B(1)* perhaps suggests that a child cannot have more than two parents within the meaning of the Family Law Act. But whether or not that is so, s 60B(1) is not inconsistent with a conception of parent which, in the absence of contrary statutory provision, accords to ordinary acceptance: hence, as it appears, the need for the express provision in s 60H(1)(d) that, where a child is born to a woman as a result of an artificial conception procedure while the woman is married to or a *de facto* partner of an “other intended parent,” a person other than the woman and intended partner who provides genetic material for the purposes of the procedure is not the parent of the child.

The extent to which this decision affects parentage orders with respect to surrogacy is yet to be seen.

* Section 60B(1) of the Australia Family Law Act provides:

The objects of this Part are to ensure that the best interests of children are met by: (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and . . . (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

FUNCTIONING: COURTS IN THE PANDEMIC

V. FUNCTIONING: COURTS IN THE PANDEMIC

OVERVIEW

“Sheltering at home” required courts to reorganize their own work as they also faced a myriad of legal questions about the responses of other institutions to COVID-19. This session focuses on how judiciaries coped during the first months of the pandemic. This brief sampling of materials provides the backdrop for discussion of what adjustments were made and whether and how those measures made the work less “court-like” or altered what we take to be “court-like.”

Unlike other chapters in which readings are compiled and excerpted, this narrative account describes a few examples of the adjustments (often termed “emergency orders”) that courts issued as countries shut down and reopened. Several members of the Seminar provided copies of special orders made in light of COVID in the spring and early summer of 2020. Also unlike other chapters, we use numbered footnotes when citing to materials in lieu of asterisks for readability.

The various accommodations in light of COVID have raised questions about how courts can be loyal to values of access, transparency, and even-handedness, as well as be just and fair, when in-person exchanges became unavailable and the physical courthouse doors are “closed.” Technological responses came to the fore and highlighted that some jurisdictions had already embraced “online dispute resolution” (ODR) for different kinds of proceedings for various reasons, including lowering costs and making entry and processes more accessible. COVID made plain the need to rely on a variety of technologies, and some commentators argue that these experiences ought to prompt more (or less) use of such platforms in the future.¹

We begin our discussion with changes made by constitutional and Supreme Courts as they altered their processes of oral arguments. In some instances, apex courts opted to postpone proceedings rather than shift to a virtual format, or left that choice to the parties. For example, deferring public hearings for the duration of the emergency, the Constitutional Court of Italy initially gave parties the option to agree to have their cases decided or to wait until public hearings could be resumed.² By mid-April, the Court ended postponements and allowed parties to choose between receiving a decision on the basis of written statements or participating in virtual public hearings, an

¹ Dame Hazel Genn, *Birkenhead Lecture 2017: Online Courts and the Future of Justice* (Oct. 16, 2017).

² Press Release, Further Measures to Ensure the Continuation of Constitutional Proceedings During the COVID-19 Emergency (Constitutional Court of Italy, Mar. 24, 2020).

arrangement that continued to the end of June.³ The Supreme Court of the United Kingdom shifted the majority of its proceedings to a virtual format, but had to temporarily adjourn a limited number of appeals because of participating counsels' illness.⁴ In the United States, the U.S. Supreme Court postponed oral arguments scheduled for its March and April sessions, which, the Court explained, paralleled responses to public health crises in earlier eras. In mid-April, the Court decided to hear oral arguments by telephone for some of the arguments that had been postponed.⁵

The Constitutional Court of Colombia authorized the use of any available technology for convening virtual plenary chamber sessions, as long as the method chosen was secure and allowed for confidential, real-time deliberation.⁶ The Indian Supreme Court mandated that hearings take place through videoconference and gave litigants and their lawyers the choice of connecting through their own devices or using a facility on the physical premises of the Court to connect.⁷ In Australia, the High Court required parties to use their own devices.⁸

The discussion above addressed how participants were able to be “present.” Another question was how to enable third parties—the public—to “attend.” Some courts streamed their proceedings before COVID, and others began to do so in the wake of COVID.⁹ Other courts did not broadcast.¹⁰ Judiciaries such as the French Constitutional Council prohibited public attendance at hearings but disseminated audiovisual recordings of the proceedings on its public website after the hearings were complete.¹¹ Some courts, such as the U.S. Supreme Court, created a method for any member of the public to phone into oral arguments to listen. The Constitutional Court of Ecuador conducted public virtual hearings on what it categorized as urgent matters related to the pandemic and broadcasted them by radio and through platforms such as Facebook Live;

³ Press Release, During the COVID-19 Emergency, Public Hearings Will No Longer Be Postponed (Constitutional Court of Italy, Apr. 20, 2020).

⁴ Practice Direction 51Y—Video or Audio Hearings During Coronavirus Pandemic (Supreme Court of the United Kingdom, Mar. 24, 2020).

⁵ Press Release (Supreme Court of the United States, Apr. 13, 2020).

⁶ Decision 1 of 2020 (Constitutional Court of Colombia, Mar. 19, 2020).

⁷ Circular (Supreme Court of India, Mar. 23, 2020).

⁸ HCA Video Connection Hearing Protocol (High Court of Australia, Mar. 20, 2020).

⁹ Grata Fund, *Australian Courts: How a Global Pandemic Built Our Launchpad into the Future* (2020).

¹⁰ Standard Operating Procedure for Ld. Advocate / Party-in-Person for Mentioning, e-Filing and Video Conferencing Hearing (Supreme Court of India, Apr. 15, 2020).

¹¹ *COVID-19 and the French Constitutional Council* (General Informal Description).

the Court permitted viewers to post comments and to share videos through their own social media profiles.¹²

In addition to arguments, many courts had to revise how litigants filed papers. The Supreme Court of Argentina permitted briefs to be filed and signed electronically instead of through paper submission.¹³ In Kenya, the Supreme Court directed parties for a thirty-day period to “serve court documents and processes through electronic mail services and mobile enabled messaging applications,” such as WhatsApp.¹⁴

The access of litigants to lower courts raised parallel questions. For example, the provincial British Columbia Supreme Court in Canada authorized hearings on civil and family matters via telephone conference, and it limited each party’s written submissions on the disputed issue to a single 10-page affidavit.¹⁵ Nigeria’s Lagos State Judiciary allowed for process to be served to defendants electronically, including by email and WhatsApp. Such service was to be verified by an affidavit displaying a printout of the electronic message.¹⁶

The technologies deployed prompted some quick studies aiming to assess impact. One example comes from the United States, when the U.S. Supreme Court shifted to telephone arguments. Researchers concluded that female justices were interrupted more often than their male colleagues.¹⁷ Another study comes from the United Kingdom, where the Civil Justice Council sought to learn about lawyers’ responses to the practical challenges in the transition to virtual civil proceedings. Lawyers who had participated in a remote hearing reported concerns about their clients having insufficient access to or comfort with technology and less confidence in the fairness as contrasted with in-person hearings.¹⁸ In some jurisdictions, these kinds of concerns were litigated. For example, a state supreme court in Australia granted an

¹² Resolution No. 007-CCE-PL-2020, Article 5 (Constitutional Court of Ecuador, June 11, 2020).

¹³ Agreement No. 11/2020 (Supreme Court of Argentina, Apr. 13, 2020).

¹⁴ Gazette Notice No. 3137: Practice Directions for Protection of Court Users from the Global Corona Virus Pandemic (Supreme Court of Kenya, Mar. 20, 2020).

¹⁵ COVID-19: Expansion of Civil and Family Matters—Telephone Conference Hearings (Supreme Court of British Columbia, Canada, Apr. 24, 2020).

¹⁶ Remote Hearing of Cases (COVID-19 Pandemic Period) Practice Direction (Lagos State Judiciary, Nigeria, May 15, 2020).

¹⁷ Leah M. Litman, *Muted Justice* (2020).

¹⁸ Civil Justice Council (Natalie Byrom, Sarah Beardon, & Abby Kendrick), United Kingdom, *The Impact of COVID-19 Measures on the Civil Justice System* (2020).

application to delay cross-examination of a defendant by video-link on the grounds that the virtual proceedings would be insufficient for gauging the defendant's credibility.¹⁹

The pandemic has also brought triaging and prioritizing to the fore. Because courts are often the gatekeepers, deciding on pre-trial detention and imprisonment after conviction, many jurisdictions faced individuals seeking to avoid being put into or asking for release from congruent housing before or after trial. In India, the Supreme Court invalidated an order issued by a high court judge concluding that bail applications were not urgent matters that merited judicial review during the country's lockdown.²⁰ The Constitutional Court of Colombia ordered detention-transit centers to take precautionary measures within a period of eight days to protect detainees from COVID, particularly those at high risk of contracting the virus. These steps included providing access to health services, toiletries, daily meals, and permanent drinking water.²¹ The Prosecutor General of Italy issued a letter to the country's public prosecutors recommending steps to decrease the prison population to reduce the risk of COVID spreading among detainees.²² In the United States, state and federal prison authorities responded in a variety of ways, and many judges heard cases involving requests for release and for safety measures for those remaining in detention.²³

¹⁹ David Quince v Annabelle Quince, [2020] NSWSC 326 (New South Wales Supreme Court, Australia, Mar. 19, 2020).

²⁰ High Court of Judicature for Rajasthan v. the State of Rajasthan & Anr. (Supreme Court of India, Apr. 3, 2020). The Supreme Court of India reviewed the order of an individual judge in the High Court of Rajasthan stating that bail applications could not be heard during the lockdown period. The full High Court had appealed to the Supreme Court against this order. *See* Gautam Bhatia, *Coronavirus and the Constitution—IX: Three Curious Bail Orders*, INDIAN CONSTITUTIONAL LAW & PHILOSOPHY (Apr. 5, 2020).

²¹ Bulletin No. 43 (Constitutional Court of Colombia, Mar. 26, 2020).

²² Letter to Prosecutors General at Courts of Appeal Regarding Prison Population (Prosecutor General's Office at the Supreme Court of Italy, Apr. 1, 2020).

²³ *See* Valentine v. Collier, No. 4:20-cv-1115 (U.S. District Court for the Southern District of Texas, Apr. 6, 2020) (ordering a Texas state prison to undertake additional measures to protect incarcerated geriatric inmates from COVID), *stayed by* Valentine v. Collier, 956 F.3d 797 (U.S. Court of Appeals for the Fifth Circuit, Apr. 22, 2020), *and motion for class certification granted by* Valentine v. Collier, No. 4:20-cv-1115 (U.S. District Court for the Southern District of Texas, June 27, 2020); Wilson v. Williams, No. 4:20-cv-00794 (U.S. District Court for the Northern District of Ohio, Apr. 22, 2020) (ordering the Federal Bureau of Prisons to identify and transfer medically vulnerable prisoners from a federal penitentiary), *vacated*, Wilson v. Williams, No. 203447 (U.S. Court of Appeals for the Sixth Circuit, June 9, 2020); Martinez-Brooks v. Easter, No. 3:20-cv-00569(MPS) (U.S. District Court for the District of Connecticut, May 12, 2020) (ordering the Federal Bureau of Prisons to identify and transfer medically vulnerable inmates from a federal penitentiary); Martinez-Brooks v. Easter (May 28, 2020) (ordering re-review to determine inmates' eligibility for home confinement); Martinez-Brooks v. Easter (May 29, 2020) (ordering the timely release of eligible inmates to home confinement absent sufficient justification for their continued imprisonment).

With respect to civil litigants, some jurisdictions suspended evictions, limited debt collection, or undertook other prophylactic measures. For example, Illinois' state Supreme Court issued an order that provided temporary relief for consumers whose assets had been frozen because of liens; the court required banks, "without the need for a court order" for as long as a state executive action suspending service of these types of debt was in effect, to release up to \$4,000 from personal bank accounts that had been frozen because of garnishment summons or citations to discover assets.²⁴

We have focused thus far on orders by courts. In some jurisdictions, legislatures responded. For example, in Portugal, a law suspended certain judicial proceedings for the duration of the pandemic; included were eviction orders and special eviction proceedings when the tenant "may be placed in a vulnerable position due to a lack of main housing or for any other compelling social reason."²⁵ In other jurisdictions, justice ministries took the lead. Pursuant to the country's Special Emergency Situation, the Israeli Ministry of Justice issued regulations on March 17, 2020 that suspended judicial operations other than reviews of cases of detention, urgent petitions to the Supreme Court of Israel, and offenses related to legislation applying to the Special Emergency Situation. These regulations extended through April 16, 2020.²⁶

This brief overview focused on how courts and litigants function. However, COVID-19 also raised a host of issues about what kinds of innovations made by other institutions were within constitutional parameters. For example, on April 26, 2020, the Supreme Court of Israel reviewed and granted journalists' petition that they be exempt from the Israeli Security Agency's collection of COVID-positive individuals' personal data for the purposes of contact tracing. These petitioners could not be subject to the policy, the Court decided, unless primary legislation granted the Israeli government such powers and the journalists consented to such tracing.²⁷ France's Constitutional Council faced similar questions regarding governmental responses to COVID. Although it validated on May 11, 2020 the law extending the country's public health state of emergency until July 10, 2020, the Council found that provisions allowing for processing of health data for contact tracing in an *ad hoc* manner without users' consent violate the right to personal privacy and are thus unconstitutional.²⁸

COVID has, in short, structured these last months and has turned this year's Seminar into a virtual exchange. Given that COVID will continue to require a host of

²⁴ *In re Illinois Courts Response to COVID-19 Emergency/Impact on Post-Judgment Proceedings*, M.R. 30370 (Supreme Court of Illinois, United States, Apr. 24, 2020).

²⁵ Law No. 4-A/2020 (Portugal, Apr. 6, 2020).

²⁶ *Coronavirus and Israeli Courts* (General Informal Description).

²⁷ *Ben Meir v. Prime Minister*, HCJ 2109/20 (Supreme Court of Israel, Apr. 26, 2020).

²⁸ Law Extending the Public Health State of Emergency and Supplementing its Provisions, Decision no. 2020-800 DC (Constitutional Council of France, May 11, 2020).

legal measures, we will return to COVID questions in the 2021 Global Constitutionalism Seminar.

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Apex Courts, Hearings, and Oral Arguments

- Dame Hazel Genn, *Birkenhead Lecture 2017: Online Courts and the Future of Justice* (Oct. 16, 2017)
- Press Release (Constitutional Court of Italy, Mar. 24, 2020)
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- Video Connection Hearings Protocol (High Court of Australia, Mar. 20, 2020)
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Using Courts

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Martinez-Brooks v. Easter (U.S. District Court for the District of Connecticut, May 12, May 28, May 29, 2020)

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MULTI-LAYERED GOVERNANCE,
INTERACTION AMONG COURTS,
AND THE ECONOMY:
THE EXCHANGES BETWEEN
THE FCC AND THE ECJ

VI. MULTI-LAYERED GOVERNANCE, INTERACTION AMONG COURTS, AND THE ECONOMY: THE EXCHANGES BETWEEN THE FCC AND THE ECJ

On May 5, 2020, the German Federal Constitutional Court (FCC) ruled that Germany's participation in the European Central Bank (ECB)'s Public Sector Asset-Purchase Program (PSPP) violated the country's Basic Law. As Article 5(1)* of the Treaty on European Union (TEU) requires, EU institutions are to ensure that their competences are used in accordance with the principles of conferral and proportionality. These principles restrict EU action to competences that have been explicitly conferred by the member states on the European Union under Article 5(1) TEU and limit the content and form of EU action to "what is necessary to achieve the objectives of the Treaties," as stated in Article 5(4)** TEU. Actions must be undertaken in a reasoned manner and should not be pursued if a less intrusive means exists to achieve the desired policy objective.

According to the FCC, the ECB violated the principle of proportionality by failing to balance the PSPP's monetary policy objective (which is within the purview of Bank's competences) against the significant economic policy effects (which intrude upon competences that reside solely with the member states). The decision rejected the European Court of Justice (ECJ)'s review of the PSPP in its December 11, 2018 *Heinrich Weiss and Others* judgment and criticized that opinion for ignoring economic policy effects in its proportionality analysis and for opening the door to an unchecked expansion of the ECB's authority.

In many discussions in the Global Constitutional Seminar, we have explored the authority of the EU, federations, transnational policies, the allocation of powers in multi-layered systems, proportionality review, and competences. This session, prompted by the May 2020 German Constitutional Court decision, returns us to these issues. One set of questions is the effect of the decision on independent banks, the ECB, and European economic integration, and in particular, the ability of central banks to respond expansively to economic emergencies. The decision also raises questions about how courts define and then navigate multilevel governance systems when competences

* Article 5(1) of the Treaty on European Union provides:

The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

** Article 5(4) of the Treaty on European Union provides:

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

cannot be neatly separated but are assigned across multiple levels. In addition, questions have emerged about whether and how broader political contexts should affect courts and, in this instance, the timing and tone of the FCC's decision. The PSPP program had been widely thought to stabilize European economies successfully, and the ECB was poised to embark on another similar program when the legality of the first program became a subject of controversy between the ECJ and the FCC.

Below we provide a brief synopsis of the FCC May 2020 judgment. We also compiled a list of materials relevant to the decision. Included are the *Weiss* line of ECJ and FCC decisions, related judgments, and EU treaties. Drawing on suggestions from participants, we provide a range of viewpoints about the ruling's impact on the capacity of EU institutions and of member state governments to alleviate the economic fallout of the COVID-19 pandemic, and on how member states will respond to the decisions of EU institutions in other domains. Given the number of comments, we have made brief notes that forecast the perspective of each author. Commentators diverge on the legal analysis of the ECJ and German Constitutional Court decisions and on the potential effects of the interaction.

THE COURTS' DECISIONS AND THE UNDERLYING TREATIES

Order of the Second Senate of 18 July 2017, 2 BvR 859/15 (Federal Constitutional Court of Germany, 2017)

Heinrich Weiss and Others, Case No. C-493/17 (European Court of Justice, Grand Chamber, 2018)

Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15 (Federal Constitutional Court of Germany, 2020)

Treaty on European Union, 1992 O.J. (C191) (Feb. 7, 1992) (providing the EU shall respect the "essential state functions" of member states (Article 4(2)); restricting the EU's actions to the "competences conferred upon it by the Member States in the Treaties" through the principle of conferral (Article 5(2)); specifying "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" through the principle of proportionality (Article 5(4)))

Treaty on the Functioning of the European Union, 2012 O.J. (C326) (Dec. 13, 2007) (providing for the definition and conduct of a single monetary policy and exchange-rate policy (Article 119); prohibiting the ECB and member state central banks from providing credit facilities to Union or member state institutions or from purchasing their debt instruments (Article 123(1)); noting the primary objective of the

European System of Central Banks is to maintain price stability (Article 127(1)))

* * *

In 2015, complainants, some of whom were affiliated with Germany's far-right Alternative for Germany (AfD) party, initiated a legal challenge in the German FCC against the PSPP. The PSPP is an ECB program specifying that Eurosystem central banks purchase more than two trillion euros of government bonds and other debt securities issued by euro area member states. Through this coordinated effort, the ECB aims to bolster economic activity by supporting aggregate consumption and investment spending in the euro area. The complainants contended the program violates the German Basic Law's principle of democracy (and thus undermines German constitutional identity) by not sufficiently accounting for the division of competences between the European Union and the member states and violating the prohibition on providing monetary financing to a member state.

On July 18, 2017, the German FCC referred the question of the PSPP's legality to the ECJ for a preliminary ruling. On December 11, 2018, the ECJ decided in *Heinrich Weiss and Others*, Case C-493/17, that no grounds existed on which to hold the PSPP invalid. The ECJ explained that the PSPP did not exceed the ECB's mandate, but instead constituted monetary policy (over which the EU has exclusive competence for the euro area) and comported with the principle of proportionality.

On May 5, 2020, the FCC's Second Senate voted 7 to 1 that the ECJ ruling could not be applied in Germany. The German court held the Basic Law's principle of democracy in Article 20(1)* combined with citizens' right to vote in Article 38(1)** required that Germany's participation in the activities of the EU and its institutions be limited only to those competences that the elected representatives of German voters had explicitly conferred on the EU. Although monetary policy is a competence conferred on the EU, economic policy is reserved for the member states. As such, the PSPP violated the EU Treaties in so far as the ECB had not demonstrated that actions taken in support of its monetary policy did not unduly intrude on the reserved member state competence in the area of economic policy, a balance that could only be struck by assessing the proportionality of the ECB's actions.

* Article 20(1) of the Basic Law for the Federal Republic of Germany provides:

The Federal Republic of Germany is a democratic and social federal state.

** Article 38(1) of the Basic Law for the Federal Republic of Germany provides:

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.

The FCC concluded that the ECJ did not conduct a comprehensible standard of proportionality review of the PSPP and thus did not determine whether the ECB had violated the principle of conferral under Article 5 TEU or whether the ECB had violated Article 123* TFEU, which bars the EU from purchasing the debt of its member states. The German court reviewed the PSPP and found it failed a proportionality analysis because the PSPP has a significant indirect impact on member states' economic policy. In the FCC's view, because the German Central Bank is barred from participating in *ultra vires* acts of EU institutions, it had to cease participating in the PSPP, and do so within three months. The FCC specified that if the ECB's Governing Council could demonstrate "in a comprehensible and substantiated manner" that the PSPP's monetary policy objectives were "not disproportionate to the economic and fiscal policy effects," the German Central Bank could continue participating in the PSPP.

Three days after the FCC's judgment, the ECJ issued a press release on May 8, 2020 that stated in part:

[T]he Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. In order to ensure that EU law is applied uniformly, the Court of Justice alone—which was created for that purpose by the Member States—has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. That is the only way of ensuring the equality of Member States in the Union they created.**

Following the FCC's ruling, the ECB submitted documents on its internal deliberations regarding the PSPP to the Federal Republic and the German Parliament through the Bundesbank. In late June 2020, the federal government declared it was

*Article 123 of the Treaty on the Functioning of the European Union provides:

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States . . . in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments. . . .

** Excerpted from Court of Justice of the European Union, *Press release following the judgment of the German Constitutional Court of 5 May 2020* (May 8, 2020).

satisfied with the ECB's analysis, which cleared the way for the Bundesbank to continue participating in the program in a manner consistent with the FCC's decision.*

How can these interactions be assessed? Within months of the ruling, a host of commentary has debated the economic and political ramifications. What German political leaders do is one question, and what other member states do is another. For example, Poland's deputy justice minister indicated the country may refer to the German court's ruling as Poland disregards pending ECJ rulings on judicial independence. And the economic impact of COVID makes the questions of fiscal policy all the more pressing, especially because the successor to the PSPP, the Pandemic Emergency Purchase Program, has a nearly identical structure and would presumably be subject to the same critique from the FCC.

The ruling was widely interpreted as a rejection of the notion that the ECJ is the ultimate interpreter of EU law in Germany and as an effort to demand greater public accountability from the ECB through clearer justification of its decision-making. One word of caution about how to approach these interactions comes from Justice Susanne Baer, a member of the FCC who does not sit on the Senate that issued the May decision. As she has pointed out, the "relationship among European courts is not fully caught if we focus on the PSPP ruling alone." Recently, the FCC held in its November 2019 *Right to be Forgotten I* (1 BvR 16/13) and *II* (1 BvR 276/17) decisions it will apply the German Basic Law as the relevant standard of review in areas in which EU law does not fully harmonize member state law, and it will directly apply the EU Charter of Fundamental Rights in cases in which German law transposes EU law (when there is full harmonization). However, in the rare case in which a discrepancy between the German constitution and the EU Charter may arise, the FCC would refer a case to the ECJ, which remains the last interpreter of the Charter.

A sampling of texts and vantage points follows.

RELATED CASE LAW

Judgment of the Second Senate of 12 October 1993, 2 BvR 2134/92 (*Maastricht*) (Federal Constitutional Court of Germany, 1993) (noting the Court's authority to "examine whether legal acts of European institutions and organs are within or exceed the sovereign powers transferred to them" as to ensure the transfer of such authorities does not violate the German Basic Law's principle of democracy)

Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08 (*Lisbon*) (Federal Constitutional Court of Germany, 2009) (claiming competence)

* Andreas Rinke, *ECB Stimulus Plan Meets Court Requirements: German Finance Minister*, REUTERS (June 29, 2020).

to declare legal acts of the EU or acts of implementation by the German state inapplicable if they contravene inviolable fundamental rights provided in the German Basic Law)

Order of the Second Senate of 14 January 2014, 2 BvR 2728/13 (*Gauweiler I*) (Federal Constitutional Court of Germany, 2014) (referring to the ECJ the question whether the Outright Monetary Transactions (OMT) program of the European Central Bank was lawful, strongly suggesting that the program violated Article 123 TFEU barring EU purchase of the national debt of member states, and proposing criteria that would permit the program to be lawful)

Gauweiler and Others v. Deutscher Bundestag, C-62/14 (European Court of Justice, Grand Chamber, 2015) (holding the OMT program was lawful, rejecting a number of arguments made by the FCC in its reference, and not addressing others)

Judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13 (*Gauweiler II*) (Federal Constitutional Court of Germany, 2016) (applying the ECJ's decision to find the OMT program lawful, elaborating on the conditions that allowed the program to comply not only with EU law but also with the German Basic Law)

COMMENTARIES

Court of Justice of the European Union, *Press Release No. 58/20* (May 8, 2020) (specifying that “the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings,” and noting the Court alone has jurisdiction to rule that an act of an EU institution is contrary to EU law)

Dieter Grimm, *A Long Time Coming*, FRANKFURTER ALLGEMEINE ZEITUNG (May 18, 2020) (disagreeing with the proposition that the German FCC's review of the ECJ decision was novel, as the Treaties of Rome provided that the EU only has competences that member states have conferred to it, and other member states' constitutional courts have claimed authority to review legal acts of the EU institutions to ensure they are in accordance with those conferred competences)

Miguel Poiares Maduro, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court*, VERFASSUNGSBLOG (May 6, 2020) (describing how the German FCC's judgment suggests that the

court will view the ECB's new Pandemic Emergency Purchase Program as violative of Article 123)

Ana Bobić & Mark Dawson, *What did the German Constitutional Court Get Right in the ECB Decision?* EU LAW LIVE (May 12, 2020) (highlighting the value of the FCC judgment in ensuring the ECB remained accountable to citizens; noting the court's proportionality analysis was justified; reiterating EU law was not superior to national law, but parallel to it; and challenging claims that the ruling will precipitate abuses of discretion by states such as Poland and Hungary)

J.H.H. Weiler & Daniel Sarmiento, *The EU Judiciary After Weiss – Proposing a New Mixed Chamber of the Court of Justice*, EU LAW LIVE (June 1, 2020) (suggesting the establishment of a new appeal jurisdiction within the ECJ Grand Chamber that would review cases implicating the jurisdictional line between member states and the EU as *Weiss* did)

Katharina Pistor, *Germany's Constitutional Court Goes Rogue*, PROJECT SYNDICATE (May 8, 2020) (reading the FCC's ruling as an overstepping of its judicial competence and as a potential harbinger of future decisions reviewing ECB policies and Germany-EU relations)

Karen Alter, *Is it a Dance or is it Chicken?* VERFASSUNGSBLOG (May 13, 2020) (calling on German leaders to disregard the decision and cautioning that the judgment would not lead to European disintegration because countries such as Poland and Hungary would have rejected ECJ rulings regardless of the FCC precedent)

Ulrich Haltern, *Ultra Vires Review in the Service of European Democracy: On the Federal Constitutional Court's PSPP Judgment* (noting the FCC's ruling was an effort to gain greater transparency regarding the ECB's monetary policy and noting this level of judicial review reinforced the EU's democratic legitimacy; warning infringement proceedings would escalate conflict between the FCC and ECJ and weaken the European legal community)

Heiko Sauer, *Substantive EU Law Review Beyond the Veil of Democracy: the German Constitutional Court Ultimately Acts as Supreme Court of the EU*, EU LAW LIVE (May 9, 2020) (noting the constitutional complaints the FCC heard should have been declared inadmissible in so far as they concerned violations of EU, rather than German, law, or should have been viewed as unfounded in so far as they concern *ultra vires* acts because the complainants were not directly affected by EU monetary policy)

Edward Watson and Jessica Downing-Ide, *"Incomprehensible and*

Arbitrary”: *Germany’s Constitutional Court Strikes Back Against the ECB and CJEU*, ILA REPORTER, (June 4, 2020) (interpreting the FCC’s ruling as justifiable in its concerns about the ECB overstepping its competences, and finding the ruling was reasonable in light of the unclear distinction between asset purchases and monetary financing)

Phedon Nicolaidis, *The Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank: Setting an Impossible and Contradictory Test of Proportionality*, EU LAW LIVE (May 15, 2020) (disagreeing with the reasoning of the FCC decision and identifying three defects with its proportionality analysis)

Jacob Öberg, *The German Federal Constitutional Court’s PSPP Judgment: Proportionality Review Par Excellence*, EUROPEAN LAW BLOG (June 2, 2020) (identifying different standards of proportionality review depending on whether the EU act at issue was a general legislative act or targeted specific individuals and arguing that even if the ECJ’s analysis of the PSPP was not *ultra vires*, the ECJ should have probed more stringently into the ECB’s evidence, facts, and projections)

Marco Dani, Joana Mendes, Agustín José Menendez, Michael Wilkinson, Harm Schepel, and Edoardo Chiti, *At the End of the Law*, VERFASSUNGSBLOG (May 15, 2020) (arguing the FCC ruling revealed the dysfunctionality of the European monetary union in its current state and a need either to strengthen it into more of a fiscal union or to dismantle it; noting the ruling threatened the concept of the Pandemic Emergency Purchase Program and the prospect of the ECB using monetary policy to compensate for a dearth of EU fiscal policy tools)

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Professor Daniel Esty is the Hillhouse Professor at Yale University with primary appointments at Yale's Environment and Law Schools and a secondary appointment at the Yale School of Management. He serves as director of the Yale Center for Environmental Law and Policy (www.yale.edu/envirocenter) and co-director of the Yale Initiative on Sustainable Finance. Professor Esty is the author or editor of twelve books and dozens of articles on environmental protection, regulatory reform, energy policy, and sustainability metrics—and their connections to corporate strategy, competitiveness, trade, and economic success. His prizewinning volume, *Green to Gold: How Smart Companies Use Environmental Strategy to Innovate, Create Value, and Build Competitive Advantage*, was recently named the top “green business” book of the past decade. His current research and writing offer cutting-edge thinking about climate change, sustainable investing, innovation in the energy/environmental context, corporate sustainability, and new approaches to environmental protection—including a widely hailed article, “Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability” as well as a 2019 edited book, *A Better Planet: 40 Big Ideas for a Sustainable Future*. From 2011 to early 2014, Professor Esty served as Commissioner of Connecticut's Department of Energy and Environmental Protection where he earned a reputation for fresh thinking and practical results. His policy innovations include the launch of Connecticut's first-in-the-nation Green Bank to promote clean energy using limited public funding to leverage private capital and the “LEAN” restructuring of all of Connecticut's environmental permitting programs to make the state's regulatory framework lighter, faster, more efficient, and effective. Prior to taking up his Yale Professorship

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About the Student Editors

Neil Alacha is a third-year J.D. student at Yale Law School. He graduated from Harvard University in 2016 with an A.B. *summa cum laude* in Social Studies. Before law school, he received an M.Phil. in International Relations from the University of Oxford, which he attended as a Rhodes Scholar. At Yale, Neil is a Coker Fellow in Constitutional Law for Professor Monica Bell, is a member of the school's First Term Committee to engage with the first-year curriculum, and is an editor of the *Yale Journal of International Law*, *Yale Journal on Regulation*, and *Yale Law and Policy Review*. He has served on the student boards of the International Refugee Assistance Project and First Generation Professionals, and was a Teaching Fellow at Yale College in Introductory Macroeconomics. Neil spent the summer of 2020 working in New York and in Washington, D.C. at Wachtell, Lipton, Rosen & Katz and at Wilkinson Walsh.

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Lawrence Liu is a third-year J.D. student at Yale Law School and a Ph.D. student in the Jurisprudence and Social Policy Program at the University of California, Berkeley. He graduated *Phi Beta Kappa* and *magna cum laude* from Princeton University's School of Public and International Affairs, with certificates in East Asian Studies and Values and Public Life. Before law school, he received an M.A. in Jurisprudence and Social Policy from U.C. Berkeley. Lawrence has research interests in administrative law, property, the legal profession, and state-society relations, with a specific focus on Chinese law and politics. At Yale, Lawrence is a member of the Housing Clinic and the Empirical Scholarship Editor for the *Yale Law Journal*, and has served as Submissions Editor for the *Yale Journal of International Law*, Co-Director of the Paul Tsai China

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Alexandria Miskho is a second-year J.D. student at Yale Law School. She studied chemical engineering at the Massachusetts Institute of Technology, graduating in 2017 with a Bachelor of Science as a member of the Tau Beta Pi Engineering Honors Society. Prior to attending law school, she worked for Oliver Wyman, a global management consulting firm. At Yale, Alexandria is a member of the Environmental Protection Clinic, serves on the board of First Generation Professionals and the Immigrant Justice Project; she is passionate about research on the intersection of climate change, health, and policy. Alexandria spent the summer of 2020 working at the United Nations International Law Commission.

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About the Editors Emeriti

José Argueta Funes is a doctoral candidate in history at Princeton University and currently a law clerk for the Honorable Guido Calabresi of the U.S. Court of Appeals for the Second Circuit. His research focuses on the intersection of law, socio-economic change, and empire in relationship to North America and the Pacific World. A native of San Salvador, El Salvador, José attended the University of Virginia as a Jefferson Scholar and graduated with Highest Distinction in history and philosophy. He holds an M.A. in history from Princeton and a J.D. from Yale Law School. At Yale, José served as Articles and Executive Editor for the *Yale Journal of Law & the Humanities*, Legal History Fellow, Co-President of the Yale chapter of the Asylum Seeker Advocacy Project, and Coker Fellow. He was also awarded the Quintin Johnstone Prize in Real Property Law. His work has been supported by the Newberry Consortium in American Indian Studies, the American Society for Legal History, the Hurst Institute at the University of Wisconsin Law School, and the William Nelson Cromwell Foundation.

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