



YALE LAW SCHOOL

GLOBAL CONSTITUTIONALISM

A Part of the Gruber Program for Global Justice and Women's Rights

Global Reconfigurations, Constitutional Obligations, And Everyday Life

Constituting the Family

Governing Sports

Refugees in a Time of "Unprecedented" Mobility

Health, Medicines, and Constitutional Obligations

Co-Editors
Judith Resnik
Clare Ryan
2018





Gruber Program for Global Justice and Women's Rights

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Preface

This year's volume, *Global Reconfigurations, Constitutional Obligations, and Everyday Life*, examines the impact of constitutional law on arenas often deemed to be "private." In the domains of family life, sports, migration and refugees, and access to medicine, constitutional norms are regularly invoked in conflicts among individuals, organizations, and the state.

Chapter I, *Constituting the Family*, edited by Douglas NeJaime, Clare Ryan, and Helen Keller, considers how constitutional regulation of families has come to the fore in light of demographic shifts, popular mobilizations, gender roles, and reproductive technologies. This chapter's questions center on when and why constitutions oblige state recognition and protection of adult relationships (through marriages and civil unions) and of parental status and authority. While courts and legislatures have long confronted the role of biological connection in parental recognition, new reproductive technologies and a wider range of family forms bring disputes into courts, requiring consideration of the roles of biology, genetics, and intent in the recognition of parenthood.

Chapter II, *Governing Sports*, engages with how to conceptualize sports organizations, which are protective of their autonomy. The materials, selected by Harold Hongju Koh, Susan Rose-Ackerman, and Miguel Poiares Maduro, explore the impact of the constitutional norms of free expression and association, equality, nondiscrimination, and due process on sport associations and sporting events. National and international laws increasingly permeate the governance of sports, as the tribunals within sports organizations interact with and adopt legal rules to respond to the problems of corruption, drug use, monopolistic practices, and governance failures.

Chapter III, *Refugees in a Time of "Unprecedented" Mobility*, framed by Muneer Ahmad, Lucas Guttentag, Cristina Rodríguez, and Marta Cartabia, addresses the "unprecedented" numbers of persons seeking safe havens across borders—25.4 million people globally as of June 2018, according to the UN Refugee Agency. Individuals and families claim rights to asylum and reunification, while states debate what responsibilities they have for protecting and accepting newcomers. In many countries, large numbers of persons are placed into what are called "camps," which suggests a transience belied by the hundreds of thousands who have lived under such conditions for decades. This chapter explores debates about who gains the status of "refugee" as contrasted with "migrant," what international obligations flow, and why many countries are seeking to deter, block, or detain entrants seeking a safer haven.

Chapter IV, *Health, Medicines, and Constitutional Obligations*, shaped by Amy Kapczynski, Samuel Moyn, and Manuel José Cepeda Espinosa, considers the role of courts in enforcing rights to medicine, and whether this arena of economic and social rights entails distinct or familiar questions of judicial enforcement. In recent years, courts in several countries have concluded that state failures to provide medicines violate constitutional rights to health and, moreover, that courts can and should order group-based or individual remedies. These cases address who decides—courts, legislatures, health administrators—what medicines are subsidized and accessible, as well as the distributional impacts of such rulings. Further, the chapter takes up

how the organization of health care and the high prices of patented medicines frame the problems and asks what regulatory efforts from courts or legislatures should be put into place.

Reflective of rapidly changing claims of sovereignty and ongoing constitutional tensions, two segments of the 2018 Global Constitutional Seminar have been organized around a set of pressing questions, rather than readings prepared in advance. One discussion, led by Reva Siegel, Robert Post, Susanne Baer, and Elena Kagan, addresses *Constitutional Norms and Conventions under Stress*. Trust, norms, and institutions—both national and international—all seem to be in flux, as conflicts within and across polities are producing changing practices and commitments. The second, *Reconfiguring the Boundaries of Sovereignty and the Norms of Constitutional Orders*, is chaired by Kim Scheppele, Manuel José Cepeda Espinosa, Dieter Grimm, and Robert Reed. The continuing debate about Brexit, the conflict over Catalonia, and resistance to the Inter-American human rights system provide examples of how normative and geographical borders are contested in regions across the world.

* * *

This volume was, as always, a collaborative venture. We are indebted to participants for suggesting materials and to the discussion leaders for their review of the compilations. Our annual reminders are that the excerpts have been ruthlessly pruned; that paragraphs have been combined for easier reading; and that most footnotes and citations have been omitted. The footnotes that have been retained have 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 additions. This book will also be published as the seventh volume in a series of Yale Global Constitutionalism Seminar E-Books, which was begun in 2012.

Thanks are due to the Yale Law Library, under the direction of Teresa Miguel-Stearns, for help identifying sources that would otherwise have been unavailable. Jason Eiseman, Yale Law School's Associate Law Librarian for Technology and Digital Initiatives, continues to provide guidance on how to turn the Seminar's volumes into E-Books, which we have done with help from Assistant Dean Sara Lulo and under the tutelage of our colleague Jack Balkin in connection with the Information Society Project that he chairs, and with the support of the Oscar M. Ruebhausen Fund at Yale Law School.

Clare Ryan joins us for a second year as a Senior Research Fellow and the co-editor of this volume. She graduated from Yale Law School in 2013 and has returned to Yale to complete a Ph.D. in Law. We are both indebted to remarkable students at Yale Law School, led by the insightful and thorough Matt Butler, who serves as the Executive and Managing Editor of this volume, along with José Argueta Funes, who has become the Associate Managing Editor. Their commitment, care, and thoughtfulness made this volume possible. They worked on all facets, from substantive research to editorial consistency, administrative coordination of other student editors, securing permissions for the reprinting of excerpted materials, and shaping the E-Book format. David Louk is our Executive and Managing Editor Emeritus, and he has been incredibly generous with his time and in providing thoughtful analyses. Our Senior Editor is returning

student Kyle Edwards, who specializes in health care law. Our new Editors are Catherine Crooke, Edgar Melgar, Allison Rabkin Golden, and Quirin Weinzierl, who have provided invaluable service. The entire group has worked across time zones and continents to bring this volume to completion.

A special note is always appropriate for Renee DeMatteo, Yale Law School's talented Senior Conference and Events Services Manager; participants know her well for her advice, attention, and kindness. Renee ensures that this book comes into being in time for its circulation to the travelers who make their way to New Haven in September. Once again, Bonnie Posick demonstrated her expertise as a proofreader and editor. We are also supported and guided by Mindy Roseman, Yale Law School's Director of International Programs and Director of the Gruber Program for Global Justice and Women's Rights.

No account of this Global Seminar would be complete without acknowledging the institutional support that frames it. The commitment of the deans of the Yale Law School has been unfailing. From Anthony Kronman, who was the dean when Paul Gewirtz founded the Seminar, to Harold Hongju Koh, Robert Post, and now Heather Gerken, their support has allowed the Seminar to flourish. 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.

As we continue the process of intergenerational transitions, this Seminar is indebted to its founding and early participants: 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 including Aharon Barak (Israel), Pedro Cruz Villalón (Spain), Lech Garlicki (Poland), Dieter Grimm (Germany), Frank Iacobucci (Canada), and László Sólyom (Hungary).

We continue to be the beneficiaries of the vision and commitments of Peter and Patricia Gruber, who have contributed so generously to this and many other arenas at Yale University. This support sustains the Seminar and our relationships across borders, as we insist on the vitality of transnational exchanges and the importance of commitments to independent and wise judging, even as we watch targeted efforts to erode stability and undermine justice.

Judith Resnik
Chair and Co-Editor,
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CONSTITUTING THE FAMILY

DISCUSSION LEADERS

DOUGLAS NEJAIME, CLARE RYAN, AND HELEN KELLER

I. CONSTITUTING THE FAMILY

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The questions in this chapter center on when and why constitutions oblige state recognition and protection of adult relationships (through marriage and non-marital statuses such as civil union and registered partnership) and parent-child relationships. The role of constitutional law in family life has been heightened by patterns of people becoming couples and parents without being married, popular mobilizations around the import of gender and sexuality, and reproductive technologies that have opened new paths to family formation.

One contemporary controversy centers around claims of same-sex couples, which many courts, legislators, and voters in countries across the world have credited as requiring state recognition. When lawmakers first acted to protect same-sex couples at the end of the twentieth century, recognition came in the form of non-marital rights and benefits. In 1989, Denmark became the first country to register same-sex couples' civil partnerships. In 2001, the Netherlands became the first to extend marriage to same-sex couples. Since then, debate over same-sex relationship recognition has continued—in courts, legislatures, and among the public. In this chapter, we ask what constitutional or human rights principles animate obligations to open the status of marriage to same-sex couples. The case law features debates about whether alternatives such as civil union and registered partnership are sufficient to respond to equality and dignity claims. The existence of alternative statuses in turn poses questions of equality and parity not only for same-sex, but also different-sex couples: must civil unions and registered partnerships be available regardless of sex and sexual orientation?

Views about parenting and gender roles are foundational to much of the opposition to same-sex marriage. Many opponents of same-sex marriage point to tradition, including but not limited to religious practices, to justify the heterosexual nature of marriage. In addition, opponents offer a functional justification that links marriage to reproduction and parenthood. Marriage, some assert, is necessary to channel procreative sex into a stable family arrangement where children can be raised by their biological mother and father.

After considering the debates about recognition of adult family relationships, we turn to the recognition of parent-child relationships, both inside and outside marriage and for parents in both different-sex and same-sex couples. While courts and legislatures have long confronted the role of biological connections in parental recognition, new technologies and family forms have brought conflicts between parenthood and biology to the fore. Reproductive technologies enable distinctions between procreation and sexual interaction and have also allowed women to separate gestation from genetics. Same-sex family formation, which often relies on these reproductive technologies, challenges the tradition of parental status as gendered and necessarily features a parent without a genetic tie to the child. Given these developments, courts and legislatures are considering the role of both gender and genetics in parentage, the relevance of marriage to parentage, and the legal rules limiting parental status to two people.

MARITAL AND NON-MARITAL RELATIONSHIPS BETWEEN ADULTS

The Legal Status of Marriage

Home Affairs v. Fourie Constitutional Court of South Africa CCT 60/04 (2005)

[Chief Justice Langa, Deputy Chief Justice Moseneke, and Justices Mokgoro, Ngcobo, Skweyiya, Van der Westhuizen, and Yacoob all concur in the judgment of Justice Sachs.]

1. Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women. . . .

3. They contend that the exclusion comes from the common law definition which states that marriage in South Africa is “a union of one man with one woman, to the exclusion, while it lasts, of all others.” . . .

4. In the pre-democratic era same-sex unions were not only denied any form of legal protection, they were regarded as immoral and their consummation by men could attract imprisonment. Since the interim Constitution came into force in 1994, however, the Bill of Rights has dramatically altered the situation. Section 9(1) of the Constitution now reads:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

Section 9(3) of the Constitution . . . reads:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth.” . . .

5. The matter before us accordingly raises the question: does the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amount to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation? And if it does, what is the appropriate remedy that this Court should order? . . .

59. . . . South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one. The[re is] . . . an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians, that is, of persons who had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and affinity for individuals of their own sex, and were socially defined as homosexual. . . . [Our] Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough. . . .

60. . . . The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. . . .

63. It is true that marriage, as presently constructed under common law, constitutes a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words ‘I do’ bring the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain. . . .

67. Children born during a marriage are presumed to be children of the husband. Both parents have an ineluctable duty to support their children (and children have a reciprocal duty to support their parents). The duty to support children arises whether the children are born of parents who are married or not. . . .

71. The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. . . .

74. . . . Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. . . .

81. . . . A law that creates institutions which enable heterosexual couples to declare their public commitment to each other and achieve the status, entitlements and responsibilities that flow from marriage, but does not provide any mechanism for same-sex couples to achieve the same, discriminates unfairly against same-sex couples. . . . Same-sex unions continue in fact to be treated with the same degree of repudiation that the state until two decades ago reserved for interracial unions; the statutory format might be different, but the effect is the same. . . .

92. . . . It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. . . .

99. Considerable stress was placed by the state on the contention that international law recognises and protects heterosexual marriage only. . . . Thus, reference was made to article 16 of the 1948 Universal Declaration of Human Rights (UDHR) which states:

“16(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”

100. The reference to “men and women” is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time. . . .

114. I conclude that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law The

exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society. . . .

[Justice Sachs ordered that the same-sex marriage judgment be suspended for twelve months to give the legislature time to enact new marriage legislation. Justice O'Regan wrote separately, arguing that the judgment should be implemented through the common law, so that same-sex couples could marry immediately.]

Litigation and Legislation Regulating Marriage in Latin America

Because much of the law coming from courts in Latin America is in Spanish and Portuguese, we provide a narrative account of some of the litigation regarding same-sex marriage in domestic and supranational courts.*

Since 2010, recognition of same-sex marriage has expanded throughout Latin America. As of May 2018, same-sex marriage is lawful in Argentina, Brazil, Colombia, some jurisdictions in Mexico, and Uruguay. Both Chilean and Costa Rican law provide a legal status for same-sex couples, but as of the time of this writing, do not extend full marriage protections. In 2015, Chile introduced civil unions as a mechanism to protect the rights of same-sex cohabiting couples. Under Chilean law, same-sex partners in a civil union may inherit each other's property and claim each other's pension benefits after death. A draft bill expanding marriage to include same-sex couples has been pending before the Chilean Congress since 2017. In contrast, same-sex marriage is constitutionally prohibited in Honduras, Paraguay, Bolivia, and the Dominican Republic, and banned by statute in El Salvador, Guatemala, Nicaragua, Panama, Peru, and Suriname.

In Mexico, Brazil, and Colombia, same-sex marriage was legalized through judicial decisions. Constitutional courts in these countries emphasized three principles in domestic constitutional law in support of same-sex couples' claims: (a) the fundamental right of individuals to pursue same-sex relationships, grounded in the right to human dignity; (b) the importance of adopting a flexible and pluralistic definition of the family, so as to best ensure the most expansive protection for an individual's right to a family; and (c) the state's responsibility to grant families constituted by same-sex couples access to the legal recognition and protections afforded by marriage.

Courts in all three jurisdictions have acted to respect individuals' sexual orientation and have recognized same-sex relationships as key to lesbian and gay identity. In 2011, the Supreme Federal Court of Brazil (A. D. 4277, S. T. F.)

* Translations by Edgar Melgar (Yale Law School, J.D. Class of 2020).

emphasized that sexual orientation is part of an individual's fundamental right to pursue happiness and that the right to pursue a same-sex relationship must be guaranteed as part of the state's responsibility to protect human dignity. That same year, the Mexican Supreme Court upheld a law enacted by the Legislative Assembly for Mexico City which recognized same-sex marriage. The Court explained that "respect for human dignity requires that the State recognize not only an individual's sexual orientation, but also one's right to form a legal union with another under such modalities as one decides to adopt." (Pleno SCJN, Tesis P. XXVII/2011: Matrimonio entre personas del mismo sexo (Agosto 2011)). The Constitutional Court of Colombia relied on its prior rulings, characterizing sexual orientation "as a suspect category usually deployed for discriminatory aims," to conclude that "[b]y virtue of the principles of human dignity, individual liberty, and equality, every human being may contract civil matrimony in accordance with their sexual orientation." (Judgment SU-214 of 2016).

The family is explicitly recognized in the constitutions of Brazil, Mexico, and Colombia. The Brazilian Constitution provides under Article 226 that "the family, which is the foundation of society, shall enjoy special protection from the state." Article 4 of the Mexican Constitution states, "Man and woman are equal before the law, which shall protect the organization and development of the family." Article 42 of the Constitution of Colombia similarly provides that "the family is the fundamental nucleus of society," and "the State and society guarantee the integral protection of the family."

To expand the right to marry to same-sex couples, constitutional courts in Colombia and Brazil re-interpreted existing approaches to marriage in their respective constitutions to be permissive and illustrative, rather than restrictive. Article 42 of the Constitution of Colombia, for example, provides that a "family" "is constituted . . . by the free decision of a man and of a woman to contract matrimony." The Brazilian Constitution, likewise, describes "the stable union between a man and a woman" as a "family entity." In both countries, constitutional courts determined that references to "man and woman" were not to be read to preclude marriage of same-sex couples, but as an emphasis on the equal partnership between partners in any marriage.

In all three jurisdictions, courts have emphasized that the "family" must be understood as a broad, dynamic, and open social concept, responsive to a pluralistic and evolving society. To that end, in a 2011 judgment interpreting Article 4 of the Constitution, the Mexican Supreme Court established that the "Federal Constitution does not refer to or limit itself to a specific type of family . . . such that it is not possible to affirm that a family can only mean a marriage between a man and a woman" (Pleno SCJN, Tesis P. XXI/2011: Matrimonio (Agosto 2011)). The Supreme Federal Court of Brazil similarly underscored that the Constitution must be understood as referring to the family "in a colloquial or proverbial sense, making reference to a domestic unit," regardless of whether it was legally registered or the result of a common law union, or whether formed by a different-sex or same-sex

couple. (Supremo Tribunal Federal, A.D.I. 4277 Distrito Federal, 2011). In Colombia, the Constitutional Court also ruled that “the concept of family cannot be understood in isolation, rather in accordance with the principle of pluralism, because in a plural society there cannot prevail a single and exclusive concept of the family.” (Judgment T-572 of 2009).

The Supreme Court of Mexico underscored the rights of the children of a same-sex couple to have their best interests protected through the marital union of their parents. The Court observed that family “must be protected in its many forms because this protection coincides definitively with the rights of children, such as the right to grow up in a family and the right to not be discriminated against or to be placed in conditions of disadvantage on account of the particular form of their family.” (Pleno SCJN, Tesis P. XXIII/2011).

In Colombia and Mexico, judgments recognizing same-sex couples’ right to marry did not result in immediate access to marriage. In 2011, the Constitutional Court of Colombia ruled in favor of a same-sex couple seeking the right to marry, but limited the right to the parties to the original suit and urged the Congress to take appropriate legislative action by June 21, 2013. (Judgment C-577 of 2011). The Congress did not meet that deadline, and the Court later extended the marriage right to all same-sex couples and retroactively turned all pre-existing same-sex civil unions into marriages. (Judgment SU-214 of 2016). While the Mexican Supreme Court has recognized a federal right to marry for same-sex couples, it has not invalidated existing state constitutional or statutory restrictions on marriage. As a result, married same-sex couples in states with restrictions on marriage can only obtain recognition as a marriage if they first attempt to obtain a marriage license from state authorities, have their argument rejected, and then present a complaint at a federal court claiming that their rights guaranteed by the Federal Constitution have been infringed.

A 2017 advisory opinion by the Inter-American Court of Human Rights (IACtHR) also addressed same-sex marriage. Costa Rica requested that the IACtHR clarify its obligations regarding legal recognition of same-sex couples. The IACtHR ruled that State Parties had to make all forms of civil status equally open to both different-sex and same-sex couples, and if a State Party was unable to do so promptly, it was at least to take steps to grant same-sex couples some form of legal recognition and protection. (Advisory Opinion OC-24/17 Requested by The Republic of Costa Rica (Nov. 24, 2017)). While the Court’s decision is formally binding only on Costa Rica, other parties to the Convention, such as Bolivia, Chile, Ecuador, Guatemala, and Peru, have recognized that the IACtHR’s decisions, including its advisory opinions, form part of the body of jurisprudence that their courts use to interpret their country’s constitutional obligations. The President of the Supreme Court of Justice of Peru, for example, has expressed that the Peruvian government must respect the IACtHR’s ruling in this case.

As of the spring of 2018, litigation on same-sex marriage is currently pending before constitutional courts in Costa Rica and Panama. The Costa Rican government announced that it will abide by the IACtHR's ruling. However, the Superior Court of Notaries of Costa Rica, the administrative body charged with regulating civil registrars and notary publics, has banned its members from performing same-sex marriages. A lawsuit challenging the constitutionality of a statutory ban on same-sex marriage is pending before the Constitutional Court of Panama. The Attorney General has called on the Supreme Court to heed the IACtHR's ruling and recognize same-sex couple's right to marry.

The Path to Marriage for Same-Sex Couples in the United States

The U.S. Constitution does not directly address the family. Nonetheless, the U.S. Supreme Court has long recognized the right to marry as a fundamental right that the Due Process Clause protects. In *Loving v. Virginia* (1967), the U.S. Supreme Court held that Virginia's anti-miscegenation law violated the individual's fundamental due process right to marry and guarantees of equal protection. Almost two decades earlier, the California Supreme Court in *Perez v. Sharp* (1948) had struck down the state's anti-miscegenation law based on federal constitutional grounds and, when doing so, had cited non-domestic law protecting against race discrimination in marital status.

When in the 1990s and the first decade of the twenty-first century, same-sex couples in the United States sought the right to marry, they relied on these inter-racial marriage precedents and argued that their exclusion from marriage violated both due process and equal protection guarantees. Same-sex couples asserted their claims to marriage primarily in state courts under state constitutions. In 2003, the Supreme Judicial Court of Massachusetts, in an opinion written by Chief Justice Margaret Marshall, became the first state supreme court in the country to recognize same-sex couples' right to marry under that state's constitution. In the years that followed, some state courts rejected same-sex couples' claims, while others accepted their claims and ordered the state to allow same-sex couples to marry. Pursuing a middle ground, some states, through court decision or legislation, extended a non-marital status—domestic partnership or civil union—to same-sex couples. Throughout these decades, opponents of same-sex marriage pressed for referenda and in several states—including California—succeeded in amending state constitutions to ban same-sex marriage. Nonetheless, in other states, of which Vermont was the first in 2009, legislatures opened the status of marriage to same-sex couples. And in 2012, Washington became the first state to enact same-sex marriage through a referendum.

While the U.S. struggled over same-sex marriage, Canada also considered the issue and acted to open marriage to same-sex couples. Between 2003 and 2005, courts in eight provinces ruled that bans on same-sex marriage were unconstitutional. In

2004, the Canadian government sent a reference to the Supreme Court of Canada, asking whether proposed federal legislation, which defined marriage without reference to gender, was consistent with the Canadian Charter of Rights and Freedoms and with separation of powers between the federal and provincial governments. The Supreme Court, in its *In re Same-Sex Marriage* decision, confirmed that the proposed legislation was constitutional. In 2005, the Canadian Parliament passed the Civil Marriage Act, which extended marriage to same-sex couples.

Back in the U.S. in 2009, same-sex couples challenged the federal Defense of Marriage Act (DOMA), a 1996 law that prohibited the federal government from recognizing same-sex couples as married for purposes of federal law. Edith Windsor and her same-sex spouse had married in Canada in 2007, and New York recognized their marriage a few years thereafter as a matter of state law. However, while the entry into marriage in the U.S. is regulated as a state-law matter, more than a thousand rights and benefits in federal law turn on marital status. Thus, after her spouse's death, Windsor challenged the federal government's refusal to recognize her marriage for purposes of federal estate taxes. In *US v. Windsor* (2013), Justice Anthony Kennedy wrote the five-person majority decision that struck down DOMA on equal protection grounds. The ruling required the federal government to recognize the valid state-law marriages of same-sex couples as well as same-sex marriages that took place in foreign countries. On the same day that the Court issued the *Windsor* decision, it decided a case involving a federal constitutional challenge to California's ban on same-sex marriage. The Supreme Court did not reach the merits but disposed of the case on procedural grounds, that the challengers lacked standing to pursue their argument in federal court.

After *Windsor*, federal lawsuits challenging same-sex marriage bans proliferated around the country; more than 100 were filed in 2013 and 2014. In 2014, the Sixth Circuit Court of Appeals upheld marriage bans in Ohio, Michigan, Tennessee, and Kentucky. Justice Kennedy, again writing for the five-person majority, held those bans unconstitutional. The excerpt below includes the differing analyses of the majority and dissents.

Obergefell v. Hodges
Supreme Court of the United States
135 S. Ct. 2584 (2015)

Justice Kennedy [joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan] delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex. . . .

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. . . . Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations. . . .

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.”* . . . [T]hese liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. . . .

The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* [*v. Virginia* (1967)] invalidated interracial marriage bans under the Due Process Clause. . . .

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. . . .

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. . . .

Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

As this Court held in *Lawrence* [*v. Texas* (2003)], same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. . . . Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and

* Section 1 of the Fourteenth Amendment to the United States Constitution provides:

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.

education. . . . By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." . . .

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. . . .

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. . . .

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace [H]e afterwards carries [that image] with him into public affairs. . . .

[W]hile the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order. . . .

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. . . . Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. . . .

It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. . . .

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. . . .

[T]hose who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. . . .

Chief Justice Roberts, with whom Justice Scalia and Justice Thomas join, dissenting. . . .

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over

same-sex marriage, making a dramatic social change that much more difficult to accept. . . .

[The] universal definition of marriage as the union of a man and a woman is no historical coincidence. . . .

The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. . . .

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? . . .

[The majority's] discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." . . .

Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." . . .

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it. . . .

[Justice Scalia wrote a dissent in which Justice Thomas joined; he focused on the democratic legitimacy of a Supreme Court judgment which, in his view, was “a naked judicial claim to legislative—indeed, super-legislative—power.” Justice Thomas wrote a dissent in which Justice Scalia joined; he stated that, for constitutional purposes, “liberty” meant freedom from government interference and not an “entitlement to government benefits” of the kind that would flow from affirmative state recognition of marriage. Justice Alito wrote a dissent in which Justices Scalia and Thomas joined. Justice Alito emphasized that “traditional” marriage was long viewed as a way to “encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children.”]

* * *

On June 5, 2018, in a case involving a U.S. citizen and a Romanian citizen married in Belgium, the Court of Justice of the European Union ruled that the word “spouse” under EU law is a “gender-neutral” term referring to any person joined in marriage. (C-673/16). The Court held that:

. . . [T]he obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.

What is Marriage?

Sherif Girgis, Robert P. George, and Ryan T. Anderson (2011)*

What is marriage? Consider two competing views:

Conjugal View: Marriage is the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts—acts that constitute the behavioral part of the process of reproduction, thus uniting them as a reproductive unit. Marriage is valuable in itself, but its inherent orientation to the bearing and rearing of children contributes to its distinctive structure, including norms of

* Excerpted from Sherif Girgis, Robert P. George, and Ryan T. Anderson, *What is Marriage?* 34 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 245 (2011).

monogamy and fidelity. This link to the welfare of children also helps explain why marriage is important to the common good and why the state should recognize and regulate it.

Revisionist View: Marriage is the union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life. It is essentially a union of hearts and minds, enhanced by whatever forms of sexual intimacy both partners find agreeable. The state should recognize and regulate marriage because it has an interest in stable romantic partnerships and in the concrete needs of spouses and any children they may choose to rear. . . .

Revisionists today miss this central question—*what is marriage?*—most obviously when they equate traditional marriage laws with laws banning interracial marriage. . . . In both cases, they argue, there is no rational basis for treating relationships differently, because the freedom to marry the person one loves is a fundamental right. . . .

But the analogy fails: antimiscegenation was about whom to allow to marry, not what marriage was essentially about; and sex, unlike race, is rationally relevant to the latter question. Because every law makes distinctions, there is nothing unjustly discriminatory in marriage law's reliance on genuinely relevant distinctions. . . .

Any legal system that distinguishes marriage from other, non-marital forms of association, romantic or not, will justly exclude some kinds of union from recognition. So before we can conclude that some marriage policy violates . . . moral or constitutional principle[s], we have to determine what marriage actually *is* and why it should be recognized legally in the first place. . . .

As a result, in deciding whether to recognize, say, polyamorous unions, revisionists would not have to figure out first whether the desire for such relationships is natural or unchanging; what the economic effects of not recognizing polyamory would be; whether nonrecognition stigmatizes polyamorous partners and their children; or whether nonrecognition violates their right to the equal protection of the law. With respect to the last question, it is exactly the other way around: Figuring out what marriage is would tell us whether equality requires generally treating polyamorous relationships just as we do monogamous ones—that is, as marriages. . . .

[L]egally enshrining conjugal marriage socially reinforces the idea that the union of husband and wife is (as a rule and ideal) the most appropriate environment for the bearing and rearing of children

If same-sex partnerships were recognized as marriages, however, that ideal would be abolished from our law: no civil institution would any longer reinforce the notion that children need both a mother and father; that men and women on average

bring different gifts to the parenting enterprise; and that boys and girls need and tend to benefit from fathers and mothers in different ways. . . .

Marriage is the kind of union that is shaped by its comprehensiveness and fulfilled by procreation and child-rearing. Only this can account for its essential features, which make less sense in other relationships. Because marriage uniquely meets essential needs in such a structured way, it should be regulated for the common good, which can be understood apart from specifically religious arguments. And the needs of those who cannot prudently or do not marry (even due to naturally occurring factors), and whose relationships are thus justifiably regarded as different in kind, can be met in other ways. . . .

Non-Marital Relationships

This section focuses on legal recognition for relationships that are not officially called “marriage” but are, in significant ways, marriage-like. A threshold question is whether the state has any obligation to furnish rights and benefits that have traditionally been reserved to married couples, to unmarried couples. Does a non-marital regime for same-sex couples meet the government’s obligations as a matter of equality and liberty? If a state creates a non-marital regime for same-sex couples, must it open that regime to different-sex couples who are eligible for marriage?

A question not explicitly raised by the cases but present in debates over relationship recognition is whether only intimate couples, as contrasted with other kinds of relationships, should qualify for rights and benefits under the relevant law. What is the basis on which the state may continue to distinguish between, on one hand, same-sex and different-sex couples, and, on the other hand, other dependency relationships? For example, do constitutional obligations require governments to recognize and accord benefits akin to those provided to married couples to the relationship of two sisters who reside in the same household during their adult lives and pool their finances to support the household?

We begin with the Supreme Court of Connecticut’s 2008 ruling that civil unions were not a constitutionally adequate alternative to marriage for same-sex couples. We then turn to the 2015 European Court of Human Rights (ECtHR) judgment, in which the court held that Italy must provide legal recognition for same-sex couples. We then excerpt an ECtHR 2017 judgment holding that Austria need not extend its civil union laws to different-sex couples who had recourse to marriage.

Kerrigan v. Commissioner of Public Health
Supreme Court of Connecticut
289 Conn. 135 (2008)

[Justice Palmer delivered the opinion of the Court, in which Justices Norcott, Katz, and Harper concurred] . . .

The issue presented by this case is whether the state statutory prohibition against same sex marriage violates the constitution of Connecticut. . . . We conclude that, in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm. . . .

[B]ecause of the long history of discrimination that gay persons have faced, there is a high likelihood that the creation of a second, separate legal entity for same sex couples will be viewed as reflecting an official state policy that that entity is inferior to marriage, and that the committed relationships of same sex couples are of a lesser stature than comparable relationships of opposite sex couples. As a consequence, “retaining the designation of marriage exclusively for opposite-sex couples and providing only a separate and distinct designation for same-sex couples may well have the effect of perpetuating a more general premise [namely] . . . that gay individuals and same-sex couples are in some respects ‘second-class citizens’ who may, under the law, be treated differently from, and less favorably than, heterosexual individuals or opposite-sex couples.” . . .

Although we traditionally have viewed [the right to marry] as limited to a union between a man and a woman, “if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions. It is instructive to recall in this regard that the traditional, well-established legal rules and practices of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities and institutions as constitutionally equal treatment.” . . .

Like these once prevalent views, our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection. Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice.

To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. . . .

[Justice Borden filed a dissenting opinion in which Justice Vertefeuille joined. They opined that sexual orientation should not be considered a “quasi-suspect” class for equal protection analysis because of “the unique and extraordinary political power of gay persons” and that the institution of civil unions was too recent to know whether it provided a constitutionally inadequate alternative to marriage. Justice Vertefeuille filed a dissenting opinion in which she underscored the presumption in favor of the constitutionality of statutes. Justice Zarella filed a dissenting opinion, which focused on the purpose of “traditional” marriage to “privilege and regulate procreative conduct.”]

* * *

In *Judgement No. 138* (2010), the Constitutional Court of Italy held that equality provisions of the Constitution of the Italian Republic protected same-sex couples against discrimination.* The Court did not resolve the question of relationship recognition, concluding:

[I]t is for Parliament to determine—exercising its full discretion—the forms of guarantee and recognition for the aforementioned unions, whilst the Constitutional Court has the possibility to intervene in order to protect specific situations It may in fact be the case that, in relation to particular situations, there is a need to treat married couples and homosexual couples equally, which this Court may guarantee within a review of a provision[']s reasonableness.

The Italian Parliament did not respond with new legislation. The case then went to the European Court of Human Rights; that judgment is excerpted below.

* The Constitution of the Italian Republic provides:

Art. 2: The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.

Art. 3: All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country. . .

Art. 29: The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family. . . .

Oliari v. Italy
European Court of Human Rights (Fourth Section)
No. 18766/11 (2015)

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of: Päivi Hirvelä, *President*, Guido Raimondi, Ledi Bianku, Nona Tsotsoria, Paul Mahoney, Faris Vehabović, Yonko Grozev, *judges*, and Françoise Elens-Passos, *Section Registrar* . . .

10. In July 2008 . . . [Mr. Enrico Oliari and Mr. A.], who were in a committed stable relationship with each other, declared their intention to marry, and requested the Civil Status Office of the Trent Commune to issue the relevant marriage banns. [Their request was rejected.] . . .

12. The two applicants challenged the decision They argued that Italian law did not explicitly prohibit marriage between persons of the same sex, and that, even if that were the case, such a position would be unconstitutional. . . .

16. [On appeal, t]he Constitutional Court considered Article 2 of the Italian Constitution, which provided that the Republic recognises and guarantees the inviolable rights of the person, as an individual and in social groups where personality is expressed, as well as the duties of political, economic and social solidarity against which there was no derogation. . . .

18. Lastly, the court considered that, in respect of Article 3 of the Constitution regarding the principle of equality, the relevant legislation did not create unreasonable discrimination, given that homosexual unions could not be considered equivalent to marriage. Even [European law] did not require full equality between homosexual unions and marriages between a man and a woman, as this was a matter of Parliamentary discretion to be regulated by national law, as evidenced by the different approaches existing in Europe. . . .

42. Italian domestic law does not provide for any alternative union to marriage, either for homosexual couples or for heterosexual ones. The former have thus no means of recognition. . . .

44. Nevertheless, some cities have established registers of “*civil unions*” between unmarried persons of the same sex or of different sexes . . . [h]owever, . . . such registers [have] a merely symbolic value. . . .

55. . . . [T]o date twenty-four countries out of the forty-seven CoE [Council of Europe] member States have already enacted legislation permitting same-sex couples to have their relationship recognised as a legal marriage or as a form of civil union or registered partnership. . . .

65. On 26 June 2015, in the case of *Obergefell . . . v. Hodges . . .*, the Supreme Court of the United States held that same-sex couples may exercise the fundamental right to marry in all States, and that there was no lawful basis for a State to refuse to recognise a lawful same-sex marriage performed in another State on the ground of its same-sex character. . . .

105. . . . [Here, t]he applicants [have] referred to the evolution which had taken place, as a result of which many countries had legislated in favour of some type of institution for same-sex couples . . . [and] noted in particular that the Italian Constitutional Court itself had considered that the state had an obligation to introduce in its legal system some form of civil union for same-sex couples. . . .

107. The applicants considered that the recognition in law of one's family life and status was crucial for the existence and well-being of an individual and for his or her dignity. In the absence of marriage the State should, at least, give access to a recognised union by means of a solemn juridical institution, based on a public commitment and capable of offering them legal certainty. . . .

123. . . . [T]he Government [has] observed that the social and cultural sensitivities of the issue of legal recognition of homosexual couples gave each Contracting State a wide margin of appreciation in the choice of the times and modes of a specific legal framework. . . . [Italy was] the only entity capable of having cognisance of the "common sense" of its own community, particularly concerning a delicate matter which affected the sensitivity of individuals and their cultural identities, and where time was necessarily required to achieve a gradual maturation of a common sense of national community on the recognition of this new form of family in the Convention sense. . . .

126. The Government further submitted that the Italian State had been engaged in developing legal status for same-sex unions since 1986, by means of intense debate and a variety of bills on the recognition of civil unions (also between same-sex couples). . . . They noted that the delicate choices involved in social and legislative policy had to achieve the unanimous consent of different currents of thought and feeling, as well as religious sentiment, which were present in society. It followed that the Italian State could not be held responsible for the tortuous course towards recognition of same-sex unions. . . .

161. . . . Of relevance to the present case is the impact on an applicant of a situation where there is discordance between social reality and the law, the coherence

of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8.* . . .

165. The Court . . . has already held that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship

172. . . . [T]he current available protection is not only lacking in content, in so far as it fails to provide for the core needs relevant to a couple in a stable committed relationship, but is also not sufficiently stable—it is dependent on cohabitation, as well as the judicial (or sometimes administrative) attitude in the context of a country that is not bound by a system of judicial precedent. . . .

173. . . . [T]here exists a conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition on the territory. . . .

174. . . . [I]n the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection—in the form of core rights relevant to a couple in a stable and committed relationship—without unnecessary hindrance. Further, the Court has already held that such civil partnerships have an intrinsic value for persons in the applicants' position, irrespective of the legal effects, however narrow or extensive, that they would produce. . . .

176. . . . [T]he Italian Government have failed to explicitly highlight what, in their view, corresponded to the interests of the community as a whole. . . . They . . .

* 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.

Article 14 of the Convention 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. . . .

referred to “the different sensitivities on such a delicate and deeply felt social issue” . . . [but] categorically denied that the absence of a specific legal framework . . . attempted to protect the traditional concept of family, or the morals of society. . . .

177. . . . While the Court can accept that the subject matter of the present case may be linked to sensitive moral or ethical issues which allow for a wider margin of appreciation in the absence of consensus among member States, . . . the instant case is not concerned with certain specific “supplementary” (as opposed to core) rights which may or may not arise from such a union and which may be subject to fierce controversy in the light of their sensitive dimension. . . .

178. . . . [O]f relevance to the Court’s consideration is also the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe The same rapid development can be identified globally, with particular reference to countries in the Americas and Australasia. The information available thus goes to show the continuing international movement towards legal recognition, to which the Court cannot but attach some importance.

179. . . . [W]hile the Government is usually better placed to assess community interests, in the present case the Italian legislature seems not to have attached particular importance to the indications set out by the national community, including the general Italian population and the highest judicial authorities in Italy. . . .

184. . . . [T]his repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time, potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account.

185. . . . [I]n the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants’ momentous interests as identified above, and in the light of domestic courts’ conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.

186. To find otherwise today, the Court would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective.

187. There has accordingly been a violation of Article 8 of the Convention. . . .

190. All the applicants further complained that they had suffered discrimination as a result of the prohibition to marry applicable to them. . . . To persist

on denying certain rights to same-sex couples only continued to marginalise and stigmatise a minority group in favour of a majority with discriminatory tendencies. . . .

192. The Court notes that despite the gradual evolution of States on the matter (today there are eleven CoE states that have recognised same-sex marriage) the findings reached in the cases mentioned above remain pertinent. In consequence the Court reiterates that Article 12* of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage. . . .

[Judges Mahoney, Tsotsoria, and Vehabović concurred in the judgment on the grounds that the Italian Constitutional Court had ruled that the Italian government must provide legal recognition for same-sex unions and that the failure to do so violated Article 8 by depriving the applicants of a domestic constitutional right.]

Ratzenböck and Seydl v. Austria
European Court of Human Rights (Fifth Section)
No. 28475/12 (2017)

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of: Angelika Nußberger, *President*, Nona Tsotsoria, André Potocki, Yonko Grozev, Mārtiņš Mits, Gabriele Kucsko-Stadlmayer, Lətif Hüseynov, *judges*, and Milan Blaško, *Deputy Section Registrar* . . .

5. The applicants . . . have been living in a stable relationship for many years.

6. . . . [They] lodged an application to enter into a registered partnership under the Registered Partnership Act.

7. . . . [T]he Mayor of Linz dismissed their application . . . as the registered partnership was exclusively reserved for same-sex couples. . . .

9. The applicants subsequently lodged complaints with both the Administrative Court and the Constitutional Court, arguing that marriage was not a suitable option for them, as it was substantially different from a registered partnership. In their view, a registered partnership was in many ways more modern and “lighter” than marriage. [The Austrian Constitutional Court dismissed the complaint because different-sex couples have recourse to marriage.] . . .

12. Under . . . the Civil Code, family relationships are based on the marriage contract, in which two individuals of opposite sex lawfully declare their intention to

* Article 12 of the European Convention on Human Rights provides:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right

live together in indissoluble matrimony, to beget and raise children, and to support each other.

13. The Registered Partnership Act [2010] . . . was introduced in order to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships. . . .

17. The applicants complained, under Article 14 of the Convention taken in conjunction with Article 8, of discrimination based on their sex and sexual orientation on account of their exclusion from the registered partnership, claiming that marriage was not a suitable alternative for them. . . .

31. [T]o arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. . . . [T]he requirement to demonstrate an analogous position does not require that the comparator groups be identical. An applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relevantly similar situation to others treated differently. However, not every difference in treatment will amount to a violation of Article 14. Firstly, the Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or “status,” are capable of amounting to discrimination within the meaning of Article 14. Secondly, a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. . . .

32. . . . Differences based solely on considerations of sexual orientation are unacceptable under the Convention.

33. . . . So far, the Court’s relevant case-law in such matters has originated from applications lodged by same-sex couples, whose complaints concerned the lack of access to marriage and lack of alternative means of legal recognition. The Court’s examination of alleged discriminatory treatment in such matters was thus conducted from the standpoint of a minority group whose access to legal recognition was still an area of evolving rights with no established consensus among the Council of Europe member States

40. . . . The registered partnership was introduced as an alternative to marriage in order to make available to same-sex couples, who remain excluded from marriage, a substantially similar institution for legal recognition. Thus, the Registered Partnership Act in fact counterbalances the exclusion of same-sex couples in terms of access to legal recognition of their relationships which existed before the Act entered into force in 2010. . . . [T]he institutions of marriage and the registered partnership are essentially complementary in Austrian law. . . .

41. The applicants, as a different-sex couple, have access to marriage. This satisfies—contrary to same-sex couples before the enactment of the Registered Partnership Act—their principal need for legal recognition. They have not argued for a more specific need. . . .

44. This being so, the Court considers that the applicants, being a different-sex couple to which the institution of marriage is open while being excluded from concluding a registered partnership, are not in a relevantly similar or comparable situation to same-sex couples who, under the current legislation, have no right to marry and need the registered partnership as an alternative means of providing legal recognition to their relationship. There has therefore been no violation of Article 14 taken in conjunction with Article 8 of the Convention.

[Judge Mits concurred in the judgment and emphasized that because the applicants brought their case only on the grounds of discrimination, the availability of marriage showed that they were not disadvantaged as compared to a same-sex couple. Judge Mits also invoked the law in Member States—that, of the nineteen Council of Europe Member States which, at that time had alternative partnership registration schemes, only eight were open to different-sex couples.]

Joint Dissenting Opinion of Judges Tsotsoria and Grozev

. . . We are unable to follow the majority in this conclusion. We are of the view that for the purposes of the Convention, a same-sex couple and a different-sex couple are in an analogous situation and that any difference in the treatment of these two groups needs to be justified. Consequently, in our view, an analysis was required as to the necessity of the different treatment, namely whether it was objectively and reasonably justified. The respondent Government having presented no sufficiently strong justification in support of the different treatment, we voted for a finding of a violation of Article 14 taken in conjunction with Article 8.

. . . [The majority's] analysis refuses to compare different-sex couples and same-sex couples as a social reality, but rather sees them as groups created by the legislature, which the legislature may choose to treat differently simply because it sees fit to do so. Different-sex couples and same-sex couples are not groups of individuals which have been created by regulatory choices. They are social groups which exist irrespective of regulatory choices and, more importantly, social groups with regard to which the Court has recognised that they “are in principle in a relatively similar or comparable situation as regards their general need for legal recognition and protection of their relationship”

The Court has previously held that the exclusion of same-sex couples from marriage is compatible with the Convention because it is justified, and not because same-sex couples are not in an analogous situation to different sex couples. . . . [T]he Court [has] explicitly stated that these two groups were in an analogous situation.

After reaching this conclusion, the Court then looked into whether the refusal to provide access to marriage was justified, and it agreed that for reasons of history and tradition, it was. The same approach, in our view, should have been followed in the present case. The alternative takes the Court down a road that justifies in perpetuity a separate but equal approach, one for which we see no justification in the Convention and the case-law of the Court. And it is a risky course, as any justification not rooted in hundreds of years of history and tradition, but rather in fresh legislative choices made today, inevitably runs the risk of sliding into stereotypes about the “different” nature of a heterosexual and a homosexual relationship.

THE PARENT-CHILD RELATIONSHIP

Historically, marriage and biological connections provided the two primary avenues to parental recognition. Until the late twentieth century, parentage flowed from marriage in many legal systems. A child born to a married woman ordinarily had two legal parents: the woman and her husband. In many jurisdictions, an unmarried woman who gave birth to a child assumed custodial responsibility for the child, but the child was deemed “illegitimate” and lacked legally enforceable rights with respect to either mother or father.

Starting in the 1960s, courts began to repudiate the discriminatory treatment of non-marital children. Biological connection furnished the basis on which to recognize legal parent-child relationships for children born outside marriage. Today, step-parent families, same-sex-couple-headed families, and families formed through assisted reproduction have made non-biological parent-child relationships more common. As courts and legislatures have confronted these arrangements, they have struggled with the relative weight to assign to traditional markers such as marriage and biological connection. And, when identifying legal parents, law has increasingly relied on concepts of intent (by asking who intends to be the child’s parent) and of function (by asking who functions as the child’s parent).

If marital relationships and genetic connections do not exclusively define parental recognition, then the possibilities increase for multiple individuals to have claims to parenthood. And if same-sex couples can parent together, then the idea that a child has one—and only one—legal mother or father no longer holds. Hence, questions emerge about whether governments can impose gender-based restrictions on parental recognition or limit a child’s parents to two. Some of these questions return us to the discussion about same-sex couples’ access to marriage. Debate continues about whether systems of parental recognition rooted in genetic connection necessarily discriminate against same-sex couples, or whether access to the legal rules of parentage for married couples constitutes a sufficient remedy for any inequality experienced by same-sex couples. This debate often raises questions about whether governments are obligated to recognize as a legal parent an individual who serves in a parental role to the child, even if that individual is neither biologically related to the child nor married to the child’s biological parent.

The cases excerpted below raise constitutional questions about who is a parent and about the status of different models of parental recognition. We focus on legal recognition of parent-child relationships, and not on conflicts between parental rights and children's rights—even as in the debates over parental recognition, children's interests are also at stake and, as some of the discussion below reflects, jurists consider whether the best interest of the child is itself embedded in constitutional or human rights principles.

Unmarried Biological Fathers

In the 1960s and 1970s, courts in Europe and the United States began to overturn “illegitimacy” laws as violating commitments to equality; decisions such as *Marckx v. Belgium* (ECtHR 1979) and *Levy v. Louisiana* (U.S. Supreme Court 1968) are illustrative. Those rulings recognized that non-marital parents and children had legally enforceable rights based on the parent-child relationship. The repudiation of “illegitimacy” was paralleled by the legal recognition of unmarried fathers. Courts held that government could not, consistent with constitutional requirements, refuse to recognize a man as a legal father because he was not married to the child's mother. Yet the question of biology's significance remained, as exemplified by a ruling in the United States that legal protection flowed only to those unmarried biological fathers who “grasped the opportunity” to form a relationship with their child. Under *Lehr v. Robertson* (U.S. Supreme Court 1983), biology alone was insufficient; to gain constitutional protection, the unmarried father had to engage in some act of parenting.

Once courts recognized that in some circumstances unmarried biological fathers have a constitutional interest in the parent-child relationship, subsequent cases addressed conflicts between biological fathers and social fathers. When the biological mother is raising the child with another man (often her husband), does the biological father still have a constitutional right to parenthood? That question is the subject of the cases excerpted below.

Michael H. v. Gerald D. Supreme Court of the United States 491 U.S. 110 (1989)

[Justice Scalia, joined by Chief Justice Rehnquist and joined in part by Justices O'Connor and Kennedy, and by Justice Stevens who concurred in the judgment, delivered the opinion of the Court] . . .

[In 1976] Carole D., an international model, and Gerald D., a top executive in a French oil company, were married. . . . In the summer of 1978, Carole became involved in an adulterous affair with a neighbor, Michael H. In September, 1980, she conceived a child, Victoria D., who was born on May 11, 1981. Gerald was listed as father on the birth certificate, and has always held Victoria out to the world as his

daughter. Soon after delivery of the child, however, Carole informed Michael that she believed he might be the father. . . .

Carole and Michael had blood tests of themselves and Victoria, which showed a 98.07% probability that Michael was Victoria's father. In January, 1982, Carole visited Michael in St. Thomas. . . . [The three lived together for eight months and] Michael held Victoria out as his child. . . .

California law, like nature itself, makes no provision for dual fatherhood. Michael was seeking to be declared the father of Victoria. The immediate benefit he evidently sought to obtain from that status was visitation rights. . . . But if Michael were successful in being declared the father, other rights would follow—most importantly, the right to be considered as the parent who should have custody, a status which “embrace[s] the sum of parental rights with respect to the rearing of a child, including the child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship.” . . .

Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship. This argument is, of course, predicated on the assertion that Michael has a constitutionally protected liberty interest in his relationship with Victoria. . . .

Michael reads [the Court's prior case law], as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship—factors that exist in the present case as well. We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family. . . .

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts. . . .

[The attorney representing the interests of the child, Victoria, asserted a Due Process claim for the child to have relationships with both men as her fathers.] We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here

because, even assuming that such a right exists, Victoria's claim must fail. Victoria's due process challenge is, if anything, weaker than Michael's. Her basic claim is not that California has erred in preventing her from establishing that Michael, not Gerald, should stand as her legal father. Rather, she claims a due process right to maintain filial relationships with both Michael and Gerald. This assertion merits little discussion, for, whatever the merits of the guardian *ad litem*'s belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country. . . .

[Justice Stevens concurred in the judgment. While he believed, unlike the majority, that Michael H. had a constitutionally protected right to assert his paternity, he viewed California's statutory scheme as sufficient to protect that right. Justice Brennan authored a dissent in which Justices Marshall and Blackmun joined. Justice Brennan criticized the majority for focusing on whether the rights of unmarried biological fathers who entered into relationships with married women were traditionally protected, so as to form a "liberty interest" under the Fourteenth Amendment. Instead he argued, "[w]here the interest under consideration is a parent-child relationship, we need not ask, over and over again, whether that interest is one that society traditionally protects," and would have granted Michael H. a hearing to assert his parental rights. Justice White authored a dissent in which Justice Brennan joined. Justice White challenged the holding that a man's parental rights could hinge on whether the child's mother was in a relationship with another man at the time of the birth. Justice White rejected the "unitary family" justification for denying Michael H. parental rights.]

* * *

In 2012, the Federal Constitutional Court of Germany (1 BvR 1493:96) held that an unmarried biological father could not assert a claim to parental recognition in cases where his claim was "at odds with the welfare of the 'social family.'" To permit such a claim would not be "in the interest of preserving an existing family cohesion between the child and its legal parents." The German Court held that "[h]aving two fathers at the same time, each of whom together with the mother bears the same constitutionally allocated parental responsibility for the child, does not correspond to the idea of parental responsibility" under the Basic Law. This question went before the European Court of Human Rights, whose judgment is excerpted below.

Ahrens v. Germany
European Court of Human Rights (Fifth Section)
No. 45071/09

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of: Dean Spielmann, *President*, Elisabet Fura, Boštjan M. Zupančič, Mark Villiger,

Ganna Yudkivska, Angelika Nußberger, André Potocki, *judges*, and Claudia Westerdiek, *Section Registrar* . . .

6. . . . [In] 2003 the applicant had a relationship with Ms P. In February 2004 Ms P. started a relationship with Mr M. In September 2004 Ms P. and Mr M. moved into a joint household. In October and November 2004 the applicant had intimate contact with Ms P. In December 2004 Ms P. informed the applicant that she was pregnant.

7. On 28 June 2005 Mr M., with the consent of Ms P., acknowledged paternity of Ms P.'s future child. On 10 August 2005 Ms P. gave birth to a daughter, R. Ms P. and Mr M. jointly exercise parental authority and are bringing up the child together.

8. On 27 October 2005 the applicant lodged an action to challenge Mr M.'s paternity, submitting a statutory declaration that he had had sexual intercourse with the child's mother during the period of conception. Mr M. submitted in reply that he lived with the child in a social-familial relationship and that he assumed full parental responsibility for the child, even if he was not her biological father. . . .

19. . . . [The unmarried biological father's claim to paternity was rejected, because a]ccording to the intentions of the legislature, who were guided by the Federal Constitutional Court's case-law, external disturbances should be avoided in the child's best interests and in the interest of the already existing family relationship. The constitutional rights of the biological father should not prevail over the equally protected rights of the legal father, if and as long as the latter assumed parental responsibility within the meaning of social parentage. . . .

26. Under [the civil code] . . . , the legal father, the mother and the child can request the examination of paternity by genetic testing. The outcome of these proceedings does not change the legal status of the persons involved. However, no such right is granted to a third person alleging that he is the biological father. . . .

37. According to the Court's case-law, where the existence of a family tie had been established, the State had to act in a manner calculated to enable this tie to be developed. In the applicant's view, the legislature had disrespected this tenet and the principle of proportionality by allowing the mother to choose another man as the child's legal father and to deny the applicant any factual relationship with his child. On the basis of the law as it had been applied by the domestic courts, the applicant had practically no possibility of becoming the legal father of his child, as the courts had let the factual and legal situation which had been one-sidedly created by the mother prevail over the applicant's interests as a biological father.

38. This situation had been further exacerbated by the fact that the applicant bore the burden of proof that no social and family relationship existed between the child and his legal father and that he had been precluded from challenging paternity in

the future even if the relationship between the mother and the legal father should come to an end and the legal father should lose interest in the child. . . .

44. The Government . . . maintained that mere biological kinship, without any close personal relationship, was insufficient to engage the protection of Article 8. In the present case, R. had lived together with her mother and her legal father in a stable family unit. . . .

55. . . . [Witnesses] contended that Ms P. had not had any relationship with the applicant during her pregnancy. Neither had they entertained a relationship at the time when the child had been conceived. After their separation, they had only had occasional sexual contact. When first learning about Ms P.'s pregnancy, the applicant had invited her to have an abortion. . . .

60. . . . Article 8 protects not only "family" but also "private" life. The Court has found on numerous occasions that proceedings concerning the establishment of or challenge against paternity concerned that man's private life under Article 8, which encompasses important aspects of one's personal identity. . . .

71. . . . [T]he Court notes that the applicant had a protected interest in establishing the truth about an important aspect of his private life, namely the fact of his being R.'s father, and having it recognised in law. . . .

74. . . . Article 8 of the Convention can be interpreted as imposing on the member States an obligation to examine whether it is in the child's best interests to allow the biological father to establish a relationship with his child, for example by granting contact rights. Accordingly, the biological father must not be completely excluded from his child's life unless there are relevant reasons relating to the child's best interests to do so. However, this does not necessarily imply a duty under the Convention to allow the biological father to challenge the legal father's status. . . .

82. It follows from the above considerations that there has been no violation of Article 8 of the Convention in the present case.

83. The applicant complained that [the German law] . . . discriminated against him in his capacity as a biological father compared to the mother, the legal father and the child. . . .

89. . . . [T]he Court observes that the main reason relied upon by the Government in treating the applicant differently from the mother, the legal father and the child with regard to the challenging of paternity was the aim of protecting the child and her social family from external disturbances. . . . [T]he Court considers that the decision to give the existing family relationship between the child and her legal parents precedence over the relationship with her biological father falls, insofar as the legal status is concerned, within the State's margin of appreciation.

90. There has accordingly been no violation of Article 14 in conjunction with Article 8 of the Convention.

Non-Biological Parents

As the cases excerpted above reflect, in many jurisdictions, parentage is established through marriage, biological connection, or adoption. Adoption is the primary way for individuals to have legal parent-child relationships with children to whom they are not biologically connected. As recognition of same-sex relationships has grown, many jurisdictions have authorized individuals in same-sex relationships to adopt the biological children of their partner.

In some jurisdictions, those without a biological connection to a child have been able to become legal parents without adopting a child. Of course, marriage has traditionally allowed a man without a biological connection to be legally recognized as a parent of a child. California treated Gerald D. as a legal father because he was married to Carole, the biological mother. With the onset of same-sex marriage, the question arises as to whether the same marital presumption of parentage must, as a matter of constitutional law, be applied to same-sex couples. While Gerald's situation was unusual (in that husbands are ordinarily the biological fathers of the children to whom their wives give birth), in same-sex couples, the birth mother's spouse is generally not the child's genetic parent. The question then becomes whether that spouse has constitutional rights to the status of a legal mother because of her marriage.

In the excerpt that follows, *Pavan v. Smith*, the U.S. Supreme Court considered whether Arkansas must issue birth certificates that list both women in a married same-sex couple as parents when one of them gives birth to a child conceived with donor sperm. Note that in the U.S., birth certificates are evidence of parentage, but they do not legally establish parentage. The Arkansas Supreme Court had reasoned that the U.S. Supreme Court's *Obergefell* decision (excerpted above) related only to the state's obligation to issue marriage licenses to same-sex couples and not to rules regulating marital parentage. Accordingly, the case invited the U.S. Supreme Court to clarify the meaning of *Obergefell*.

Claims to religious exemptions by those opposed to same-sex marriage have also produced debate over the impact of *Obergefell*. In the United States, what are called "public accommodations laws" require businesses and organizations open to the public not to discriminate on a number of grounds, including race, religion, sex, and, in some states, sexual orientation. A series of Supreme Court decisions have protected clubs when they are either so private as not to admit strangers or when the group is constituted to express a political point of view. Other cases address the scope of constitutional protections accorded religious beliefs. In June 2018, the U.S. Supreme

Court issued a narrow ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), a case involving a baker who refused on religious grounds to sell wedding cakes to same-sex couples. The Court held that the baker's constitutional Free Exercise rights were violated because the Colorado Civil Rights Commission, in enforcing the state's antidiscrimination law, failed to consider the religious objection with neutrality and respect for religion but instead exhibited hostility toward religion. Because it ruled on this case-specific basis, the Court did not resolve the broader question of whether and when the government can constitutionally apply antidiscrimination law to business owners opposed on religious grounds to same-sex marriage.

Pavan v. Smith
Supreme Court of the United States
137 S. Ct. 2075 (2017)

Per Curiam

As this Court explained in *Obergefell v. Hodges* (2015), the Constitution entitles same-sex couples to civil marriage “on the same terms and conditions as opposite-sex couples.” In the decision below, the Arkansas Supreme Court considered the effect of that holding on the State's rules governing the issuance of birth certificates. When a married woman gives birth in Arkansas, state law generally requires the name of the mother's male spouse to appear on the child's birth certificate—regardless of his biological relationship to the child. According to the court below, however, Arkansas need not extend that rule to similarly situated same-sex couples: The State need not, in other words, issue birth certificates including the female spouses of women who give birth in the State. Because that differential treatment infringes *Obergefell*'s commitment to provide same-sex couples “the constellation of benefits that the States have linked to marriage,” we reverse the state court's judgment. . . .

Justice Gorsuch, issued a dissenting opinion in which Justices Thomas and Alito joined:

. . . [N]othing in *Obergefell* spoke (let alone clearly) to the question whether . . . the Arkansas Code, or a state supreme court decision upholding it, must go. The statute in question establishes a set of rules designed to ensure that the biological parents of a child are listed on the child's birth certificate. Before the state supreme court, the State argued that rational reasons exist for a biology based birth registration regime, reasons that in no way offend *Obergefell*—like ensuring government officials can identify public health trends and helping individuals determine their biological lineage, citizenship, or susceptibility to genetic disorders. In an opinion that did not in any way seek to defy but rather earnestly engage *Obergefell*, the state supreme court agreed. And it is very hard to see what is wrong with this conclusion for, just as the state court recognized, nothing in *Obergefell* indicates that a

birth registration regime based on biology, one no doubt with many analogues across the country and throughout history, offends the Constitution. . . .

* * *

What happens to women in same-sex couples who do not marry? Will the non-biological co-parent be recognized as a legal parent without adopting the child? In 2017, the Uniform Law Commission, an organization in the United States that promulgates model acts for adoption by state legislatures in a variety of areas, issued the Uniform Parentage Act, prompted by the need to update parentage laws in light of *Obergefell v. Hodges*. The 2017 model act includes provisions for the recognition of non-biological parents inside and also outside marriage. In 2018, Washington State became the first state to adopt the provisions of the act relevant to this discussion.

Uniform Parentage Act (2017)

United States

Prefatory Note

. . . [UPA (2017)] makes five major changes to the [previous] UPA. First, UPA (2017) seeks to ensure the equal treatment of children born to same-sex couples. . . . [The Previous UPA] was written in gendered terms, and its provisions presumed that couples consist of one man and one woman. For example, [one section] . . . provided that “[a] man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is a parent of the resulting child.”

In *Obergefell v. Hodges* (2015), the United States Supreme Court held that laws barring marriage between two people of the same sex are unconstitutional. . . . [I]n June 2017, the Supreme Court held that a state may not, consistent with *Obergefell*, deny married same-sex couples recognition on their children’s birth certificates that the state grants to married different-sex couples. *Pavan v. Smith*, (2017). After *Obergefell* and *Pavan*, parentage laws that treat same-sex couples differently than different-sex couples may be unconstitutional. For example, in September 2017 the Arizona Supreme Court held that refusing to apply that state’s marital presumption equally to same-sex spouses would violate the Due Process and Equal Protection Clauses of the United States Constitution. . . .

UPA (2017) updates the act to address this potential constitutional infirmity by amending provisions throughout the act so that they address and apply equally to same-sex couples. These changes include broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles to make them gender-neutral. [The acknowledgement procedure is the most common way that the parentage of non-marital children is established in the U.S.]

Second, UPA (2017) includes a provision for the establishment of a de facto parent as a legal parent of a child. Most states recognize and extend at least some parental rights to people who have functioned as parents to children but who are unconnected to those children through either biology or marriage. . . .

Third, UPA (2017) includes a provision that precludes establishment of a parent-child relationship by the perpetrator of a sexual assault that resulted in the conception of the child. . . .

Fourth, UPA (2017) updates the surrogacy provisions to reflect developments in that area. . . . UPA (2017) updates the surrogacy provisions to make them more consistent with current surrogacy practice[. The relevant Article regulates and permits both genetic (often referred to as “traditional”) and gestational surrogacy agreements. But UPA (2017) imposes additional safeguards and requirements on genetic surrogacy agreements.] . . .

Finally, UPA (2017) includes a new article . . . that addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers. . . .

SECTION 204. PRESUMPTION OF PARENTAGE.

(a) An individual is presumed to be a parent of a child if:

(1)(A) . . . the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage . . . or

(2) the individual resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual’s child. . . .

SECTION 301. ACKNOWLEDGMENT OF PARENTAGE.

A woman who gave birth to a child and an alleged genetic father of the child, intended parent under [the Article on assisted reproduction], or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child. . . .

SECTION 609. ADJUDICATING CLAIM OF DE FACTO PARENTAGE OF CHILD.

. . . (d) . . . [T]he court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by clear-and-convincing evidence that:

(1) the individual resided with the child as a regular member of the child’s household for a significant period;

- (2) the individual engaged in consistent caretaking of the child;
- (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
- (4) the individual held out the child as the individual's child;
- (5) the individual established a bonded and dependent relationship with the child which is parental in nature;
- (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and
- (7) continuing the relationship between the individual and the child is in the best interest of the child. . . .

* * *

UPA (2017) aimed to encourage states toward greater recognition of same-sex and non-biological parents. The recognition of non-biological parents is connected to the goal of sexual orientation equality. Same-sex couples are not similarly situated to different-sex couples as a matter of biological parenthood; they “necessarily include a parent without a gestational or genetic tie to the child, and thus are especially vulnerable in a parentage regime where recognition turns on biological connection.”*

In *Brooke S.B. v. Elizabeth A.C.C.* (N.Y. Court of Appeals 2016), the highest court of New York acknowledged this reality: “Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing [as a legal parent], as only one can be biologically related to the child. By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption.” The court used a test of “pre-conception intent” to decide whether to extend parental recognition to an unmarried non-biological mother: “where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive parent has standing to seek visitation and custody [as a parent under state law].” The court explained that such an approach “ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.” In contrast, other state courts have ruled that unmarried non-biological co-parents are not legal parents and that the state’s refusal to bestow parentage on them does not violate constitutional guarantees.

For same-sex couples with children, there is ordinarily an individual outside the couple with a genetic connection to the child. If this individual is a donor, he may

* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE LAW JOURNAL 2260, 2297 (2017).

lack parental rights. But if he possesses parental rights, the non-biological mother in the same-sex couple may struggle for parental recognition. Perhaps both individuals can be legal parents. Below we consider how Canadian courts and lawmakers have addressed these issues.

AA v. BB
Court of Appeals for Ontario
2007 ONCA 2 (2007)

[Justice Rosenberg delivered the judgment, joined by Justice McMurty and Judge Labrosse:]

Five-year-old D.D. has three parents: his biological father and mother (B.B. and C.C., respectively) and C.C.'s partner, the appellant A.A. A.A. and C.C. have been in a stable same-sex union since 1990. In 1999, they decided to start a family with the assistance of their friend B.B. The two women would be the primary caregivers of the child, but they believed it would be in the child's best interests that B.B. remain involved in the child's life. D.D. was born in 2001. He refers to A.A. and C.C. as his mothers. . . .

A.A. seeks a declaration that she is a mother of D.D. She and C.C. have not applied for an adoption order because, if they did so, B.B. would lose his status as D.D.'s parent by reason of . . . [the Child and Family Services Act, which] provides: "For all purposes of law, as of the date of the making of an adoption order . . . the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made and that person ceases to be the parent of the adopted child, except where the person is the spouse of the adoptive parent." . . .

Perhaps one of the greatest fears faced by lesbian mothers is the death of the birth mother. Without a declaration of parentage or some other order, the surviving partner would be unable to make decisions for their minor child, such as critical decisions about health care

The application judge accepted that the relationship of mother and child need not be biological or genetic, but after a careful consideration of the legislative scheme and the applicable rules of interpretation, he held that [the law] contemplates only one mother of a child. He relied principally on the use of the words "the father" and "the mother" . . . , which connote a single father and a single mother. . . . I agree with his analysis of the statute. . . .

The [1990 law at issue] was intended to remove disabilities suffered by children born outside of marriage . . . [it] was progressive legislation, but it was a product of its time. It was intended to deal with the specific problem of the incidents of illegitimacy—the need to "remove, as far as the law is capable of doing so, a stigma which has been cast on children who in the nature of things cannot be said to bear

responsibility for it.” The possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar scheme. The Act does not deal with, nor contemplate, the disadvantages that a child born into a relationship of two mothers, two fathers or as in this case two mothers and one father might suffer. . . .

The court’s inherent *parens patriae* jurisdiction [a common law power of judges to fill gaps in legislation that put a child at risk] may be applied to rescue a child in danger or to bridge a legislative gap. This is not a case about a child being in danger. If the *parens patriae* authority were to be exercised it would have to be on the basis of a legislative gap. . . .

The [1990 law] was not about the status of natural parents but the status of children. The purpose of the legislation was to declare that all children should have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. . . .

Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the . . . legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child’s parents as adopting parents or “natural” parents. The [law], however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide. . . .

It is contrary to D.D.’s best interests that he is deprived of the legal recognition of the parentage of one of his mothers. There is no other way to fill this deficiency except through the exercise of the *parens patriae* jurisdiction. . . . [Therefore, the Court of Appeals recognized all three adults as D.D.’s legal parents.]

Ontario All Families are Equal Act (2016)

Entered into Force January 1, 2017

. . . 8. (1) If the birth parent of a child conceived through assisted reproduction had a spouse at the time of the child’s conception, the spouse is, and shall be recognized in law to be, a parent of the child. . . .

9. (1). . . [A] “pre-conception parentage agreement” means a written agreement between two or more parties in which they agree to be, together, the parents of a child yet to be conceived.

(2) This section applies with respect to a pre-conception parentage agreement only if, (a) there are no more than four parties to the agreement; (b) the intended birth parent is not a surrogate, and is a party to the agreement; (c) if the child is to be conceived through sexual intercourse but not through insemination by a sperm donor,

the person whose sperm is to be used for the purpose of conception is a party to the agreement; and (d) if the child is to be conceived through assisted reproduction or through insemination by a sperm donor, the spouse, if any, of the person who intends to be the birth parent is a party to the agreement, subject to subsection (3) [providing that “before the child is conceived, the birth parent’s spouse provides written confirmation that he or she does not consent to be a parent of the child and does not withdraw the confirmation”]

Reproductive Technology and Conflicts over Surrogacy

With the development and use of assisted reproductive technologies (ART), courts and legislatures have been called on to address (1) which methods of family formation law must permit, (2) who is able to access the permitted methods of family formation, and (3) what principles govern the recognition of parent-child relationships that result from use of these methods of family formation. Below, we begin with cases considering limits on access to ART and on individuals’ claims of rights to become a parent. We then turn to disputes involving parental recognition after the parties have used ART.

The cases on parental recognition require analyses of various principles that animate legal rules. If *biology* governs parentage, the question becomes the weight to be accorded to pregnancy and birth, as contrasted with genetics, as they may diverge. If *intent* governs parentage, then the person who participated in assisted reproduction with the intent to be a parent gains the legal status of parent of the resulting child. *Function* may be a factor, such that law treats as a parent an individual who forms an actual parental relationship with the child.

In some disputes over parental recognition, the individuals involved agree on who is a parent (and who is not), but the state refuses to grant recognition in a way that meets the parties’ expectations. On other occasions, the relevant parties disagree on the question of who is a parent. In both kinds of disputes, individuals raise constitutional claims to be recognized as a parent, and sometimes the children involved also raise their own claims. In the excerpts below, the courts address how principles of equality and autonomy intersect with a state’s interest in deterring or regulating certain reproductive practices.

S.H. v. Austria European Court of Human Rights (Grand Chamber) No. 57813/00 (2011)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Jean-Paul Costa, *President*, Nicolas Bratza, Françoise Tulkens, Josep Casadevall, Elisabeth

Steiner, Elisabet Fura, Danutė Jočienė, Ján Šikuta, Dragoljub Popović, Ineta Ziemele, Päivi Hirvelä, Mirjana Lazarova Trajkovska, Ledi Bianku, Nona Tsotsoria, Işıl Karakaş, Guido Raimondi, Vincent A. De Gaetano, *judges*, and Michael O’Boyle, *Deputy Registrar* . . .

49. The applicants complained that the prohibition [under a 1992 Austrian law] of heterologous artificial procreation techniques for *in vitro* fertilisation [which prohibited the use of genetic material, such as ova and sperm, from donors] had violated their rights under Article 8 of the Convention. . . .

82. The Court considers that the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is . . . protected by Article 8, as such a choice is an expression of private and family life. . . .

84. . . . [S]ince the [Austrian] Constitutional Court’s decision in [1998 upholding the prohibition on heterologous ART,] many developments in medical science have taken place to which a number of Contracting States have responded in their legislation. Such changes might therefore have repercussions on the Court’s assessment of the facts. However, it is not for the Court to consider whether the prohibition of sperm and ovum donation at issue would or would not be justified today under the Convention. The issue for the Court to decide is whether these prohibitions were justified at the time they were considered by the Austrian Constitutional Court. . . .

97. Since the use of *in vitro* fertilisation treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the present case touch on areas where there is not yet clear common ground among the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one

100. The Court considers that concerns based on moral considerations or on social acceptability must be taken seriously in a sensitive domain like artificial procreation. However, they are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique such as ovum donation. . . .

103. The Court considers that the field of artificial procreation is developing particularly fast both from a scientific point of view and in terms of the development of a legal framework for its medical application. It is for this reason that it is particularly difficult to establish a sound basis for assessing the necessity and appropriateness of legislative measures, the consequences of which might become apparent only after a considerable length of time. It is therefore understandable that the States find it necessary to act with particular caution in the field of artificial procreation. . . .

115. Having regard to the above considerations, the Court therefore concludes that neither in respect of the prohibition of ovum donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for *in vitro* fertilisation . . . had the Austrian legislature, at the relevant time, exceeded the margin of appreciation afforded to it.

116. Accordingly, there has been no breach of Article 8 of the Convention as regards all of the applicants.

[Judge De Gaetano concurred in the judgment but wrote separately to express concern over the possibility of treating the creation of human life as a mere “medical or laboratory technique” and also to reemphasize the importance of the value and dignity of every person, including the child. Judges Tulkens, Hirvelä, Lazarova Trajkovska, and Tsotsoria, dissented on the grounds that the Court should not have assessed the scientific evidence and European consensus at the time that the Austrian legislature passed the Act on IVF, but rather should have reviewed the question based on present circumstances. The dissenters argued that by 2011, European consensus was clearly on the side of access to reproductive technologies and that the Austrian law was out of compliance with the requirements of Article 8.]

Artavia Murillo v. Costa Rica

Inter-American Court of Human Rights

Inter-Am. Ct. H.R. (ser. C) No. 257 (2012)

[T]he Inter-American Court of Human Rights . . . composed of the following judges: Diego García-Sayán, President; Leonardo A. Franco, Judge; Margarette May Macaulay, Judge; Rhadys Abreu Blondet, Judge; Alberto Pérez Pérez, Judge, and Eduardo Vio Grossi, Judge; also present: Pablo Saavedra Alessandri, Secretary; and Emilia Segares Rodríguez, Deputy Secretary; . . . delivers this Judgment . . . :

. . . 63. Assisted reproductive techniques or procedures are a group of different medical treatments used to help infertile individuals and couples achieve pregnancy; they include “the manipulation of both ovocytes and spermatozoids, or embryos . . . for the establishment of a pregnancy.” . . . Assisted reproduction techniques do not [for present purposes] include assisted or artificial insemination. . . .

71. . . . [Under Costa Rican law], any citizen may file an action of unconstitutionality against a norm “when, owing to the nature of the matter, there is no direct individual injury, or when it relates to the defense of diffuse interests or those that relate to the community as a whole.” . . . [In] 1995, Hermes Navarro del Valle filed an action of unconstitutionality against the Executive Decree that regulated IVF in Costa Rica, using different arguments relating to the violation of the right to life. . . . The arguments put forward in the action for unconstitutionality included the following: . . . “the generalized practice [of IVF] violates human life . . . ; “human life begins from the moment of fertilization; therefore, following conception, any

elimination or destruction, whether voluntary or arising from the negligence of the doctor or the inaccuracy of the technique used—would result in a clear violation of the right to life contained” in the Costa Rican Constitution . . . ; “the business of in vitro fertilization [is] a business, . . . it does not provide a cure for . . . a disease, and [is] not an emergency treatment to save a life”

[The Constitutional Court of Costa Rica held that the executive decree permitting IVF was unconstitutional and violated the right to life and human dignity.]

142. Article 11* of the American Convention requires the State to protect individuals against the arbitrary actions of State institutions that affect private and family life . . . [and] this Court has interpreted Article 7 of the American Convention broadly when indicating that it includes a concept of liberty in a broad sense as the ability to do and not do all that is lawfully permitted. . . . [E]very person has the right to organize, in keeping with the law, his or her individual and social life according to his or her own choices and beliefs. . . .

143. The scope of the protection of the right to private life has been interpreted in broad terms by the international human rights courts, when indicating that this goes beyond the right to privacy. The protection of private life encompasses a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships. . . . [T]he Court has indicated that motherhood is an essential part of the free development of a woman’s personality. . . .

150. . . . [T]he right to private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right. . . . It is worth mentioning that the General Assembly of the United Nations, in its declaration on this right, described its connection to the satisfaction of the material and spiritual needs of all sectors of the population. . . . The right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, de [j]ure or de facto, to exercise the reproductive decisions that correspond to each individual. . . .

* Article 11 of the American Convention on Human Rights provides:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

272. The . . . decision to have biological children using assisted reproduction techniques forms part of the sphere of the right to personal integrity and to private and family life. In addition, the way in which this decision is arrived at is part of the autonomy and identity of a person, in both the individual dimension and as part of a couple. . . .

273. . . . [T]he “absolute right to life of the embryo” as grounds for the restriction of the rights involved, is not supported by the American Convention; thus, it is not necessary to make a detailed analysis of each of these requirements, or to assess the disputes regarding the declaration of unconstitutionality in the formal sense based on the presumed violation of the principle of legal reserve. Despite the foregoing, the Court considers it appropriate to indicate the way in which the sacrifice of the rights involved in this case was excessive in comparison to the benefits referred to with the protection of the embryo. . . .

282. . . . [T]he psychological integrity of the individual is harmed by denying him or her the possibility of acceding to a procedure that makes it possible to exercise the desired reproductive freedom. . . .

284. . . . [D]ifferentiated impacts also exist[] in relation to the situation of disability, gender and financial situation, aspects related to the factors alleged by the parties regarding possible indirect indiscrimination in the instant case. . . .

298. . . . [An expert witness] explained that “[t]he gender identity model is socially defined and molded by the culture; . . . women are raised and socialized to be wives and mothers, to take care of and attend to the intimate world of affections. The ideal for women, even nowadays, is embodied in sacrifice and dedication, and the culmination of these values is represented by motherhood and the ability to give birth. . . . A woman’s fertility is still considered by much of society to be something natural that admits no doubts. . . . The impact of infertility in women is usually greater than in men because . . . motherhood has been assigned to women as an essential part of their gender identity, transformed into their destiny. The burden of their self-blame increased exponentially when the ban on IVF arose. . . .”

299. . . . [A]lthough infertility can affect both men and women, the use of assisted reproduction technologies is especially related to a woman’s body. Even though the ban on IVF is not expressly addressed at women, and thus appears neutral, it has a disproportionately negative impact on women. . . .

302. The Court emphasizes that these gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them. The Court is not validating these stereotypes and only recognizes them and defines them in order to describe the disproportionate impact [on women] of the interference caused by the Constitutional Chamber’s judgment. . . .

314. A weighing up of the severity of the limitation of the rights involved in this case as compared to the importance of the protection of the embryo allows it to be affirmed that the effects on the rights to personal integrity, personal liberty, private life, intimacy, reproductive autonomy, access to reproductive health services, and to found a family is severe and entails a violation of these rights because, in practice, they are annulled for those persons whose only possible treatment for infertility is IVF. In addition, the interference had a differentiated impact on the victims owing to their situation of disability, gender stereotypes and, for some of the victims, to their financial situation. . . .

[Judge Eduardo Vio Grossi dissented on the grounds that “human life” under the American Convention on Human Rights includes embryos, which must be protected. Because IVF presents significant “risk of death” to fertilized embryos, Judge Vio Grossi argued that access to such forms of reproductive technologies could not constitute a protected right under the Convention.]

A.B. v. Minister for Social Development
Constitutional Court of South Africa
CCT 155/15 (2016)

[Justices 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, their opinion is excerpted below.]

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. However, on consulting an attorney, AB was informed 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 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. . . .

**Report of the Special Rapporteur on the Sale and Sexual Exploitation
of Children, Including Child Prostitution, Child Pornography, and
Other Child Sexual Abuse Material**

United Nations (January 15, 2018)*

. . . The present study . . . examines when surrogacy arrangements constitute the sale of children under international human rights law and as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. . . . The study notes the presence of abusive practices in both unregulated and regulated contexts. In order to strengthen the legitimacy and viability of the fundamental norm prohibiting the sale of children, the study provides analysis and recommendations on implementing this prohibition as it relates to surrogacy. . . .

The analysis of sale of children . . . is applicable to both international and national surrogacy, traditional and gestational surrogacy, and commercial and altruistic surrogacy. The study concentrates on the prohibition of sale of children and child rights as per international standards and protection issues that arise under contemporary surrogacy practice. The implications of surrogacy for women's rights is beyond the scope of the present study, except as regards issues that affect both children's rights and women's rights, or certain clear rights violations that illuminate regulatory or enforcement issues. The Special Rapporteur echoes the position of other human rights experts who have stated that discrimination against women, through the instrumentalization of their bodies for cultural, political, economic and other purposes, including when rooted in patriarchal conservatism, cannot be accepted. . . .

The cross-border patterns of international surrogacy arrangements are diverse. Commonly, intending parents from developed countries, including Australia, Canada, France, Germany, Israel, Italy, Norway, Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America, have engaged in commercial international surrogacy arrangements with surrogate mothers in developing countries, such as Cambodia, India, the Lao People's Democratic Republic, Nepal and Thailand. However, California and other jurisdictions in the United States are centres for commercial international surrogacy arrangements, as are Georgia, the Russian Federation and Ukraine, creating a different set of cross-border relationships. In addition, intending parents from China frequently engage in commercial surrogacy in South-East Asia and the United States. All of these patterns pose human rights concerns.

* 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 (January 15, 2018).

National laws governing surrogacy vary across a spectrum from prohibitionist to permissive. This variation occurs across national boundaries and sometimes within national boundaries, as surrogacy is sometimes regulated primarily by local law (i.e. in Australia, Mexico and the United States). The most prohibitionist jurisdictions, such as France and Germany, ban all forms of surrogacy, including commercial and altruistic, and traditional and gestational. Most jurisdictions with laws governing surrogacy, including Australia, Greece, New Zealand, South Africa and the United Kingdom, prohibit “commercial,” “for-profit” or “compensated” surrogacy, while explicitly or implicitly permitting “altruistic” surrogacy. Only a small minority of States explicitly permit commercial surrogacy for both national and foreign intending parents, thereby choosing to become centres for both national and international commercial surrogacy. Cambodia, India, Nepal and Thailand, and the Mexican State of Tabasco, are examples of States or jurisdictions which have served as centres for commercial international surrogacy arrangements but have recently taken steps to prohibit or limit such arrangements, generally in response to abusive practices. However, Georgia, the Russian Federation and Ukraine, and some states in the United States, have for a sustained period of time chosen to remain centres for international surrogacy arrangements. . . .

Amidst this controversy, the present study identifies a safe harbour, in a simple premise: all States are obligated to prohibit, and to create safeguards to prevent, the sale of children. While the imperative to prohibit and prevent the sale of children does not provide answers to all policy debates over surrogacy, it does narrow the scope of permissible approaches.

This focus on the prohibition of sale of children responds to the risk that States and the international community would attempt to legalize and normalize the sale of children and other human rights violations when regulating surrogacy. 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.

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. Moreover, many of the arguments provided in support of these legal regimes for commercial surrogacy could, if accepted, legitimate practices in other fields, such as adoption, that are considered illicit. Thus, if this type of governing legal regime becomes accepted, whether as international or national law, or through

recognition principles, it would undermine established human rights norms and standards. . . .

Johnson v. Calvert
Supreme Court of California
5 Cal.4th 84 (1993)

[Justice Panelli delivered the judgment of the Court, with whom Justices Lucas, Mosk, Baxter, and Chief Justice George concurred:]

In this case we address several of the legal questions raised by recent advances in reproductive technology. When, pursuant to a surrogacy agreement, a zygote formed of the gametes of a husband and wife is implanted in the uterus of another woman, who carries the resulting fetus to term and gives birth to a child not genetically related to her, who is the child's "natural mother" under California law? Does a determination that the wife is the child's natural mother work a deprivation of the gestating woman's constitutional rights? And is such an agreement barred by any public policy of this state?

We conclude that the husband and wife are the child's natural parents, and that this result does not offend the state or federal Constitution or public policy.

Mark and Crispina Calvert are a married couple who desired to have a child. . . . In 1989 Anna Johnson heard about Crispina's plight from a coworker and offered to serve as a surrogate for the Calverts.

On January 15, 1990, Mark, Crispina, and Anna signed a contract providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna and the child born would be taken into Mark and Crispina's home "as their child." Anna agreed she would relinquish "all parental rights" to the child in favor of Mark and Crispina. In return, Mark and Crispina would pay Anna \$10,000 in a series of installments, the last to be paid six weeks after the child's birth. . . . Less than a month later, an ultrasound test confirmed Anna was pregnant. . . .

In July 1990, Anna sent Mark and Crispina a letter demanding the balance of the payments due her or else she would refuse to give up the child. The following month, Mark and Crispina responded with a lawsuit, seeking a declaration they were the legal parents of the unborn child. . . .

Anna, of course, predicates her claim of maternity on the fact that she gave birth to the child. The Calverts contend that Crispina's genetic relationship to the child establishes that she is his mother. . . .

Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as

manifested in the surrogacy agreement. Mark and Crispina . . . affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. . . . No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.

. . . [A]lthough 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. . . .

Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when Anna entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. . . . The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up “parental” rights to the child. Payments were due both during the pregnancy and after the child's birth. We are, accordingly, unpersuaded that the contract used in this case violates [California's public policy]

Anna and some commentators have expressed concern that surrogacy contracts tend to exploit or dehumanize women, especially women of lower economic status. Anna's objections center around the psychological harm she asserts may result from the gestator's relinquishing the child to whom she has given birth. Some have also cautioned that the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will. . . .

We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds. Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional

status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes. . . .

Anna argues at length that her right to the continued companionship of the child is protected under the federal Constitution. . . .

Anna relies mainly on theories of substantive due process, privacy, and procreative freedom, citing a number of decisions recognizing the fundamental liberty interest of natural parents in the custody and care of their children. Most of the cases Anna cites deal with the rights of unwed fathers in the face of attempts to terminate their parental relationship to their children. These cases do not support recognition of parental rights for a gestational surrogate. . . .

Since Crispina is the child's mother under California law because she, not Anna, provided the ovum for the in vitro fertilization procedure, intending to raise the child as her own, it follows that any constitutional interests Anna possesses in this situation are something less than those of a mother. . . .

Society has not traditionally protected the right of a woman who gestates and delivers a baby pursuant to an agreement with a couple who supply the zygote from which the baby develops and who intend to raise the child as their own; such arrangements are of too recent an origin to claim the protection of tradition. To the extent that tradition has a bearing on the present case, we believe it supports the claim of the couple who exercise their right to procreate in order to form a family of their own, albeit through novel medical procedures. . . .

[Justice Kennard dissented on the grounds that the case should have been remanded to the trial court to determine parentage based on a "best interest of the child" standard, rather than the "intent" standard articulated by the majority.]

J.R. v. Utah

U.S. District Court for the District of Utah

261 F. Supp. 2d 1286 (D. Utah 2002)

[Judge Jenkins:]

. . . Unable for medical reasons to have children on their own, J.R. and M.R., entered into a written agreement with W.K.J. in February 1999 in which W.K.J. agreed to serve as a gestational carrier surrogate for a child to be conceived *in vitro* by J.R. and M.R. W.K.J. agreed to carry the implanted embryo through delivery, to have J.R. and M.R.'s names entered on the child's birth certificate as the parents of the child, and to "voluntarily surrender and waive all custody rights, if any, to the child's parents immediately upon birth of the child." . . .

Notwithstanding the terms of the Agreement . . . the Utah State Office of Vital Records and Statistics has declined plaintiffs' request that birth certificates be issued listing J.R. and M.R. as the parents of the two children. Instead, the existing birth certificates list W.K.J. as the mother and no one as the father. . . .

Utah Code Ann. § 76-7-204 (1999) reads: . . . "(2) An agreement which is entered into, without consideration given, in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result, is unenforceable. . . . the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes." . . .

Plaintiffs . . . assert that the statute infringes upon their fundamental constitutional right to procreate by denying them the right to make an enforceable agreement to obtain the assistance of a third party in bearing children that J.R. is medically incapable of bearing on her own. . . . [The law] effectively leaves them childless, thereby denying their right to procreate altogether. Further, the statute "[r]emov[es] the possibility that a biological mother can become the legal parent of children produced through gestational surrogacy" because it conclusively presumes the surrogate mother to be the legal parent of the child. This presumption also denies equal protection to J.R., . . . because under Utah law and administrative practice, the genetic/biological father of a child born to an unmarried gestational surrogate may be listed as the father on the child's birth certificate, while the genetic/biological mother may not. . . .

Plaintiffs also challenge [the] presumption that "the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes." . . . [The presumption] infringes on W.K.J.'s fundamental right to make procreative decisions by "forc[ing] legal parenthood on her against her will." . . .

[Utah] . . . asserts that the constitutional questions raised by plaintiffs need not even be decided . . . because the result sought by plaintiffs—full legal recognition of J.R. and M.R. as the parents and guardians of their children and the issuance of conforming birth certificates—may be achieved through Utah adoption proceedings without running afoul of the provisions of the surrogacy statute. . . .

To the extent that [the presumption that the gestational surrogate is the mother] may be read to limit or even preclude the assertion of parental rights or interests by the genetic/biological father or mother of the child, the genetic/biological parents' constitutionally protected rights have been burdened by the statute. Absent a compelling state interest justifying that burden, a finding that [the Utah law] is unconstitutional as applied becomes "strictly unavoidable" if the genetic/biological parents' fundamental rights—and the constitutions that guarantee them—are to be vindicated. . . .

[T]his court is not prepared to say that a surrogate birth mother—even a surrogate birth mother who is a genetic stranger to the child born to her—is not exercising her fundamental rights, *viz.*, her right to procreate and to make her own decisions about reproduction (*e.g.*, whether to terminate or continue a pregnancy), or that she has no legally protected interest in her relationship to the child she has carried to term and to whom she in fact gave birth. . . .

Resort to the adoption process to gain legal recognition of J.R. and M.R.’s parental rights, effective though it might be, still fails to account for the parent-child relationship that already exists in fact between J.R. and M.R. and the twin children they conceived, and thus continues to burden J.R. and M.R.’s fundamental parental rights. . . .

This court concludes that Utah Code’s presumption that W.K.J. as a surrogate mother is the “mother of the child for all legal purposes” cannot lawfully be given preclusive or conclusive effect in the light of evidence that J.R. and M.R. are in fact the genetic/biological parents of the twin children that W.K.J. gave birth to in January of 2000. . . .

In re T.J.S.

Superior Court of New Jersey (Appellate Division)
419 N.J. Super. 46 (2011)*

[Judge Parrillo delivered the opinion, joined by Judges Yannotti and Skillman:]

At issue is whether the New Jersey Parentage Act . . . recognizes an infertile wife as the legal mother of her husband’s biological child, born to a gestational carrier, and, if not, whether the statutory omission violates equal protection by treating women differently than similarly-situated infertile men, whose paternity is presumed when their wives give birth during the marriage. . . . [W]e hold that the Parentage Act does not intend maternity in such a circumstance absent adoption and, in determining the parentage of a child, the legislation does not offend constitutional principle. . . .

There are several means by which to establish a parental relationship under the Act: (1) genetic contribution, (2) gestational primacy, *i.e.*, giving birth; or (3) adoption. In addition, a rebuttable presumption of paternity derives from the parties’ legal relationship, *i.e.*, marriage or its equivalent, when a child is born during the course of a marriage or within 300 days of its termination. This presumption, that a man is the father of a child born to his wife, extends to a husband who consents to his wife being inseminated with donor sperm under the supervision of a licensed physician. . . .

* Affirmed in a Per Curiam order by the New Jersey Supreme Court. *In re T.J.S.*, 212 N.J. 334 (2012).

[T]he plain language of the Act provides for a declaration of maternity only to a biologically—or gestationally—related female and requires adoption [for non-biological mothers]. . . .

It is this statutory gender-based classification of similarly-situated infertile married women and men that plaintiffs claim deprives them of constitutional protection by withholding from the former, without any legitimate justification, the parental status either presumptively or automatically bestowed on the latter. . . .

[W]e discern no violation of equal protection in . . . confer[ring] paternity, by operation of law, upon a man whose wife, with his consent, has a child after being artificially inseminated with donor sperm. . . . [P]aternity attaches to the infertile husband because of the sperm donor's lack of temporal, physical, and emotional investment in the child's creation. This stands in sharp contrast to the surrogate mother whose parental rights are deemed worthy of protection and thus stand in the way of the infertile wife's claim to automatic motherhood. . . .

The Legislature, in recognizing genetic link, birth, and adoption as acceptable means of establishing parenthood, has not preferred one spouse over the other because of gender. And where both spouses are infertile, the law treats them identically by requiring adoption as the singular means of attaining parenthood. Where, however, only one of the spouses is infertile, an equal protection claim has not been articulated because their respective situations are not parallel and the Legislature is entitled to take these situational differences into account in defining additional means of creating parenthood. Thus, we are satisfied that the complained of disparate treatment is not grounded in gendered constructions of parenthood but in actual reproductive and biological differences, necessitating in the case of an infertile wife, the introduction of a birth mother whom the law cloaks with superior protection. . . .

* * *

In 2018, New Jersey enacted a law permitting gestational surrogacy and recognizing the intended parents as the legal parents. "Intended parents" may be different-sex or same-sex couples, married or unmarried. An "intended parent" can also be a single individual. The intended parent need not have a genetic connection to the child. Provided the parties comply with the statute's requirements—which include psychological evaluations for both the gestational surrogate and the intended parent(s), as well as independent representation by counsel for both—the intended parents are treated as the legal parents and the gestational surrogate has no claim to parental recognition. In fact, New Jersey's parentage law has been amended to provide that the "natural mother may be established by . . . proof of her having given birth to the child unless the child is born in connection with a gestational carrier agreement."

The Nature of Parenthood

Douglas NeJaime (2017)*

. . . Nonbiological mothers in different-sex couples are not the only ones who struggle to achieve parentage when they engage in egg-donor gestational surrogacy. Nonbiological fathers in same-sex couples do as well. Gay male couples engaging in gestational surrogacy necessarily include a nonbiological intended parent. . . .

Parentage presumptions applicable to same-sex couples replicate the gender-differentiated rules applicable to different-sex couples. Presumptions of parentage for the second parent, even when they apply to both women and men, relate to that person's marriage to "the woman giving birth" or the "natural mother." Accordingly, a woman can derive parentage by virtue of her marriage to the biological mother, as parental regulation in lesbian couples makes clear. But a man can only derive parentage by virtue of marriage to the biological mother, not the biological father. Without biological ties, men in same-sex couples and women in different-sex couples find themselves in the same position: neither can establish parentage without adoption. . . .

[E]ven in an age of sex and sexual-orientation equality, courts and legislatures continue to treat *biological mothers* as the parents from whom the *legal family* necessarily springs. This treatment is rooted in the marital presumption and is carried forward by the presumption's adaptation to ART. Traditionally, the woman giving birth is the legal mother, and, if she is married, her husband is the legal father. Law has adapted this reasoning to different-sex and same-sex couples using donor insemination. And this reasoning has reached different-sex and same-sex couples using donor eggs and embryos when the intended mother is the birth mother.

The gendered, heterosexual legacy of marital parentage—parentage by virtue of marriage to the woman giving birth—is justified by resort to the gendered, heterosexual logic of reproductive biology. But law's accommodation of ART reveals the instability of that very logic. Courts are willing to deviate from the gendered logic of reproductive biology to recognize the genetic mother who engages a gestational surrogate to carry her child. Within a regime that prioritizes biological ties, contemporary courts view the genetic mother like the biological father protected by the [U.S. Supreme] Court in the 1970s. The differential treatment of genetic mothers and fathers poses an equality problem. Yet, in considering the claim of a nonbiological mother who engages in egg-donor gestational surrogacy, reproductive biology persists as a justification to reject her claim to parental recognition. Courts do not see an equality problem when law recognizes a nonbiological father as a legal parent but withholds recognition from a nonbiological mother.

* Excerpted from Douglas NeJaime, *The Nature of Parenthood*, 126 YALE LAW JOURNAL 2260 (2017).

In either of these cases, one could imagine courts invoking reproductive biology to justify the differential treatment of mothers and fathers. In fact, in some of the earliest gestational surrogacy cases, courts rejected the claims of genetic intended mothers based precisely on grounds of reproductive biology; motherhood resulted from the specific act of birth. But today, courts disclaim reproductive biology as a basis to withhold recognition from a genetic mother. Indeed, . . . in accepting gestational surrogacy, the Massachusetts Supreme Judicial Court deemed the children of the genetic intended mother “children of [the] marriage.” The mother’s genetic—not gestational—connection produced marital children. Yet a father’s genetic connection does not produce marital children, and therefore does not offer a route to parentage to a nonbiological mother. Reproductive biology continues to justify treating the claims of nonbiological mothers differently than the claims of nonbiological fathers.

. . . For a man or woman *married to a biological mother*, biological connection is not necessary for legal parenthood; that man or woman is deemed a legal parent by virtue of marriage. But for a man or woman *married to a biological father*, the lack of a biological connection excludes that individual from legal parenthood.

From this perspective, it becomes clear that the shift toward nonbiological parenthood has occurred along only one axis: legal “fatherhood” can capture nonbiological parenthood, but legal “motherhood” cannot. And the collapse of gendered parental statuses has occurred in only one direction: women can be legal “fathers,” but men cannot be legal “mothers.” On this view, biological mothers are indispensable—essential to the legal family. In contrast, biological fathers are replaceable—by men or women who have no biological connection to the child.

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, Aleš Pejchal, *judges*, and Claudia Westerdiek, *Section Registrar* . . .

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.

The applicants specified that, in accordance with Californian law, the “surrogate mother” was not remunerated but merely received expenses. They 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 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, that this 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. A comparative-law survey conducted by the Court shows that surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe—other than France—studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States

and appears to be tolerated in four others. In thirteen of these thirty-five States it is possible to obtain legal recognition of the parent-child relationship between the intended parents and the children conceived through a surrogacy agreement legally performed 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. . . .

92. . . . [H]aving regard to the practical obstacles which the family has had to overcome on account of the lack of recognition in French law of the legal parent-child relationship between the first two applicants and the third and fourth applicants . . . all four of them were able to settle in France shortly after the birth of the [children], are in a position to live there together in conditions broadly comparable to those of other families[,] and . . . there is nothing to suggest that they are at risk of being separated by the authorities on account of their situation under French law. . . .

94. Accordingly, in the light of the practical consequences for their family life of the lack of recognition under French law of the legal parent-child relationship . . . and having regard to the margin of appreciation afforded to the respondent State, [there has been no violation of the right to family life]. . . .

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. . . .

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*, and Roderick Liddell, *Registrar*. . . .

9. After trying to have a child and having unsuccessfully resorted to medically assisted reproduction techniques, the applicants put themselves forward as adoptive parents.

10. On 7 December 2006 the applicants obtained official authorisation from the Campobasso Minors Court to adopt a foreign child The applicants state that they waited in vain for a child who was eligible for adoption.

11. They subsequently decided to try resorting to assisted reproduction techniques again and to a surrogate mother in Russia. To that end, they contacted a Moscow-based clinic. The first applicant stated that she travelled to Moscow, transporting from Italy the second applicant's seminal fluid, duly conserved, which she handed in at the clinic.

A surrogate mother was found and the applicants entered into a gestational surrogacy agreement with the company Rosjurconsulting. After a successful in vitro fertilization, . . . two embryos were implanted in the surrogate mother's womb

13. The first applicant travelled to Moscow on 26 February 2011, the clinic having indicated that the child was due to be born at the end of the month. . . .

16. . . . [T]he applicants were registered as the new-born baby's parents by the Registry Office in Moscow. The Russian birth certificate, which indicated that the applicants were the child's parents, was certified in accordance with the provisions of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. . . .

21. . . . [Upon the applicant and child's return to Italy, the Italian] prosecutor's office opened criminal proceedings against the applicants, who were suspected of "misrepresentation of civil status" [and] . . . of "use of falsified documents"

22. In parallel, . . . [the prosecutor at the] Minors Court requested the opening of proceedings to make the child available for adoption, since he was to be considered as being in a state of abandonment for the purposes of the law. . . .

30. . . . [T]he second applicant and the child underwent DNA testing. The result of these tests showed that there was no genetic link between them.

31. Following the outcome of these tests, the applicants sought an explanation from the Russian clinic. Months later, . . . the clinic's management informed them that it had been surprised by the results of the DNA test. It stated that there had been an internal inquiry, since an error had clearly occurred, but it had proved impossible to identify the individual responsible for the error, given that there had been dismissals and recruitment of other staff in the meantime. . . .

36. By an immediately enforceable decision of 20 October 2011, the Campobasso Minors Court ordered that the child be removed from the applicants, taken into the care of the social services and placed in a children's home. . . .

40. . . . The Court of Appeal found that the child T.C. was "in a state of abandonment" . . . as the applicants were not his parents. In those circumstances, the question of whether or not the applicants were criminally liable and whether or not there had been an error in the use of seminal fluid of unknown origin was not, in its view, relevant. . . .

44. . . . [T]he Campobasso Court dismissed the applicants' appeal on the ground of the strong suspicions that they had committed the offences in question. In particular, the court noted the following facts: the first applicant had spread a rumour that she was pregnant; she had gone to the Italian Consulate in Moscow and implied that she was the natural mother; she had subsequently admitted that the child had been born to a surrogate mother; she had stated to the *carabinieri* on 25 May 2011 that the second applicant was the biological father, which had been disproved by the DNA tests; she had thus made false statements; she had been very vague as to the identity of the genetic mother; the documents concerning the surrogate motherhood stated that the two applicants had been seen by the Russian doctors, which did not correspond to the fact that the second applicant had not travelled to Russia; the documents relating to the birth did not give any precise date. The court considered that the only certainty was that the child had been born and that he had been handed over to the first applicant against payment of almost 50,000 euros. . . .

49. . . . [T]he child was placed in a children's home for about fifteen months, in a location that was unknown to the applicants. All contact between the applicants and the child was prohibited. They were unable to obtain any news of him. . . .

51. At the beginning of April 2013 the guardian asked the Minors Court to give the child a formal identity, so that he could be registered for school without complications. He stated that the child had been placed in a family on 26 January 2013, but that he did not have an identity. This “inexistence” had a significant impact on administrative matters, particularly with regard to deciding under what name the child was to be registered for school, for vaccination records, and for residence. . . . [A] temporary formal identity would enable the secrecy surrounding the child’s real identity to be maintained, while simultaneously enabling him to have access to public services; for the time being, he was entitled only to use emergency medical services.

52. The . . . child received a formal identity . . . [and] has now been adopted. . . .

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. The Court considers that the 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, moreover, 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 in the present case, it is nonetheless the consequence of the legal uncertainty that they themselves created in respect of the ties in question, 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

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. Accordingly, what 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. The Court observes that the 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. They argued that, in making this choice, 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. The Court accepts that, by prohibiting private adoption based on a contractual 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. . . . There is no doubt that recourse to [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, as the Government have pointed out, where, as here, 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. In that connection, the Court observes that 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. The present case differs from cases in which the separation of a child from its parents is at stake, where in principle separation is a measure which may only be ordered if the child's physical or moral integrity is in danger. In contrast, the Court does not consider in the present case that the domestic courts were obliged to give priority to the preservation of the relationship between the applicants and the child. Rather, they 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. The Court does not underestimate the impact which the immediate and irreversible separation from the child must have had on the applicants' private life. While the Convention does not recognise a right to become a parent, the Court cannot ignore the emotional hardship suffered by those whose desire to become parents has not been or cannot be fulfilled. However, the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child. 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. . . .

[Judge Raimondi concurred in the judgment, emphasizing that the case fell under private and not family life. Judges De Gaetano, Pinto de Albuquerque,

Wojtyczek, and Dedov concurred in the judgment, reasoning that because the applicants established their “parental project” in violation of Italian law, the application of Article 8’s protection of family life was especially tenuous. Judge Dedov concurred in the judgment, contending that any form of surrogacy is dangerous for society, regardless of whether it facilitates trafficking. Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens, and Grozev dissented on the grounds that immediate removal of the child without a finding that he was in any danger was disproportionate and violated Article 8.]

* * *

In 2017, after the European Court of Human Rights found that there was no violation under the European Convention on Human Rights, the Italian Constitutional Court reviewed the absolute ban on parental recognition for intended parents who had engaged in surrogacy and bore no genetic relationship to the child (Judgment 272 of 2017). The Italian Court held that, although under Italian law, surrogacy “causes intolerable offence to the dignity of the woman and profoundly undermines human relations,” the best interest of the child may be taken into account when determining the legal relationship between intended parents and children to whom they bear no genetic relationship. The Italian Constitutional Court concluded that:

[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 express recognition by this Court that “the issue of genetic origin is not an essential prerequisite for the existence of a family.”

GOVERNING SPORTS

DISCUSSION LEADERS

HAROLD HONGJU KOH, SUSAN ROSE-ACKERMAN,
AND MIGUEL POIARES MADURO

II. GOVERNING SPORTS

DISCUSSION LEADERS:

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Sports are one of the most important leisure activities worldwide. At the same time, sports have become a professionalized, global market. In 2006, the sports industry accounted for 1% of global GDP and 3.7% of the EU's GDP.* In both of these capacities, and as exemplified by the ancient and the modern Olympic Games,

* See CONFEDERATION OF INDIAN INDUSTRY, *THE BUSINESS OF SPORTS* 6, (2016), available at <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2016/09/the-business-of-sports.pdf>; Commission of the European Communities, White Paper on Sport 11, Brussels, 11.7.2007 COM(2007) 391 final.

sports and athletic competitions have a unique capacity to transcend national borders and geopolitics.

Private systems of governance are the primary regulators of sports on both the domestic and the international level. Dating from when sports were amateur leisure-time activities, these regulators determine access to the most noteworthy sports markets; promulgate, adjudicate, and enforce many of the rules under which those sports operate; and control or shape upstream and downstream economic activities. As self-constituted entities, these regulatory structures lack mechanisms for public participation and have not invited public scrutiny.

Tides may be shifting, however. As this volume goes to press in June of 2018, controversies have made headlines about political speech by American football players, the place of gender-nonconforming athletes in international competitions, and corruption within the International Olympic Committee (IOC) and Fédération Internationale de Football Association (FIFA)—the body governing the World Cup in football, or what the U.S. calls soccer. These problems illustrate why questions are being raised about the ability and the legitimacy of these organizations governing themselves.

The chapter addresses three broad sets of questions. First, do constitutional rights and obligations—such as free speech, equality, and nondiscrimination based on gender—apply to the world of sports, and if so, how should judges decide their parameters? Thus, we focus on the expanding roles played by nation states and their constitutional courts, interacting with sports organizations. Second, are sports organizations subject to the application of domestic regulatory laws apart from constitutional mandates, such as competition or anti-corruption statutes? Should domestic sports organizations be thought of as private institutions fully subject to state regulation, or as public or semi-public institutions with a distinctive freedom of self-government? Third, as we contemplate the future of “the law of sport” (*lex sportiva*), which developed as a nearly autonomous body of law, what norms of self-governance or external governance dominate? Going forward, should sports organizations be required to parallel either transnational law or the particular legal regimes of the countries in which they sit, and if so, where will those requirements come from? And, as a matter of policy or of law, what degree of oversight from which countries best responds to and addresses the contemporary charges of corrupt dealings, doping, and other governance failures in sports organizations?

DO CONSTITUTIONAL RIGHTS APPLY?

What constraints do constitutional and statutory protections place on sports organizations? This section takes up examples arising from the tensions between the internal regulations of many sports organizations and constitutional commitments to freedom of expression, association, and equality.

Expressive Speech and Associational Rights

Recent political demonstrations by athletes in protest of their nation's policies or in support of global human rights concerns have put the question of sports regulation at the forefront of media attention. Demonstrations by individual athletes and by spectators put the question of the autonomy of sports organizations in sharp relief. Examples below from the U.S. and Europe illustrate some of the many issues raised.

In 2016, American football games were the sites of waves of protests, with some players "taking a knee" while the U.S. national anthem was heard; the participants explained their kneeling as a protest to draw attention to racialized police brutality. Members of the San Francisco 49ers, an American professional football team, began kneeling in August of 2016, and since then, more than 200 players have either knelt or sat during the anthem. When faced with widespread criticism by owners, commentators, and fans, these players invoked U.S. constitutional traditions of free speech.

In May of 2018, the National Football League of the United States (NFL) announced that all "team and league personnel on the field shall stand and show respect for the flag and the anthem," while persons not wanting to do so can "stay in the locker room" or other locations.* The NFL stated that it would fine clubs whose "personnel" on fields did not stand. Below, we excerpt the NFL Commissioner's explanation of the reasons.

A parallel can be found in the Olympic Charter's prohibition on "demonstration[s] or propaganda," dating from 1975, most recently revised in 2015, and also excerpted below. For example, at the 1968 Summer Olympics in Mexico City, American athletes Tommie Smith and John Carlos each raised a black-gloved fist during their medal ceremony in support of the Black Power Movement. Avery Brundage, the President of the International Olympic Committee (IOC), ordered Smith and Carlos suspended from the U.S. team and banned from the Olympic Village. The IOC described the actions as "a deliberate and violent breach of the fundamental principles of the Olympic spirit." Frédérique Faut's discussion, also excerpted below, analyzes the conflict of the IOC rules and the European Convention on Human Rights.

Further questions are about the conduct of spectators, some of whom have also argued that freedom of association and of participation protect their behavior. In 2018, the Federal Constitutional Court of Germany, even as it upheld the legality of a ban on several spectators associated with a riot, recognized the importance of fans' ability "to participate in social life" and the need for sports organizations to provide reasons when excluding individuals from such venues.

* *Roger Goodell's statement on national anthem policy*, News, NATIONAL FOOTBALL LEAGUE, May 23, 2018, <http://www.nfl.com/news/story/0ap3000000933962/article/roger-goodells-statement-on-national-anthem-policy>.

Letter from Roger Goodell, Commissioner of the National Football League, to the Chief Executives and Club Presidents

October 10, 2017

We live in a country that can feel very divided. Sports, and especially the NFL, brings people together and lets them set aside those divisions, at least for a few hours. The current dispute over the National Anthem is threatening to erode the unifying power of our game, and is now dividing us, and our players, from many fans across the country.

I'm very proud of our players and owners who have done the hard work over the past year to listen, understand and attempt to address the underlying issues within their communities. . . .

Like many of our fans, we believe that everyone should stand for the National Anthem. It is an important moment in our game. We want to honor our flag and our country, and our fans expect that of us. We also care deeply about our players and respect their opinions and concerns about critical social issues. The controversy over the Anthem is a barrier to having honest conversations and making real progress on the underlying issues. We need to move past this controversy, and we want to do that together with our players. . . .

Everyone involved in the game needs to come together on a path forward to continue to be a force for good within our communities, protect the game, and preserve our relationship with fans throughout the country. The NFL is at its best when we ourselves are unified. . . .

* * *

As noted above, in May of 2018, the NFL released new regulations allowing players to remain in their locker rooms, but warning teams that they would be fined if any players took a knee on the field during the national anthem. In a statement released with the new policy, Commissioner Goodell stated that the measures were an attempt to correct "a false perception among many that thousands of NFL players were unpatriotic." As of this writing, some analysts predict that lawsuits may be filed to challenge this ban.

Olympic Charter Article 50
Adverting, Demonstrations, Propaganda
International Olympic Committee (2015)

. . . 2. No kind of demonstration or political, religious or racial propaganda is permitted in the Olympic areas.

Bye-law to Rule 50

1. No form of publicity or propaganda, commercial or otherwise, may appear on persons, on sportswear, accessories or, more generally, on any article of clothing or equipment whatsoever worn or used by all competitors, team officials, other team personnel and all other participants in the Olympic Games, except for the identification . . . of the manufacturer of the article or equipment concerned, provided that such identification shall not be marked conspicuously for advertising purposes. . . .

Any violation of this Bye-law 1 and the guidelines adopted hereunder may result in disqualification of the person or delegation concerned, or withdrawal of the accreditation of the person or delegation concerned, without prejudice to further measures and sanctions which may be pronounced by the IOC Executive Board or Session.

The Prohibition of Political Statements by Athletes and Its Consistency with Article 10 of the European Convention on Human Rights
Frédérique Faut (2014)*

Political statements of athletes on sports events, such as the Olympic Games, form a controversial topic in the world of sport. Whereas sports governing bodies as the International Olympic Committee (IOC) are keen to ban them, thereby referring to their regulations and statutes and the fact that sport should be kept free from politics and propaganda, this policy is often put to the test by athletes who feel the necessity to express their (political) thoughts and feelings, even on the spot. Recent incidents at the Olympic Winter Games in Sochi form a true exemplification of this controversy: the commemoration stickers on helmets worn by Canadian freestyle skiers remembering Sarah Burke who died after a training accident several years ago, a gesture that was banned by the IOC that considered it to be a political statement; the black armbands worn by four Norwegian cross-country skiers commemorating the death of the brother of a team member, an act that was characterised as political and as such reprimanded with a letter to the Norwegian Olympic Committee; the black armbands intended to be worn by Ukrainian athletes who wanted to respect those who died during the political demonstrations in Kiev, a request that was refused by the IOC that considered it to be overtly political as both parties to the conflict could use it as a way to claim support from the athletes; and the rainbow glove worn by Dutch snowboarder Cheryl Maas, an openly gay athlete showing her disregard for Russia's anti-gay law, that was considered to be inappropriate as well. Going back in time, reference can be made to the black power salute made by American sprinters Tommie Smith and John Carlos for instance who, at the Mexico City Summer Olympics of 1968, stood on the medal

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stand with beads and without shoes, while hanging their heads and raising their fists when the national anthem set in. The IOC did not tolerate this political statement with which the athletes expressed their sympathy for the struggle against racial segregation in the USA and beyond and decided to throw them off the Olympic Games and to send them home. . . .

The International Olympic Committee, being responsible for the ban of “any political or commercial abuse of sport and athletes,” basically states that Rule 50 paragraph 3 of the Olympic Charter aims to warrant the spirit of the Olympic Games . . . the promotion of unity in diversity by bringing together a diverse range of competitors and spectators from all over the world . . . the protection of the athletes from external influences and the creation of an environment in which athletes can compete free from divisive and emotional distractions. . . . The IOC emphasises that the Games are about sport and that there is no space for political statements on armed conflicts, legislation, religious issues, etc. Athletes, officials, other people accredited to have access to the Olympic sites and games spectators are therefore prevented from showing any sign, banner, poster, piece of equipment or clothing within Olympic sites and venues that could be identified as a form of demonstration or propaganda, “actions or manifestations of any kind by a person or a group of persons, including but not limited to their external appearance, clothing, gestures, and written or oral statements” included. Rule 50 does not have the intention to tackle public debate. Athletes and other accredited persons are free to express their opinions and thoughts and are free, during the Games, to answer questions as they may deem necessary. They may do so in (media) interviews, during press conferences, on social media, in the Olympic Press or Broadcasting Centres and enter into a discussion with other athletes, officials and others. In essence this means, as stated by IOC President Thomas Bach in an interview in which he assured that athletes enjoy the freedom of speech, that: “Athletes [are] allowed to make political statements in press conferences . . . but [are] punished for doing so while competing or during Games ceremonies.” In case of a breach of the prohibition, each case is dealt with by the IOC on a case-by-case basis, depending on the facts of the matter. . . .

Article 10 on freedom of expression* can . . . be applicable to private relationships via positive obligations on the State. . . . [A] broad range of private

* 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

relationships is covered [in the case law], . . . in which one person or entity exercises some power over the other and is in a position to impose on it conditions that adversely affect its fundamental rights and freedoms. Although these cases do not concern sports as such, several elements and conclusions are to be highlighted as they might be of interest for the sports cases.

Of relevance in this context is first of all the, more general, statement made by the Court that States must create an environment in which all persons are able to participate in public debate, whereby they get the opportunity to express their opinions and ideas without fear, even if these views are not in conformity with those of the official authorities or the public opinion, such as to irritate or shock them. The State is under a positive obligation to protect a person's freedom of expression against attack by private entities, a notion that might be applicable . . . as the athletes' statements are often part of a broader public debate.

Focusing on the cases that deal with issues in a work-related context, i.e. that concern a relationship between employer and employee, the Court seems to apply certain criteria when considering whether a case finds protection under Article 10 of the Convention. Expressions that are made as part of a broader public debate, which are made spontaneously in the sense that they are spoken and not written down and fall within the limits of admissible criticism, are granted more protection than those that are not, especially in case the expression made is punished with a manifestly disproportionate or excessive sanction. It is furthermore common ground that expressions of an employee that are unconnected with the work in question, in the sense that they do not contain statements or criticism that can be linked to the work performed, can count on broader protection under Article 10 than expressions that are. Although it might be open to debate as to whether the expressions of athletes are made in a work-related context, as it is unclear whether their relationship with the IOC is to be characterised as a relationship between employer and employee, the above-mentioned cases might be indicative of the way the Court deals with issues of such a nature and might form the basis for future developments that might be relevant to the world of sport, the more since an analogy can easily be drawn. . . .

Over the years, the prohibition of political statements as laid down in Rule 50 of the Olympic Charter has become broader and broader, with its nature and scope still being undefined. Whereas in the first instance only political meetings or demonstrations were prohibited, at a later stage political propaganda and publicity became subject to the rule as well. The same goes for the way the publicity or propaganda is expressed. Initially, publicity or propaganda was not allowed on sportswear, accessories or any article of clothing or equipment. More recently, the ban has been widened to also cover publicity or propaganda on persons. Although the sanction mechanism has become weaker at the same time, in the sense that a violation

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.

of the provision in question no longer automatically results in both disqualification and the withdrawal of accreditation, athletes can nowadays be more severely punished for breaching an Olympic rule covering a broader and indefinite range of incidents than several decades ago. The fact that the IOC brings incidents of commemorating athletes wearing black armbands under the same rule as incidents whereby athletes make statements as part of a broader public debate, such as racial segregation or Russia's anti-gay laws, is exemplary in this regard. . . . The fact that the IOC generally does not disclose its reasoning when ruling on such cases makes it even more complex, especially in terms of public oversight and legal certainty. Combining this with the fact that the decisions of the IOC Executive Board are final in case of disqualification or withdrawal of accreditation, . . . seriously endangers the due process rights of athletes. They have no other choice than to accept the rule of the powerful and monopolistic IOC if they are to participate to the Olympic Games as they are in no position to influence the rule, since athletes lack a powerful and democratic voice at the IOC. Excessive disciplinary sanctions in the sense of disqualification or the withdrawal of accreditation can seriously harm an athletes' career and can prevent him or her from exercising his or her profession.

Two solutions might possibly increase compliance with Article 10 of the European Convention. The first one lies in more transparent and less excessive sanction mechanisms. A second option would be a laxer prohibition on political statements in the Olympic Charter, covering a smaller range of incidents. The rules of the international football association FIFA might function as a source of inspiration in this regard, as they allow players to wear black arm-bands for instance when commemorating the death of a person. . . .

* * *

Regulation of the speech and of the actions of spectators is another problem that has garnered attention. On April 11, 2018, the German Federal Constitutional Court addressed the application of constitutional rights to sports organizations in an order concerning "stadium bans" for violent fans.

Press Release No. 29/2018
Decision in "Stadium Ban" Proceedings
Federal Constitutional Court of Germany (First Senate) (April 27, 2018)*

. . . In 2006, the complainant, a then sixteen-year-old fan of the football club FC Bayern Munich, attended a football match against MSV Duisburg in the opposing team's stadium. After the end of the match, verbal and physical altercations involving

* Excerpted from Press Release No. 29/2018 of 27 April 2018, Decision in "Stadium Ban" proceedings clarifies the indirect horizontal effects of the right to equality in private law relations, The Federal Constitutional Court, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-029.html>.

a group of FC Bayern Munich fans, among them the complainant, and fans of MSV Duisburg resulted in personal injury and damage to property. Subsequently, approximately 50 persons, including the complainant, were placed in police custody for the purposes of establishing their identities. The public prosecution office opened investigation proceedings on suspicion of rioting charges against the complainant. Following this, MSV Duisburg imposed a ban on the complainant at the suggestion of the local chief of police, prohibiting him from entering any stadium in Germany until June 2008. In this respect, MSV Duisburg acted as agent on behalf of the German Football Association . . . as the clubs have mandated each other as agents with the authority to impose such stadium bans, to exercise the owner's right to enforce house rules and to enforce bans on entering the grounds of their respective football venues. . . . The criminal investigation proceedings were discontinued Nonetheless, MSV Duisburg decided, without having heard the complainant, that the stadium ban be kept in place. FC Bayern Munich subsequently expelled the complainant from the club and cancelled his annual membership pass.

The complainant brought an action requesting that the nationwide stadium ban be lifted. . . . With his constitutional complaint, the complainant claims a violation of his fundamental rights, contending that he was banned from entering stadiums on the basis of a mere suspicion, without viable justification or reasons. . . .

1. . . . The challenged decisions concern a legal dispute between private actors relating to the scope of proprietary rights vis-à-vis third parties under private law. According to the established case-law of the Court, fundamental rights may have a bearing on such disputes by way of indirect horizontal effects. Fundamental rights do not generally create direct obligations between private actors. They do, however, have a permeating effect on legal relationships under private law, and it is incumbent upon the regular courts to give effect to fundamental rights in the interpretation of ordinary law, in particular regarding general clauses in private law and legal concepts that are not precisely defined in statutory law. The decisions on constitutional values enshrined in fundamental rights thus permeate and impact private law.

In this regard, the extent to which fundamental rights indirectly permeate private law depends on the circumstances of the individual case. It is imperative that a balance be sought between the spheres of freedom of the respective holders of fundamental rights, in order to sufficiently lend effect to the decisions on constitutional values underlying fundamental rights.

2. . . . In principle, all persons have the freedom to choose—according to their own preferences—when, with whom and under which circumstances they want to enter into contracts and how they want to make use of their property in this context.

Under specific circumstances, however, requirements pertaining to the right to equality may derive from [Article 3(1) of the Basic Law]* . . . with regard to relationships between private actors. The nationwide stadium ban in dispute is based on such circumstances. For determining the indirect horizontal effects of the requirement of equal treatment, the decisive factor is that the stadium ban was imposed, based on the right to enforce house rules, as a one-sided exclusion from events that the organisers on their own volition opened up to a large audience without distinguishing between individual persons, and that this measure has a considerable impact on the ability of the persons concerned to participate in social life. When private actors undertake to organise such events, they must also accept a special legal responsibility under constitutional law. They may not use their discretionary powers resulting from the right to enforce house rules—similar to power positions in other cases arising from a monopoly or structural advantages—to exclude specific persons from such events without factual reasons. . . . [T]he constitutional recognition of property as an absolute right and the resulting one-sided discretionary powers of the owner to enforce house rules must be balanced, in light of the principle that property entails a social responsibility towards the public good (*Sozialbindung des Eigentums*), against the permeating effect of the principle of equal treatment on private law

3. When reviewing a stadium ban that was issued based on the right to enforce house rules under private law, it is primarily incumbent on the civil courts to resolve the conflict between proprietary rights and the principle of equal treatment. The courts are afforded a wide margin of assessment in this respect. The Federal Constitutional Court intervenes only in the event of manifest errors of interpretation that are based on a fundamentally incorrect understanding of the significance of the relevant fundamental right. . . .

a) In view of the principle of equal treatment, the civil courts must consequently ensure that stadium bans are not imposed arbitrarily, but are based on factual reasons. In particular, they are called upon to further specify the requirements regarding the necessary balancing [of fundamental rights] against proprietary rights in relation to the factual circumstances under which stadium bans are imposed, the intended effects of the measure and the responsibility of the persons concerned. It is not objectionable under constitutional law if the courts already consider it sufficient for determining a factual reason justifying a stadium ban to show well-founded concerns that a person poses a risk of future disturbances. In this context, evidence of previous criminal conduct or unlawful behaviour is not a necessary prerequisite, given the legitimate interest of stadium operators to ensure undisturbed football matches and their responsibility for the safety of athletes and the audience. It is sufficient to demonstrate that the concerns regarding future disturbances caused by the affected persons are based on specific and proven facts of sufficient weight.

* Article 3(1) of the Basic Law for the Federal Republic of Germany provides:

(1) All persons shall be equal before the law.

b) The requirement that stadium bans be based on factual reasons gives rise to procedural requirements. In particular, stadium operators must make reasonable efforts to investigate the facts of the case. This includes, at least in principle, that the persons concerned be heard prior to imposing a stadium ban. Reasons for the decision must also be given upon request in order to enable the persons concerned to seek legal recourse to enforce their rights.

Recognising such procedural guarantees does not conflict with the nature of legal disputes under private law. It is true that there is no basis for recognising such guarantees in private law in disputes concerning mutual contractual obligations that the parties freely determine themselves. Where it is clear from the outset that decisions in the domain of private law do not come into conflict with protected rights of third parties, and where these decisions can be rendered without regard to the concerns of the other party, it is not necessary, at least in principle, to put in place such [procedural] guarantees. The situation is different, however, insofar as the principle of equal treatment deriving from fundamental rights permeates the legal relationship of the parties, requiring that the denial of a service be based on justifying reasons. Where the right to enforce house rules is invoked for decisions that factually have punitive effects, thus requiring that the persons concerned be provided with viable reasons for the decision, certain minimum standards must be met: the persons concerned must be given the opportunity to address the allegations against them and to exercise their rights in a timely manner, including by submitting their view. . . .

[4.]b) As regards the contended violations of procedural guarantees, the constitutional complaint was also unsuccessful. At least for the future, the now updated Guidelines on Stadium Bans provide that the person concerned has a right to be heard and that, as a rule, this must take place before a stadium ban is imposed. Likewise, using a reasonable interpretation, such decisions must state reasons, at least where stadium bans are under review. For the specific stadium ban at issue, which expired in the meantime, the proceedings before the civil courts provided the complainant with the opportunity to address, at least retroactively, the reasons put forward for the stadium ban and to be heard in this regard.

Equality

Many athletic organizations are structured around gendered dichotomies. Illustrative is Rule 141 (3) of the Competition Rules of the International Association of Athletics Federations (IAAF), which provides that “[c]ompetition . . . is divided into men’s, women’s and universal classifications.”

In recent years, claimants have argued that national and transnational precepts calling for gender equality and/or parity should apply to sporting events. One set of

questions is about who falls within the categories of “women” and “men” and when and whether sporting rules can continue to rely on this binary. Pressures to change come from a range of vectors, as individuals and groups assert rights of intersex, transgender, and other gender non-conforming individuals.

In *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games* (2009), excerpted below, the Court of Appeal for British Columbia addressed the impact of Canadian obligations to prevent gender discrimination; the court held that Canada’s Charter of Rights and Freedoms did not apply to the IOC. Another decision comes from the International Association of Athletics Federations (IAAF) that, in 2011, opted for distinguishing men from women by testosterone levels in their blood serum. In *Chand v. Athletics Federation of India (AFI) and The International Association of Athletics Federation (IAAF)* (2015), also excerpted, the Court of Arbitration for Sport (CAS) stayed this regulation. The IAAF revised its rules in April 2018. The new provisions continued to rely on hormone levels, though targeting a handful of women’s middle-distance running events and basing that decision on what the IAAF described as a more developed scientific record. Critics, as the excerpt from Silvia Camporesi illustrates, have argued that the provisions continue to lack a sound scientific basis.

Other issues focus on whether resources and opportunities are parallel and whether parity of resources and market shares ought to be provided. We explore these issues through examining how leadership positions within FIFA are decided. Similar concerns have emerged about the funding for women’s athletic programs at universities and the discrepancies by gender in pay for professional athletes in the same sport.

**Sagen v. Vancouver Organizing Committee for the 2010 Olympic and
Paralympic Winter Games**
Court of Appeals for British Columbia
2009 BCCA 522 (2009)

[Before: The Honourable Madam Justice Rowles, The Honourable Mr. Justice Frankel, and The Honourable Mr. Justice Groberman]

1. The appellants, all highly-ranked women ski jumpers, brought an application against the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (“VANOC”) seeking the following declaratory order:

If VANOC plans, organizes, finances and stages ski jumping events for men in the 2010 Winter Olympic Games, then a failure to plan, organize, finance and stage a ski jumping event for women violates their equality rights, as guaranteed in section

15(1) of the Canadian Charter of Rights and Freedoms [the Charter],^{*} and is not saved under s. 1.^{**}

2. . . . [Among the central issues in the court below was:] does the Charter apply to the claim of gender discrimination advanced by the appellants against VANOC? . . .

37. The appellants recognize that VANOC is a private entity and that in hosting and staging the [2010 Winter Olympic] Games, VANOC is not engaged in the implementation of a statutory scheme on behalf of government. Instead, the appellants rely on the Multiparty Agreement[, between the local, provincial, and federal government and several private Olympics organizing bodies,] in asserting that various commitments made by the three levels of government at the time the bid to host the Games was made demonstrate, as the [trial court] judge found, that hosting and staging the Games is a governmental activity.

38. There is a serious question, however, as to whether a contract entered into by government to provide infrastructure and to make up any shortfall in paying for liabilities of the Games falls within the “ascribed activity” test posited by [this Court]. . . . [T]he wording of s. 32 limits the application of the Charter.^{***} In this case, the relevant phrase to consider is “in respect of all matters within the authority of Parliament.”

^{*} Section 15 of the Canadian Charter of Rights and Freedoms provides:

Equality Rights

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. . . .

^{**} Section 1 of the Canadian Charter of Rights and Freedoms provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

^{***} Section 32 of the Canadian Charter of Rights and Freedoms provides:

(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

56. . . . The [a]ppellants' greatest challenge is to demonstrate that the unequal benefit (the availability of men's, but not women's, ski jumping events) is in some way a product of "law." On the face of it, the right to compete in a ski jumping event at the Olympics Games does not appear to be a "benefit of the law." It is not a right deriving from legislation, nor is it conferred by a governmental entity. Instead, it derives from a decision by the IOC to hold an event. It is not suggested that the IOC is a law-making body. Further, the IOC's decision not to hold a women's ski jumping event at the 2010 Games is a decision that has not been endorsed by VANOC, or by any Canadian government body. . . .

62. For the purposes of s. 15(1) of the Charter, an action or provision will typically be considered "law" only if its validity derives from statutory authority. We say "typically" to leave open the possibility that actions or provisions that derive their authority from the royal prerogative or from the "ordinary" powers of the Crown might, in some circumstances, be considered "law"; that issue does not arise in this case. The case we are dealing with does not involve the exercise of any power flowing from the Crown.

63. . . . The defendant in this case, in contrast, is a private corporation with the powers of an ordinary person. It is not an agent of the Crown. It has authority to undertake its duties under the Host City Contract without the need for additional powers delegated by the Crown.

64. There are other difficulties with the appellants' argument that the decision to hold men's, but not women's, ski jumping events constitutes "law" for the purposes of s. 15(1) of the Charter. Even if the Multiparty Agreement or the Host City Contract qualified as "law" for the purposes of s. 15(1), the appellants would have to demonstrate that the policy that is the root of their complaint is embodied in those contracts. They are unable to do so. Indeed, as the appellants concede, the decision at issue in this case is within the exclusive authority of the IOC; VANOC has attempted to convince the IOC to include a women's event in the 2010 Games, but has been unsuccessful.

65. This is not a case, then, of a governmental body attempting to circumvent the Charter by exercising power through contract instead of through legislation. Rather, it is a case in which a non-governmental body is brought before the court as a result of policies which neither it nor any Canadian authority has the power to change. . . .

68. The appeal is dismissed. . . .

**Dutee Chand v. Athletic Federation of India (AFI) and The
International Association of Athletics Federations (IAAF)**

Court of Arbitration for Sport

Interim Arbitral Award CAS 2014/A/3759 (2015)

[Before The Hon. Justice Annabelle Claire Bennett AO, Federal Court of Australia, President of the Panel; Prof. Richard H. McLaren, Arbitrator; Dr. Hans Nater, Arbitrator; Edward Craven, *Ad hoc* Clerk]

. . . 4. This case concerns a challenge to the validity of the IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (the "Hyperandrogenism Regulations"). The Hyperandrogenism Regulations place restrictions on the eligibility of female athletes with high levels of naturally occurring testosterone to participate in competitive athletics. In particular, the Athlete challenges the Hyperandrogenism Regulations on the basis that: (a) they discriminate unlawfully against female athletes and against athletes who possess a particular natural physical characteristic; (b) they are based on flawed factual assumptions about the relationship between testosterone and athletic performance; (c) they are disproportionate to any legitimate objective; and (d) they are an unauthorised form of doping control. The IAAF rejects each of those arguments.

5. The case raises complex legal, scientific, factual and ethical issues. The parties' submissions draw upon a diverse range of expert scientific evidence, factual accounts of the evolution of the Hyperandrogenism Regulations and the experiences of female athletes who were subjected to their "gender testing" and "sex verification" predecessors, and philosophical arguments about the meaning of fairness in sport. . . .

448. The Hyperandrogenism Regulations only apply to female athletes. It is not in dispute that it is *prima facie* discriminatory to require female athletes to undergo testing for levels of endogenous testosterone when male athletes do not. In addition, it is not in dispute that the Hyperandrogenism Regulations place restrictions on the eligibility of certain female athletes to compete on the basis of a natural physical characteristic (namely the amount of testosterone that their bodies produce naturally) and are therefore *prima facie* discriminatory on that basis too.

449. The Athlete contended, and the IAAF did not submit to the contrary, that the IOC Charter, the IAAF Constitution and the laws of Monaco all provide that there shall not be discrimination and that these provisions are higher-ranking rules that prevail. Accordingly, unless the Hyperandrogenism Regulations are necessary, reasonable and proportionate, they will be invalid as inconsistent with the IOC Charter, the IAAF Constitution and the laws of Monaco.

450. The Panel concludes that, on their face, the Hyperandrogenism Regulations are discriminatory. It follows that the onus shifts to the IAAF to establish that the Hyperandrogenism Regulations are necessary, reasonable and proportionate

for the purposes of establishing a level playing field for female athletes. Such an approach is consistent with the countervailing requirements for sport and is recognised in a wide range of domestic and international laws, including laws directed to the prohibition of discrimination generally. . . .

510. First, the parties agree that it is reasonable and proportionate to divide athletes into male and female categories. Secondly, there should be an objective criterion or criteria to police this divide. Thirdly, gender testing is not an appropriate criterion. Fourthly, athletes may be female while still possessing high levels of testosterone, and thereby increased LBM [Lean Body Mass], which creates a competitive advantage. Fifthly, whether a person is a female is a matter of law. Sixthly, there is no evidence before the Panel that legal recognition as a female varies in most countries other than reference by the parties to the fact that there are a small number of countries where a person's status as a male or female is determined exclusively by a process of self-identification. Seventhly, the level of endogenous testosterone and sensitivity to testosterone may provide an appropriate criterion to divide normal male and female populations. However, eighthly, there are females such as those with DSDs [Difference of Sexual Development] who have high levels of endogenous testosterone relative to other females and are sensitive to testosterone and remain females. There is no separate category in which those athletes may compete (for example, an "intersex" category). Ninthly, the Hyperandrogenism Regulations only apply to females. Tenthly, if the Regulations apply to a female to preclude her competing as a female, she may not compete as a male. That is, the Regulations do not police the male/female divide but establish a female/female divide within the female category. Eleventhly, the criteria of a level of endogenous testosterone of 10 nmol/L with a degree of virilisation as an indicator of "masculine traits," are based on the best available science concerning the typical ranges of testosterone in males and females and physical indications of androgen sensitivity.

511. The distinction between male and female is a matter of legal recognition. Nevertheless, as explained above, the Panel is of the view that levels of endogenous testosterone are a key biological indicator of the difference between males and females. However, that is not the use to which endogenous testosterone is being put under the Hyperandrogenism Regulations. It is not being used to determine whether an athlete should compete either as a male or as a female. Instead, it is being used to introduce a new category of ineligible female athletes within the female category. The necessity and proportionality of that restriction therefore requires particularly careful analysis.

512. . . . [T]here are only two categories of competition: male and female. These categories are together intended to cover all athletes who wish to participate in competitive athletics. Female athletes who exhibit high levels of endogenous testosterone may include females with intersex characteristics. As an intersex population exists, and is represented in female athletics, it must be accepted that these athletes may exhibit characteristics across a range, from those within the normal

female range to those within the normal male range. Where an athlete is female, and thereby only eligible to compete as a female, is it reasonable and proportionate to impose a test that excludes her from the female athlete category for the purposes of competition, when she exhibits, naturally, the characteristic most closely associated with male competitive advantage? The Panel need[s] to be satisfied on a balance of probabilities that it is.

513. The Panel considers that every athlete must in principle be afforded the opportunity to compete in one of the two categories and should not be prevented from competing in *any* category as a consequence of the natural and unaltered state of their body. A rule that prevents some women from competing at all as a result of the natural and unmodified state of their body is antithetical to the fundamental principle of Olympism that “Every individual must have the possibility of practising sport, without discrimination of any kind.” So too is a rule that permits an athlete to compete on condition that they undergo a performance-inhibiting medical intervention that negates or reduces the effect of a particular naturally occurring genetic feature. Excluding athletes from competing at all on the basis of a natural genetic advantage, or conditioning their right to compete on undergoing medical intervention which reduces their athletic performance, imposes a significant detriment on the athletes concerned, and is therefore only valid if it is clearly established to be a necessary and proportionate means of achieving fair competition. . . .

515. . . . [T]he Hyperandrogenism Regulations were designed to protect the majority of female athletes by ensuring that a person with a condition (for example a DSD) that confers a competitive advantage by reason of the presence of a very high level of testosterone compared to other females (which is a key reason for and measure of male athletic advantage) does not compete in the female category. However, it was also recognised that not only complete androgen insensitivity but also partial androgen insensitivity may mean that the advantage of high testosterone levels is only of “minor importance” for competitive advantage. . . .

517. The premise underpinning the Hyperandrogenism Regulations is therefore that some members of the female class have a competitive advantage over other members of the female class that is similar to the performance advantage enjoyed by male athletes. . . . [I]t is the *degree* of competitive advantage that is said to make for unfair competition and absence of a level playing field. . . .

527. The Panel considers the lack of evidence regarding the quantitative relationship between enhanced levels of endogenous testosterone and enhanced athletic performance to be an important issue. While a 10% difference in athletic performance certainly justifies having separate male and female categories, a 1% difference may not justify a separation between athletes in the female category, given the many other relevant variables that also legitimately affect athletic performance. The numbers therefore matter. . . .

531. It follows that the Panel is unable to conclude that the Hyperandrogenism Regulations fulfil their stated purpose. . . .

536. . . . [T]he Panel finds that the IAAF has not discharged its burden of establishing that the criteria in the Hyperandrogenism Regulations are necessary and proportionate to pursue the legitimate objective of regulating eligibility to compete in female athletics to ensure fairness in athletic competition. . . .

538. It may be that evolving scientific evidence or the compilation of existing evidence and data will reach a sufficient level of proof of unacceptable competitive advantage to enable a specific standard to be reached, either by reference to testosterone or by reference to, for example, LBM or otherwise. . . .

548. In these circumstances, the Panel is unable to uphold the validity of the Regulations. The Panel therefore suspends the Hyperandrogenism Regulations for a period of two years

* * *

In April 2018, the IAAF published new Eligibility Regulations for Female Classification (Athlete with Differences of Sexual Development) for events from 400m to the mile (“Restricted Events”). These rules will come into force on November 1, 2018. In order to be eligible to compete in Restricted Events in an International Competition (or set a World Record) as a woman, the athlete must “maintain her blood testosterone level below five (5) nmol/L continuously.” Athletes who do not wish to lower their testosterone levels would be eligible to compete in the male classification of the Restricted Events.

The IAAF explained that it aimed to ensure “a level playing field for athletes,” and IAAF relied on what it called “a broad medical and scientific consensus, supported by peer reviewed data and evidence from the field, that the high levels of endogenous testosterone circulating in athletes with certain DSDs can significantly enhance their sporting performance.”*

Ethics of Regulating Competition for Women with Hyperandrogenism

Silvia Camporesi (2016)**

. . . [T]he IAAF had abandoned all [guidelines regulating gender testing] in 1991, as did the International Olympic Committee (IOC) in 1999. As reported, the

* IAAF, *Eligibility Regulations for the Female Classification: Athletes with Differences of Sex Development*, April 23, 2018 (effective November 1, 2018).

** Excerpted from Silvia Camporesi, *Ethics of Regulating Competition for Women with Hyperandrogenism*, 35 CLINICS IN SPORTS MEDICINE 293 (2016).

IAAF argued that gender testing was no longer necessary because “modern sportswear was now so revealing that it seemed unfeasible that a man could masquerade as a woman,” which had been the main concern underlying the gender testing regulations. After concerns for false-positive results at the Atlanta Olympic Games in 1996, in 1999 the IOC also removed the requirements for gender testing. . . .

[T]here are many unknowns regarding how testosterone works with regard to athleticism, but what is clear is that testosterone cannot be used to predict who is going to perform better, nor can it be used to infer that people who perform better have more testosterone. Moreover, although the reference range for testosterone for men is between 300 and 1200 ng/dL and for women it does not exceed, on average, 100 ng/dL, it has been observed that testosterone concentrations vary according to several factors, such as exposure to exogenous hormones (eg, estrogen and thyroxine), the time of the day, and the age of the individual. Evidence has also been provided against the supposed correlation between high levels of endogenous testosterone and an advantage in competition from athletes with nonfunctioning testosterone.

That the correlation between levels of testosterone and competitive advantage has not been proved is the argument that led on July 27, 2015 to the suspension of the regulations by the CAS. But even if this correlation could be unequivocally proved, I argue that this would not constitute an unfair advantage. . . .

Singling out, and setting a limit on, hyperandrogenism from other biologic variations that may confer a genetic advantage is an inconsistent policy: there are plenty of other genetic variations that are not regulated by the IAAF and, even though advantageous for athletic performance, they are not considered unfair for competition.

More than 200 genetic variations have been identified that provide an advantage in elite sport, which affect a variety of functions including blood flow to muscles, muscle structure, oxygen transport, lactate turnover, and energy production. . . .

In addition, the IAAF and IOC policies raise concerns in terms of internal consistency. Indeed, if we buy into the IAAF assumption that higher levels of testosterone confer an unfair advantage in competition and that it is necessary to set an upper limit to redress the level playing field, then one wonders why there is not an upper limit for the male category. . . . “For many years now, natural advantage among male athletes has not been policed and reduced in sports, but on the contrary has been admired and celebrated.” . . .

Although the IAAF no longer uses the term “femininity” in its regulations, they nonetheless display a marked focus on what are broadly considered to be feminine physical characteristics, such as (lack of) body hair and the size and shape of breasts. Hence, female athletes who do not conform to “normal” social standards of femininity are the targets for testing. Hence, there is an increasing pressure on women

athletes to “perform heteronormative standards femininity” to avoid having their gender called into question. . . .

[S]o far all the women who have been targeted by the IAAF guidelines are women from developing countries The standard stereotype of femininity to which athletes are pressured to conform is white, and “flawless.” Hence one can see in these policies the intersection of different narratives of gender, race, and medical imperialism. This supports the claim that female athletes who do not conform to heteronormative standards of femininity are targets of the testing. . . .

Hyperandrogenism does not pose an immediate threat to the health of the person affected. . . . There are many women who are not athletes affected by hyperandrogenism (between 10% and 15% of women are affected by polycystic ovary syndrome), but they do not have to take androgen suppressive therapy or undergo surgeries, including feminizing plastic surgeries that are recommended by the regulations and that have nothing to do with levels of testosterone. . . .

[S]urgical and medical procedures are unnecessary from a clinical practice point of view, but are only necessary as a condition to re-enter the field of play. In this respect, the rationale for imposing treatment lies outside of considerations of beneficence cheered in medical ethics. . . .

The burden of proof to demonstrate androgen resistance (and hence, not to derive an “advantage” from higher levels of testosterone) falls on the athletes. . . . [So does] the burden of cost for the treatment. Indeed, although the policies provide explicit recommendation of treatment, they also explicitly state that they do not cover the costs for medical intervention. . . .

FIFA, Football and Women

Submission to Mr. Francois Carrad, Chair of FIFA Reform Committee, by
Moya Dodd, Chair, FIFA Task Force for Women’s Football (2015)

Under pressure from authorities, commercial partners and stakeholders within, FIFA is in need of imminent change. The moment has arrived for far-reaching reforms.

With this pressure comes the opportunity to correct what is perhaps the most profound, long-standing and systemic injustice in sport—the exclusion of women and girls from the world’s most popular game, football.

This submission sets out the case for this to be rectified as part of the Reform process. . . .

Football today is overwhelmingly male—not because women and girls are inherently disinterested or incapable, but rather due to decades of institutional and

social barriers that prevent them from playing. When girls don't play, women's equity in leadership in technical, administration and governance remains under-realized.

Too few decision-makers in football appreciate the nature and scale of the issue, because the sufferers are barely present to voice it or challenge the existing assumptions. However, at the 2015 FIFA Women's Football Symposium, delegates from the 171 member associations (MAs) present called for far-reaching reforms that would fundamentally alter football's profile.

Two issues in these 'Calls to Action' can be directly addressed by this Reform Committee Given that women constitute an enormous growth opportunity for football, such measures would undoubtedly serve FIFA's objectives.

Women comprise only 8% of [Executive Committee (ExCo)] members globally. . . . Only 7% of registered coaches are female, and they battle a "glass ceiling" despite their qualifications and disproportionate success. . . .

Perhaps the most evident hallmark of the women's game is its systematic under-resourcing throughout the world. Even though FIFA outlaws discrimination, it is still the case that many girls grow into women without having the chance to play in a team or know how it feels to score a goal. Those who do get less opportunities, fewer competitions, reduced support and diminished rewards compared to their male peers, largely because historical, social and institutional bans have delayed competitions and suffocated development. . . .

The Reform Committee is respectfully requested to recommend an immediate 20% presence of women on the FIFA Executive Committee, to be mirrored within a reasonable time at all levels . . . with a longer-term target of 30% gender balance. . . . The Reform Committee is respectfully requested to recommend an immediate requirement for all football stakeholders (including governing bodies and clubs) to actively resource participation opportunities for women and girls at all levels, without gender discrimination in fair financial proportion to its female participation and potential. . . .

Guidelines for Promoting the Involvement of Women on the FIFA Council

Governance Committee

Fédération Internationale de Football Association (FIFA) (2017)

One of FIFA's objectives is the promotion of "the development of women's football and the full participation of women at all levels of football governance." Each confederation is "required to work closely with FIFA in every domain" to achieve this objective.

In order to achieve this objective, it is necessary for women to participate actively at every level of FIFA's governance structure. To this end, the FIFA Statutes require that each confederation[, or regional association formed at the continental level,] elect at least one woman to the FIFA Council[, the governing body of FIFA]. The FIFA Statutes further provide that a confederation that fails to elect a woman will have one less representative on the FIFA Council. This requirement is a minimum: it is not a statement about what level of female representation is sufficient to achieve the objective of promoting the participation of women in football governance, and it is certainly not a maximum. It should form part of an overall programme of encouraging and developing the role of women in football governance in FIFA, in each confederation, and in each member association.

As a result, when confederations conduct elections to the FIFA Council, the election of *at least* one female candidate should be ensured by using an electoral system that neither suggests that only one woman should be elected, nor has the effect of encouraging that outcome in practice. Women should be encouraged to run for *all* seats on the FIFA Council. This includes generally available seats, seats reserved by confederations for specific regions or linguistic groupings (if any), and confederation presidencies. In particular, an electoral system that encourages women to run only for a "women's seat" does not comply with the objective of promoting the *full* participation of women. . . .

ARE SPORTS ORGANIZATIONS PRIVATE INSTITUTIONS SUBJECT TO STATE REGULATION?

As associations incorporated under national law, sports organizations may be subject to statutory and regulatory laws in the countries in which they operate. For example, in 2017, the European Commission found that the eligibility rules of the International Skating Union (ISU) violated European competition law. Two Dutch professional speed skaters, Mark Tuitert and Niels Kerstholt, brought a complaint challenging the ISU's rules preventing speed skaters from participating in non-ISU events, with potential penalties including multiyear suspensions and lifetime bans. The Commission concluded that this regulation both unfairly curtailed speed skaters' opportunities to participate in non-ISU events and had the potential to prevent non-ISU events from ever arising, as the best speed skaters would forego them to maintain eligibility.

In response to such regulatory efforts, sports organizations have argued that their status as semi-public institutions makes them ill-suited for regulation under existing competition laws. This semi-public status has also framed government prosecutors' efforts to curtail corruption, which has plagued organizations like FIFA and the IOC and often involves behavior that, in the terminology of public institutions, would be seen as bribery and self-dealing.

Competition Law and Economic Freedoms

As is more than evident, sports are a business for the organizations, athletes, and sponsors. As private businesses, sports organizations could be subject to antitrust laws. Yet some suggest that, because of the degree to which sports are identified as based in national identities, their actions render them sufficiently public so as to be exempt from anti-monopoly regulation.

These issues are debated in the United States under doctrinal approaches about what constitutes “state action” and how to interpret statutes providing (or not) special exemptions for entities. For example, in *San Francisco Arts and Athletes v. U.S. Olympic Committee* (1987), the Supreme Court of the United States concluded that the U.S. Olympic Committee was not a government actor; although established under federal statute, the Court concluded that “extensive regulation by the government does not transform the actions of the regulated entity into those of the government.” In *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001), the Supreme Court of the United States explored further the factors that render an entity a state actor.

The European Court of Justice (ECJ) addressed a similar question in *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman* (1995) to decide whether the European Communities’ fundamental freedoms were binding on this sport organization. More recently, the ECJ in *Meca-Medina v. Commission of the European Communities* (2006) and the Supreme Court of the United States in *American Needle, Inc. v. National Football League* (2010) have concluded that concerted action by sport clubs can be regulated by competition law.

Brentwood Academy v. Tennessee Secondary School Athletic Association

Supreme Court of the United States
531 U.S. 288 (2001)

Justice Souter delivered the opinion of the Court.

[In the late 1990s, the Tennessee Secondary School Athletic Association (“Tennessee Association”) investigated Brentwood Academy’s athletic recruiting practices. As a private school, Brentwood Academy depended on voluntary enrollment by students, through their families. The Tennessee Association had a long-standing prohibition on exerting “undue influence” in recruiting middle school students—thirteen- and fourteen-year-olds. The Tennessee Association concluded that the Brentwood coach had violated that rule by mailing a letter that invited eighth-grade boys to attend spring practice sessions and emphasized that “getting involved as soon as possible would definitely be to your advantage.”

The Tennessee Association fined Brentwood Academy, placed it on probation for four years, and declared the boys' football and basketball teams ineligible to compete in the playoffs for two years. Brentwood sued the Tennessee Association and argued that the Tennessee Association was acting under "color of state law" and had both failed to accord it the process due under the Fourteenth Amendment and violated Brentwood's right to freedom of expression under the First Amendment of the Constitution.

The federal trial court held that the Tennessee Association was a state actor that had provided inadequate process before imposing regulations on Brentwood. On appeal, the Sixth Circuit Court of Appeals reversed, finding that the Tennessee Association "was neither engaging in a traditional and exclusive public function nor responding to state compulsion." The Supreme Court reversed that ruling.]

The issue is whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school. . . . We hold that the [Tennessee Association]'s regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way. . . .

Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not.* The judicial obligation is not only to "'preserv[e] an area of individual freedom by limiting the reach of federal law' and avoi[d] the imposition of responsibility on a State for conduct it could not control," but also to assure that constitutional standards are invoked "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. Thus, we say that state action may be found if, though only if, there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself." . . .

Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action

* Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

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.

when it results from the State’s exercise of “coercive power,” when the State provides “significant encouragement, either overt or covert,” or when a private actor operates as a “willful participant in joint activity with the State or its agents.” We have treated a nominally private entity as a state actor when it is controlled by an “agency of the State,” when it has been delegated a public function by the State, when it is “entwined with governmental policies,” or when government is “entwined in [its] management or control.” . . .

The nominally private character of the [Tennessee] Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it. . . .

There would be no recognizable [Tennessee] Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the [Tennessee] Association exists and functions in practical terms. . . .

To complement the entwinement of public school officials with the [Tennessee] Association from the bottom up, the State of Tennessee has provided for entwinement from top down. State Board members are assigned ex officio to serve as members of the board of control and legislative council, and the [Tennessee] Association’s ministerial employees are treated as state employees

The entwinement down from the State Board is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.

Justice Thomas, with whom The Chief Justice [Rehnquist], Justice Scalia, and Justice Kennedy join, dissenting.

We have never found state action based upon mere “entwinement.” Until today, we have found a private organization’s acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government. The majority’s holding—that the [Tennessee Association’s] enforcement of its recruiting rule is state action—not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect. . . .

* * *

Several years later, the case returned to the U.S. Supreme Court. In *Tennessee Secondary School Athletic Association v. Brentwood Academy*, 551 U.S. 291 (2007),

Justice John Paul Stevens wrote for the Court, which unanimously held that the anti-recruiting rule of the Tennessee Association did not violate the First Amendment. One factor in the analysis was that Brentwood Academy had made a “voluntary decision” to participate in the Association and abide by its rules.

**Union Royale Belge des Sociétés de Football Association ASBL v.
Jean-Marc Bosman**
European Court of Justice
C-415/93 (1995)

[Before G.C. Rodríguez Iglesias, President, C.N. Kakouris, D.A.O. Edward and G. Hirsch (Presidents of Chambers), G.F. Mancini (Rapporteur), J.C. Moitinho de Almeida, P.J.G. Kapteyn, C. Gulmann, J.L. Murray, P. Jann and H. Ragnemalm, Judges; Advocate General: C.O. Lenz; Registrars: R. Grass, Registrar, and D. Louterman-Hubeau, Principal Administrator]

[Mr. Bosman, a Belgian footballer, claimed in a Belgian court that his ability to play for a French team was impeded by transfer rules and fees, imposed by the Royal Belgian Football Association. The Belgian court referred a question to the ECJ as to whether such rules were compatible with Article 48 EC Treaty, freedom of movement for workers—now recognized under Article 45 of the Treaty on the Functioning of the European Union.*] . . .

71. [The Royal Belgian Football Association] argued . . . that the Community authorities have always respected the autonomy of sport, that it is extremely difficult to distinguish between the economic and the sporting aspects of football and that a decision of the Court concerning the situation of professional players might call in question the organization of football as a whole. For that reason, even if Article 48 of the Treaty were to apply to professional players, a degree of flexibility would be essential because of the particular nature of the sport.

72. The German Government [which intervened as a third party] stressed, first, that in most cases a sport such as football is not an economic activity. It further submitted that sport in general has points of similarity with culture and pointed out that, under Article 128(1) of the EC Treaty, the Community must respect the national and regional diversity of the cultures of the Member States. Finally, referring to the freedom of association and autonomy enjoyed by sporting federations under national law, it concluded that, by virtue of the principle of subsidiarity, taken as a general principle, intervention by public, and particularly Community, authorities in this area must be confined to what is strictly necessary.

* Article 45 of the Treaty on the Functioning of the European Union provides:

1. Freedom of movement for workers shall be secured within the Union. . . .

73. . . . [S]port is subject to Community law only in so far as it constitutes an economic activity This applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service. . . .

75. Application of Article 48 of the Treaty is not precluded by the fact that the transfer rules govern the business relationships between clubs rather than the employment relationships between clubs and players. The fact that the employing clubs must pay fees on recruiting a player from another club affects the players' opportunities for finding employment and the terms under which such employment is offered.

76. As regards the difficulty of severing the economic aspects from the sporting aspects of football, the Court has held that the provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches. It stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.

77. With regard to the possible consequences of this judgment on the organization of football as a whole, it has consistently been held that, although the practical consequences of any judicial decision must be weighed carefully, this cannot go so far as to diminish the objective character of the law and compromise its application on the ground of the possible repercussions of a judicial decision. At the very most, such repercussions might be taken into consideration when determining whether exceptionally to limit the temporal effect of a judgment.

78. The argument based on points of alleged similarity between sport and culture cannot be accepted, since the question submitted by the national court does not relate to the conditions under which Community powers of limited extent, such as those based on Article 128(1), may be exercised but on the scope of the freedom of movement of workers guaranteed by Article 48, which is a fundamental freedom in the Community system.

79. . . . [The] principle [of freedom of association], enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms* and resulting from the constitutional traditions common to the Member

* Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

States, is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.

80. However, the rules laid down by sporting associations to which the national court refers cannot be seen as necessary to ensure enjoyment of that freedom by those associations, by the clubs or by their players, nor can they be seen as an inevitable result thereof. . . .

83. The Court has held that the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law.

84. . . . [W]orking conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. Accordingly, if the scope of Article 48 of the Treaty were confined to acts of a public authority there would be a risk of creating inequality in its application. . . .

85. . . . [The Belgian football association] objects that such an interpretation makes Article 48 of the Treaty more restrictive in relation to individuals than in relation to Member States, which are alone in being able to rely on limitations justified on grounds of public policy, public security or public health.

86. That argument is based on [a] false premis[e]. There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.

87. Article 48 of the Treaty therefore applies to rules laid down by sporting associations . . . , which determine the terms on which professional sportsmen can engage in gainful employment. . . .

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. . . .

Meca-Medina v. Commission of the European Communities
European Court of Justice (Third Chamber)
C-519/04 P (2006)

[Before A. Rosas, President of the Chamber, J. Malenovský (Rapporteur), J.-P. Puissechot, A. Borg Barthet and A. Ó Caoimh, Judges, Advocate General: P. Léger, Registrar: B. Fülöp, Administrator.] . . .

7. The applicants are two professional athletes who compete in long-distance swimming, the aquatic equivalent of the marathon.

8. In an anti-doping test carried out on 31 January 1999 during the World Cup in that discipline at Salvador de Bahia (Brazil), where they had finished first and second respectively, the applicants tested positive for Nandrolone. . . .

16. . . . [T]he applicants challenged the compatibility of certain regulations adopted by the IOC [International Olympic Committee] and implemented by FINA [Fédération Internationale de Natation] and certain practices relating to doping control with the Community rules on competition and freedom to provide services. First of all, the fixing of the limit at 2 ng/ml is a concerted practice between the IOC and the 27 laboratories accredited by it. That limit is scientifically unfounded and can lead to the exclusion of innocent or merely negligent athletes. In the applicants' case, the excesses could have been the result of the consumption of a dish containing boar meat. Also, the IOC's adoption of a mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by arbitration (the CAS and the ICAS) which are insufficiently independent of the IOC strengthens the anti-competitive nature of that limit. . . .

40. The appellants contend that in rejecting their complaint the Commission wrongly decided that the anti-doping rules at issue were not a restriction of competition [under European Community law]. . . .

43. As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.

44. In addition, given that penalties are necessary to ensure enforcement of the doping ban, their effect on athletes' freedom of action must be considered to be, in principle, inherent itself in the anti-doping rules.

45. Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action,

they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, . . . since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.

46. While the appellants do not dispute the truth of this objective, they nevertheless contend that the anti-doping rules at issue are also intended to protect the IOC's own economic interests and that it is in order to safeguard this objective that excessive rules, such as those contested in the present case, are adopted. . . .

47. It must be acknowledged that the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in. It follows that . . . the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport.

48. Rules of that kind could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of those penalties. . . .

54. . . . It does not appear that the restrictions which that threshold imposes on professional sportsmen go beyond what is necessary in order to ensure that sporting events take place and function properly.

55. Since the appellants have, moreover, not pleaded that the penalties which were applicable and were imposed in the present case are excessive, it has not been established that the anti-doping rules at issue are disproportionate. . . .

American Needle, Inc. v. National Football League
Supreme Court of the United States
560 U.S. 183 (2010)

Justice Stevens delivered the [unanimous] opinion of the Court.

"Every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade" is made illegal by § 1 of the Sherman Act. The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade. This case raises that antecedent question about the business of the 32 teams in the National Football League (NFL) and a corporate entity that they formed to manage their intellectual property. We conclude that the NFL's licensing activities constitute

concerted action that is not categorically beyond the coverage of § 1. The legality of that concerted action must be judged under the Rule of Reason.

Originally organized in 1920, the NFL is an unincorporated association that now includes 32 separately owned professional football teams. Each team has its own name, colors, and logo, and owns related intellectual property. Like each of the other teams in the league, the New Orleans Saints and the Indianapolis Colts, for example, have their own distinctive names, colors, and marks that are well known to millions of sports fans.

Prior to 1963, the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys. In 1963, the teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Most, but not all, of the substantial revenues generated by NFLP have either been given to charity or shared equally among the teams. However, the teams are able to and have at times sought to withdraw from this arrangement.

Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manufacture and sell apparel bearing team insignias. Petitioner, American Needle, Inc., was one of those licensees. In December 2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams. It thereafter declined to renew American Needle's nonexclusive license.

American Needle . . . [alleges] that the agreements between the NFL, its teams, NFLP, and Reebok violated §§ 1 and 2 of the Sherman Act. In their answer to the complaint, the defendants averred that the teams, NFL, and NFLP were incapable of conspiring within the meaning of § 1 “because they are a single economic enterprise, at least with respect to the conduct challenged.” . . .

As the case comes to us, we have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a “contract, combination . . . , or conspiracy” as defined by § 1 of the Sherman Act, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents “must be viewed as that of a single enterprise for purposes of § 1.” . . .

We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate. As a result, we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. . . .

Conversely, there is not necessarily concerted action simply because more than one legally distinct entity is involved. . . .

The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business. “[T]heir general corporate actions are guided or determined” by “separate corporate consciousnesses,” and “[t]heir objectives are” not “common.” The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel.

Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the “common interests of the whole” league but is instead pursuing interests of each “corporation itself,” teams are acting as “separate economic actors pursuing separate economic interests,” and each team therefore is a potential “independent center of decisionmaking.” Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that “depriv[e] the marketplace of independent centers of decisionmaking,” and therefore of actual or potential competition. . . .

Football teams that need to cooperate are not trapped by antitrust law. “[T]he special characteristics of this industry may provide a justification” for many kinds of agreements. The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis.

When “restraints on competition are essential if the product is to be available at all,” *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason. [The Rule of Reason standard requires a fact-intensive examination to determine whether a particular economic arrangement unreasonably restrains trade.] In such instances [where restraints are necessary for the product to be available at all], the agreement is likely to survive the Rule of Reason. And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it “can sometimes be applied in the twinkling of an eye.”

Other features of the NFL may also save agreements amongst the teams. We have recognized, for example, “that the interest in maintaining a competitive balance” among “athletic teams is legitimate and important.” While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for § 1 purposes when it comes to the marketing of the teams’ individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of

collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand. . . .

[In February 2015, American Needle and the NFL reached a settlement agreement, with American Needle receiving monetary damages for the harms caused by the NFL teams' collusive efforts.]

Anti-Corruption Efforts

In 2015, in efforts to curtail corruption in athletic associations, the U.S. Attorney for the Eastern District of New York brought a series of charges against FIFA officials, other persons, and corporations. The government alleged a widespread conspiracy, racketeering, wire fraud, and other federal crimes. As discussed by Bruce Bean below, the indictments focused on actions by individuals within FIFA's business for conduct that, in the public context, would be considered bribery. However, as Susan Rose-Ackerman and Bonnie Palifka have noted, "[b]ecause the officials of FIFA are not public officials, ordinary anti-bribery laws do not apply, leaving prosecutors to rely on other legal violations."^{*} Below, we begin with Bean's 2016 overview of the prosecution and of the allegations of widespread corruption within FIFA. We then excerpt the 2015 indictment, brought by U.S. prosecutors and charging acts comprising a criminal enterprise.

An Interim Essay on FIFA's World Cup of Corruption

Bruce Bean (2016)^{**}

On May 27, 2015, the United States Department of Justice unsealed a 161-page indictment (the "Indictment") in the United States District Court for the Eastern District of New York. A Brooklyn Grand Jury returned the Indictment against fourteen defendants, current or former officials of Fédération Internationale de Football Association, ("FIFA") and five businessmen associated with businesses involved with FIFA. The public filing was coordinated with raids by United States and Swiss officials on FIFA facilities in Miami and at FIFA headquarters in Zurich. Swiss authorities also conducted an early morning raid on Zurich's luxury Baur du Lac Hotel arresting seven FIFA officials.

^{*} SUSAN ROSE-ACKERMAN AND BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 244-45 (1999).

^{**} Excerpted from Bruce W. Bean, *An Interim Essay on FIFA's World Cup of Corruption: The Desperate Need for International Corporate Governance Standards at FIFA*, 22 INTERNATIONAL LAW STUDENTS ASSOCIATION JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 357 (2016).

In addition to the fourteen individuals charged with various United States federal crimes, the Indictment described twenty-five unnamed co-conspirators, at least some of whom were identified to the Grand Jury. . . . The crimes charged include \$150,000,000 in bribes paid over a period of twenty years, often in connection with the selection of a host nation for the quadrennial FIFA World Cup or the sale of marketing and broadcast rights for FIFA events. The charges against the defendants included “RICO” counts (the Racketeering Influenced Criminal Organizations Act, originally enacted to secure convictions of Mafia members), plus wire fraud, conspiracy and other charges.

At the time the Indictment was unsealed, Loretta Lynch, the United States Attorney General, announced that guilty pleas had been already secured from four individuals and two corporate legal entities. The long-serving President of FIFA, Joseph (Sepp) Blatter, was not named in the Indictment and was reelected to a fifth four-year term as FIFA’s President just days after the raids, arrests and release of the Indictment. In the media storm that raged after the scope and gravity of the charges became known, Blatter announced he would resign once a newly called Extraordinary Congress of FIFA member elected a new President in February 2016. . . .

FIFA is a not-for-profit association organized under the Swiss Civil Code. Its role is to govern international football. FIFA as a legal entity has not been charged with violations of United States law. . . .

More than 70% of FIFA’s revenues are tied to the sale of television and marketing rights to its World Cup and championship games which are conducted every four years. FIFA pays no taxes on its profits, including the \$969 million of profits it earned between 2007 and 2014 on almost \$10 billion in revenues. . . .

The Superseding Indictment alleges that many tens of millions of dollars in bribes have been paid in connection with the operations of FIFA and its continental confederations. . . .

In dealing with the charge that the United States should not have intervened in FIFA’s supervision and management of the world’s most popular sport, an *Economist* article notes: “America has a long history of being tougher on white collar crime and corruption than other countries.” The *Economist* further commented, that while Mr. Putin expressed unhappiness with the May 27, 2015, Indictment, “Most of Europe is happy, believing that FIFA has long been a cesspit of corruption in desperate need of fresh faces and reform.” . . .

The selection of Russia for the 2018 World Cup and Qatar for the 2022 World Cup “could reasonably be described as having stunned nearly everyone.” An integral part of the selection process had been an exhaustive due diligence investigation of each of the nations’ bidding to host the 2018 and 2022 World Cups. All venues were

ultimately rated “low risk” except for Qatar (“high risk”) and Russia (“medium risk”). Nevertheless, Russia and Qatar were the venues selected. . . .

An instantaneous explosion of media criticism followed the 2010 announcement of the selection of Russia and Qatar as future World Cup venues. The media crisis did not abate. As a result, FIFA finally took a number of “actions” which it highly publicized. It convened an Independent Governance Committee that included truly independent experts in international corporate governance, amended its organizational document, the FIFA Statutes, to empower the Congress of 209 Member Associations, and not the Executive Committee, to “vote on” future World Cup venues. FIFA also issued press statements in support of “reform” and revised its recently established Ethics Code and the structure of its Ethics Committee. The FIFA Ethics Code includes all the right words. Its Preamble states:

FIFA bears a special responsibility to safeguard the integrity and reputation of football worldwide. FIFA is constantly striving to protect the image of football, and especially that of FIFA, from jeopardy or harm as a result of illegal, immoral or unethical methods and practices.

The restructuring of the Ethics Committee established two new “chambers.” An Investigatory Chamber was created, and Michael J. Garcia, a totally independent former United States Attorney for the Southern District of New York, was hired as its Chairman. . . .

Until the United States, a minor player in international football, commenced criminal actions in May 2015, corruption of all kinds in football was widely known and unchallenged throughout the world. Corruption within the international football ecosystem is an accepted aspect of the culture of FIFA. . . .

The Superseding Indictment will certainly result in impressive fines, disgorgement of fairly large sums, and prison terms for assorted FIFA associated persons. This will profoundly affect those individuals but will have no important impact on the culture within FIFA. The pervasiveness of resistance to any change in FIFA’s corrupt culture is made clear in this example. After two years of work the Independent Governance Committee submitted its Final Report to FIFA. The Committee expressed its concern over the negative reaction to its modest reform proposals from Members of UEFA, the most important of FIFA’s continental confederations.

However, the [Committee] was surprised and actually worried about the seriousness of some of the key opinion leaders in football, when a declaration of the Presidents and Secretaries of all 53 Members Associations of [Union of European Football Associations (UEFA)] was published on January 24, 2103, which fell short of fundamental requirements of modern governance in essential parts.

So long as FIFA officials know that they may react to allegations of corruption by merely talking about change, they will continue to act with impunity as they extort payments in exchange for access to broadcast and marketing rights and votes for hosting FIFA events. This moral hazard, so obvious in FIFA's past history, must be eliminated. . . .

United States v. Hawit
Superseding Indictment

U.S. District Court for the Eastern District of New York
No. 15-252 (S-1) (RJD) (E.D.N.Y. 2015)

The Grand Jury Charges: . . .

1. The Fédération Internationale de Football Association ("FIFA") and its six constituent continental confederations . . . together with affiliated regional federations, national member associations, and sports marketing companies, collectively constituted an "enterprise," . . . that is, a group of legal entities associated in fact. The enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. The enterprise was engaged in, and its activities affected, interstate and foreign commerce.

2. The principal purpose of the enterprise was to regulate and promote the sport of soccer worldwide. The members of the enterprise carried out this purpose by using a variety of methods and means, including creating and enforcing uniform standards and rules, organizing international competitions, and commercializing the media and marketing rights associated with the sport. The members of the enterprise, as well as individuals and entities employed by and associated with the enterprise, frequently engaged in banking and investment activities with United States financial institutions. . . .

95. Certain individuals and entities employed by and associated with the enterprise . . . together with others, conspired with one another to use their positions within the enterprise to engage in schemes involving the solicitation, offer, acceptance, payment, and receipt of undisclosed and illegal payments, bribes, and kickbacks. Although they also helped pursue the principal purpose of the enterprise, the defendants and their co-conspirators corrupted the enterprise by engaging in various criminal activities, including fraud, bribery, and money laundering, in pursuit of personal and commercial gain. The defendants also participated in the corruption of the enterprise by conspiring with and aiding and abetting their co-conspirators in the abuse of their positions of trust and the violation of their fiduciary duties.

96. To further their corrupt ends, the defendants and their co-conspirators provided one another with mutual aid and protection. The conspirators engaged in conduct designed to prevent the detection of their illegal activities, to conceal the

location and ownership of proceeds of those activities, and to promote the carrying on of those activities. The conduct engaged in by various members of the conspiracy included, among other things: the use of “consulting services” agreements and other similar types of contracts to create an appearance of legitimacy for illicit payments; the use of various mechanisms, including trusted intermediaries, bankers, financial advisors, and currency dealers, to make and facilitate the making of illicit payments; the creation and use of shell companies, nominees, and numbered bank accounts in tax havens and other secretive banking jurisdictions; the active concealment of foreign bank accounts; the structuring of financial transactions to avoid currency reporting requirements; bulk cash smuggling; the purchase of real property and other physical assets; the use of safe deposit boxes; income tax evasion; and obstruction of justice. . . .

97. The damage inflicted by the defendants and their co-conspirators was far-reaching. By conspiring to enrich themselves through bribery and kickback schemes relating to media and marketing rights, among other schemes, the defendants deprived FIFA, the confederations, and their constituent organizations—and, therefore, the national member associations, national teams, youth leagues, and development programs that relied on financial support from their parent organizations—of the full value of those rights. In addition, the schemes had powerful anti-competitive effects, distorting the market for the commercial rights associated with soccer and undermining the ability of other sports marketing companies to compete for such rights on terms more favorable to the rights-holders. Finally, the schemes deprived FIFA, the confederations, and their constituent organizations of their right to the honest and loyal services of the soccer officials involved. Over time, and in the aggregate, such deprivations inflicted significant reputational harm on the victimized institutions, damaging their prospects for attracting conscientious members and leaders and limiting their ability to operate effectively and carry out their core missions.

98. Over a period of approximately 25 years, the defendants and their co-conspirators rose to positions of power and influence in the world of organized soccer. During that same period, sometimes with the assistance of the defendants and their co-conspirators, a network of marketing companies developed to capitalize on the expanding media market for the sport, particularly in the United States. Over time, the organizations formed to promote and govern soccer in regions and localities throughout the world, including the United States, became increasingly intertwined with one another and with the sports marketing companies that enabled them to generate unprecedented profits through the sale of media rights to soccer matches. The corruption of the enterprise arose and flourished in this context.

99. The corruption of the enterprise became endemic. Certain defendants and their co-conspirators rose to power, unlawfully amassed significant personal fortunes by defrauding the organizations they were chosen to serve, and were exposed and then either expelled from those organizations or forced to resign. Other defendants and

their co-conspirators came to power in the wake of scandal, promising reform. Rather than repair the harm done to the sport and its institutions, however, these defendants and their co-conspirators quickly engaged in the same unlawful practices that had enriched their predecessors. In some instances, these practices continued even after the original indictment returned by the Grand Jury in this case was unsealed on May 27, 2015 and most of the defendants charged in that indictment were arrested.

100. Over the period of the Indictment, the defendants and their co-conspirators were involved in criminal schemes involving the agreement to pay and receive well over \$200 million in bribes and kickbacks. . . .

* * *

In the wake of the first indictment most of the accused individuals, including two former FIFA Vice Presidents, entered guilty pleas in 2015. Three cases proceeded. In *United States v. Hawit*, No. 15-cr-252 (E.D.N.Y. Feb. 17, 2017), a federal district court judge denied several motions to dismiss. When doing so, the court held that FIFA, regional confederations, and other entities constituted a “global, association-in-fact enterprise,” to which criminal statutes applied. With regard to the Wire Fraud Statute, “the alleged fraud schemes extended beyond the United States—and may very well have had their centers of gravity outside the United States—but the schemes’ contacts with the United States were substantial, and the U.S. wires were an integral part of the overall schemes.” The District Court also found the Federal Money Laundering charge as well as the Racketeer Influenced and Corrupt Organizations (RICO) Act charge pertinent and applied extraterritorially. In 2018, two of the defendants were found guilty on most of the counts charged, while the third defendant was acquitted of all charges.

On October 25, 2017, the District Court sentenced the former president of Guatemala’s soccer association, who admitted to accepting and laundering money, to an eight-month prison term and ordered that he pay \$415,000 in restitution to the victims of his crimes. Some of the accused, including a former FIFA Vice President residing in Trinidad and Tobago, have objected to extradition to the United States.

FIFA has also taken internal measures to deal with the corruption crisis. Its ethics committee issued interim and then final bans against officials, including former president Joseph Blatter, in the immediate aftermath of the revelation of Swiss investigations in 2015. Both FIFA’s appeals committee and CAS upheld these sanctions in principle. However, in the case of Blatter, his initial eight-year ban was reduced by the appeals committee to six years, which in turn was upheld by CAS.* FIFA also issued bans and fines against those individuals who pled guilty or were convicted in the U.S. criminal case, excerpted above. As of this writing, no CAS decisions have been issued with regard to those punishments.

* *Platini v. FIFA*, CAS Award of 16 September 2016, CAS 2016/A/4474 (in French).

In the fallout from the 2010 decision to host the World Cup in Russia and Qatar, Michael Garcia, a former U.S. Attorney for the Southern District of New York, led an inquiry into what factors contributed to these anomalous selections. In the final report, completed in 2014, but only released to the public in full in 2017, Garcia documented widespread corruption within FIFA and recommended the adoption of a number of structural reforms, including term limits for members of the Executive Committee, a requirement that members of the Executive Committee recuse themselves from venue-selection decisions when their nations bid for the World Cup, and enhanced reporting requirements for gifts and other benefits provided by bidding teams, foreign officials, or others promoting a bid.

* * *

Europe has also seen an uptick in efforts to identify corruption within FIFA and the UEFA. In a report issued in 2017 for the Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe,* Member and Rapporteur Anne Brasseur elaborated on the governance initiatives and structural failures:

18. Even though [this analysis] . . . aims to underline the problematic issues, it would be unfair to ignore from the outset the fact that improvements have been made at both FIFA and UEFA, particularly with regard to financial transparency, a reduction in certain types of spending, monitoring money flows to prevent misappropriations and participatory governance. . . .

19. The high concentration of power and the lack of proper checks and balances are two problematic elements of the governance of sports institutions in general, including football institutions. In this respect I welcome that the new FIFA Statutes provide today for a clear separation of the strategic function—performed by the FIFA Council (previously Executive Committee)—from the management/executive function—performed by the general secretariat under the authority of the Secretary General. . . .

20. However the control of the President over all FIFA activities including over management functions seems to be as strong as under the previous leadership. . . .

23. I believe that the prominence of the President's position and his drive (also) on management issues are still a key element of FIFA governance culture. It has been like this for decades and it would be naïve to think that this could change just because a new provision proclaims a different *modus operandi*. . . .

* Good Football Governance, Council of Europe, Report Doc. 14452 (December 15, 2017).

49. To remedy this situation, there are no ready-made solutions. Some formal safeguards like the introduction of a “staggered board” membership principle for bodies like the Ethics Committee could help; . . . but the main issue remains who proposes and selects the members of the “independent bodies” If FIFA policy makers really accept that scrutiny of their action is led by independent persons—meaning persons over whom they have no control whatsoever—they must also accept that they do not have such a prominent role in nominating people and ending contracts. A system should be established whereby candidates are put forward (and proposed for renewal or not) from outside the FIFA system. . . .

50. The effectiveness of many significant advances in FIFA governance reforms is highly dependent on an effective room for manoeuvre of the independent committees, including the Governance Committee, to work truly independently. If this independence, while proclaimed and formally safeguarded by many provisions, were tamed by practices of the Council or the president, any attempt to build up a new culture in FIFA governance would be doomed to fail.

CAN SELF-GOVERNANCE ACHIEVE GOOD GOVERNANCE?

The autonomy of transnational sports law also comes to the fore when rulings of national courts conflict with those of sport organizations’ arbitral tribunals, operating under their own bodies of regulation and legal precedent. The vast majority of these organizations have accepted appellate review by CAS—the arbitral body featured in the *Chand* excerpt above. CAS also acts as a forum of first instance in cases concerning the International Olympic Committee (IOC). Sports organizations include provisions in their membership agreements and employment contracts prohibiting their members—*i.e.*, clubs, functionaries, and athletes—from seeking recourse to courts.

Many states have accepted, and some supported, the establishment of such arbitral mechanisms. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”) is one example; member states agree to accept private arbitral awards issued in other member states as valid and agree that annulment proceedings can only take place on limited grounds. The question of the status of CAS as such a body was the focus of the Swiss judgment, excerpted below.

In addition to establishing norms and regulations for athletic conduct, sporting organizations assume the right to enforce their regulations and decisions against their members. One prominent example is the case of banning Pete Rose, who had been an

American baseball player and then became a manager. Major League Baseball, the governing body over American professional baseball, banned Rose from participation for life (including lucrative membership in Baseball's Hall of Fame) based on a finding that he bet on games in violation of internal rules. The press statement by the MLB Commissioner and former President of Yale University A. Bartlett Giamatti, excerpted below, illustrates the argument for sporting organizations doing so.

Statement of A. Bartlett Giamatti

Commissioner of Baseball

August 24, 1989

The banishment for life of Pete Rose from baseball is the sad end of a sorry episode. One of the game's greatest players has engaged in a variety of acts which have stained the game, and he must now live with the consequences of those acts. By choosing not to come to a hearing before me, and by choosing not to proffer any testimony or evidence contrary to the evidence and information contained in the report of the Special Counsel to the Commissioner, Mr. Rose has accepted baseball's ultimate sanction, lifetime ineligibility.

This sorry episode began last February when baseball received firm allegations that Mr. Rose bet on baseball games and on the Reds' games. . . . To pretend that serious charges of any kind can be responsibly examined by a Commissioner alone fails to recognize the necessity to bring professionalism and fairness to any examination and the complexity a private entity encounters when, without judicial or legal powers, it pursues allegations in the complex, real world. . . .

That Mr. Rose and his counsel chose to pursue a course in the courts* rather than appear at hearings scheduled for May 25 and then June 26, and then chose to come forward with a stated desire to settle this matter is now well known to all. My purpose in recounting the process and the procedures animating that process is to make two points that the American public deserves to know:

First, that the integrity of the game cannot be defended except by a process that itself embodies integrity and fairness; Second, should any other occasion arise where charges are made or acts are said to be committed that are contrary to the interests of the game or that undermine the integrity of baseball, I fully intend to use such a process and procedure to get to the truth and, if need be, to root out offending behavior. I intend to use, in short, every lawful and ethical means to defend and protect the game. . . . Let it also be clear that no individual is superior to the game.

* Rose had sought a restraining order from the Hamilton County Common Pleas Court—a state court of Ohio—to prevent Giamatti from deciding the case. Giamatti then filed a federal lawsuit and argued that the Rose case ought to be removed from state court. The federal court agreed. *See Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio, 1989).

‘Our sin? We appeared to take our task at Fifa too seriously’

Navi Pillay, Miguel Poiares Maduro, and Joseph Weiler (2017)*

It was a cause for great optimism after years of scandal and corruption at Fifa, when in 2015 the [U.S.] authorities initiated criminal prosecutions against some of the worst alleged offenders, and a new top leadership took office with sweeping promises of reform.

We, the chairman and two independent members of the new governance committee were part of that reform effort. . . . Today, none of us is any longer in office. Our sin? We appear to have taken our task too seriously. . . .

There is a huge structural conflict of interest at the heart of Fifa: its leaders depend for their survival on those whom they ought to reform; power in Fifa is a political cartel. This is why the leadership of football survived for so long despite the many scandals surrounding it. With a little help from the FBI, and the independent Fifa ethics committee, whose two chairmen also had their tenures ended at the Bahrain congress in May, it might be that some bad apples have finally been removed. But the system remains largely unchanged. The leadership of football does not answer to the court of public opinion; it responds to its own constituency that would replace leadership which seriously tried to reform football.

All of us, united in our love for the game but with no ties to it, and with considerable experience in law and governance, accepted our appointment having received solemn promises regarding our independence.

Understanding that reform would not happen overnight, we showed flexibility when we thought it was proper. But we drew some red lines. We tried to effectively and impartially enforce Fifa’s stated principle that members of the Fifa council must be politically neutral. Our decision, in that context, to ban the Russian deputy prime minister Vitaly Mutko from elections led to a backlash from the new Fifa leadership against our independence. We also tried to enforce gender equality, human rights, and regulate the integrity of Fifa elections, and faced resistance on all of them. Ultimately it became clear to us that the leadership, in order to secure its own survival, could no longer support our independence.

We have concluded that Fifa cannot reform from within. Those responsible for leading such reform are politically dependent on the associations and officials they need to reform, and may remove members of the judicial and supervisory independent committees at a whim. . . .

* Excerpted from Navi Pillay, Miguel Poiares Maduro, and Joseph Weiler, ‘*Our sin? We appeared to take our task at Fifa too seriously.*’ THE GUARDIAN, December 21, 2017, <https://www.theguardian.com/football/2017/dec/21/our-sin-take-task-fifa-seriously>.

What can be done? We advocate decisive external action. Parliamentary inquiries are good starting points, but it is necessary for them to produce concrete results. No country on its own—including Switzerland which hosts many of the world governing bodies—has the effective power to regulate such transnational organisations. The European Union is, though, in a privileged position: it brings together 28 member states—while the UK is still a member—which, collectively, these governing bodies cannot ignore. We believe the EU should take the lead.

The European Commission is entitled to act under competition or internal market powers, and the European Parliament could seize the issue by demanding effective action from the commission and the council. One initiative, which we strongly support, is now in a draft resolution of the Parliamentary Assembly of the Council of Europe, following a report by the former Luxembourg sports minister, Anne Brasseur. It calls on the EU to create an independent agency, which would not govern sports itself, but have the authority to review and supervise ethical issues and structures, to guarantee that transnational sports organisations conform with good governance. A second initiative would be to make the criminal investigation and prosecution of transnational sports-related criminal activity a priority for the forthcoming European Public Prosecutor. . . .

A and B v. International Olympic Committee
Federal Supreme Court of Switzerland (First Civil Law Division)
4P.267/2002 (2003)

[Judges Corboz (President), Walter, Klett, Nyffeler and Favre. Registrar: Mr Carruzzo.]

. . . 3. The plaintiffs submit, as their principal argument, that the CAS is not an independent tribunal in a dispute in which the IOC is a party. On the basis of Art. 190 para. 2 (a) [Swiss Federal Code of Private International Law]* in conjunction with Art. 6 para. 1 of the [European Convention on Human Rights]** and Art. 30 para. 1 of the

* Article 190 of Switzerland's Federal Code of Private International Law provides:

IX. Finality, appeal . . .

1. The award shall be final when communicated.

2. It can be challenged only: If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; . . .

** Article 6, paragraph 1 of the European Convention on Human Rights provides:

Right to a fair trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order

[Federal Constitution of the Swiss Federation],* they argue that the two awards in which the IOC is named as a party should be set aside. . . .

3.1 . . . If an arbitral tribunal lacks independence or impartiality, it is “constituted irregularly” in the sense of Art. 190

3.2 The Federal Supreme Court has accepted that the CAS may be considered a true arbitral tribunal for cases in which the IOC is not a party, but where the CAS is established by an international sports association as the appeals body charged with examining the validity of sanctions imposed by its organs. . . .

3.3.1 The CAS [was created as] . . . [a]n independent arbitral institution without legal personality The operating costs of the CAS were borne by the IOC, which was entitled to modify the CAS Statute. . . .

[In 1993, t]he Federal Supreme Court expressed reservations concerning the CAS’ independence vis-à-vis the IOC on account of the organisational and financial links between the two bodies. It thought that the CAS needed to become more independent of the IOC. This judgement led to a major reform of the CAS. The main developments were the creation of the International Council of Arbitration for Sport (ICAS) in Paris on 22 June 1994

3.3.3 In order to conclude whether an arbitral tribunal offers sufficient guarantees of independence and impartiality, reference must be made to the constitutional principles concerning State courts.

According to Article 30 para. 1 of the Constitution, every person whose case must be judged in judicial proceedings has the right to have this done by a court that is established by law, has jurisdiction, and is independent and impartial. This principle means it should be possible to demand that a judge be challenged if his situation or conduct is likely to give rise to doubts about his impartiality; in particular, it is meant to prevent circumstances external to a case from influencing the judgement either in favour or to the detriment of one of the parties. It does not mean that a judge can only be challenged if prejudice is established, since an internal predisposition on his part is virtually impossible to prove; it is sufficient that circumstances produce the appearance of prejudice and cast doubt over the judge’s impartiality. Only objectively

or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

* Article 30 of the Federal Constitution of the Swiss Confederation provides:

Judicial proceedings

1. Any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited. . . .

noted circumstances may be taken into consideration; the purely individual impressions of one of the parties to the case are not sufficient in themselves.

The question of whether . . . the demands made on arbitrators chosen by one of the parties should be less strict has not been resolved and does not need to be answered in the present case. However, case-law suggests that account should be taken of the specific characteristics of arbitration, especially international arbitration, when considering whether an arbitral tribunal offers sufficient guarantees of impartiality and independence. International arbitration is actually a narrow field and it is inevitable that, after a few years on the circuit, arbitrators, many of whom are lawyers themselves, will hear cases in which either a fellow arbitrator or one of the counsels has served with them on a previous Panel. This does not automatically mean they are no longer independent. . . .

3.3.3.2 . . . [T]he plaintiffs are wrong to suggest that the ICAS organs are structurally dependent on the IOC because they belong to the Olympic Movement.* An autonomous foundation, the ICAS is not mentioned in Rule 3 of the Olympic Charter which, in conjunction with Rule 4, sets out the conditions for membership of the Olympic Movement. It can amend its own Statutes, does not take orders from the IOC and is not obliged to abide by the IOC's decisions. . . . ICAS members may not, in any case, appear on the list of CAS arbitrators, nor act as counsel to any party in proceedings before the CAS. As for the Secretary General of the CAS, who also acts as Secretary to the ICAS, he only has a consultative voice within the latter institution and does not form part of CAS Panels. With this structure, . . . the ICAS is therefore able to safeguard the independence of the CAS and the rights of the parties. . . .

* The term "Olympic Movement" is defined by International Olympic Committee, *Olympic Charter* (2015):

Rule 1: Composition and general organization of the Olympic Movement

1. Under the supreme authority and leadership of the International Olympic Committee, the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter. The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised in accordance with Olympism and its values.

2. The three main constituents of the Olympic Movement are the International Olympic Committee ("IOC"), the International Sports Federations ("IFs") and the National Olympic Committees ("NOCs").

3. In addition to its three main constituents, the Olympic Movement also encompasses the Organising Committees for the Olympic Games ("OCOGs"), the national associations, clubs and persons belonging to the IFs and NOCs, particularly the athletes, whose interests constitute a fundamental element of the Olympic Movement's action, as well as the judges, referees, coaches and the other sports officials and technicians. It also includes other organisations and institutions as recognised by the IOC.

4. Any person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.

It should also be pointed out that the CAS, which functions as an appeals body, independent of the international federations, cannot be compared to a permanent arbitral tribunal set up by an association and responsible to rule in the last instance on internal disputes. As a body which reviews the facts and the law with full powers of investigation and complete freedom to issue a new decision in place of the body that gave the previous ruling, the CAS is more akin to a judicial authority independent of the parties. . . .

To conclude our discussion of the financing of the CAS, it should be added that there is not necessarily any relationship of cause and effect between the way a judicial body is financed and its level of independence. This is illustrated, for example, by the fact that State courts in countries governed by the rule of law are often required to rule on disputes involving the State itself, without their judges' independence being questioned on the ground that they are financially linked to the State. Similarly, the CAS arbitrators should be presumed capable of treating the IOC on an equal footing with any other party, regardless of the fact that it partly finances the Court of which they are members and which pays their fees.

3.3.3.3 . . . A true "supreme court of world sport" . . . the CAS is growing rapidly and continuing to develop. An important new step in its development was recently taken at the World Conference on Doping in Sport, held in Copenhagen at the beginning of March 2003. This Conference adopted the World Anti-Doping Code as the basis for the worldwide fight against doping in sport. . . . Under the terms of Art. 13.2.1 of the new Code, the CAS is the appeals body for all doping-related disputes related to international sports events or international-level athletes. This is a tangible sign that States and all parties concerned by the fight against doping have confidence in the CAS. It is hard to imagine that they would have felt able to endorse the judicial powers of the CAS so resoundingly if they had thought it was controlled by the IOC.

This new mark of recognition from the international community shows that the CAS is meeting a real need. There appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively. . . . The CAS, with its current structure, can undoubtedly be improved. . . . Having gradually built up the trust of the sporting world, this institution which is now widely recognised and which will soon celebrate its twentieth birthday, remains one of the principal mainstays of organised sport.

3.3.4 To conclude, it is clear that the CAS is sufficiently independent vis-à-vis the IOC, as well as all other parties that call upon its services, for its decisions in cases involving the IOC to be considered true awards, equivalent to the judgements of State courts.

* * *

CAS gains jurisdiction over athletes by virtue of arbitration clauses which must be signed as a prerequisite to eligibility to compete. As in other industries, athletes may be faced with having either to cede rights to CAS—or some other arbitral body—or give up the opportunity to compete through these sports organizations. These organizations gain leverage from their monopolistic position: in the vast majority of sports, only one federation per geographical level is allowed at each level of competition (the so-called *Ein-Platz-Prinzip*). Thus, if an athlete wants to make a living from a particular sport, there is no alternative to the international competitions organized by the governing bodies, and they must accept the arbitration clause that the organizing federations include in their registration forms. Other examples of obligations to arbitrate are familiar in U.S. law, as illustrated by *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018), in which the U.S. Supreme Court upheld employer prohibitions on class actions in arbitrations or in courts as a condition of continuing employment in several service industries.

A distinct question is access to judicial review of decisions rendered by arbitral bodies, whether in sports or otherwise. Article 192 of Switzerland's Private International Law Act,* permits non-Swiss parties to waive judicial review. The question of enforcement of such provisions is addressed in the excerpt below from *Cañas v. ATP Tour*, in which the Federal Supreme Court of Switzerland set aside a waiver of state-court review signed by a tennis player, Guillermo Cañas.

Cañas v. ATP Tour

Federal Supreme Court of Switzerland (First Civil Law Division)
4P.172/2006 (2007)

[Judges Corboz (President), Klett, Rottenberg Liatowitsch, Kiss and Mathys. Registrar: Mr Carruzzo.]

Guillermo Cañas, an Argentinian professional tennis player, was found to have violated the anti-doping regulations of the Association of Tennis Professionals (ATP) by the ATP's Anti-Doping Tribunal. The ATP imposed a two-year period of ineligibility and ordered the repayment of money earned in those competitions disqualified by doping use. Cañas appealed the decision to CAS, which upheld the finding that Cañas had violated the anti-doping provisions, but modified the penalty to vacate the tournament results only during the period when he tested positive for doping agents, ordered the return of some of his prize money, and reduced his suspension to fifteen months. Cañas filed an appeal in Swiss court under Swiss federal

* Article 192 of the Private International Law Act of Switzerland provides:

Waiver of annulment

If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment [by a domestic court] . . .

law, seeking to have the CAS judgment annulled. ATP argued that Cañas had waived the right to a public appeal when signing on as a member of the ATP.]

. . . 4.3 . . . The validity of the waiver of appeal, within the meaning of [Swiss law] has both technical and factual aspects, which should be examined in turn. . . .

4.3.2.1 By introducing, . . . the possibility for the parties to exclude all appeals against the award, the legislator had two objectives: firstly, to make the Swiss arbitration system more attractive for international arbitration by removing awards from the dual control of the appeals body and the exequatur judge; and secondly, to lighten the workload of the Federal Tribunal. The idea underlying the first of these two objectives was that the international award would be subject in any case to judicial control at the enforcement stage, in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 19 June 1958 . . . [I]n the mind of the legislator, this provision was primarily intended to apply to international commercial arbitration and, in particular, to awards that need to be submitted to the exequatur judge. It is therefore unlikely that the legislator had international sports arbitration in mind, especially not disputes relating to the suspension of athletes, when adopting this provision. . . . Furthermore, sanctions imposed against athletes, such as disqualification or suspension, do not require any exequatur procedure in order to be enforced. . . . [The Swiss law] does not therefore appear to be designed to apply to appeals against awards issued in the field of sporting sanctions.

4.3.2.2 . . . [A] waiver of appeal is based on an agreement between the parties Such an agreement, just like any other contract, is only valid if the parties have, mutually and in agreement with each other, demonstrated their wish to exclude all appeals. Freedom of contract, which forms part of the parties' freedom to arrange their own affairs, requires that such a demonstration does not emanate from a desire that is subject to any kind of interference. It is especially important that the expression of the desire to exclude all appeals should not be invalidated by any form of constraint, since such an exclusion denies its author of the possibility of appealing any future award, even if it were to violate the fundamental principles of the rule of law, such as public policy, or essential procedural guarantees such as the proper composition of the arbitral tribunal, its jurisdiction, the equality of the parties or even the right to a fair hearing in an adversarial proceeding.

Competitive sport is characterised by a very hierarchical structure at both national and international levels. Established on a vertical basis, the relations between athletes and the organisations that govern the different sporting disciplines are different from the horizontal relations between the parties to a contract. This structural difference between the two types of relations has an impact on the volitional process that leads to the conclusion of an agreement. In principle, when two parties are on an equal footing, each expresses its wishes without being subject to the goodwill of the other. This is generally the case in international commercial relations. The situation is quite different in the world of sport. Apart from the fairly hypothetical situation where

a famous athlete is so well known that he is able to dictate his conditions to the international federation governing his sport, experience shows that, most of the time, athletes do not have a great deal of power over their federation and have to adhere to its wishes whether they like it or not. Therefore, an athlete who wishes to participate in a competition organised under the auspices of a sports federation whose regulations include an arbitration clause has no option but to accept such a clause, particularly by adhering to the statutes of the sports federation in question in which the clause appears. This is especially true where professional athletes are concerned. They are confronted with the dilemma of either agreeing to arbitration or practising their sport as an amateur. Faced with the choice of either submitting to arbitral jurisdiction or practising his sport “in his garden” while watching the competitions “on television,” an athlete who wishes to face genuine opponents or who wishes to do so because it is his only source of income (prize money or earnings in kind, advertising income, etc.) will in effect be compelled *nolens volens* to take the first option. . . .

[T]he refusal to hear an appeal by an athlete who had no other choice but to agree to waive his right of appeal in order to be allowed to participate in competitions also appears questionable under Article 6 para. 1 of the European Convention on Human Rights. . . .

4.4.1 [Here,] the tennis player expressly agrees not to appeal any CAS award by any legal means (“The decisions of the CAS shall be final, non-reviewable, non-appealable and enforceable”). . . .

4.4.2 . . . [A] waiver of appeal cannot, in principle, be used as a defence against the athlete, notwithstanding its technical validity. . . .

The respondent explains in detail the procedures for drawing up and amending its rules, in order to show that tennis players are involved in the process via their Council, of which the appellant is a member. However, it is irrelevant whether a tennis player who is an ATP member participates or not—and if he does, to what extent—in the formation of the wishes of this legal entity. The only decisive factor . . . is whether the player can refuse to sign the ad hoc declaration in which he promises not to appeal against any CAS awards, while preserving his right to enter competitions organised by the respondent. As the latter openly admits, that is not the case

It must therefore be concluded from this analysis that the appellant did not legitimately waive his right to appeal against future CAS awards. There is therefore no reason why the appeal should not be heard.

* * *

The independence of CAS was assessed again by the German Federal Court of Justice (FJC) in *Pechstein v. International Skating Union* (2016). As part of its holding on whether it had jurisdiction to hear Pechstein’s claim for antitrust damages, based in an alleged abuse of a dominant position by the International Skating Union

(ISU), the FJC ruled on the validity of the arbitration agreement between Pechstein and the ISU. According to the FJC, “access to the court of law can be effectively excluded [only] in cases where the arbitration court called upon to decide the particular case represents an independent and neutral instance.” Pointing to the methods of drawing up the lists of arbitrators and to the independence granted to arbitrators under the Statutes and the Procedural Rules of CAS, the FJC found that “CAS represents . . . an independent and neutral [organization]. Unlike a federation or association tribunal, it is not incorporated into any particular federation or association. As an institution, it is independent of the sports federations and Olympic Committees that support it; it is intended to ensure uniform jurisdiction across all federations.”

The FJC then assessed the validity of the arbitration agreement concluded by Claudia Pechstein and the ISU. The court held that the arbitration agreement was in fact imposed on Pechstein, as the ISU holds a monopoly on the organization of speed skating world championships. In such cases of “heteronomy,” the fundamental rights of both parties must be taken into account and balanced in such a way as to ensure that they are as effective as possible for all parties concerned. Pechstein’s rights included access to court, as well as her fundamental right of exercising her profession freely. The ISU, the FJC held, also had autonomy rights as an association, which was equally guaranteed as a fundamental right under the German Constitution.

The FJC has also recognized, that due to Germany’s ratification of the International Convention against Doping in Sport, the principles of the World Anti-Doping Code (WADC) (which requires CAS arbitration agreements) represent binding contractual obligations under international law. Balancing these interests, the FJC upheld the arbitration agreement and emphasized that not only the federations, but also the athletes benefit from the advantages of sports arbitration, since they depend on fair conditions during competition to be able to exercise their athletic talents. Lastly, the Court held Pechstein had validly waived her right to access to courts under Article 6 of the European Convention on Human Rights. As of June 2018, this case is pending before the Federal Constitutional Court of Germany.

* * *

Before bringing her case to the German courts, Claudia Pechstein brought claims in Switzerland. She argued that CAS lacked impartiality and independence. Excerpted below is the decision from the Federal Supreme Court of Switzerland, in which it clarified the standards of review applied to arbitral awards by CAS as well as by others.

Pechstein v. International Skating Union
Federal Supreme Court of Switzerland (First Civil Law Division)
4A_619/2009 (2010)

[Judges Klett (President), Corboz, Rottenberg Liatowitsch, Kolly and Kiss. Clerk of the Court: Mr Leemann.]

The well-known speed skater Claudia Pechstein was banned by the Disciplinary Commission of the International Skating Union (ISU) for two years for having taken illicit substances. On appeal, CAS upheld the decision of the Disciplinary Commission, with slight differences. Pechstein appealed to the Federal Supreme Court of Switzerland.] . . .

2.3 The Federal Supreme Court bases its decision on the factual findings of the arbitral tribunal. It may not rectify or supplement the factual findings of the arbitral tribunal, even when these are obviously inaccurate or result from a violation of the law . . . Yet the Federal Supreme Court may review the factual findings of the award under appeal when admissible grievances . . . are brought against the factual findings or exceptionally when new evidence is considered. . . .

2.4.1 . . . An extension of the judicial review of the Federal Supreme Court, as requested by the Appellant under claim of due process, is not justifiable.

Since in an appeal against an international arbitral award, . . . only the grounds for appeal set out in [the Swiss code of private international law] may be invoked, but not directly a violation of the Federal Constitution, the ECHR or other treaties. . . . [T]he various grievances of violations of corresponding provisions are not capable of appeal in principle. . . .

3.1 To start with, the Appellant challenges the independence of the CAS itself.

3.1.1 She argues . . . [that] the primary interests are those of the International Olympic Committee (IOC) and the international sporting associations in general, which consider the economic value of the Olympic Games and their sporting events to be at risk as a result of doping issues. . . .

3.1.3 . . . According to the case law of the Federal Supreme Court [see above *A and B v. IOC*], the CAS is furthermore sufficiently independent from the IOC, which is why its decisions, even in matters which concern the IOC's interests, can be regarded as judgments comparable with those of a state court. . . .

4. The Appellant further claims a violation of the right to a public hearing.

4.1 In this respect she incorrectly invokes Art. 6 (1) ECHR, Art. 30 (3) Federal Constitution and Art. 14 (1) ICCPR since these are not applicable to voluntary

arbitration proceedings It is not possible to derive a right to a public hearing in the framework of the arbitration proceedings from the provisions mentioned. . . .

Be this as it may, in view of the outstanding significance of the CAS in the field of sport, it would be desirable for a public hearing to be held on request by the athlete concerned with a view to the trust in the independence and fairness of the decision making process. . . .

6.1 The material review of an international arbitral award by the Federal Supreme Court is limited to the issue as to whether the arbitral award is consistent with public policy. The material adjudication of a dispute violates public policy only when it ignores some fundamental legal principles and is therefore plainly inconsistent with the fundamental, widely recognized system of values, which according to the prevailing opinions in Switzerland, should be the basis of any legal order. Among such principles are: the fidelity to contracts (*pacta sunt servanda*), the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables. The award under appeal may be annulled only if it contradicts public policy in its result and not merely in its reasons

[The court found against Pechstein, and an application, consolidated with *Mutu v. Switzerland*—another athlete’s challenge to CAS—is pending, as of this writing, before the European Court of Human Rights.*]

WADA and Anti-Doping Efforts

Doping, the use of banned athletic performance-enhancing drugs by athletic competitors, has not always been perceived as an illegitimate part of sport. Today, mainly because of health risks, equality of opportunity, and the promotion of athletes as role models for children, the use of certain substances is prohibited in national and international sports. Such prohibitions are imposed both by nation states and by sporting organizations. In an effort to harmonize doping-related sports rules, sanctions, and testing procedures around the world, sport organizations and nation states have formed the World Anti-Doping Agency (WADA).

* Pechstein v. Switzerland, (ECtHR pending) no. 67474/10; Mutu v. Switzerland, (ECtHR pending) no. 40575/10. Applications Communicated to the Government in February 2013.

Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)

Lorenzo Casini (2009)*

. . . The phenomenon of doping has always occurred in sports, with peaks in the 1960s and in the 1980s that led to the creation of the IOC Medical Commission and to the adoption of the Anti-Doping Charter for Sport by the Council of Europe. However, the decade between the end of 1980s and 1990s has been marked by several scandals (in, amongst others, athletics, swimming, and cycling).

In response to the huge increase of doping cases (such as, for example, the scandal that shocked the cycling world in the summer of 1998), the IOC convened a new World Conference on Doping in Sport (there had been a few conferences previously, the first in Ottawa in 1988). Held in Lausanne in February 1999, the Conference produced a Declaration on Doping in Sport, in which the creation of “an independent international anti-doping agency” was proposed. Pursuant to the terms of the Declaration, the WADA was created on 10 November 1999 in Lausanne to promote and coordinate the fight against doping in sport internationally. . . .

The “equal partnership between the Olympic Movement and public authorities” is reflected by the structure of the Foundation Board (of up to 40 members, up to 18 of whom are appointed by the Olympic Movement, with another maximum of 18 appointed by public authorities, and 4 appointed jointly by the two). . . .

In spite of its formally private nature, WADA carries out functions that aim to further public goals, such as . . . promoting and coordinating at the international level the fight against doping in sport in all its forms, . . .

However, WADA’s most important activity (in terms of its “public” function) is its role as a global standard setter. In particular, it is charged with carrying out three main tasks: 1) to establish, adapt, modify and update, at least yearly, for all the public and private bodies concerned the list of substances and methods prohibited in the practice of sport; 2) to develop, harmonize and unify scientific, sampling and technical standards and procedures with regard to analyses and equipment, including the homologation of laboratories, and to create a reference laboratory; 3) to promote harmonized rules, disciplinary procedures, sanctions and other means of combating doping in sport, and contribute to the unification thereof, taking into account the rights of the athletes.

It is clear, then, that WADA carries out significant normative functions such as the establishment of international standards, and also produces “soft-law” in the form

* Excerpted from Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, 6 *International Organizations Law Review* 421 (2009).

of recommendations and good practices. Beside these tasks, WADA carries out other relevant administrative activities, such as monitoring anti-doping tests during major sports event through the office of an “independent observer.”

The most significant outcome of WADA’s activities is the World Anti-Doping Code (WADC), which was adopted in 2003 and entered into force on 1 January 2004. . . . [O]ver 1000 delegates representing 80 governments and international and national sports institutions unanimously agreed to adopt the WADC as the basis for the fight against doping in sport (the Copenhagen Declaration). . . .

WADC’s Signatories (i.e. those entities signing the Code and agreeing to comply with it) include the [national and international Olympic and Paralympic committees], Major Event Organizations, National Anti-Doping Organizations (NADOs), and WADA. Governments instead are not asked to be signatories to the Code, but rather to sign the Copenhagen Declaration (2003) and ratify, accept, approve or accede to the UNESCO Convention against Doping in Sport. . . .

The WADC, then, is the core document that provides the framework for the harmonization of anti-doping policies, rules, and regulations within sports organizations and among public authorities. . . . [F]or the first time, universal criteria were set for deciding whether a substance or method should be banned from use. Moreover, the WADC sets the standard for minimum and maximum sanctions, while providing flexibility for the consideration of circumstances of each individual case . . . [T]he WADC provides important procedural guarantees, such as the right to a fair hearing granted to any person who is alleged to have committed an anti-doping rule violation (Art. 8, which establishes requirements such as that of a timely hearing before a fair and impartial body). . . .

States have played an important role in improving the force of the Code. In October 2005, an international treaty, the International Convention against Doping in Sport, was unanimously approved by 191 governments at the United Nations Educational, Scientific, and Cultural Organization (UNESCO)’s General Conference. In particular, the Convention enables governments to align—the principles of the WADC are “the basis” for national measures—their domestic policy with the Code, thereby harmonizing global sports regulation and public legislation in the fight against doping in sport. The Convention, currently ratified by 110 States, refers explicitly to WADA and its Code as providing an illustration of good practice of cooperation between private actors and public authorities within the global context. In the fight against doping in sport, standards and rules set by a private body have gradually been accepted as “binding” by States; a process made possible mostly as a result of the particular hybrid structure of WADA. . . .

[A]lthough the WADC formally rests on an instrument of private law (as it itself clarifies: . . . “Most governments cannot be parties to, or be bound by, private non-governmental instruments such as the Code”), it displays rather a hybrid nature,

due to the role played by public authorities both in WADA's decision-making process and in the procedure for the drafting of the Code.

World Anti-Doping Agency (WADA) v. Federación Mexicana de Fútbol (FMF) and Mr. José Salvador Carmona Alvarez
Court of Arbitration for Sport
Arbitration CAS 2006/A/1149 and CAS 2007/A/1211 (2007)

[Before: Mr Jan Paulsson (Paris), President; Peter Leaver Q.C. (London); Prof Massimo Coccia (Rome); Ad hoc secretary: Mr Nicolas Cottier (Laussane)]

In proceedings against José Salvador Carmona Alvarez before the Federación Mexicana de Fútbol's (FMF) Disciplinary Committee, FMF contended that Mr. Carmona is guilty of repeated drug offences and should therefore be declared ineligible for life under the FIFA Disciplinary Code. The Disciplinary Committee dismissed the indictment based on a failure to give notice. FMF appealed the decision before the Comisión de Apelación y Arbitraje del Deporte (CAAD), an organ of the Mexican Ministry of Public Education created pursuant to the General Law of Physical Culture and Sports. The CAAD dismissed.

WADA initiated arbitration against the CAAD decision, naming FMF, the Player, and CAAD as respondents. The CAS Panel informed the parties that it did not consider that it had jurisdiction over CAAD, and that if WADA wished to pursue the case against the two other respondents it should so inform CAS, which WADA did.

In the same case WADA asks the Panel to impose lifetime ineligibility on the Player pursuant to the FIFA Disciplinary Code, while overturning the FMF denial to sanction as upheld by CAAD.]

26. . . . [T]he Player's counsel sought to argue that . . . the jurisdiction of CAAD was obligatory as a matter of Mexican law, and would therefore make it impossible for CAS to exercise authority in this case. . . . But the coexistence of national and international authority to deal with doping cases is a familiar feature, and it is well established that the national regime does not neutralise the international regime.

27. National associations have vested disciplinary authority in international federations precisely in order to eliminate unfair competition, and in particular to remove the temptation to assist national competitors by over-indulgence. The objective is to subject all athletes to a regime of equal treatment, which means that national federations must be overruled if they look the other way when their athletes breach international rules. Thus, in a case involving doping in the sport of swimming, a CAS tribunal recognised the imperative need for international federations to be able to review decisions resolved by national federations, lest international competition be distorted by reason of laxness on the part of national bodies.

28. Subsequently . . . CAS extended this approach to sanctions decided by national public authorities. That case involved a doping violation which led to a suspension decided by the French Minister of Sports, who under a French law of 1989 had the power to substitute his decision for that of national sports federations. . . . The ministerial decision was not in conformity with the rules of the International Judo Federation, which brought the case to CAS . . . The arbitrators reasoned notably as follows:

The panel is of the view that the latitude which this precedent accorded to international federations should be extended to cases where the control and sanction of doping is carried out not by a national federation acting pursuant to sports rules, but by a public authority acting either pursuant to a national law, as in this case, or on the basis of an international convention.

The subordination of national decisions in the realm of doping to international control, irrespective of the authority which renders them, is justified not only by the objective of avoiding that certain federations or governmental organs engage in a wholly unhealthy form of unfair competition, by declining to sanction their own athletes with the same degree of rigour and severity as other federations and/or their international federations, but also by the goal which each international federation should have of ensuring the equal and consistent treatment of all participants in a sport. . . .

30. The just-mentioned award [together with another one not excerpted here] were cited with approval in the two cases rendered in December 2006 by CAS arbitrators faced with a Spanish law which, according to the argument of two cyclists having tested positive for doping, forbade recourse to arbitration in the context of alleged doping infractions. The arbitrators rejected the objection to their jurisdiction, reasoning as follows:

States and international sports federations are not rivals for authority; on the contrary, their roles are complementary. States are concerned only with the conduct of those who fall within the reach of their laws, while international federations administer competitions within the scope of their activity. The same behaviour may be subject to criminal sanctions in a particular territory without the cyclist necessarily being sanctioned on the international level. Similarly, it may well be that behaviour which gives rise to no criminal sanctions may nevertheless lead to exclusion from sports events because it offends fair play. . . .

32. The Panel does not presume to be empowered to repeal the CAAD decision. Moreover, WADA expressly confirmed at the outset of the hearing in Lausanne that it had abandoned its initial request that the CAAD decision be set aside;

its position is rather that whatever the status of that decision may be for other purposes it should be held to have no effect in the context of the FIFA regime. . . .

33. The CAAD decision is thus given no effect for the purposes of the international regulation of the sport; the FMF and the Player are obliged to respect the international regime irrespective of the CAAD decision and whatever the latter's effects may be outside the domain covered by the FIFA rules. It would be a mistake to consider this conclusion to be contrary to Mexican interests. In the first place, the exclusion of recidivist doping violators is in the interest of all Mexican clubs and players who respect the doping Rules. Secondly, all Mexican associations, clubs and players obviously benefit from the coherent and effective regime which FIFA has sought to establish. . . .

Good Governance Efforts

In the 2000s, the European Union and the Council of Europe became active in bringing forward initiatives on good governance in sports. The European Union began laying groundwork with its White Paper on Sport (2007). The Council of Europe formed the Enlarged Partial Agreement on Sport (EPAS), which provides a platform for intergovernmental sports co-operation between the public authorities of its member states. EPAS also encourages dialogue between public authorities, sports federations, and NGOs. Different recommendations, initially prepared by EPAS, have been adopted by the Council of Europe's Committee of Ministers on issues of sports ethics, the autonomy of the sports movement, and the protection of young athletes from dangers associated with migration.

States have also created regulatory frameworks to promote good governance. For example, in England, the government's two public sport investment arms—Sport England and UK Sport—have implemented a tiered system of ethical principles for sports organizations. By tying adherence to continued public funding, these provisions rely on positive incentives—rather than the threat of criminal prosecution or being barred from participation—to accomplish their goals.

England's Code for Sports Governance Sport England and UK Sport (2016)

[The Code for Sports Governance's mandatory requirements include:] . . .

1. The organisation is properly constituted, has a clear purpose and, if membership based, is inclusive and accessible.

2. The governing committee meets regularly and decision making is recorded.

3. Conflicts of interest are recognised, managed by the chair and recorded. At least three of the people on the committee are unrelated or non-cohabiting.

4. In deciding who sits on its governing committee the organisation considers the skills and diversity required of its committee members.

5. Committee members are subject to regular election and ideally should serve no more than nine years.

6. The organisation has a bank account and two independent signatories are required for payments.

7. Annual accounts are prepared, scrutinised independently of the person responsible for finance (e.g. treasurer) and are made available to members to describe how money has been spent.

A Tailored Approach to Sports Governance

Craig Beeston (2016)*

. . . The new Code for Sports Governance was published by UK Sport and Sport England on 31 October [2016]. It follows the Government's commitment for a new Code to protect and maximise the effectiveness of public investments made in sports, which totalled over £1 billion . . . over the past four years. . . .

The new Code adopts a tiered structure and tailored approach, imposing more stringent conditions on those organisations where the financial investment is greater or is provided over an extended period of time. It is aimed at implementing good governance practices without placing an onerous administrative burden on smaller organisations, negatively affecting the essential volunteer base of many of them, or deterring bodies from making funding applications. It is recognised that the Code “will stretch organisations beyond where they are now”—that, after all, is the point.

However, if the flexible approach is applied consistently and thoughtfully, and if organisations are offered appropriate guidance and support, the Code could ensure that principles of good governance are inculcated at all levels of UK sport where public money is invested. It will also give bodies across the spectrum, from grassroots to the custodians of the national game, an opportunity to take a closer look at how their organisations function.

The Code is constructed around five principles: structure, people, communication, standards and conduct, and policies and processes. These aim to

* Excerpted from Craig Beeston, *A Tailored Approach to Sports Governance*, GOVERNANCE AND COMPLIANCE, Dec. 13, 2016, available at <https://www.icsa.org.uk/knowledge/governance-and-compliance/features/december-2016-sports-governance>. Reprinted with permission of the author. Originally published *Governance and Compliance* magazine, www.govcompmag.com.

establish clear governance structures with a board which holds collective responsibility for the organisation and is exclusively vested with the power to lead it (for organisations falling under the lower tier, the Code's terminology recognises that a committee may perform this role).

The principles also aim to encourage responsible recruitment of those with the appropriate skills, experience and independence; a commitment to diversity, transparency and accountability; and responsible financial planning and risk management. Funding applications will fall into one of three tiers which will determine what is expected of organisations in return for an award.

[Tier 1] . . . is aimed at investments granted on a one-off basis at a value of less than £250,000. It represents the minimum level of mandatory requirements to be met by all organisations seeking funding. The requirements cover: An organisation's constitution and purpose; regular meeting of the governing committee and recording of decision making; conflicts of interest; skills and diversity within the governing committee; regular election of committee members, ideally serving maximum terms of nine years; preparation and scrutiny of annual accounts.

They are accompanied by non-compulsory guidance as to how organisations may meet them, but allowance is made for the circumstances and resources of each body.

Tier 2 . . . covers investments between £250,000 and £1 million It is, by necessity, the least clear of the three tiers in terms of what is expected of organisations. It requires all of the Tier 1 stipulations, along with some drawn from the more prescriptive Tier 3. Which of these are to be required, and the timeline for meeting them, will be tailored according to the investment and the circumstances of the organisation.

Tier 3 concerns funding granted over a number of years or an investment totalling over £1 million. It will place greater governance demands on organisations and will seek a formal commitment to meet them within a set timeframe. The document lays out numerous criteria which organisations might be required to satisfy, with a particular focus on the structure, composition and duties, and conduct of the board. . . .

As a set of principles, there is much to be welcomed. However, the test for the Code will be in its application and there remain a number of key areas where the detail of its operation is yet to be finalised. In some respects this is by necessity.

The bespoke nature of the Code, particularly for those organisations falling under Tier 2, and the consideration to be given to the size of and resources available to organisations in all tiers, means that the exact requirements for each funded body are at this time unknown. Furthermore, once decided, organisations will not be subject to immediate, outright compliance, but to a timetable for implementation. . . .

There have been a number of mooted and confirmed consequences for organisations which fail to adhere to the Code. The obvious possible sanction is the withdrawal, suspension or non-awarding of funding. Another option is the withholding of Government support for bids to stage major international events, something which may be of concern to the Football Association [FA], given its rumoured interest in hosting the 2028 European Championships or 2030 World Cup.

As its institutional arrangements stand, the FA would fall foul of the Code's stipulations that the board exercise primacy in decision making (requiring reform of the Association's Council, which has long been resisted) and the new diversity targets, which encourages a minimum of 30 per cent of each gender on boards. The FA currently has one female member on its board of 12. The Sports Minister, Tracey Crouch, has said that the FA also faces losing its £30 million of Government funding over four years if it does not undertake reform to comply with the new governance arrangements. . . .

The Code has received criticism for its focus on gender representation on boards, but not on other areas of diversity. Only gender representation is given a target figure. An audit undertaken by Sporting Equals, released in November 2016 and including responses from organisations funded by UK Sport and Sport England, found that 26 of 601 board members (4.3 per cent) and just one chairperson came from black, Asian, or minority ethnic backgrounds. . . .

In what may be a missed opportunity, the Code does not make a requirement for the establishment of a whistleblowing process, making only one mention of such a mechanism in a list of legal and regulatory obligations, which it suggests organisations may consider pertinent to them. . . .

The Code makes a number of references to organisational culture, echoing other sectors in stating that this comes from the top, with the tone set by the board and senior management. However, other codes of governance have given robust whistleblowing arrangements an important role in establishing desirable cultures.

A firmly-stated provision in the Code for processes and practices to be monitored and challenged throughout sporting bodies might more effectively embed appropriate cultures within them, highlight and remedy incidences of poor practice and consequently deliver the level of public confidence which the authors hope will be felt towards sports receiving public investment. Good governance derives not simply from systems and policies, but from behaviours and actions. Effective whistleblowing can improve both. . . .

Working Towards a Framework for Modern Sports Governance
Council of Europe (Parliamentary Assembly) (2018)

[Rapporteur: Mr. Mogens Jensen, Denmark] . . .

39. The introduction of a broad-based governance framework [for sport] would need to be built on three pillars:

- introduction of the basic regulatory framework and culture that supports it, which applies first and foremost to individual sports organisations and how they are managed at different levels;
- adoption of common tools, including a harmonised legislative framework and procedures of fair trial, independent arbitration and collaboration with law-enforcement and investigative bodies; but also harmonised standards and compliance with them;
- inclusive action and cultivating governance culture through knowledge-sharing, involvement in policy making and communication of a broad range of stakeholders and diverse societal groups, and cooperation with multi-stakeholder platforms. . . .

42. [Good governance] . . . is used to describe how institutions and organisations conduct themselves and make their most important decisions, how they determine who they involve in the process and how they render account.

43. Unfortunately for sports governing bodies, national and international sports federations do not neatly align with the governance models of either traditional commercial or non-profit entities. Despite this, there is no reason for other standards to be applied in terms of good governance.

44. When looking at what constitutes good governance, there is the organisational structures element, which encompasses the separation of powers, the existence of statutes and internal rules of procedure, transparency and accountability, internal control measures, codes of ethics and ethics commissions and appropriate judicial/disciplinary and appeals procedures.

45. Another element is management practices, such as: election of board members; encouragement of competitive elections; application of term limit; separation of political and operational management merit-based boardrooms; diversity and respect for gender equality; clearly outlined responsibilities of board members; declaration of conflict of interest of board members; merit-based hiring of staff; recognition of rights and equitable treatment of members and shareholders; involvement and managing diversity of stakeholders and investors; proactive anti-corruption measures and financial integrity.

46. . . . [S]port has also specific aspects that need to be taken into consideration when developing proactive policies against doping, match-fixing, illegal betting, intolerance and discrimination, abuse of athletes or trafficking of athletes, or for the integrity of sports events (including bidding processes and selection of event hosts, ticket pricing and distribution, selection of sponsors, granting media broadcasting rights, building event infrastructure for major events, respect of the bidders for human rights, labour standards, environment and anti-corruption, sustainability and legacy) or development funding (clear rules for fair, equal and transparent allocation and use of funding for sports development; reinvestment of benefits into grassroots activities; control mechanisms of use of development funds) and an environment and social responsibility strategy/programme.

47. . . . [T]he key to good governance in sport is having a robust regulatory system in place to which all sporting bodies are accountable and the culture that supports that. The tone is set from the top and that needs to be filtered all the way to the bottom. The scandals that have hurt sport have in fact mostly been in relation to leadership failures from the cultural perspective. Therefore, there needs to be a robust system of following these clear rules and regulations and that culture needs to filter through sports organisation and through those who fund sport.

48. Restoring public trust begins with ending impunity and bringing those responsible for crimes to justice. First and foremost, it is the sports movement itself that needs to demonstrate that it is able and willing to take proactive measures to root out the culture of corruption and lawlessness within its ranks, and to bring to justice those who commit crimes. Secondly, national authorities have the obligation to bring appropriate legislation up-to-date. Thirdly, it is also for the national authorities to introduce governance codes and monitor their compliance. Finally, in this context, it is also important that whistle-blowers receive appropriate protection.

49. The other side of the coin is also bringing culprits to justice through the procedures of free trial, providing independent arbitration and collaboration with law-enforcement and investigative bodies.

50. Governments and parliaments can play a pivotal role and have a key responsibility in investigating, prosecuting or sanctioning corruption, even when it takes place within the framework of sport. . . .

52. Governments and public authorities can also adopt other concrete measures within their respective jurisdiction, . . . by:

- evaluating whether national legislation is appropriate to allow for investigation, prosecution and mutual legal assistance with police and judicial co-operation in cases of corrupt behaviour in sport;
- adopting and effectively enforcing clear criminal provisions to crackdown on private corruption, which would automatically allow

corruption in sport to be prosecuted;

– applying appropriate measures as regards the fight against money laundering and corruption in the field of sport, for example for financial institutions to consider some leaders of sports organisations as “politically exposed persons.” . . .

54. Furthermore, governments could also consider tax deductions for sponsors that promote clean sport and good governance, consider requesting legal status change for professional elite sports federations on their territory, and consider promoting international co-operation.

55. While the intrinsic value of whistle-blowers in sport is today generally recognised, it goes without saying that policies and procedures must be in place to regulate the use of whistle-blower information and protect whistle-blowers from retaliation.

56. Whistle-blower hotlines, policies and procedures are increasingly being implemented in various sports organisations and other authorities in the area of anti-doping, match-fixing and harassment of athletes.

57. Yet the protection of whistle-blowers in sport is by and large vested in the hands of private sports organisations and/or public or semi-public authorities. . . .

59. Sports organisations and anti-doping agencies cannot develop effective whistle-blowing programmes in isolation. Law-enforcement agencies should be involved and there should be a united approach to manage endangered whistle-blowers. Governments need to play a much more active role. Collaboration with sports organisations and anti-doping and integrity agencies is a fundamental necessity if protection of whistleblowers is to be credible and effective.

60. Governments should take measures to guarantee that whistle-blowers do not need to flee or in worst cases to change their identities in return for telling the truth and take measures to provide financial support at least temporarily until they are able to support themselves again. That is the least we can do if we want whistle-blowers to do the right thing. . . .

62. Naturally, this will only work in situations where governments can be trusted. Often, they cannot. Or they lack the will to protect people giving compromising information. . . . The World Anti-Doping Agency (WADA) has implemented a programme to protect informants, called ‘Speak Up’. The IOC says it has established a whistle-blower programme a few years ago, but no information on its policies, protection measures and results are shared with the public. . . .

76. Introducing a Council of Europe convention on good governance in sport would complement the existing conventional basis of the Organisation covering

doping, match-fixing and spectator violence, bind its member States by the observance of the same harmonised standards and enable efficient monitoring of their implementation.

77. As a first step towards a Convention-based monitoring of sports governance, the Council of Europe could already introduce a systematic review system of the national policies of good governance in sport and their implementation and produce a dashboard of the available monitoring results seeking their critical analysis. . . .

98. Self-regulation only works when there is sufficient external pressure by stakeholders, by governments, by public actors or by international organisations. Today the external stakeholder pressure is unfortunately not strong enough. Creating change via motivation may work better. . . .

101. Introducing an international rating system for sports governance offers a solution that is similar to the ISO standardisation scheme in terms of being solicited (voluntary), elaborated through the involvement of key stakeholders, assessed by fully independent private service providers and results of the assessment would belong entirely to the organisation/federation assessed. In addition, it presents the bonus of being more dynamic and encouraging positive competition within sports organisations. The rating can fluctuate with time, giving the organisations a possibility to improve, but also to lose their credit points when corruption cases emerge. It thereby contains a competitive element against desired target goals, which can give sports organisations incentives to improve their governance performance over time.

102. Similarly to ISO certification, both international and national federations and clubs of different sizes and legal statutes could benefit from the independent evaluation that is voluntary and professional. The rating system has proved reliable in the economic world touching companies and countries. Professional agencies base their evaluation on scientific modules and algorithms as opposed to sources of academic research; they have solid and credible methodology, which could be adapted to the specificities and existing codes and principles in the sports environment. . . .

108. There is a lack of strong leadership in the sports movement today for taking the sports governance and integrity matters in hand. At the same time, there is a clear move towards involving new stakeholders in sports policy making, and notably the new multi-stakeholder platforms and alliances that are looking to take the lead in seeking global solutions. . . .

110. . . . [N]ew multi-stakeholder platforms that [perform] . . . any monitoring, assisting and consulting must be strictly kept apart from compliance control, which for the sake of guaranteeing full independence, must be carried out by an external professional fit-for-purpose agency. Advisors should not be judges! . . .

REFUGEES IN A TIME OF
“UNPRECEDENTED” MOBILITY

DISCUSSION LEADERS

MUNEER AHMAD, LUCAS GUTTENTAG, CRISTINA RODRÍGUEZ,
AND MARTA CARTABIA

III. REFUGEES IN A TIME OF “UNPRECEDENTED” MOBILITY

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In the wake of World War II, refugees gained a new level of international legal protection, setting them apart from other categories of displaced peoples. The United Nations’ 1951 Convention on Refugees enshrined the concept of non-refoulement, now considered a principle of customary international law, which prohibits any state from returning refugees to places where they might suffer persecution based on their race, religion, nationality, membership of a particular social group, or political opinion. The Convention was originally limited to European refugees escaping persecution related to the events of World War II, but the 1967 Protocol Relating to the Status of Refugees removed those temporal and geographic restrictions. Domestic laws and transnational agreements likewise recognize the special status of refugees.

In the last decades, conflicts around the world have put the plight of refugees into sharp relief. As millions of people have sought safe havens, some countries have been receptive, but others have sought to prevent entry. As the UN General Assembly declared in 2016, “[w]e are witnessing in today’s world an unrepresented level of human mobility.”* In response, the UN General Assembly adopted a non-binding resolution known as the “New York Declaration for Refugees and Migrants.” We borrow this chapter’s title from the resulting 2016 document, which articulated a commitment to “save lives, protect rights, and share responsibility.”

According to the UN Refugee Agency (UNHCR), in June of 2018, refugees, who represent a fraction of peoples on the move, numbered 25.4 million. This mobility has challenged both old and new principles of protection. In many countries, large numbers of persons are placed into what are called “camps,” which suggests a

* G.A. RES. 71/1, New York Declaration for Refugees and Migrants, ¶ 3 (Sept. 19, 2016).

transience belied by the millions who have lived under such conditions for decades. Questions thus emerge about mobility and immobility when identifying individuals and groups as refugees.

We begin with a brief excerpt from the 1951 Convention, which states have frequently construed narrowly as they sought to limit the scope of their obligations. Thus, a body of law has emerged to assess the impact of the 1951 Convention, other international agreements, and domestic law on various provisions related to refugees.

We then turn to the New York Declaration for Refugees and Migrants, adopted by the UN General Assembly in 2016, aspiring to obtain political commitments to develop a “comprehensive refugee response based on principles of international cooperation and burden- and responsibility-sharing” and to gain agreement for a new global compact in 2018.

The challenges of fulfilling those goals become vivid as we shift focus to the various state efforts to “manage”—and in some instances, to deter and rebuff—refugees. What is known as the European “Dublin System” of 1990 sought to create a method of sharing responsibility for refugees among Member States of the European Union. But Member States closer to refugee transit routes have expressed distress that the challenges have not been shared fairly. The System and its 2015 modifications have produced several court rulings exploring the substantive and procedural rights of refugees, as states have crafted policies responding to the movement of refugees within, at, and beyond their borders.

Two forms of deterrence have become common: interdiction and detention. Litigants challenging these actions have argued that they run counter to the Convention, violate human rights, and flout national law. States have contended that these forms of action are within their authority to enforce their own immigration laws and to police their borders. Hence, we conclude the chapter with reflections from political and legal theory about states’ power to limit entrance through diverse forms of boundary protection.

MOBILITY, REFUGEES, AND THE OBLIGATIONS OF STATES

Who are refugees, and what obligations does the legal status impose on states? The touchstone is the 1951 U.N. Convention Relating to the Status of Refugees, which laid out the framework of obligations.

Convention Relating to the Status of Refugees United Nations (1951)*

... Article 1 DEFINITION OF THE TERM “REFUGEE”

* Excerpted from Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 2545.

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who: . . .

(2) . . . [O]wing 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. . . .

C. This Convention shall cease to apply to any person falling under the terms of section A if:

. . . (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee . . . who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee . . . who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence. . . .

Article 26 FREEDOM OF MOVEMENT

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances. . . .

Article 31 REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be

applied until their status in the country is regularized or they obtain admission into another country. . . .

Article 32 EXPULSION

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. . . .

Article 33 PROHIBITION OF . . . “REFOULEMENT” . . .

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. . . .

* * *

In September of 2016, the UN General Assembly hosted a summit to address large movements of refugees and migrants. From that meeting emerged the New York Declaration, a non-binding resolution outlining key principles to inform a global response to this “unprecedented mobility.” The Declaration won broad support for core principles of refugee protection and appeared to recommit Member States to a cooperative approach. The Declaration also called for the development of global compacts in 2018 on refugees; for safe, orderly, and regular migration; and set out measures to facilitate global cooperation. As the materials thereafter illustrate, changes in the political leadership since 2016 have demonstrated the degree to which anti-refugee and anti-immigrant attitudes in several countries have gained traction and produced new restrictions, whose lawfulness is now debated.

New York Declaration for Refugees and Migrants
United Nations General Assembly (2016)*

. . . We, the Heads of State and Government and High Representatives, meeting at United Nations Headquarters in New York on 19 September 2016 to

* Excerpted from G.A. RES. 71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016). In July of 2018, the United National put forth its final draft of the Global Compact for Safe, Orderly and Regular Migration for adoption by the Member States in December 2018.

address the question of large movements of refugees and migrants, have adopted the following political declaration.

1. . . . Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters . . . , or other environmental factors. Many move, indeed, for a combination of these reasons. . . .

3. We are witnessing in today’s world an unprecedented level of human mobility. . . . Migrants are present in all countries in the world. . . . In 2015 their number surpassed 244 million, growing at a rate faster than the world’s population. . . . [T]here are roughly 65 million forcibly displaced persons, including over 21 million refugees, 3 million asylum seekers and over 40 million internally displaced persons. . . .

6. Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms. They also face many common challenges and have similar vulnerabilities

7. Large movements of refugees and migrants have political, economic, social, developmental, humanitarian and human rights ramifications, which cross all borders. These are global phenomena that call for global approaches and global solutions. No one State can manage such movements on its own. . . .

11. We acknowledge a shared responsibility to manage large movements of refugees and migrants

22. . . . [W]e will ensure a people-centred, sensitive, humane, dignified, gender-responsive and prompt reception for all persons arriving in our countries . . . whether refugees or migrants. We will also ensure full respect and protection for their human rights and fundamental freedoms. . . .

24. Recognizing that States have rights and responsibilities to manage and control their borders, we will implement border control procedures in conformity with applicable obligations under international law We reaffirm that, in line with the principle of non-refoulement, individuals must not be returned at borders. . . .

33. Reaffirming that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider reviewing policies that criminalize cross-border movements. We will also pursue alternatives to detention

42. . . . We reaffirm that everyone has the right to leave any country, including his or her own, and to return to his or her country. We recall at the same time that each

State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations. . . .

53. We welcome the willingness of some States to provide temporary protection against return to migrants who do not qualify for refugee status and who are unable to return home owing to conditions in their countries. . . .

58. . . . Any type of return, whether voluntary or otherwise, must be consistent with our obligations under international human rights law and in compliance with the principle of non-refoulement. . . .

65. We reaffirm the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto as the foundation of the international refugee protection regime

67. We reaffirm respect for the institution of asylum and the right to seek asylum. We reaffirm also respect for and adherence to the fundamental principle of non-refoulement

68. . . . To address the needs of refugees and receiving States, we commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees

70. . . . We wish to see administrative barriers eased, with a view to accelerating refugee admission procedures to the extent possible. . . . [W]e recognize that the ability of refugees to lodge asylum claims in the country of their choice may be regulated, subject to the safeguard that they will have access to . . . protection elsewhere. . . .

73. We recognize that refugee camps should be the exception and . . . a temporary measure in response to an emergency. . . . We underline that host States have the primary responsibility to ensure the civilian and humanitarian character of refugee camps and settlements. . . .

78. We urge States that have not yet established resettlement programmes to consider doing so at the earliest opportunity. Those which have already done so are encouraged to consider increasing the size of their programmes. . . .

* * *

The New York Declaration built on the binding principles of the Convention to outline an aspirational framework for a systemic response to the challenges posed by mobility. But the Declaration also reproduced several of the shortcomings that have characterized past regional and global schemes for protecting people on the move.

Because of [its] inter-governmental nature . . . [the declaration] could

not avoid the difficult issues related to North-South clashes, sovereignty, and public opinion. . . . The declaration placates states in the North concerned about their sovereignty by making border controls, returns, and readmissions central to the document and more importantly to the future global compact. . . . [S]tates . . . feared negative backlash if the New York Declaration committed to mass resettlement or another grand bargain . . . [, so] the declaration avoid[s] committing to criteria for burden sharing—postponing crucial decisions about resource mobilization.*

The following excerpts by Katy Long and T. Alexander Aleinikoff provide an overview of how similar past compromises have curtailed the ability of refugees to access protection.

When Refugees Stopped Being Migrants

Katy Long (2013)**

. . . In the past decade, a significant body of research has . . . shown persuasively that “refugee” and “migrant” flows are often interconnected, with communities, families and even individuals shifting between these different policy categories. . . .

The question therefore needs to be asked: when—and why—did refugees stop being considered migrants? . . .

Refugees are clearly not “just” migrants. Though legal emphasis on persecution as the qualifying criteria for refugee status may obscure the role that poverty plays in prompting forced movement, a refugee’s claim to freedom of movement goes beyond development to encompass humanitarian motives. A refugee . . . cannot return “home” or access rights guaranteed by a meaningful state–citizen relationship. Their plea for asylum . . . is distinctively a humanitarian claim The 1930s—when refugees were treated as migrants during a period of economic and nationalist retrenchment—provides ample evidence of the catastrophic consequences of such an approach. The achievement of the 1951 refugee protection framework was to provide a universal humanitarian basis upon which asylum . . . was to be granted to many of the displaced.

Yet if a refugee’s claim to asylum is a moral claim that is intended to separate refugees (who need admission) from migrants (who want admission), long-term

* Nicholas R. Micinski and Thomas G. Weiss, *Global Migration Governance: Beyond Coordination and Crises*, in *THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE* (G. Ziccardi Capaldo, ed., forthcoming 2018).

** Excerpted from Katy Long, *When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection*, 1 *MIGRATION STUDIES* 4 (2013).

protection and “solving” refugee crises often depends on refugees securing access to existing migration channels. This was formally recognized by the international protection framework in place between 1920 and 1950. . . . [A]lthough refugees were not ordinary migrants, they would find economic self-sufficiency and national protection by being assisted to join existing migration processes.

Contemporary approaches to formal refugee protection often see movement as fundamentally at odds with the provision of humanitarian assistance. This trend is evident in states’ continuing use of encampment to restrict freedom of movement. . . . Refugees’ protection has become a sedentary pursuit, with refugees expected to remain in fixed locations . . . pending an eventual repatriation. . . .

Yet what is very clear is that migration . . . remains a *de facto* choice many refugees make in seeking their own solutions to exile. . . . [M]igration has a crucial role to play in development, particularly in fragile post-conflict states where infrastructure is weak and state capacity to provide adequate socio-economic services very limited. The problem therefore . . . lies in the fact that formal international interventions . . . fixate on humanitarian relief rather than development and movement-based solutions. In separating refugee and migrant identities, and assigning one a humanitarian and one a development moniker, displacement has been largely absent from the migration-development discourses of the past decade.

Looking back to the period between 1920 and 1950—when refugees were very much treated as a special category of migrant—offers us some important insights into the flawed construction of the contemporary refugee and migrant regimes as well as reminding us of the possibility of an alternative framework. . . . [I]n marrying displacement to development, in seeking to protect refugees’ freedom of movement and in acknowledging the links between resolving poverty and fighting persecution, [this] era . . . offers an alternative vision of longer-term refugee protection centered not on relief but on freedom and development

The fundamental obstacle to resolving displacement crises remains . . . the concern of states to protect national interests and respond to their domestic constituents first. . . . An artificial separation between “refugee” and “migrant” . . . removes the humanitarian imperative for states to admit the needy in all but a minority of cases, opening up opportunities to restrict migration. . . .

This is why the fate of refugee protection has always been inextricably tied to migration policies. . . .

The 1930s provide a powerful warning that a migration system alone cannot protect the persecuted. The 1951 refugee regime established a basic right to protection secured through a process of exceptional and non-socioeconomic admission. Yet this ability to cross borders, secured by separating refugee and migrant categories, has left

refugees frequently unable to move freely in order to secure the livelihoods that form an essential part of long-term protection and sustainable solutions. . . .

Taking Mobility Seriously
T. Alexander Aleinikoff (2018)*

. . . The experience of most forced migrants today can broadly be described as coerced displacement followed by constrained movement. The initial movement of refugees is forced, not voluntary; and once they have achieved safety in (usually) a country bordering their home State they become largely immobile. If the hosting State has a policy of encampment—as does Kenya—then refugees may be denied the right of freedom of movement within the asylum State, a violation of the rights guaranteed by the Refugee Convention. And opportunities for moving beyond the country of first asylum are generally quite limited: only a small number of refugees each year are granted resettlement in third countries; a few are able to take advantage of other routes of lawful migration (for work, education or to join family). So most onward movement from countries of first asylum is deemed by destination States as illegal.

In the earliest days of the refugee regime, movement was understood as crucial to the project of helping refugees rebuild their lives. A central innovation of the post-WWI efforts to extend protection to refugees was the “Nansen Passport” For many refugees who had no documentation from either their home State or hosting State, the Nansen Passport served as an identity card. The Nansen Passport did not guarantee entry to another State[,] . . . [b]ut it facilitated travel outside the borders of the State of asylum: receiving States would accept the document as adequate for purposes of identification, and asylum States would recognize the Nansen Passport as sufficient to permit re-entry of a refugee who had ventured abroad. . . .

This sensible idea of providing opportunities for refugees to move no longer figures in the refugee regime. Refugees are . . . given one shot at safety and security. Consider how this played out during the movement of hundreds of thousands of Syrian refugees from Turkey to Europe in 2015-16. Those . . . accepted into European States were placed into the asylum process, where they will be subject to individualized determinations as to their status as refugees. Others met with border police . . . and were denied entry; for those States, the refugees were simply illegal migrants who had no right to enter either based on their refugee status or in order to file a claim for asylum. . . . Eventually, an agreement was negotiated between the EU and Turkey, which permitted the return of Syrian asylum-seekers to Turkey (in exchange for a promise of 6 billion euros, progress toward visa-free travel for Turks in the EU, and a restart of the process that could eventuate in Turkey’s admission to the EU). . . .

* Excerpted from T. Alexander Aleinikoff, *Taking Mobility Seriously in the Model International Mobility Convention*, 56 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 296 (2018).

Scholars and policy experts have over the past several years made a number of proposals for reforming the international refugee regime. Unfortunately, enhancing refugee mobility does not figure prominently in their thinking. It is possible to identify what I would label a New Liberal Consensus on reform[,] . . . a set of ideas and policy recommendations that are generally adhered to and advocated for by a wide range of progressive, reform-minded government officials, experts, and institutions. These include: (1) the refugee definition should not be “opened up,” but persons fleeing conflict and violence are and should be generally assisted as refugees; (2) refugees are best assisted in States close to home (it is cheaper and makes return easier); (3) self-reliance should replace “care and maintenance” as the primary focus of international programming (with the assistance of development actors and the private sector); (4) refugees can be a benefit to hosting States; (5) resettlement programs should be expanded and additional legal pathways created to help share the burden imposed on countries of first asylum; and (6) non-entrée policies should be criticized and xenophobia condemned. . . .

[T]he Consensus is actually quite at home with the premises of the approach that has produced the present dismal state of affairs. We can see this by noticing what is missing. While the Consensus gestures at increased responsibility sharing . . . , no serious effort is made to construct a global framework for addressing protracted situations. States are not being asked to commit themselves to a system of distributing burdens, nor is any international structure or platform suggesting allocating “shares.” . . .

Crucial to the success of the international refugee regime is a far more robust commitment to global responsibility sharing than currently exists. And it is here that the concept of mobility can play an important role. . . . [R]efugees should be recognized as having the right of free movement between and among the members of the regime. In essence, this is a suggestion for the revival of the Nansen Passport . . . with the additional element of presumptively authorizing entry of recognized refugees to other State members of the international system of refugee protection. Persons arriving from a country of first asylum would not be subject to lengthy asylum determinations that take years and impose substantial costs on receiving States; prior adjudication of refugee status, perhaps certified by UNHCR or another international body, would suffice for all members of the regime. To be acceptable to member States—and to be consistent with fair distribution of responsibilities—they could limit admissions to a certain annual amount or could condition admission upon demonstration that the refugee has a means of supporting him or herself and their families (and other conditions relating to security and the like). But the central principle would be one of supporting refugee agency as they attempt to rebuild their lives.

* * *

The Dadaab Refugee Complex is located in eastern Kenya, near the border with Somalia. In 2016, citing concerns that the camps had been infiltrated by members

of Al-Shabab, the government of Kenya announced it would disband the Department for Refugee Affairs, close the Complex, and repatriate all refugees living in it to Somalia. The Kenya National Commission on Human Rights brought suit against several government officials. It argued that the government's actions were discriminatory, unconstitutional, and in violation of the Kenya's obligations under several international agreements. In the excerpt below, the High Court of Kenya held that the closure of the camps and the repatriation of refugees to Somalia violated the principle of non-refoulement.

The Kenyan government has asserted it would appeal the decision to the Court of Appeal of Kenya, but no appeal is listed as pending as of May 2018. The order to close the Complex was not rescinded, but the government did not take steps to act on it. However, the Kenyan government continued the voluntary repatriation of Somali refugees under a 2014 Tripartite Agreement among Kenya, Somalia, and UNHCR.

**Kenya National Commission on Human Rights and Another v.
The Honorable Attorney General and Others**
High Court of Kenya at Nairobi
Constitutional Petition No. 227 of 2016 (2017)

[Judge Mativo:]

... Kenya is signatory to a number of international treaties applicable to individuals seeking asylum and protection. . . . [I]t acceded to the 1951 United Nations Convention Relating to the Status of Refugees on May 16, 1966, and its 1967 Protocol in 1981. Kenya is also a state party to the 1969 African Union (AU) . . . Convention Governing the Specific Aspects of Refugee Problems in Africa In addition, Kenya acceded to the 1984 Convention against Torture and Other Cruel, inhumane or Degrading Treatment or Punishment in February 1997. . . .

In 2006, Kenya put in place a national legal framework governing refugee matters and assumed partial responsibility for the refugee status determination . . . process. It . . . enact[ed] the Refugees Act in 2006, which took effect the next year, and its subsidiary legislation, the Refugees (Reception, Registration and Adjudication) Regulations, in 2009 (Refugees Regulations). . . . [T]he Act established the Department of Refugee Affairs (DRA). . . .

It is submitted that the blanket condemnation and labelling refugees of Somali origin as terrorists is discriminatory and violates the principle of “individual criminality.” It is also the petitioners case that the decision to disband the Department of Refugees Affairs did not take into account the fact that Kenya hosts refugees from several other countries and that asylum seekers will have no access to asylum procedures in contravention of Kenya's obligations under the 1951 convention and refugees whose identification documents have expired will have nowhere to renew their documents and that the decision will undermine protection of refugees

[Dr. Karanjo Kibichho, Principal Secretary, State Department of Interior] . . . stated that the decision complained of was informed by two factors, namely, (a) the cessation of the circumstances giving rise to the refugee status and (b) the justifiable emergent challenges that render Kenya incapable of continued hosting of refugees [He] . . . cited . . . overcrowding in the camps, terrorists attacks, huge economic costs, human trafficking, proliferation of arms, strained government resources and insecurity.

[Dr. Kibicho] . . . also cited a Tripartite Agreement on repatriation of Somalia refugees in November 2013 with UNHCR and [the] Federal Republic of Somalia which is to be implemented in three years terminating on 13th November 2016. Under the . . . Tripartite agreement, a Commission was formed . . . to develop and oversee implementation of a comprehensive repatriation plan

[The Secretary/CEO of the Commission] . . . also averred that the measures taken are draconian and will expose the lives of innocent, helpless refugees to the danger of trauma, torture, harm an[d] possible loss of life . . . , that the improved situation in Somalia as alluded to by the government is not fundamental, enduring, stable so as to warrant the invocation of the principle of ceased circumstances. . . .

The principle of *non-refoulement* is the cornerstone of asylum and of international refugee law. . . . [T]his principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights

At the universal level the most important provision in this respect is Article 33(1) of the 1951 Convention relating to the Status of Refugees

[I]ts application is not dependent on the lawful residence of a refugee in the territory of a Contracting State. . . . [T]he words “*where his life or freedom would be threatened*,” . . . make it clear that the principle of *non-refoulement* applies not only in respect of the country of origin but to any country where a person has reason to fear persecution. . . .

[R]espect for the principle of *non-refoulement* requires that asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are not refugees. Every refugee is, initially, also an asylum applicant; . . . asylum applicants must be treated on the assumption that they may be refugees until their status has been determined. . . .

While the principle of *non-refoulement* is basic, it is recognized that there may be certain legitimate exceptions to the principle. . . .

With regard to the ‘national security’ exception [in Article 33(2) of the Refugee Convention] . . . , the European Court of Justice ruled [in *Regina v. Boucherrau* (1977)] that “there must be a genuine and sufficiently serious threat to the

requirements of public policy affecting one of the fundamental interests of society.” It follows from state practice and the Convention *travaux [préparatoires]* . . . that criminal offences without any specific national security implications are not to be deemed threats to national security, and that national security exceptions to *non-refoulement* are not appropriate in local or isolated threats to law and order.

With regard to the interpretation of the ‘particularly serious crime’-exception [in Article 33(2) of the Refugee Convention], two basic elements must be kept in mind. First, as Article 33(2) is an exception to a principle, it is to be interpreted and implemented in a restrictive manner. . . . Second, given the seriousness of an expulsion for the refugee, such a decision should involve a careful examination of the question of proportionality between the danger to the security of the community or the gravity of the crime, and the persecution feared. The application of this exception must be . . . the last recourse . . . to deal with a case reasonably. . . .

For Article 33(2) to apply, . . . the crime itself must be of a very grave nature. UNHCR has recommended that such measures should only be considered when one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where other measures, such as detention, assigned residence or resettlement in another country are not practical to prevent him or her from endangering the community. . . .

The application of Article 33(2) requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) [T]his rules out group or generalized application or collective condemnation. . . . [T]he averment by the Government that the two exceptions . . . are applicable and not based on individual consideration or determination to each affected refugee but are dangerously generalized in a manner that is [akin] . . . to collective punishment. . . .

It is alleged that the . . . refugee camps have become breeding grounds for criminal activities. No single arrest or conviction has been cited nor has it been established why a blanket condemnation should be applied to all refugees nor is it clear why the government with its capable and mighty state machinery has not been able to identify any refugees involved in crime and prosecute them instead of mounting a blanket condemnation at the risk of punishing minor children, women and innocent persons. . . .

[T]he government’s decision . . . violates the principle of *non-refoulement* and is therefore a breach of international law, international conventions and the country’s obligations under the various conventions to which it’s a signatory and above all our constitution. . . .

Cessation under Article 1C(5) and 1C(6) [of the Refugee Convention] does not require the consent of or a voluntary act by the refugee. Cessation of refugee status

terminates rights that accompany that status. It may bring about the return of the person to the country of origin and may thus break ties to family, social networks and employment in the community in which the refugee has become established. . . . [A] premature or insufficiently grounded application of the ceased circumstances clauses can have serious consequences. It is therefore appropriate to interpret the clauses strictly and to ensure that procedures for determining general cessation are fair, clear, and transparent.

States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist. [A]n essential element in such assessment by States is the fundamental, stable and durable character of the changes, making use of appropriate information available in this respect . . . from relevant specialized bodies The government decision does not appear to have been backed by a report from the “relevant specialized bodies” referred to above. . . .

[T]he government has not satisfied the required standard to demonstrate the changed circumstances which . . . was a prerequisite before the repatriation. A report by the relevant specialized bodies on the subject would have sufficed. . . .

X and X v. Belgium

Court of Justice of the European Union (Grand Chamber)

Case No. C-638/16 PPU (2017)

THE COURT (Grand Chamber), composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen, T. von Danwitz, J.L. da Cruz Vilaça and M. Berger (Rapporteur), Presidents of Chambers, A. Borg Barthet, A. Arabadjiev, C. Toader, M. Safjan, E. Jarašiūnas, C.G. Fernlund, C. Vajda, S. Rodin and F. Biltgen, Judges, . . . gives the following Judgement:

. . . 19. The applicants in the main proceedings—a married couple—and their three young, minor children are Syrian nationals and live in Aleppo (Syria). On 12 October 2016 they submitted, at the Belgian Embassy in Beirut (Lebanon), on the basis of Article 25(1)(a)* of the Visa Code, applications for visas with limited territorial validity, before returning to Syria on the following day.

* Article 25 of the Visa Code of the European Union provides:

1. A visa with limited territorial validity shall be issued exceptionally, in the following cases:

(a) when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations

20. In support of their visa applications, the applicants . . . stated that the purpose . . . was to enable them to leave the besieged city of Aleppo . . . to apply for asylum in Belgium. One of the applicants . . . claimed . . . to have been abducted by a terrorist group, then beaten and tortured, and finally released following the payment of a ransom. The applicants . . . emphasised . . . the precarious security situation in Syria . . . and the fact that, being Orthodox Christians, they were at risk of persecution on account of their religious beliefs. They added that it was impossible for them to register as refugees in neighbouring countries, having regard . . . to the closure of the border between Lebanon and Syria.

21. . . . [T]he . . . Immigration Office, Belgium . . . rejected their applications. The Immigration Office stated . . . that the applicants intended to stay more than 90 days in Belgium, that Article 3* of the ECHR did not require States that are parties to the convention to admit into their respective territories ‘victims of a catastrophic situation’ and that Belgian diplomatic posts were not among the authorities to which a foreign national could submit an application for asylum. . . .

23. . . . [T]he applicants . . . claim . . . that Article 18** of the Charter imposes a positive obligation on the Member States to guarantee the right to asylum and that the granting of international protection is the only way to avoid any risk that Article 3 of the ECHR and Article 4*** of the Charter will be infringed. . . . [S]ince the Belgian authorities have themselves taken the view that the applicants . . . are in a situation that is exceptional from a humanitarian point of view, . . . the conditions for applying Article 25(1)(a) of the Visa Code were satisfied, and they . . . therefore . . . should have been issued, on humanitarian grounds, with the visas that they were seeking to obtain.

24. . . . [T]he Belgian State [argues] that it is under no obligation . . . to admit a third-country national into its territory, and that its only obligation . . . is to refrain from deportation.

25. The referring court argues that . . . the applicants . . . may rely on Article 3 of the ECHR only if they are within Belgian ‘jurisdiction.’ . . . [T]he referring court

* 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.

** Article 18 of the Charter of Fundamental Rights of the European Union provides:

The right to asylum shall be guaranteed with due respect for the rules of the [Geneva Convention] and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union

*** Article 4 of the Charter of Fundamental Rights of the European Union provides:

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

asks whether the implementation of the visa policy may be regarded as the exercise of jurisdiction in that sense. . . . [T]he referring court asks whether a right of entry could follow, as a corollary to the obligation to take preventative measures and to the principle of *non-refoulement*, from Article 3 of the ECHR

26. . . . [T]he referring court notes that the implementation of Article 4 of the Charter, unlike Article 3 of the ECHR, does not depend on the exercise of jurisdiction but on the application of EU law. However, it does not follow either from the Treaties or from the Charter that that implementation is territorially limited. . . .

28. . . . [T]he . . . Council for asylum and immigration proceedings, Belgium decided to stay the proceedings and to refer the following questions . . . for a preliminary ruling:

‘(1) Do the “international obligations” referred to in Article 25(1)(a) of the Visa Code cover all the rights guaranteed by the Charter, including, in particular, those guaranteed by Articles 4 and 18, and do they also cover obligations which bind the Member States, in the light of the ECHR and Article 33 of the Geneva Convention?

(2)(a) [If so,] . . . must Article 25(1)(a) of the Visa Code be interpreted as meaning that . . . a Member State to which an application for a visa with limited territorial validity has been made is required to issue the visa applied for, where a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation by which it is bound is established?

(b) Does the existence of links between the applicant and the Member State to which the visa application was made (for example, family connections, host families, guarantors and sponsors) affect the answer to that question?’ . . .

41. . . . Article 1 of the Visa Code . . . establish[es] the procedures and conditions for issuing visas for transit through or intended stays on the territory of the Member States In Article 2(2)(a) and (b) of the code the concept of ‘visa’ is defined . . . as . . . ‘an authorisation issued by a Member State’ . . . to ‘transit through or an intended stay on the territory of the Member States for a duration of no more than 90 days in any 180-day period’ and to ‘transit through the international transit areas of airports of the Member States.’

42. . . . [A]pplicants . . . submitted applications . . . with a view to applying for asylum in Belgium immediately upon their arrival in that Member State and, thereafter, to being granted a residence permit with a period of validity not limited to 90 days.

43. In accordance with Article 1 of the Visa Code, such applications, even if formally submitted on the basis of Article 25 of that code, fall outside the scope of that code, in particular Article 25(1)(a) thereof

44. In addition, since . . . no measure has been adopted . . . by the EU legislature . . . with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals on humanitarian grounds, the applications at issue in the main proceedings fall solely within the scope of national law.

45. Since the situation at issue in the main proceedings is not, therefore, governed by EU law, the provisions of the Charter . . . do not apply

48. . . . [T]o conclude otherwise . . . would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the system established by [the Dublin System]

49. . . . [T]o conclude otherwise would [also] mean that Member States are required . . . de facto to allow third-country nationals to submit applications for international protection to the representations of Member States that are within the territory of a third country. . . .

* * *

How do refugees travel? When is help required, and when can countries prosecute assistance to refugees as a crime? One set of responses to these questions comes from the Canadian Supreme Court in 2015 and another from the Conseil Constitutionnel of France in 2018.

R. v. Appulonappa
Supreme Court of Canada
[2015] S.C.R. 754

Coram: McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ. . . .

The judgment of the Court was delivered by The Chief Justice —

1. On October 17, 2009, a vessel called the *Ocean Lady* was apprehended off the west coast of Vancouver Island, in British Columbia. Seventy-six people, among them the appellants, were aboard. All were Tamils from Sri Lanka. They claimed to have fled Sri Lanka because their lives were endangered in the aftermath of the civil

war in that country. They asked for refugee status in Canada. None had the required legal documentation. . . .

7. The four appellants [the captain and chief crew of the vessel] . . . are alleged to have been the point persons for a transnational for-profit operation to smuggle undocumented migrants from Southeast Asia to Canada. . . .

8. The appellants were charged with the offence of “Organizing entry into Canada” found in s. 117 of the [*Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”)] . . . which, at the relevant time, provided:

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

9. . . . Section 117 as it was at the time of the alleged offences of the appellants is . . . no longer in force. The constitutionality of the current s. 117 is not before us.

10. The appellants brought an application . . . for a declaration that s. 117 of the *IRPA* is unconstitutionally overbroad . . . because it may lead to the conviction of humanitarian workers or family members assisting asylum-seekers for altruistic reasons. They argued that convicting people in these categories . . . infringes the guarantee of liberty contrary to the principle of fundamental justice against overbreadth. This violation of the liberty guarantee in s. 7* of the *Charter* was not justified under s. 1** of the *Charter*

24. The main issue before us is whether s. 117 of the *IRPA* threatens liberty, protected by s. 7 of the *Charter*, in a manner contrary to the principles of fundamental justice. If the answer is yes, a second question arises: Is the infringement justified under s. 1 of the *Charter*? If the answer to this second question is no, a final question arises: What is the appropriate remedy for the constitutional infirmity in s. 117? . . .

28. The appellants argue that s. 117 is overbroad, not as it applies to the conduct alleged against them, but as it applies to other reasonably foreseeable situations. . . .

* Section 7 of the Canadian Charter of Rights and Freedoms provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

** Section 1 of the Canadian Charter of Rights and Freedoms provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

29. The first scenario the appellants ask us to consider is the situation of a person assisting a close family member to flee to Canada. The appellants cite as examples a mother carrying her small child, or the father of a household taking his family dependants with him aboard a boat. This scenario could also encompass cases of mutual assistance among unrelated asylum-seekers. . . .

30. The second scenario advanced by the appellants is the case of a person who, for humanitarian motives, helps people to flee from persecution. . . .

31. . . . [O]verbreadth analysis turns on whether the reach of the law exceeds its object. The first step is therefore to determine the object of s. 117. . . .

34. . . . The text of s. 117 is admittedly broad. However, . . . the true purpose of s. 117 is to combat people smuggling. The meaning of “people smuggling,” . . . excludes mere humanitarian conduct, mutual assistance or aid to family members. I conclude that s. 117 violates the *Charter* by catching these categories of conduct outside the provision’s purpose. . . .

41. The provisions of the *IRPA* relating to the fight against the assisting of unauthorized entry of persons to Canada respond to Canada’s international commitments related to these matters in the *Convention relating to the Status of Refugees*, [and] . . . the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*

43. Consistent with [the *Refugee Convention*], . . . the *IRPA* provides that foreign nationals who enter Canada without documents cannot be charged with illegal entry or presence while their refugee claims are pending. As I explain in *B010 [v. Canada (Citizenship and Immigration)*, [2015] SCC 58], art. 31(1) of the *Refugee Convention* seeks to provide immunity for genuine refugees who enter illegally in order to seek refuge. . . . [T]he law must recognize that persons often seek refuge in groups and work together to enter a country illegally. . . . [A] state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety.

44. The *Smuggling Protocol* . . . requires signatory states to adopt measures to establish migrant smuggling as a criminal offence. . . . [T]he *Smuggling Protocol* was not directed at family members or humanitarians. Furthermore, . . . the *Smuggling Protocol* . . . includes a “saving clause” that provides that nothing in the *Smuggling Protocol* “shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law.” It would depart from the balance struck in the *Smuggling Protocol* to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid. . . .

45. . . . Canada's international commitments support the view that the purpose of s. 117 is to permit the robust fight against people smuggling in the context of organized crime. This excludes criminalizing conduct that amounts solely to humanitarian, mutual or family aid. . . .

51. . . . [Section] 117 should be interpreted in a balanced way that respects both the security concerns as well as the humanitarian aims of the *IRPA*. An interpretation of s. 117 that catches all acts of assistance to undocumented migrants arguably allows security concerns to trump the humanitarian aims of the *IRPA*. . . .

57. . . . Both broad aims must be respected. This is accomplished by interpreting s. 117 as targeting organized smuggling operations having a criminal dimension, thereby excluding humanitarian, mutual and family aid. . . .

66. It . . . emerges from the 1987 debates that the reason s. 117(1) of the *IRPA* permits prosecution of those providing humanitarian assistance to fleeing refugees or assistance to close family members is not because Parliament wanted to capture such persons, but because of a drafting dilemma—it was feared that a categorical approach to exceptions would inadequately respond to the multi-faceted and complex nature of real-life smuggling cases. . . . [I]nstead of legislatively exempting such people from potential criminal liability, it sought to screen them out at the prosecution stage by requiring the Attorney General's consent to prosecute [by enacting s.117(4)].* . . .

70. . . . [T]he purpose of s. 117 . . . does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada. . . .

72. . . . We cannot avoid the overbreadth problem by interpreting s. 117(1) as not permitting prosecution of persons providing humanitarian, mutual or family assistance. Such an interpretation would require the Court to ignore the ordinary meaning of the words of s. 117(1), which unambiguously make it an offence to “organize, induce, aid or abet” the undocumented entry. . . .

73. . . . The remaining question is whether the requirement under s. 117(4) that the Attorney General authorize prosecution saves s. 117 from the charge or overbreadth by effectively narrowing the scope of s. 117(1).

74. . . . [S]o long as it is not impossible that the Attorney General could consent to prosecute, a person who assists a family member or who provides mutual or humanitarian assistance to an asylum-seeker entering Canada faces a possibility of

* Section 117(4) of the Canadian Immigration and Refugee Protection Act provided:

(4) [No proceedings without consent] No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

imprisonment. . . . [N]othing remains in the provision to prevent conviction and imprisonment. This possibility alone engages s. 7 of the *Charter*. . . .

77. I conclude that s. 117 of the *IRPA* is overbroad. The remaining issue is whether this overbreadth is justified under s. 1 of the *Charter* as a reasonable measure in a free and democratic society. . . .

79. . . . The first step of the s. 1 analysis asks whether the Crown has demonstrated a pressing and substantial objective. . . . The broad purpose of s. 117 of the *IRPA* is to combat organized crime-related people smuggling, without criminalizing family assistance, mutual aid or humanitarian aid to asylum-seekers coming to Canada. This objective is clearly pressing and substantial.

80. The second step . . . asks whether the legislative objective is rationally connected to the limit the law imposes on the right at issue. . . . [S]ince . . . [some] applications of s. 117 are rationally connected to the legislative object, this suffices to satisfy the rational connection stage of the analysis. . . .

81. The third step . . . asks whether the offending law is tailored to its objective. . . . The record here shows why that will not *always* necessarily be the case.

82. The Crown’s position appears to be that even though the provision is overbroad, it is nevertheless minimally impairing, because although imperfect, there was no better alternative. . . . Section 1 of the *Charter* does not allow rights to be limited on the basis of bare claims, but requires the Crown to provide a *demonstrable justification* for inconsistencies with *Charter* rights. The Crown has not satisfied its burden under s. 1. . . .

86. I would allow the appeals and read down s. 117 of the *IRPA* . . . as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members), to bring it in conformity with the *Charter*. . . .

* * *

In a new trial before Justice Arne Silverman of the Supreme Court of British Columbia, the Crown argued that the four appellants organized the voyage in order to turn a profit and were therefore outside the scope of the Canadian Supreme Court’s ruling. In July of 2017, Justice Silverman ruled for the appellants. He concluded that the four appellants were themselves asylum seekers and that their actions therefore counted as “mutual aid.”

In 2018, the Conseil Constitutionnel of France provided a preliminary ruling on the issue of constitutionality regarding the conviction of Cédric Herrou.* Herrou

* Translation provided by Clare Ryan (Yale University, PhD in Law).

had been convicted of violating a 2012 French law that prohibited giving assistance to foreign migrants who entered the country without permission and sought to travel through or reside in France. The 2012 law modified the French Code for Entry and Residence of Foreigners and the Right to Asylum,^{*} which included the offense of providing assistance for the unlawful entry or stay of a foreigner—known in France as the “*délit de solidarité*,” by providing exceptions. Included were an expanded definition of family members exempted from the law and a new exemption for organizations or individuals providing legal counsel, medical care, food and lodgings, or other acts—without seeking remuneration—necessary to ensure dignified and decent living conditions and to preserve the “dignity or physical integrity” of the migrant.

In 2017, Herrou was convicted of helping migrants to cross the French-Italian border and make their way through the Roya Valley in the south of France. Herrou was fined 3,000 euros. In a reference to the Conseil Constitutionnel, Herrou challenged the constitutionality of the law; he argued that it did not sufficiently respect the constitutional principle of “*fraternité*” and that the term “unlawful migrant” was overly vague.^{**} We excerpt the decision of the Conseil Constitutionnel finding the statute inconsistent with the country’s constitutional principles.

Decision No. 2018-717/718 QPC
Conseil Constitutionnel of France
July 6, 2018

[President Laurent Fabius, Madame Claire Bazy Maluarie, Monsieur Jean-Jacques Hiest, former Prime Minister Lionel Jospin, Madame Dominique Lottin, Madame Corinne Luquiens, Madame Nicole Maestracci, and Monsieur Michel Pinault delivered the opinion of the Conseil Constitutionnel]. . . .

7. . . . [F]raternité constitutes a constitutional principle.

8. The freedom to give aid to others, as a humanitarian act and without regard to their legal status within the country, is included in the right of “*fraternité*.”

^{*} Article L622-1 of the French Code for Entry and Residence of Foreigners and the Right to Asylum provides that any individual who either directly or indirectly aids or attempts to aid in the unlawful entry, movement, or stay of a foreign national in France shall be subject to five years’ imprisonment and a fine of 30,000 euros. Article L622-4 provides exceptions to the crime, for close family members of the foreign national—parents, children, spouses, and siblings are exempt—as well as for situations of immediate threat or danger.

^{**} The preamble of the Constitution refers to the French constitutional principles of “*Liberté, Égalité, Fraternité*.” Article 2 of the French Constitution provides:

The motto of the French Republic is “*Liberté, Égalité, Fraternité*.”

9. At the same time, no law or constitutional principle ensures the absolute right of foreign nationals to enter and reside in France. Indeed, the aim of combatting unlawful entry in order to protect the public order constitutes a constitutional purpose.

10. It is the role of the legislature to strike a proper balance between the principle of “fraternité” and protection of public order. . . .

13. . . . [The law does not distinguish between helping someone to enter the country and helping someone to move within the country, the former creates an unlawful situation, while in the latter the aid is to someone who is already unlawfully present. By not distinguishing between the seriousness of these two situations,] the legislature has failed to provide a proper balance between “fraternité” and protection of the public order. Consequently . . . Article L622-4 must be declared incompatible with the Constitution. . . .

14. [In order to be compatible with the principle of “fraternité,” immunity for specific acts, such as legal counsel and medical aid, provided in the 2012 law must be interpreted to include all humanitarian acts]. . . .

16. According to Article 8 of the Declaration on the Rights of Man and Citizen of 1789, “The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied.” . . .

18. . . . The Conseil Constitutionnel does not have the same general powers that the Constitution confers upon Parliament, but instead has the power to determine the compatibility of laws with the Constitution. It is the Conseil’s duty to ensure that the penalties set out by the legislature are not manifestly disproportionate to the offense. [In this case, the law is sufficiently clear and does not constitute an arbitrary penalty.] . . .

[The parts of the Code deemed incompatible with the Constitution will be reported as abrogated starting on December 1, 2018. The Conseil did not expressly rule on M. Herrou’s conviction, which was to be referred to the criminal court.]

SHARING RESPONSIBILITY IN EUROPE

The Dublin System Cecilia Rizcallah (2017)*

The Dublin system, initiated . . . in 1990 . . . , allocates responsibility for examining asylum applications lodged by third country nationals (TCNs) in the . . .

* Excerpted from Cecilia Rizcallah, *The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection*, EU LAW ANALYSIS, Feb. 20, 2017, available at <http://eulawanalysis.blogspot.com/2017/02/the-dublin-system-ecj-squares-circle.html>.

[European Union], in such a manner that . . . only one State has the task of examining each asylum request lodged on the European Union's territory. Pursuing harmonisation of Member states' asylum policies, the Treaty of Amsterdam introduced the competence of the European Community . . . to adopt additional measures in order to achieve a Common European Asylum System (CEAS). On that basis, the Dublin Convention was replaced by the "Dublin II" Regulation (Regulation n°343/2003) and then the "Dublin III" Regulation (Regulation 604/2013). Also, a number of directives were adopted in order to set up minimum standards on the qualification and status of refugees and persons with subsidiary protection, . . . on asylum procedures . . . and on reception conditions for asylum-seekers . . .

[Under the] . . . Dublin system, . . . the State of first entry into the European Union is the responsible Member State, but there are several exceptions. If another Member State is approached, that state can either . . . automatically transfer the asylum seeker lodging the application to the responsible state, [or] . . . decide to examine the application itself . . . (Article 17, Dublin III Regulation: the "sovereignty-clause"). . .

[D]ue to their geographic situation, some Member States were faced with a high number of arrivals that put their asylum-seekers' reception infrastructures under pressure, and resulted in degradation of their national asylum systems.

It did not take long before challenges against transfer decisions were . . . introduced, because of the risks faced by asylum-seekers regarding their fundamental rights in the State which the Dublin system made responsible for examining their applications. . . . [T]he European Court of Human Rights . . . noted, in the [2011] case of *M.S.S c. Belgium and Greece* . . . , that Belgium, being aware of, or having a duty to be aware of the poor detention and reception conditions of asylum-seekers in Greece, should have relied upon the "sovereignty-clause" of the Dublin II Regulation, to refrain from transferring this individual to a country where he faced a real risk of becoming a victim of inhuman and degrading treatment in accordance with Article 3 ECHR.

Less than a year later, the [Court of Justice of the European Union] . . . addressed the same issue with the additional difficulty of having the duty to safeguard the Dublin system's *effet utile*. In the famous [2011] *N.S.* case the Court [considered] . . . whether "a State which should transfer the asylum seeker [to the responsible Member State according to the Dublin regulation] is obliged to assess the compliance, by that Member State, with the fundamental rights of the European Union." . . . [T]he ECJ relied . . . upon the principle of mutual trust between Member States, founded on the presumption that "all participating States [to the Dublin system] observe fundamental rights," to conclude that it was inconceivable that "any infringement of a fundamental right by the Member State responsible" would affect the obligations of other Member States to comply with the Dublin Regulation. . . .

One could ask . . . whether the risk of the violation of other fundamental rights than the prohibition of inhuman and degrading treatment must justify an exception to the Dublin distribution of responsibilities and, thereby, to the principle of mutual trust. . . . [N]ot . . . [every] breach of any fundamental rights would prevent Member States to rely upon the principle of mutual trust in order to transfer an asylum-seeker. . . . [O]nly very serious risks of violation of absolute fundamental rights (Chapter I of the Charter)* would . . . [seem to justify, according to the Court of Justice,] mandatory suspension of the transfer of asylum-seekers.

Tarakhel v. Switzerland
European Court of Human Rights (Grand Chamber)
Application No. 29217/12 (2014)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Dean Spielmann, *President*, Josep Casadevall, Guido Raimondi, Mark Villiger, Isabelle Berro-Lefèvre, András Sajó, Ledi Bianku, Nona Tsotsoria, Işıl Karakaş, Nebojša Vučinić, Julia Laffranque, Linos-Alexandre Sicilianos, Helen Keller, André Potocki, Paul Lemmens, Helena Jäderblom, Paul Mahoney . . . [d]elivers the following judgment . . . :

1. The case originated in an application . . . against the Swiss Confederation . . . by eight Afghan nationals . . . , Mr Golajan Tarakhel (“the first applicant”), . . . his wife Mrs Maryam Habibi (“the second applicant”), . . . and their six minor children, . . . all living in Lausanne, on 10 May 2012. . . .

10. On an unspecified date the couple and their children left Iran for Turkey and from there took a boat to Italy. . . . [T]he applicants . . . landed on the coast of Calabria on 16 July 2011 and were immediately subjected to the EURODAC [European Dactyloscopy] identification procedure (taking of photographs and fingerprints) after supplying a false identity. The same day the couple and the five children were placed in a reception facility provided by the municipal authorities of Stignano (Reggio Calabria province), where they remained until 26 July 2011. On that date they were transferred to the Reception Centre for Asylum Seekers (. . . “CARA”) in Bari, in the Puglia region, once their true identity had been established.

11. According to the applicants, living conditions in the centre were poor, particularly on account of the lack of appropriate sanitation facilities, the lack of privacy and the climate of violence among the occupants.

12. On 28 July 2011 the applicants left the CARA in Bari without permission. They subsequently travelled to Austria, where on 30 July 2011 they were again

* Chapter I of the Charter of Fundamental Rights of the European Union includes protection of human dignity (Article 1), the right to life (Article 2), the right to the integrity of the person (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), and the prohibition of slavery and forced labor (Article 5).

registered in the EURODAC system. They lodged an application for asylum in Austria which was rejected. On 1 August 2011 Austria submitted a request to take charge of the applicants to the Italian authorities, which on 17 August 2011 formally accepted the request. . . . [T]he applicants [next] travelled to Switzerland. On 14 November 2011 the Austrian authorities informed their Italian counterparts that the transfer had been cancelled because the applicants had gone missing.

13. On 3 November 2011 the applicants applied for asylum in Switzerland. . . .

16. . . . [The Federal Migration Office (FMO)] rejected the applicants' asylum application and made an order for their removal to Italy. The administrative authority considered that "the difficult living conditions in Italy [did] not render the removal order unenforceable," that "it [was] therefore for the Italian authorities to provide support to the applicants"

17. On 2 February 2012 the applicants appealed to the Federal Administrative Court. . . . [T]hey submitted that the reception conditions for asylum seekers in Italy were in breach of Article 3 of the Convention and that the federal authorities had not given sufficient consideration to their complaint

18. In a judgment of 9 February 2012 the Federal Administrative Court dismissed the appeal, upholding the FMO's decision in its entirety. . . .

20. . . . [T]he applicants applied to this Court and sought an interim measure requesting the Swiss Government not to deport them to Italy for the duration of the proceedings. . . .

53. Relying on Article 3 of the Convention, the applicants submitted that if they were returned to Italy "in the absence of individual guarantees concerning their care," they would be subjected to inhuman and degrading treatment linked to the existence of "systemic deficiencies" in the reception arrangements for asylum seekers in Italy. . . .

93. . . . [T]he expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3 . . . where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country. . . .

103. . . . [T]he presumption that a State participating in the "Dublin" system will respect the fundamental rights laid down by the Convention is not irrebuttable [T]he Court of Justice of the European Union has ruled that the presumption . . . is rebutted in the event of "systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible,

resulting in inhuman or degrading treatment . . . of asylum seekers transferred to the territory of that Member State.” . . .

110. . . . [N]either the Swiss nor the Italian Government claimed that the combined capacity of the SPRAR [(Protection System for Asylum Seekers and Refugees)] system and the CARAs would be capable of absorbing the greater part, still less the entire demand for accommodation.

111. As regards living conditions in the available facilities, the studies cited by the applicants referred to certain accommodation centres where lack of privacy, insalubrious conditions and violence were allegedly widespread. The applicants themselves also claimed to have witnessed violent incidents during their short stay in the Bari CARA. They further submitted that, in some centres, families of asylum seekers were systematically split up.

112. . . . [I]n its Recommendations for 2013 UNHCR . . . did not refer to situations of widespread violence or insalubrious conditions, and even welcomed the efforts undertaken by the Italian authorities to improve reception conditions for asylum seekers. . . .

114. . . . [T]he current situation in Italy can in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment . . . where . . . there were fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers and . . . the conditions of the most extreme poverty described by the applicant existed on a large scale. . . .

120. . . . [T]he possibility that a significant number of asylum seekers removed to [Italy] may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded. It is therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together.

121. . . . [T]he Swiss Government stated that the FMO had been informed by the Italian authorities that, if the applicants were returned to Italy, they would be accommodated in Bologna in one of the facilities funded by the ERF [(European Refugee Fund)]. Nevertheless, in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit . . . the Swiss authorities do not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.

122. . . . [W]ere the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children

and that the family would be kept together, there would be a violation of Article 3 of the Convention. . . .

[Casadevall, Berro-Lefèvre, and Jäderbloom JJ, jointly dissenting in part:]

. . . [T]he general deficiencies in the Italian system for the reception of asylum seekers are not of a kind or a degree that would justify a blanket ban on the return of families to that country. . . .

[T]he risk for the applicants of being subjected to inhuman or degrading treatment is not sufficiently concrete for Switzerland to be held responsible for a violation of Article 3 if it were to enforce the order for the applicants' expulsion to Italy. . . .

No doubt it was clearly foreseeable by the Swiss authorities that the applicants' standard of accommodation in Italy might be poor. . . . It is possible that such conditions, if they extend over a lengthy period, may eventually give rise to a violation of Article 3. Were that the case it would be too far-reaching to hold the Swiss authorities responsible for failure to include that possibility in their risk assessment. Instead Italy . . . would be answerable for an alleged violation of Article 3, and it would still remain open to the applicants to lodge an appeal with the Italian authorities.

C.K. and Others v. Republika Slovenija
Court of Justice of the European Union (Fifth Chamber)
Case No. C-578/16 PPU (2017)

THE COURT (Fifth Chamber), composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, M. Berger, A. Borg Barthet, E. Levits and F. Biltgen, Judges, Advocate General: E. Tanchev, Registrar: M. Aleksejev, Administrator, . . . gives the following Judgment. . . .

29. . . . [O]n 16 August 2015, C. K., a national of the Syrian Arab Republic, and H. F., a national of the Arab Republic of Egypt, entered the territory of the European Union by means of a visa validly issued by the Republic of Croatia. . . . [A]fter a short stay in that Member State, they crossed the Slovenian border equipped with false Greek identification. C. K. and H. F. were subsequently admitted to the reception centre for asylum seekers in Ljubljana (Slovenia) and each submitted an asylum application to the Ministry of the Interior of the Republic of Slovenia. . . . C. K. was pregnant at the time of her entry into the territory of Slovenia.

30. On 28 August 2015, the Slovenian authorities, taking the view that the Republic of Croatia was . . . the Member State responsible for examining the application for asylum of the appellants . . . , sent a request to the authorities of that

Member State to take charge of them. . . . [T]he Republic of Croatia accepted its responsibility

31. Taking into account the advanced pregnancy of C. K., the Republic of Slovenia did not . . . pursue the procedure under the Dublin III Regulation until after 20 November 2015, . . . [when] the appellant . . . gave birth to her child A. S. . . .

32. On 20 January 2016, the Ministry of the Interior issued a decision refusing to examine the applications for asylum of the appellants . . . and ordering their transfer to the Republic of Croatia. . . .

33. By judgment of 2 March 2016, the . . . Administrative Court, Slovenia . . . annulled that decision and referred the case back for re-examination by instructing the competent authorities to obtain an assurance from the Republic of Croatia that C. K., H. F. and their child would have access to adequate medical care in that Member State. . . .

35. On 5 May 2016, the Ministry of the Interior adopted a new decision refusing to examine the applications for asylum of the appellants . . . and ordering their transfer to the Republic of Croatia. . . .

38. By judgment of 1 June 2016, the . . . Administrative Court . . . annulled the decision to transfer the appellants

39. The Ministry of the Interior thereupon brought an appeal against that judgment before the . . . Supreme Court, Slovenia On 29 June 2016, that court . . . confirmed that transfer decision. . . . [I]t held that it was apparent from a report of . . . UNHCR . . . that the situation in the Republic of Croatia concerning the reception of asylum seekers was good. According to that report, that Member State had . . . an accommodation centre designed specifically for vulnerable persons, where asylum seekers had free access to medical care provided by a doctor regularly visiting the centre or, in the event of emergencies, by the local hospital or even, if necessary, by the hospital in Zagreb

40. . . . [The] Supreme Court . . . held that [appellants] . . . had not demonstrated that there were substantial grounds for believing that, in Croatia, systemic flaws existed in the asylum procedure and in the conditions for the reception of asylum seekers that were likely to give rise . . . to a risk of inhuman or degrading treatment Moreover, neither the EU institutions nor the UNHCR regarded the situation in that Member State as critical.

41. . . . [T]he appellants . . . lodge[d] . . . a constitutional appeal with the . . . Constitutional Court, Slovenia

44. . . . [A]ccording to that court . . . there is an obligation on the competent authorities and the national court to examine all the circumstances of significance for

observance of the principle of non-refoulement, including the state of health of the person concerned, in the case where an asylum seeker claims that the Member State responsible for his application is not a “safe State” for him. . . . [T]hose authorities must take into account the applicant’s personal situation in Slovenia and assess whether the mere fact of transferring that person might in itself be contrary to the principle of non-refoulement.

45. Consequently, . . . [the] Supreme Court could not confine itself, as it did, to taking account of the state of health of C. K. as part of the assessment of the situation in Croatia, but also should have verified whether the transfer . . . considered in isolation, was compatible with Article 3 of the ECHR. By failing to assess the claims and the evidence submitted by the appellants . . . that court disregarded their right . . . to be accorded “equal protection in law.” . . . [The] Constitutional Court . . . set aside the judgment of . . . [the] Supreme Court . . . and referred the case . . . back to that court for judgment

46. . . . [T]he . . . Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling

55. . . . [T]he referring court asks, in essence, whether Article 4 of the Charter must be interpreted as meaning that, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment [T]he referring court expresses uncertainty as to whether the Member State concerned would be required to . . . itself examine the asylum application at issue. . . .

65. . . . [T]he transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which preclude that transfer from resulting in a real risk of the person concerned suffering inhuman or degrading treatment

66. . . . [G]iven the particularly serious state of health of an asylum seeker, his transfer . . . may result in such a risk for him.

67. . . . [T]he prohibition of inhuman or degrading treatment laid down in Article 4 of the Charter corresponds to that laid down in Article 3 of the ECHR and . . . its meaning and scope are . . . the same as those conferred on it by that convention.

68. It follows from the case-law of the European Court of Human Rights relating to Article 3 of the ECHR . . . that the suffering which flows from naturally occurring illness, whether physical or mental, may be covered by Article 3 of the ECHR if it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be

held responsible, provided that the resulting suffering attains the minimum level of severity required by that article. . . .

70. . . . Member States bound by the ‘reception’ directive . . . are required . . . to provide asylum seekers with the necessary health care and medical assistance including, at least, emergency care and essential treatment of illnesses and of serious mental disorders. In . . . accordance with the mutual confidence between Member States, there is a strong presumption that the medical treatments offered to asylum seekers in the Member States will be adequate.

71. In the present case . . . the Republic of Croatia has . . . a reception centre designed specifically for vulnerable persons Slovenian authorities have obtained from the Croatian authorities an assurance that the appellants . . . would receive any necessary medical treatment. . . .

73. That said, . . . the transfer of an asylum seeker whose state of health is particularly serious may, in itself, result, for the person concerned, in a real risk of inhuman or degrading treatment . . . irrespective of the quality of the reception and the care available in the Member State responsible for examining his application.

74. . . . [I]n circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in his state of health, that transfer would constitute inhuman and degrading treatment. . . .

75. . . . [W]here an asylum seeker provides . . . objective evidence, such as medical certificates . . . capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, including its courts, cannot ignore that evidence. They are . . . under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer

81. . . . [T]he Member State carrying out the transfer must be able to organise it in such a way that the asylum seeker concerned is accompanied, during transportation, by adequate medical staff with the necessary equipment, resources and medication, so as to prevent any worsening of his health or any act of violence by him towards himself or other persons. . . .

84. If the court having jurisdiction finds that those precautions are sufficient to exclude any real risk of inhuman or degrading treatment in the event of transferring the asylum seeker . . . it will be for that court to take the necessary measures to ensure that they are implemented by the authorities of the requesting Member State before the person concerned is transferred. . . .

85. On the other hand, if the taking of those precautions is . . . not sufficient . . . it is for the authorities of the Member State concerned to suspend the execution of that person's transfer for such time as his state of health renders him unfit for such a transfer. . . .

88. . . . Where necessary, if . . . the state of health of the asylum seeker . . . is not expected to improve in the short term, or . . . the requesting Member State may choose to conduct its own examination of his application by making use of the "discretionary clause" [N]evertheless . . . that provision . . . cannot be interpreted . . . as meaning that it implies an obligation on that Member State to make use of it in that way.

89. . . . [I]f the state of health of the asylum seeker . . . does not enable the requesting Member State to carry out the transfer before the expiry of the six-month period provided for in Article 29(1) of the Dublin III Regulation, the Member State responsible would be relieved of its obligation to take charge of the person concerned and responsibility would then be transferred to the first Member State. . . .

* * *

In response to increased irregular migration into Italy and Greece, the Council of the European Union adopted Decision 2015/1601 in September of 2015, which called for the relocation of 120,000 refugees from Italy and Greece to other Member States. Several Member States have challenged the decision on the grounds that it intrudes on their sovereignty.

Hungary and the Slovak Republic brought suit in 2015 against the Council of the European Union. They alleged the Council lacked the authority to enact the Decision under Article 78 of the Treaty on the Functioning of the EU (TFEU), which provides:

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. . . . [T]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system

3. In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may

adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

The Court of Justice of the European Union dismissed the action in 2017. An excerpt is provided below.

Slovak Republic and Hungary v. Council of the European Union
Court of Justice of the European Union (Grand Chamber)
Joined Case Nos. C-643/15 and C-647/15 (2017)

THE COURT (Grand Chamber), composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen and A. Prechal (Rapporteur), Presidents of Chambers, J.-C. Bonichot, A. Arabadjiev, C. Toader, M. Safjan, E. Jarašiūnas, C.G. Fernlund, C. Vajda, S. Rodin and F. Biltgen, Judges, Advocate General: Y. Bot, Registrar: I. Illéssy, Administrator, gives the following Judgment[:]

1. . . . [T]he Slovak Republic and Hungary seek annulment of Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. . . .

5. The Commission’s initial proposal provided for the relocation of 120,000 applicants for international protection, from Italy (15,600 persons), Greece (50,400 persons) and Hungary (54,000 persons), to the other Member States. . . .

10. . . . Hungary . . . did not wish to be among the Member States benefiting from relocation as were Italy and Greece. . . . [A]ll reference to Hungary as a beneficiary Member State . . . was deleted. . . . Hungary was included . . . as a Member State of relocation of applicants for international protection from Italy and Greece respectively and allocations were therefore attributed to it

11. On 22 September 2015, the Commission’s initial proposal as thus amended was adopted by the Council by a qualified majority. The Czech Republic, Hungary, Romania and the Slovak Republic voted against the adoption of that proposal. . . .

62. . . . [A] legal act can be classified as a legislative act of the European Union only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure. . . .

67. The Council . . . was . . . fully entitled to take the view that [the contested decision] . . . had to be adopted following a non-legislative procedure and was accordingly a non-legislative EU act.

68. . . . [T]he Slovak Republic and Hungary maintain [that] . . . Article 78(3) TFEU was not a proper legal basis for the contested decision because the decision is a non-legislative act which derogates from a number of legislative acts, whereas only a legislative act can derogate from another legislative act. . . .

71. . . . [T]he wording of Article 78(3) TFEU does not in itself support a restrictive interpretation of the concept of “provisional measures” to the effect that the concept covers only accompanying measures which support a legislative act

77. . . . [T]he concept of “provisional measures” . . . must be sufficiently broad in scope to enable the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterised by a sudden inflow of nationals of third countries. . . .

79. . . . [T]he Court finds that the derogations provided for in the contested decision meet the requirement that their material and temporal scope be circumscribed and have neither the object nor the effect of replacing or permanently amending provisions of legislative acts.

80. . . . [T]he derogations . . . apply for a two-year period only, subject to the possibility of extending that period . . . , and will, in the event, cease to apply on 26 September 2017. . . .

92. . . . Article 78(3) TFEU, whilst requiring that the measures referred to therein be temporary, affords the Council discretion to determine their period of application on an individual basis, in the light of the circumstances of the case and, in particular, of the specific features of the emergency situation justifying those measures. . . .

96. . . . [T]he Council did not manifestly exceed the bounds of its discretion when it set the period of application of the measures provided for in the contested decision, given that it took the view . . . that “a period of 24 months is reasonable in view of ensuring that the measures provided for in this Decision have a real impact in respect of supporting Italy and Greece in dealing with the significant migration flows on their territories.” . . .

113. . . . [T]he Slovak Republic[] argu[es] . . . that the inflow of nationals of third countries to Greece and Italy in 2015 cannot be classified as “sudden” for the purposes of Article 78(3) TFEU, since it represented the continuation of what was already a large inflow of such nationals in 2014 and was therefore foreseeable. . . .

122. . . . [T]he Council . . . identified—on the basis of statistical data that have not been challenged by the Slovak Republic—a sharp increase in the inflow of third country nationals into Greece and Italy over a short period of time, in particular during July and August 2015.

123. It must be held that in such circumstances the Council could, without making a manifest error of assessment, classify such an increase as “sudden”

254. . . . [C]ontrary to what is maintained by the Slovak Republic and Hungary, the choice of a binding relocation mechanism cannot be criticised on the ground that Article 78(3) TFEU only permits the adoption of provisional measures that can be swiftly put into effect, whereas the preparation and implementation of a binding relocation mechanism requires a certain amount of time before relocations can proceed at a steady pace.

255. Article 78(3) TFEU seeks to ensure that effective action is taken and does not prescribe for that purpose any period within which provisional measures must be implemented. . . .

289. According to Hungary, the imposition of binding quotas on it represents a disproportionate burden, taking account of the fact that it was, even after mid-September 2015, in an emergency situation because the migratory pressure on its borders had not diminished but had, at the most, shifted towards its border with Croatia where significant numbers of irregular border crossings were taking place every day. . . .

293. Faced with Hungary’s refusal to benefit from the relocation mechanism as the Commission had proposed, the Council cannot be criticised . . . for having concluded on the basis of the principle of solidarity and fair sharing of responsibility . . . that Hungary had to be allocated relocation quotas in the same way as all the other Member States that were not beneficiaries of the relocation mechanism. . . .

326. Hungary has also criticised the contested decision for allegedly failing to include proper rules for ensuring that applicants for international protection will remain in the Member State of relocation while a decision is taken on their applications or, in other words, for ensuring that “secondary” movements are prevented. . . .

329. [T]he contested decision . . . [was] based on criteria related to solidarity and fair sharing of responsibility between the Member States. . . .

332. The contested decision therefore cannot be regarded as comprising an arbitrary system which has taken the place of the objective system laid down by the Dublin III Regulation. . . .

333. . . . [T]here is ultimately no substantial difference between those two systems in the sense that the system established by the contested decision is based—like the system established by the Dublin III Regulation—on objective criteria rather than on a preference expressed by an applicant for international protection. . . .

335. . . . [A]lthough no provision is made . . . for the applicant to consent to his relocation, . . . the contested decision provides that . . . the applicant is to be informed that he is the subject of a relocation procedure and . . . requires the authorities of the beneficiary Member State to notify the applicant of the relocation decision before he is actually relocated

336. . . . [I]t is because applicants do not have the right to choose which Member State is to be responsible for examining their applications that they must have the right to an effective remedy against the relocation decision, so as to ensure respect for their fundamental rights. . . .

338. . . . [I]t cannot validly be maintained that the contested decision, in so far as it provides for the transfer of an applicant for international protection before a decision on his application has been taken, is contrary to the Geneva Convention because that convention allegedly includes a right to remain in the State in which the application has been lodged while that application is pending. . . .

Hungary's Response to Irregular Migration Within the EU

In addition to joining in the suit against the Council of the European Union, Hungary has adopted several domestic policies in response to Decision 2015/1601. In 2016, the Hungarian government, led by Prime Minister Viktor Orbán, put forth a referendum asking the people of Hungary: “Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without approval of the National Assembly?” On October 2, the overwhelming majority of the voters answered “no,” but the turnout fell short of the required minimum to render the referendum valid.

After the referendum, the Hungarian Constitutional Court considered a petition filed by the Commissioner for Fundamental Rights requesting an abstract interpretation of Article E) (2)* of the Basic Law. The petition challenged Decision 2015/1601, characterizing it as a collective removal, which is forbidden under Article XIV (1)** of the Basic Law. The Commissioner asked whether Article E) (2) of the

* Article E) (2) of the Basic Law of Hungary provides:

With a view to participating in the European Union . . . and on the basis of an international treaty, Hungary may . . . exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union.

** Article XIV of the Basic Law of Hungary provides:

(1) . . . Foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision. Collective expulsion shall be prohibited. . . .

Basic Law allowed state agents to take actions required as part of Hungary’s obligations as a Member State but which were nonetheless in violation of the Basic Law.

The Hungarian Constitutional Court did not reach the question of whether state action under Decision 2015/1601 violated the Basic Law. Instead, in *Decision 22/2016* (XII. 5.) (2016), the Court held that it had the authority to review alleged violations of fundamental rights or of Hungary’s constitutional self-identity of the sort the Commissioner presented in this petition:

67. The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the . . . [Basic] Law Consequently, constitutional identity cannot be waived by way of an international treaty Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. . . .

69. If human dignity, another fundamental right, the sovereignty of Hungary[,] . . . or its self-identity based on its historical constitution [are] . . . violated due to [actions taken under] . . . Article E) (2) of the . . . [Basic] Law, the Constitutional Court may examine, on the basis of a relevant petition . . . the existence of the alleged violation.

After Hungary lost its case at the Court of Justice, Orbán included in his 2018 election campaign his disagreement with the EU about migration. Once he gained two-thirds of the parliamentary seats in the April 8, 2018 election, he sought to amend the Basic Law to override the CJEU’s decision. The draft constitutional amendment, introduced into the Hungarian Parliament on May 28, 2018, is excerpted below:

Draft of Seventh Amendment to the Basic Law of Hungary (2018)*

. . . 5. (1) Articles XIV, parts 1 . . . of the Basic Law shall be replaced by the following:

“(1) No alien population can be installed in Hungary. Foreign nationals—not including persons with a right of free movement and residence—may live on the territory of Hungary only on the basis an individual request to the Hungarian authorities. The basic rules for submitting and examining the application are determined by a cardinal law. [A cardinal law requires a relative two-thirds majority of the parliament, which effectively shields the rules from change by future parliaments unless that future government has supermajority support.] . . .

* Translation provided by Professor Kim Lane Scheppele (Princeton University).

(2) In accordance with Article XIV of the Basic Law, the following paragraph[] [was] added:

(4). . . . An alien who has arrived in the territory of Hungary through a country where they have not been exposed to the direct danger of persecution is not entitled to asylum.

(5) The basic rules for the granting of asylum are determined by cardinal law.” . . .

Reasoning

[All Hungarian Laws are accompanied by an explanatory section. Here is a translation of the explanatory section for Section 5:]

5 . . . Hungary recognizes customary international law as revealed in state practice . . . in which, “the State has the right to define the conditions, on the basis of which aliens are admitted.” . . . [S]tate sovereignty immanently includes the inalienable right to allow (or not) aliens to enter state territory. . . .

Hungary will only grant asylum to those who arrive directly from a country . . . where they have a well-founded fear of persecution. For everybody else, the Parliament is free to choose asylum or similar protection for them and if so, what substantive conditions and procedural rules apply. . . .

Facing the Refugee Challenge in Europe Cecilia Rizcallah (2018)*

. . . [The Common European Asylum System’s (CEAS’s)] . . . shortcomings reveal a disavowal of what makes up the EU’s historical and normative identity. . . .

[C]ommon values and shared ideals are . . . the European Union’s bedrock. These values notably include the respect for human dignity of every human being, freedom, democracy, equality, the rule of law, and human rights

[S]olidarity among Member States constitutes “the bedrock of European construction” since its outset, and its promotion continues to be one of the EU’s cardinal objectives. . . . [T]he failure of the CEAS in its prevailing form to observe this principle is one of the main causes of its dysfunction. . . .

* Excerpted from Cecilia Rizcallah, *Facing the Refugee Challenge in Europe: A litmus test for the European Union* (MOSE Jean Monet Workshop, 2018).

The first type of core identity components wrecked by the CEAS in its current form concern the intra-EU relationships between Member States and, more precisely, the lack of solidarity they demonstrate. . . .

[The Dublin System] is one of the main weaknesses of the CEAS and this precisely because it contravenes the principle of solidarity. Indeed, for years now, it has served to massively disadvantage States at the external border of the European Union. The asymmetry resulting from “laying the burden where it falls” and the ensuing disrespect for the principle of solidarity, led to major flaws in the system. Firstly, the system gives little incentive to geographically disadvantaged Member States to comply with its rules. Hand in hand with the asylum seeker’s willingness to avoid identification upon arrival, a reluctance in implementing the obligation of fingerprinting all those who arrive . . . is evident. By bypassing this obligation, first-entry countries can avoid the return of asylum-seekers who entered the Union through their borders. . . .

Secondly, the Dublin system’s solidarity deficit has resulted in the undermining if not the collapse of some national asylum services. . . .

The second type of core identity components infringed by the CEAS in its current form concerns the EU’s and its Member States’ attitude toward the rest of the world. . . . [T]he Treaty lays down that “in its relations with the wider world, the Union shall uphold and promote its values” and that it shall contribute to solidarity and mutual respect among peoples as well as the protection of human rights. . . . The present management of the influx of migrants nonetheless obviously distances itself in several respects from these values that are supposed to frame the EU’s identity on the international scene. . . .

[T]he principle of solidarity . . . is understood in an “exclusive” manner, leaving little, if any, space for its application “to third-country nationals or those on the outside.” Yet . . . the founding Treaties do indeed require the EU to uphold and promote solidarity among peoples and to be guided by the principle of solidarity on the international scene. Today’s EU’s response to the migration flows appears in contradiction with this principle. The exclusive character of solidarity is notably demonstrated by the EU’s actions intended to bar asylum seekers from entering into its territory. . . . [I]n March 2016 the EU concluded an agreement with Turkey, aimed at reducing large-scale movement of refugees to Greece, requiring, among other matters, Turkey to “take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU,” and thus, to bar the route of people seeking protection in the EU. Yet, these mechanisms . . . are at odds with the EU’s duty of solidarity *vis-à-vis* the rest of the world. The disavowal by the Union of its solidarity-based character in the current management of the refugee flows thus jeopardizes the EU’s very foundations.

The prevailing problems encountered by the CEAS moreover also reveal a major denial of the EU's values of human dignity, pluralism, equality and non-discrimination, and more generally human rights, despite the fact that they are meant to lie at the heart of EU's identity. Fundamental rights laid down in the EU Charter are indeed supposed to enshrine the "universal values of the inviolable and inalienable rights of the human person on which European construction is founded and which the European Union and its Member States defend and promote, both on their territory and in their relations with third countries." . . .

[The] legal structure of the Union is "based on the fundamental premise that each Member State shares with all the other Member States . . . a set of common values on which the EU is founded That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that implements them will be respected." . . . Besides the fundamental importance of improving the current CEAS such that it complies with these values for the sake of the asylum-seekers, it also constitutes a normative condition for the EU's survival. . . .

DETECTING REFUGEES

This section examines measures that seek to deter refugees either by preventing them from reaching their destinations or by arresting, detaining, or deporting them immediately when they do. Constitutional courts have considered legal challenges to efforts to bar entry and utilize prolonged detention.

Before the Border: *Non-Entrée*

A Cosmopolitan Legal Order Alec Stone Sweet and Clare Ryan (2018)*

. . . The primary role of the European Court [of Human Rights] is to ensure that states meet their obligations under Article 1 ECHR:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention. . . .

In early drafts of Article 1, the founders referred to member states' obligations to "all persons residing within their territories." In removing the reference to "residence," the framers gave Article 1 a cosmopolitan complexion: every person who comes within the *jurisdiction* of a member state is a rights-holder. The *travaux préparatoires*, however, had little to say about how the contours of state jurisprudence should be delineated. . . .

* Excerpted from ALEC STONE SWEET AND CLARE RYAN, A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 203-246 (2018).

The issue became more pressing as European states engaged in joint peacekeeping efforts, counter-terrorism alliances, collaborative migration control, and other efforts that would take place outside *l’espace juridique Européenne*. . . .

In 1985, a nineteen-year-old German named Jens Soering was arrested in England for check fraud. At that time, Mr. Soering was wanted for the brutal murder of his girlfriend’s parents in the State of Virginia, where the prosecutor promised to seek the death penalty. The petitioner raised a novel argument: that to endure years on death row, while being subjected to the dangers of violence and sexual assault, would amount to treatment contrary to Article 3. The Plenary Court agreed. . . .

The Court held that Article 3 required the [UK] . . . to investigate conditions in the extradition-requesting state, before proceeding to extradition. . . .

In *Soering v. UK* (1989), the Court articulated a position—derived from Europe’s “common heritage of political traditions, ideals, freedom and rule of law”—on which it would heavily rely in the future:

It would hardly be compatible with the underlying values of the Convention . . . were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. . . .

Under customary international law and the Convention Relating to the Status of Refugees . . . , states may not return asylum seekers to a country where they risk persecution This prohibition is called the *non-refoulement* principle, of which the post-*Soering* line of cases is an expression.

It is also a concrete instantiation of the Kantian principle of hospitality. In its most narrow formulation, Kant defined Cosmopolitan Right in the following terms:

. . . [I]n this context hospitality means the right of a stranger not to be treated in a hostile manner by another upon his arrival on the other’s territory. If it can be done without causing his death, the stranger can be turned away, yet as long as he behaves peacefully . . . his host may not treat him with hostility.

While scholars have intensively debated the scope to be given the “universal principle of hospitality,” few would deny the deep connections it has with that of *non-refoulement*. . . .

Indeed, in an early draft of *Perpetual Peace*, Kant had proposed that “a ship seeking port in a storm, or a stranded group of sailors cannot be chased away from the beach or the oasis . . . and sent back to imminent danger.”

Since 2010, Europe has experienced an explosive number of asylum claims caused by a severe refugee crisis that shows no signs of abating. . . .

In an effort to stem the tide, countries began intercepting migrants' ships on the high seas, and returning the passengers to North African ports. The Court . . . confronted a novel situation in *Hirsi Jamaa v. Italy* (2012). The Italian coast guard had intercepted the applicants' rickety boat, and then forced the passengers onto an Italian ship, which returned them to Tripoli without being given the opportunity to demand asylum. The case bundled together the claims of twenty-four petitioners from Somalia and Eritrea, who claimed that they were owed the same protections applicable to asylum seekers on Italian soil.

The Court agreed. Because the migrants were under the effective control of Italian flagships, the *non-refoulement* principle prohibited the petitioner's return to Libya, a country where they risked treatment contrary to Article 3. . . .

Strasbourg presents its ruling in *Hirsi Jamaa* as an obvious and necessary extension of *Soering* . . . and the *non-refoulement* principle to an emergent context Yet prior to *Hirsi*, domestic courts in the regime had routinely excluded migrants from rights protection until they had reached solid ground, the stance of US courts as well. Had the Court permitted consensus analysis to control, the judgment would have been presumptively precluded. Instead, the Court forcefully took a cosmopolitan position. . . .

Hirsi Jamaa and Others v. Italy
European Court of Human Rights (Grand Chamber)
Application No. 27765/09 (2012)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Nicolas Bratza, *President*, Jean-Paul Costa, Françoise Tulkens, Josep Casadevall, Nina Vajić, Dean Spielmann, Peer Lorenzen, Ljiljana Mijović, Dragoljub Popović, Giorgio Malinverni, Mirjana Lazarova Trajkovska, Nona Tsotsoria, Işıl Karakaş, Kristina Pardalos, Guido Raimondi, Vincent A. de Gaetano, [and] Paulo Pinto de Albuquerque . . . [d]elivers the following judgment. . . :

. . . 9. The applicants, eleven Somali nationals and thirteen Eritrean nationals, were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast.

10. On 6 May 2009, when the vessels were 35 nautical miles south of Lampedusa (Agrigento), that is, within the Maltese Search and Rescue Region of responsibility, they were intercepted by three ships from the Italian Revenue Police (Guardia di finanza) and the Coastguard [and returned to Libya]. . . .

12. On arrival in the port of Tripoli, following a ten-hour voyage, the migrants were handed over to the Libyan authorities. According to the applicants’ version of events, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships.

13. At a press conference held on 7 May 2009, the Italian Minister of the Interior stated that the operation to intercept the vessels on the high seas and to push the migrants back to Libya was the consequence of the entry into force on 4 February 2009 of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine immigration. . . .

19. On 29 December 2007 Italy and Libya signed a bilateral cooperation agreement in Tripoli to combat clandestine immigration. On the same date the two countries signed an Additional Protocol setting out the operational and technical arrangements for implementing the said Agreement. . . . Libya undertook to “coordinate its actions with those of the countries of origin in order to reduce clandestine immigration and ensure the repatriation of immigrants.” . . .

74. Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under . . . the Convention that are relevant to the situation of that individual. . . .

76. . . . [T]he events in issue occurred on the high seas, on board military ships flying the Italian flag. . . .

77. . . . [A] vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. . . .

79. . . . Italy cannot circumvent its “jurisdiction” under the Convention by describing the events in issue as rescue operations on the high seas. In particular, the Court cannot subscribe to the Government’s argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time. . . .

85. The applicants alleged that they had been the victims of an arbitrary refoulement. . . .

113. . . . Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. . . . [T]he right to political asylum is not contained in either the Convention or its Protocols.

114. However, expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State . . . where substantial grounds have been shown

for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. . . .

117. . . . [T]o ascertain whether or not there was a risk of ill-treatment, the Court must examine the foreseeable consequences of the removal of an applicant to the receiving country in the light of the general situation there as well as his or her personal circumstances. . . .

122. . . . [T]he States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers. It does not underestimate the burden and pressure this situation places on the States concerned. . . .

However, having regard to the absolute character of the rights secured by Article 3, that cannot absolve a State of its obligations under that provision. . . .

123. . . . Article 3 imposes on States the obligation not to remove any person who, in the receiving country, would run the real risk of being subjected to such treatment. . . .

129. . . . Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if . . . those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States. . . .

146. . . . [I]ndirect refoulement of an alien leaves the responsibility of the Contracting State intact, and that State is required, in accordance with the well-established case-law, to ensure that the person in question would not face a real risk of being subjected to treatment contrary to Article 3 in the event of repatriation.

147. It is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced. . . . [T]hat obligation is all the more important when . . . the intermediary country is not a State Party to the Convention. . . .

153. The Court observes . . . that Libya has not ratified the Geneva Convention on Refugee Status. Furthermore, international observers note the absence of any form of asylum and protection procedure for refugees in Libya. . . .

156. . . . Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack

of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by UNHCR. . . .

158. . . . [T]he transfer of the applicants to Libya . . . violated Article 3 of the Convention because it exposed the applicants to the risk of arbitrary repatriation. . . .

169. . . . [T]he Court must . . . examine whether Article 4 of Protocol No. 4* applies to a case involving the removal of aliens to a third State carried out outside national territory. It must ascertain whether the transfer of the applicants to Libya constituted a “collective expulsion of aliens” within the meaning of the provision in issue. . . .

177. . . . If . . . Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and . . . on the high seas. . . . [M]igrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land.

178. . . . Where . . . the Court has found that a Contracting State has . . . exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. . . . [T]o afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole. . . .

180. . . . [T]he removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4. . . .

185. . . . [T]he Court can only find that the transfer of the applicants to Libya was carried out without any form of examination of each applicant’s individual situation. . . . [T]he applicants were not subjected to any identification procedure by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the

* Article 4 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

Collective expulsion of aliens is prohibited.

Court notes that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.

That is sufficient for the Court to rule out the existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination.

186. . . . [T]he Court concludes that the removal of the applicants was of a collective nature, in breach of Article 4 of Protocol No. 4 to the Convention. . . .

Non-Refoulement in a World of Cooperative Deterrence Thomas Gammeltoft-Hansen and James C. Hathaway (2015)*

. . . The practice of *non-entrée*—comprising efforts by powerful states to prevent refugees from ever reaching their jurisdiction at which point they become entitled to the benefit of the duty of *non-refoulement* and other core rights set by the Refugee Convention—has long been a feature of the refugee protection landscape. . . .

[One] form of *non-entrée* is to effect deterrence on the high seas, an area that is in fact an international zone. In the 1990s, for example, U.S. Coast Guard ships were ordered to stop all persons in flight from the violence and persecution that accompanied the overthrow of the murderous Cedrés dictatorship in Haiti. In the years that followed, more than 35,000 Haitians were interdicted in international waters and returned to Haiti without having had a proper assessment of their claims to be refugees. West African states were among those that followed the American lead, forcing vessels carrying refugees away from their ports.

Over the past two decades, however, these traditional *non-entrée* practices have been successfully challenged, both in practice and as a matter of law. . . .

[T]here is little support for the view that a state can deter refugees in the international space of the high seas without violating its duties of protection. The outlier case is the 1993 decision of the Supreme Court of the United States in *Sale [v. Haitian Centers Council]*, in which the Court engaged in highly formalist and decontextualized reasoning to find that a refugee cannot be “returned” by an asylum state to her home country if she has yet to arrive in the asylum state, and that a purely territorial scope for the duty of *non-refoulement* is required by the language of its national security exception. The Court purported to draw on the Convention’s *travaux préparatoires* to justify its reasoning, prompting the American representative to the specialist committee that drafted the Refugee Convention to reply that it would be “incredible that states that had agreed not to force any human being back into the hands of his or her oppressors intended to leave themselves—and each other—free to

* Excerpted from Thomas Gammeltoft-Hansen and James Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 235 (2015).

reach out beyond their territory to seize a refugee and to return him or her to the country from which he sought to escape.”

Happily, the U.S. Supreme Court’s approach has not found favor elsewhere. It was rejected by the Inter-American Commission on Human Rights, which adopted the contrary position advanced by the United Nations High Commissioner for Refugees (UNHCR) in its brief to the U.S. Supreme Court. The English Court of Appeal chose to treat *Sale* as “wrongly decided; it certainly offends one’s sense of fairness.” And in the recent case of *Hirsi*, a Grand Chamber of the European Court of Human Rights determined unanimously that push-backs on the high seas were in breach of regional *non-refoulement* obligations. . . .

[P]owerful states have embraced a new generation of deterrent regimes intended to overcome many of the weaknesses of the original generation of *non-entrée* practices. The new approaches are predicated on international cooperation, with deterrence occurring in the territory, or under the jurisdiction, of the home state or a transit country. As a practical matter, new forms of *non-entrée* often include action in states of origin or transit designed to disrupt migrant smuggling networks, thereby stymying travel toward the frontiers of developed states. This geographical reorientation is also thought to be legally instrumental. Even as international law has evolved to make clear that liability under the *non-refoulement* norm ensues for actions taken by a state at its own borders and in any other place under its jurisdiction, it is assumed that actions undertaken under the jurisdiction of the authorities of other countries are legally risk-free. With poorer states of origin and transit often willing for economic, political, and other reasons to serve as the gatekeepers to the developed world, wealthier countries believe that they can insulate themselves from liability for refugee deterrence by having such action take place under the sovereign authority of another country. . . .

The . . . most basic new form of *non-entrée* relies on diplomatic relations. . . . The European Union has been especially active in promoting this approach, seeking to negotiate agreements with key Mediterranean and Eastern European states to combat “irregular” migration

The truly pernicious nature of these new forms of *non-entrée* is especially clear when the cooperation is with countries not themselves legally bound to protect refugees. . . . And even when formally bound by refugee law, many of the favored partner states have no national procedure in place to assess refugee status nor the *de facto* capacity to or will to ensure respect for refugee rights. . . . [R]efugees trapped under the jurisdiction of these states have little or no ability to claim the rights to which they are in principle entitled by international law.

* * *

In April 2018, a caravan of Central American refugees set out toward the United States fleeing violence in their countries. In an effort to prevent these refugees from entering and seeking asylum in the United States, the Trump Administration pursued policies within what Gammeltoft-Hansen and Hathaway describe as the new regime of *non-entrée*. In particular, the administration sought a “safe third country” agreement with Mexico, which would allow U.S. officials to refuse entry to refugees on grounds that they could seek protection in Mexico. As of May 2018, the two countries had not entered into such an agreement.

Detention

Refugee detention is one aspect of a widespread turn by states toward coercive techniques to manage migration flows. Courts faced with challenges to detention have addressed questions about the constraints on state agents’ discretion to detain refugees and other migrants. Courts have also considered the length of detention permissible and the availability of safeguards for refugees and for migrants in detention, including those subject to deportation orders.

Immigration Detention, Punishment, and the Transformation of Justice

Mary Bosworth (2017)*

As the number of people on the move has grown, even though most have remained in their home region, politics in the global north concerning immigration has hardened. Across Europe, the US and Australia, right-wing nationalist parties have flourished, while left and centrist ones have been unsure how to respond. . . .

In addition to these familiar parts of the criminal justice system, other, parallel forms of policing, courts and incarceration exist for foreigners within the immigration system. Rather than being wholly separate sites of governance, those agencies intersect with and often work alongside criminal justice partners. . . . Meanwhile, immigration officers have acquired limited policing powers, and are permitted to arrest at ports and other designated sites, and detain foreign nationals for a specific period of time. . . .

Such issues are not limited to England and Wales. Rather, over the past 20 years most industrialised countries in the global north have pursued similar policies. In the US, for instance, border policing makes up the majority of work conducted by the Department of Homeland Security, while state police increasingly check the immigration status of those they consider to be foreign. Suspects, research indicates, are overwhelmingly likely to be Latino/a, irrespective of their nationality. Most dramatically, US immigration prosecutions now exceed prosecutions in the federal

* Excerpted from Mary Bosworth, *Immigration Detention, Punishment and the Transformation of Justice*, SOCIAL AND LEGAL STUDIES (December 26, 2017).

system for all other crimes. As a result, foreigners make up 22% of the federal prison population, far outstripping their proportion in the community. State and local prisons not only hold foreign offenders, but also house the majority of immigration detainees, while in the federal system too, a growing number of prisons are filled with non-citizens.

Across Europe, matters are much the same. The police are increasingly employed directly in border control, tasked not only with stopping and searching suspected irregular migrants, but also with detaining and deporting them. On average, one in five people in prison across Europe have been born abroad. In certain countries, like Switzerland, they make up the vast majority, in other places, like Belgium, they account for nearly half. Such disproportionate treatment not only draws into question some of the key assumptions about European penal moderation, but also, more fundamentally, demands answers about the purpose and nature of punishment. In Europe, as elsewhere, these examples reveal enduring relations between race and punishment, since most of the foreign populations belong to racial and ethnic minorities. . . .

[Immigration Removal Centres, or] IRCs are neither part of the criminal justice system, nor is a period of confinement within them a sanction handed down by a court in response to a criminal act. Immigration detention is an administrative form of custody that is used pursuant to removal or deportation, or to allow for identification. . . . [A] period of detention may be triggered by an immigration violation, or may flow as a consequence from a criminal sentence, as foreign offenders increasingly face mandatory deportation. So, too, immigration detention can occur within the criminal justice system. In the UK, former prisoners may be held post-sentence, under immigration action powers, in prison, while in the US, many of the beds used for immigration detainees are located in state and federal prisons and local jails. . . .

The purpose and impact of immigration detention is notoriously contested. On the one hand, as sites of administrative detention, IRCs are designed only to hold foreign nationals, so that the state can administer border control. Yet, in a world where politicians speak of deliberately constructing a ‘hostile environment’ to immigration, IRCs appear increasingly conceived as a form of deterrence. Faced with calls for stiffer border controls, states across the world have invested heavily in these kinds of establishments. Conditions inside them are kept to a minimum; regimes are sparse.

Such matters, in the UK at least, are dwarfed by the absence of a statutory time limit for all but those who are pregnant or under 18. The fact that nobody knows how long they will be detained, trumps all other concerns an officer at IRC Colnbrook made clear: “[The Criminal Case Directorate] CCD9 wants to make detention more of a deterrent. They think that people sit there quite happily for 4 years getting 3 square meals a day so they want it to be ‘more austere’ for those who are not compliant.” In a view that is well-documented throughout the field, this guard suggested, the primary

pain of immigration detention, lay in its uncertain duration; if that did not operate as a deterrence, then nothing would. . . .

* * *

What constrains officer discretion to detain refugees? Under the Dublin System, a Member State may detain refugees to transfer them to the country where they first entered the Union if there is significant risk of absconding. In the following case, the Second Chamber of the Court of Justice of the European Union concluded that such detention would be permissible only when national law provided officers with criteria for determining what constitutes a “significant risk of absconding.”

Police Force of the Czech Republic et al. v. Al Chodor
Court of Justice of the European Union (Second Chamber)
Case No. C-528/15 (2017)

THE COURT (Second Chamber), composed of M. Ilešič, President of the Chamber, A. Prechal (Rapporteur), A. Rosas, C. Toader and E. Jarašiūnas, Judges, Advocate General: H. Saugmandsgaard Øe, Registrar: L. Hewlett, Principal Administrator, . . . gives the following Judgment[:]. . . .

13. The Al Chodors, . . . Iraqi nationals, travelled to the Czech Republic, where they were subject to a police check As they did not produce any documents establishing their identity, they were interviewed by the Foreigners Police Section. . . .

15. After stopping the Al Chodors in the Czech Republic, the Czech Foreigners Police Section consulted the Eurodac database and found that they had made an asylum application in Hungary.

16. The Foreigners Police Section took the view that there was a serious risk of absconding, given that the Al Chodors had neither a residence permit nor accommodation in the Czech Republic while awaiting their transfer to Hungary. . . . [N]otwithstanding the rules forbidding them from doing so, they had left the refugee camp in Hungary . . . without waiting until a decision had been made in relation to their asylum application. The Foreigners Police Section accordingly placed the Al Chodors in detention for 30 days pending their transfer to Hungary pursuant to Paragraph 129(1)* of the Law on the residence of foreign nationals, read in conjunction with Article 28(2) of the Dublin III Regulation.**

* Paragraph 129(1) of Law No. 326/1999 of the Czech Republic provides:

The police shall detain a foreign national who has entered or stayed in the Czech Republic illegally for the period of time necessarily required in order to secure transfer procedures in accordance with an international treaty concluded with another Member State of the European Union . . . or with directly applicable legislation of the European Union.

** Article 28(2) of the Dublin III Regulation provides:

2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the

17. The Al Chodors brought an action against the decision ordering their detention. . . . [The] Regional Court . . . annulled that decision, finding that Czech legislation does not lay down objective criteria for the assessment of the risk of absconding within the meaning of Article 2(n) of the Dublin III Regulation.* That court accordingly ruled that the detention was unlawful. . . .

18. Following the annulment of the decision of the Foreigners Police Section, the Al Chodors were released from custody. . . .

19. The Foreigners Police Section brought an appeal . . . before the . . . Supreme Administrative Court, Czech Republic According to the Foreigners Police Section, the inapplicability of Article 28(2) of the Dublin III Regulation cannot be justified by the mere absence in Czech legislation of objective criteria defining the risk of absconding. That provision subjects the assessment of the risk of absconding to three conditions, namely an individual assessment taking account of the circumstances of the case, the proportionality of the detention, and the impossibility of employing a less coercive measure. The Foreigners Police Section has submitted that it satisfied those conditions. . . .

23. . . . [T]he . . . Supreme Administrative Court . . . decided . . . to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the sole fact that a law has not defined objective criteria for assessment of a significant risk that a foreign national may abscond [within the meaning of Article 2(n) of the Dublin III Regulation] render detention under Article 28(2) [of that regulation] inapplicable?’ . . .

25. . . . [T]he Dublin III Regulation . . . permits the detention of applicants, in order to secure transfer procedures . . . when there is a significant risk of absconding on the basis of an individual assessment, and only in so far as the detention is proportional and where other less coercive alternative measures cannot be applied effectively. Article 2(n) of that regulation defines . . . the term ‘risk of absconding’ as the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that the person concerned may abscond. . . .

basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

* Article 2(n) of the Dublin III Regulation provides:

2. For the purposes of this Regulation: . . .

(n) “risk of absconding” means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.

28. . . . Article 2(n) of the Dublin III Regulation . . . explicitly requires that objective criteria defining the existence of a risk of absconding be ‘defined by law.’ Since those criteria have been established neither by that regulation nor in another EU legal act, the elaboration of those criteria . . . is a matter for national law. . . .

33. . . . [The Dublin III Regulation] is intended to make the necessary improvements . . . to the effectiveness of the Dublin system [and] . . . to the protection afforded to applicants under that system, to be achieved by, inter alia, the judicial protection enjoyed by asylum seekers.

34. This high level of protection afforded to applicants . . . is also provided for with regard to the detention of those applicants Article 28 of that regulation . . . places significant limitations on the power of the Member States to detain a person. . . . [T]he Member States may not hold a person in detention for the sole reason that he or she is an applicant for international protection. . . .

38. According to the European Court of Human Rights, any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law, but also that lawfulness concerns the quality of the law and implies that a national law authorising the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness. . . .

40. . . . [T]he detention of applicants . . . is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness. . . .

43. . . . [O]nly a provision of general application could meet the requirements of clarity, predictability, accessibility and . . . protection against arbitrariness. . . .

45. . . . Article 2(n) and Article 28(2) of the Dublin III Regulation . . . must be interpreted as requiring that the objective criteria underlying the reasons for believing that an applicant may abscond must be established in a binding provision of general application. . . . [S]ettled case-law confirming a consistent administrative practice on the part of the Foreigners Police Section . . . cannot suffice.

46. In the absence of those criteria in such a provision . . . the detention must be declared unlawful

* * *

In the early 2000s, the Australian government adopted a policy of transporting refugees to processing centers in island nations, including Nauru and Papua New Guinea (PNG). The practice, temporarily abandoned in 2008, was resumed in 2012, citing rising numbers of irregular maritime arrivals to Australia. Any refugee deemed legitimate by Australian authorities would be resettled in PNG at the Manus Island Processing Center (MIPC). “Settlement” is one description; “detention” is another. In

the excerpt below, the Supreme Court of Papua New Guinea considered the constitutionality of this agreement and of attempts to incorporate the indefinite detention of refugees within the constitutional framework of PNG.

Namah v. Pato
Supreme Court of Papua New Guinea
[2016] PGSC 13 (26 April 2016)

[Justice Kandakasi wrote one of two leading judgments, and was joined by Deputy Chief Justice Salika, Justice Sakora, and Justice Sawong. Justice Higgins, the author of the other leading judgment, joined in Justice Kandakasi’s judgment as well. Justice Kandakasi:]

5. This . . . application . . . concerns people . . . who sought asylum . . . in Australia but got transferred and held against their will on [PNG’s] . . . MIPC . . . under an arrangement between the Australian and . . . PNG . . . governments in the form of Memorandum of Understandings (MOU) . . . September 2012 (1st MOU) and . . . August 2013 (2nd MOU). Later the two governments sought to validate the arrangements by an amendment to s. 42[(1)(g)]* of the PNG Constitution and before that took a number of administrative measures under the Migration Act

7. . . . [T]he issues for us to consider and determine are:

(1) Whether the bringing into PNG by the Australian Government and detaining the asylum seekers at MIPC is contrary to their constitutional rights of personal liberty guaranteed by s. 42 of the *Constitution*?

(2) Is s. 1 of the *Constitution Amendment (No 37) (Citizenship) Law* 2014 (2014 Amendment) unconstitutional and thus invalid?

(3) [If so] does s. 42(1)(g) and or s. 42(1)(ga)** of the *Constitution*

* Section 42(1)(g) of the Papua New Guinea Constitution provides:

42. Liberty of the person

(1) No person shall be deprived of his personal liberty except . . .

(g) for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes

** The proposed amendment to Section 42(1)(g) of the Papua New Guinea Constitution, Section 42(1)(ga), provided:

(ga) for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organisation that the Minister responsible for immigration matters, in his absolute discretion, approves.

apply to the asylum seekers under the 1st and the 2nd MOUs? . . .

20. . . . A number of people in PNG . . . took serious issue with the two governments arrangements claiming a violation of the asylum seekers['] fundamental human rights and in particular their liberty guaranteed under s. 42 of the *Constitution*. . . . [T]he two governments proceeded to bring in the asylum seekers who consist of men, women and children, under Australia Federal Police escort and have them held at the MIPC against their will. The MIPC is enclosed with razor wire and manned by security officers to prevent the asylum seekers from leaving the centre. All costs are paid for by the Australian government. . . .

22. In a bid to overcome the challenges or issues raised in opposition to the arrangements, the PNG government . . . rushed through Parliament a Constitutional amendment to s. 42 of the *Constitution* and introduced s.42 (1)(ga). Parliament did not pass any Act of Parliament to give effect to the provisions of s.42 (1)(ga). The only Act that would be relevant is the *Migration Act*.

23. By notice published in the National Gazette on 5th September 2012, the Minister exempted all . . . asylum seekers . . . who travelled to PNG pursuant to the 1st MOU from . . . the *Migration Act*[']s entry permit requirements] By notice on 28th November 2012, the Minister declared the MIPC as a Regional Processing Centre for the temporary residence of asylum seekers pending the determination of their refugee status. By another notice . . . the Minister directed all persons permitted to enter and reside in PNG under the 1st MOU with Australia to temporarily reside at the MIPC.

24. By the time the amendments took effect, a good number of asylum seekers were detained and continue to remain detained at the MIPC. In respect of the conditions of their detention, Cannings J., found . . . :

“ . . . the asylum seekers have been ‘detained’ but they have not been . . . permitted to communicate without delay and in private with a lawyer of their choice. They have not been given adequate opportunity to give instructions to a lawyer of their choice in the place in which they are detained.” . . .

33. . . . [Section] 42(1) of the *Constitution* says no person’s liberty . . . can be deprived or restrained, except only in the circumstances in s. 42(1). The listing of these circumstances are not complete. They are subject to Acts of Parliament which must give meaning and effect to each of the exceptions [T]herefore . . . any detention or arrest outside that which is authorized by s. 42(1), as elaborated upon and provided for by a specific legislation, would be unconstitutional and therefore illegal. . . .

35. . . . [T]he *Migration Act* gives legal meaning and framework for the purposes of s. 42(1)(g) of the *Constitution*. Section 13 of the *Act* stipulates in material respects:

“13. Power to detain and remove persons from country.

(1) The Minister may order that a person against whom a removal order has been made be detained in custody until arrangements can be made for his removal from the country. . . .” . . .

38. The power to detain and therefore deprive a person’s liberty pursuant to s. 42 (1)(g) . . . is available only against persons who have entered and or remain in the country without a valid entry permit or an exemption. Any deprivation of a person’s liberty outside what is provided for will undoubtedly be unconstitutional and illegal.

39. . . . [T]he undisputed facts clearly reveal that the asylum seekers had no intention of entering and remaining in PNG. Their destination was and continues to be Australia. . . . It was the joint efforts of the Australian and PNG governments that has seen the asylum seekers brought into PNG and kept at the MIPC against their will. . . . [These] arrangements were outside the Constitutional and legal framework in PNG. . . . PNG’s Foreign Affairs Minister . . . issued permits [exempting refugees from entry permit requirements under the *Migration Act*] [N]o situation has arisen for the purposes of s. 13 of the *Act* or s. 42(1)(g) of the *Constitution* to warrant, the asylum seekers’ detention. . . . [T]he forceful bringing into and detention of the asylum seekers on MIPC is unconstitutional and is therefore illegal.

40. . . . [D]id the amendment render the unconstitutional and illegal act described above constitutional and legal? An answer to that question is dependent on the question of whether the amendment is valid. . . . I will deal with the technical question of the validity of the amendment first. . . .

42. The stated purpose of the amendment was:

“. . . to amend the Constitution by amending the provisions in relation to Citizenship, and for related purposes.” . . .

45. The Respondents put forward two arguments support of their contention that the amendments are valid. . . . Their first argument is that s. 42(g) covers and permits a law to authorise the detention of the asylum seekers pending a processing of their asylum claims and thereafter their resettlement or deportation. Secondly, as an alternative to the first argument, s.42(ga) has that effect and that s.42(ga) is a valid amendment to the *Constitution*. . . .

53. . . . [T]he law under consideration was passed by Parliament with the requisite majority of votes on two separate sittings, though without much of a debate. . . . [T]he law was certified by the Speaker of Parliament Unfortunately, the law does not specify the purpose of the amendment or the right or rights which it purports to regulate or restrict. . . . [T]he amendment does not say the regulation or restrictions [are] “reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.” . . . [I]t is not clear how the provision

on personal liberty logically fits in with a law intended to cover for dual citizenship and hence the rights of citizens only. In the absence of any evidence to the contrary, it is clear the 2014 Amendment was inserted without any proper consideration or thought.

54. . . . Respondents had the burden to demonstrate . . . that the amendment . . . is “reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind” . . . “in the light of circumstances obtaining when the decision on the question is made” This the Respondents . . . failed to do. On these bases alone the amendment is unconstitutional and is therefore invalid

55. . . . [G]iven that the 2014 Amendment was for the purposes of covering the asylum seekers detained at MIPC . . . I now turn to that question [: does s. 42(1)(ga) of the *Constitution* apply to asylum seekers?] . . .

56. The 2014 amendments do not say anything about the manner and form of detention. . . . An Act of Parliament would have to elaborate on what is provided for in s. 42 (1)(ga), and provide for the manner and form of detention, its purpose and make enough provisions to render the detentions “reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.” . . . [T]he Respondents . . . ha[ve] not assisted the Court with any evidence or submission disclosing any corresponding amendments to the *Migration Act* to provide for the legal framework to give effect to the provisions of s. 42(1)(ga) or another Act of Parliament enacted for that purpose. . . .

69. . . . [T]reating those required to remain in the relocation centre as prisoners irrespective of their circumstances or their status save only as asylum seekers . . . offend[s] . . . their rights and freedoms as guaranteed by the various conventions on human rights at international law and under the PNG *Constitution*. This position is aggravated by the lack of any Act of Parliament or a regulation . . . made for that purpose clearly specifying how the asylum seekers are to be treated, whilst having due regard to their rights and freedoms The lack of clarity is worse, given that the asylum seekers were brought into PNG against their will but otherwise have entered and remain lawfully in the country. . . . As such . . . [the amendment] does not and cannot apply to the asylum seekers at the MIPC. . . .

* * *

Following the Court’s decision, the PNG government announced it would immediately close MIPC but did not announce a timeframe for the closure. PNG asked Australia to make alternative arrangements for the remaining detainees, but the Australian government reiterated that it would not resettle any detainees in Australia and that any refugees seeking asylum would have to do so in PNG. The government of PNG provided some relocation sites, and the closure of MIPC became effective on October 31, 2017. Nonetheless, more than 600 refugees chose to remain in MIPC

despite limited access to water and other necessities. Those who remained cited attacks against refugees at the alternate placement sites as well as a lack of sufficient and appropriate facilities for their relocation as their rationale for staying. MIPC was officially cleared of all refugees on November 23, 2017, after PNG police and immigration officials forcibly removed the remaining refugees from the site.

The United States has also resorted to detention as a means of deterring refugees. In 2014, tens of thousands unaccompanied children and women fled Central America and sought asylum in the United States. In response, the Department of Homeland Security (DHS) implemented policies meant to discourage refugees from undertaking the journey to the United States. One approach was a “No-Release Policy,” under which Immigration Judges (IJs) were instructed to consider “general deterrence” as a factor in individual hearings to determine whether to release Central American mothers and their minor children on bond for the pendency of their immigration proceedings. In the decision below, the District Court for the District of Columbia considered a challenge to this policy on the ground that “general deterrence” is an impermissible consideration in custody determinations under the relevant statute.

R.I.L-R, et al. v. Johnson

U.S. District Court for the District of Columbia
80 F. Supp. 3d 164 (D.D.C. 2015)

James E. Boasberg, United States District Judge:

. . . Under the [Immigration and Nationality Act (INA)] . . . , a foreign national apprehended shortly after entering the United States without valid documentation is initially subject to a streamlined removal process dubbed “expedited removal.” If, however, she can demonstrate a “credible fear” of persecution in her home country during the initial screening she is transferred to “standard” removal proceedings Once reclassified, the foreign national is entitled to a full asylum hearing before an immigration court, and, if unsuccessful, she may file an administrative appeal with the Board of Immigration Appeals (BIA). She may also petition for review of any removal order entered against her in the appropriate court of appeals.

This case revolves around what happens to these aliens between their initial screening and these subsequent proceedings. Detention authority over such individuals is governed by 8 U.S.C. § 1226(a), which instructs:

Pending a decision on whether the alien is to be removed from the United States[,], . . . the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole

[T]he Secretary of DHS shares the Attorney General’s authority under § 1226(a) to detain or release noncitizens during the pendency of removal proceedings. By regulation, the Secretary’s authority is delegated to individual officers within Immigration and Customs Enforcement [(ICE)], a component of DHS. For each noncitizen who passes the threshold “credible-fear” screening, an ICE officer . . . “may, in [his] discretion, release [the] . . . alien . . . provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.”

If ICE denies release or sets bond that the noncitizen cannot pay, she remains in custody pending a final asylum determination. . . . [T]he alien has the options of requesting a custody redetermination from an immigration judge within the Department of Justice and appealing an adverse redetermination decision to the Board of Immigration Appeals. DHS may also appeal the IJ’s custody decision and may automatically stay the decision (and thus the individual’s release) pending the appeal.

The ten named Plaintiffs and other members of the class they seek to represent are mothers accompanied by minor children who fled severe violence and persecution in their Central American home countries. In the fall of 2014, after crossing the border and entering the country without documentation, each family unit was apprehended by U.S. Customs and Border Protection (CBP). All crossed the border with the intent to seek asylum. . . . Although initially referred to expedited removal proceedings, each subsequently went on to establish a “credible fear” of persecution. That showing made, Plaintiffs were transferred to standard removal proceedings.

. . . Each and every family was refused bond after an ICE custody hearing and was detained at the Karnes County Residential Facility in Texas. Although all were subsequently released several weeks or months later as a result of IJ custody-redetermination hearings, ICE’s initial denials form the crux of Plaintiffs’ case. . . .

In years past, say Plaintiffs, . . . after an individualized assessment of their potential flight risk and danger to the community, the majority of such families was released on bond or their own recognizance. Plaintiffs claim that an abrupt about-face occurred in June 2014, when DHS adopted an unprecedented “No–Release Policy” in response to increased immigration from Central America[,] . . . direct[ing] . . . ICE officers to deny release to Central American mothers detained with their minor children in order to deter future immigration. . . .

On January 6, 2015, Plaintiffs brought a class-action suit in this Court, alleging, *inter alia*, that the No–Release Policy violates the Immigration and Nationality Act and the Due Process Clause of the Constitution. They further claim

that the policy is contrary to law and arbitrary and capricious, and thus constitutes illegal agency action under the Administrative Procedure Act [(APA)]. . . .

Defendants have essentially conceded that . . . ICE officials are *required* to follow the binding precedent contained in *Matter of D–J–* (2003), in which then-Attorney General John Ashcroft held that deterrence of mass migration should be considered in making custody determinations. Defendants admit, moreover, that this factor is considered “where applicable,” and that an immigration “influx across the southwest border” . . . last year “further support[s] the use of this factor in making custody determinations since June 2014.” . . .

The Court, accordingly, is satisfied that ICE has a policy of taking deterrence of mass migration into account in making custody determinations, and that such consideration has played a significant role in the large number of Central American families detained since June 2014, including the named Plaintiffs. . . .

Plaintiffs allege that DHS’s deterrence policy violates the INA and is thus “contrary to law” under the APA. Likelihood of success . . . turns on the strength of their argument that deterrence of mass immigration is an impermissible consideration in custody determinations made pursuant to 8 U.S.C. § 1226(a). . . .

The Government notes that [Section 1226(a)] . . . contains no limitation on the Executive’s discretion to detain, nor does it enumerate the factors that may be considered. They further point out that the Attorney General . . . interpret[ed] . . . § 1226(a) to allow consideration of mass migration in *Matter of D–J–*. Because that construction of the statute is facially permissible, Defendants argue, it is entitled to deference under *Chevron*[*Inc. v. Natural Resources Defense Council* (1984)]

The Government raised a virtually identical argument in *Zadvydas v. Davis* (2001), in relation to an analogous provision of the INA, 8 U.S.C. § 1231(a)(6). That provision . . . says that such aliens [who have been ordered removed] “*may* be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.” The Government contended that the provision “set [] no limit” on the length of detention and, therefore, that the Attorney General had total discretion over whether and how long to detain, even indefinitely.

The Supreme Court disagreed, relying on the “cardinal principle of statutory interpretation” that “when an Act of Congress raises a serious doubt as to its constitutionality,” the Court “will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” The Court held that the statute could not be construed to permit indefinite detention; rather, . . . § 1231(a)(6) “limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States.” . . .

The *Zadvydas* Court clearly identified a pair of interests that can . . . suffice to justify the detention of noncitizens awaiting immigration proceedings: “preventing

flight” and “protecting the community” from aliens found to be “specially dangerous.” It explained that because those potentially legitimate justifications were “weak” or “nonexistent” when applied to *indefinite* detention, such detention raised serious constitutional concerns. The Court emphasized those same justifications in *Demore v. Kim* (2003) Although the *Demore* Court upheld mandatory detention of certain criminal aliens under 8 U.S.C. § 1226(c), it justified such detention on the ground that such aliens . . . pose a demonstrated risk of flight and danger to the community. . . .

The justifications for detention previously contemplated by the Court relate wholly to characteristics inherent in the alien himself or in the category of aliens *being detained* The Government [here] . . . maintains that one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration.

This appears out of line with analogous Supreme Court decisions. In discussing civil commitment more broadly, the Court has declared such “general deterrence” justifications impermissible. . . .

[T]he Court finds the Government’s interest here particularly insubstantial. . . . It claims that such Central American immigration implicates “national security interests,” but . . . the principal thrust of its explanation is economic in nature. It argues . . . that such migrations force ICE to “divert resources from other important security concerns” and “relocate” their employees. The Government has not, however, proffered any evidence that this reallocation of resources would leave the agency somehow short-staffed or weakened. . . . In addition, a general-deterrence rationale seems less applicable where . . . neither those being detained nor those being deterred are certain wrongdoers, but rather individuals who may have legitimate claims to asylum in this country. . . .

Plaintiffs have a significant likelihood of succeeding on the merits of their claim Having decided this critical issue, the Court moves on to the remaining three preliminary-injunction factors.

To establish the existence of the second factor, a party must demonstrate that the injury is “of such *imminence* that there is a ‘clear and present’ need for equitable relief to prevent irreparable harm.” The injury must also be “both certain and great; it must be actual and not theoretical.” Finally, the injury must be “beyond remediation.”

Plaintiffs have satisfied this inquiry [T]he evidence they present suggests that a large number of asylum-seeking families from Central America are currently being detained as a result of DHS’s deterrence policy. Such detention harms putative class members in myriad ways, and as various mental health experts have testified, it is particularly harmful to minor children. . . .

[T]he Court will grant Plaintiffs’ Motions for a Preliminary Injunction and Provisional Class Certification and deny Defendants’ Motion to Dismiss. . . .

In May 2015, ICE announced it would not consider general deterrence as a factor in custody determinations involving families. The parties in *R.I.L.-R v. Johnson* agreed to dissolve the injunction. Under the district court’s order, the government must inform Plaintiffs when it wishes to resume the practice considering deterrence as a factor in custody determinations, and Plaintiffs may then return to court to reinstate the injunction.

In another 2015 suit involving ICE’s family detention policies, a district court in California held that ICE had violated the terms of the 1997 *Flores* Settlement—the product of a 1985 class-action lawsuit against Immigration and Naturalization Service (INS, whose functions were transferred to DHS in 2003) challenging the agency’s detention of children. The Settlement required INS, among other things, to release children from immigration detention “without unnecessary delay.” In 2015, members of the *Flores* class filed a motion to enforce the Settlement, arguing that the application of the “no-release” policy to accompanied children and their parents was a breach of the Settlement. ICE defended the policy, in part arguing that releasing accompanied children and their parents gave families a strong incentive to undertake the dangerous journey into the United States. The district court rejected this argument and held that the terms of the Settlement applied to accompanied children and also required release of their parents, unless doing so would create a flight or safety risk. On appeal in *Flores v. Lynch* (2016), the Court of Appeals for the Ninth Circuit upheld the application of the Settlement to accompanied minors, but reversed the district court’s inclusion of the children’s parents within the scope of the Settlement.

The Trump Administration has continued to use detention as a response to refugees and migrants arriving at the southern border. As of the spring of 2018, the government focused on refugee families through its policies of criminal prosecutions and separation of parents from children. In June of 2018, the number of children separated from parents was 2300, and images of young children taken away from adults and sent to holding facilities made international headlines. In another example of the use of detention as deterrence, ICE announced in March of 2018 that it would abandon its policy of generally releasing pregnant women, including asylum-seekers, and instead subject them to case-by-case determinations for release, known in U.S. law as “parole.”

In addition to questions concerning the discretion of state officials to detain refugees, courts have also considered challenges to the length of detention of other immigrants subject to deportation. As the following case highlights, the permissibility of lengthy or indefinite detention—for asylum applicants and some longtime residents whose status is questioned—remain open questions in U.S. jurisprudence.

Jennings v. Rodriguez
Supreme Court of the United States
138 S. Ct. 830 (2018)

Justice Alito delivered the opinion of the Court

Every day, immigration officials must determine whether to admit or remove the many aliens who have arrived at an official “port of entry” (e.g., an international airport or border crossing) or who have been apprehended trying to enter the country at an unauthorized location. Immigration officials must also determine on a daily basis whether there are grounds for removing any of the aliens who are already present inside the country. The vast majority of these determinations are quickly made, but in some cases deciding whether an alien should be admitted or removed is not as easy. As a result, Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings. Detention during those proceedings gives immigration officials time to determine an alien’s status without running the risk of the alien’s either absconding or engaging in criminal activity before a final decision can be made.

In this case we are asked to interpret three provisions of U.S. immigration law that authorize the Government to detain aliens in the course of immigration proceedings. . . . [T]he text of these provisions . . . does not give detained aliens the right to periodic bond hearings during the course of their detention. But by relying on the constitutional-avoidance canon of statutory interpretation, the Court of Appeals for the Ninth Circuit held that detained aliens have a statutory right to periodic bond hearings under the provisions at issue.

Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems. . . . Because the Court of Appeals in this case adopted implausible constructions of the three immigration provisions at issue, we reverse its judgment and remand for further proceedings.

To implement its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering. . . .

[Justice Alito described the three statutory provisions governing these determinations: 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c). Section 1225(b) applies to aliens who arrive or are present in the United States, but have not been admitted. These “applicant[s] for admission” must be inspected by immigration officers before they are allowed into the country. Section 1225(b) authorizes the detention of aliens pending review of their application for admission. An alien detained under this section who indicates “either an intention to apply for asylum . . . or a fear of persecution” is referred for an asylum interview. If the alien is determined to have a credible fear of

persecution, “the alien shall be detained for further consideration of the application for asylum.” Section 1226(a) was the same provision at issue in *R.I.L.-R et al v. Johnson, supra*. Section 1226(c) allows for the detention of aliens who have committed certain crimes. The issue under §§ 1226(c) and 1225(b) is *whether* there is a right to a bond hearing at all. The text of § 1226(a) allows for a bond hearing, so the issues here are whether detainees held under this section have a right to periodic hearings—and, if so, with what frequency these hearings must be held—and who bears the burden of proof at these hearings.]

The primary issue is the proper interpretation of §§ 1225(b), 1226(a), and 1226(c).

Respondent Alejandro Rodriguez is a Mexican citizen. Since 1987, he has also been a lawful permanent resident of the United States. In April 2004, after Rodriguez was convicted of a drug offense and theft of a vehicle, the Government detained him under § 1226 and sought to remove him from the country. At his removal hearing, Rodriguez argued both that he was not removable and, in the alternative, that he was eligible for relief from removal. In July 2004, an Immigration Judge ordered Rodriguez deported to Mexico. Rodriguez chose to appeal that decision to the Board of Immigration Appeals, but five months later the Board agreed that Rodriguez was subject to mandatory removal. Once again, Rodriguez chose to seek further review, this time petitioning the Court of Appeals for the Ninth Circuit for review of the Board’s decision.

. . . [W]hile Rodriguez was still litigating his removal in the Court of Appeals, he filed a habeas petition in the District Court for the Central District of California, alleging that he was entitled to a bond hearing to determine whether his continued detention was justified. Rodriguez’s case was consolidated with another, similar case brought by Alejandro Garcia, and together they moved for class certification. . . .

[T]he District Court certified the following class:

“[A]ll non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified.”

. . . Rodriguez and the other respondents argued that the relevant statutory provisions—§§ 1225(b), 1226(a), and 1226(c)—do not authorize “prolonged” detention in the absence of an individualized bond hearing at which the Government proves by clear and convincing evidence that the class member’s detention remains

justified. Absent such a bond-hearing requirement . . . those three provisions would violate the Due Process Clause of the Fifth Amendment.* . . .

[T]he District Court entered a permanent injunction in line with the relief sought by respondents, and the Court of Appeals affirmed. Relying heavily on the canon of constitutional avoidance, the Court of Appeals construed §§ 1225(b) and 1226(c) as imposing an implicit 6-month time limit on an alien's detention under these sections. After that point, . . . the Government may continue to detain the alien only under the authority of § 1226(a). The Court of Appeals then construed § 1226(a) to mean that an alien must be given a bond hearing every six months and that detention beyond the initial 6-month period is permitted only if the Government proves by clear and convincing evidence that further detention is justified. . . .

When “a serious doubt” is raised about the constitutionality of an act of Congress, “it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” Relying on this canon of constitutional avoidance, the Court of Appeals construed §§ 1225(b), 1226(a), and 1226(c) to limit the permissible length of an alien's detention without a bond hearing. Without such a construction, the Court of Appeals believed, the “prolonged detention without adequate procedural protections” authorized by the provisions “would raise serious constitutional concerns.” . . .

The Court of Appeals misapplied the canon in this case because its interpretations of the three provisions at issue here are implausible. . . . [S]ubject only to express exceptions, §§ 1225(b) and 1226(c) authorize detention until the end of applicable proceedings. . . . [T]here is no justification for any of the procedural requirements that the Court of Appeals layered onto § 1226(a)

Section 1225(b) divides . . . applicants [for admission] into two categories. First, certain aliens claiming a credible fear of persecution under § 1225(b)(1) “shall be detained for further consideration of the application for asylum.” Second, aliens falling within the scope of § 1225(b)(2) “shall be detained for a [removal] proceeding.”

Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded. . . .

Nothing in the text of § 1225(b)(1) or § 1225(b)(2) even hints that those provisions restrict detention after six months

Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to “choos[e] between

* The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

competing *plausible* interpretations of a statutory text.” To prevail, respondents must thus show that § 1225(b)’s detention provisions may plausibly be read to contain an implicit 6-month limit. And they do not even attempt to defend that reading of the text.

In much the same manner, the Court of Appeals all but ignored the statutory text. Instead, it read *Zadvydas v. Davis* (2001), as essentially granting a license to graft a time limit onto the text of § 1225(b). *Zadvydas*, however, provides no such authority. . . .

[A] series of textual signals distinguishes the provisions at issue in this case from *Zadvydas*’s interpretation of § 1231(a)(6). While *Zadvydas* found § 1231(a)(6) to be ambiguous, the same cannot be said of §§ 1225(b)(1) and (b)(2): Both provisions mandate detention until a certain point and authorize release prior to that point only under limited circumstances. As a result, neither provision can reasonably be read to limit detention to six months. . . .

Finally, as noted, § 1226(a) [states that] . . . the Attorney General “may release” [a detained] . . . alien on “bond . . . or conditional parole.” Federal regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention.

The Court of Appeals ordered the Government to provide procedural protections that go well beyond the initial bond hearing established by existing regulations Nothing in § 1226(a)’s text—which says only that the Attorney General “may release” the alien “on . . . bond”—even remotely supports the imposition of either of those requirements. . . .

Justice Kagan took no part in the decision of this case. . . .

Justice Thomas, with whom Justice Gorsuch joins . . . , concurring

In my view, no court has jurisdiction over this case. Congress has prohibited courts from reviewing aliens’ claims related to their removal, except in a petition for review from a final removal order or in other circumstances not present here. Respondents have not brought their claims in that posture, so [8 U.S.C.] § 1252(b)(9) removes jurisdiction over their challenge to their detention. I would therefore vacate the judgment below with instructions to dismiss for lack of jurisdiction. . . . I agree with the Court’s resolution of the merits

Justice Breyer, with whom Justice Ginsburg and Justice Sotomayor join, dissenting. . . .

The Court reads the statute as forbidding bail, hence forbidding a bail hearing, for these individuals. . . . [T]he majority’s interpretation of the statute would likely render the statute unconstitutional. . . . I would follow this Court’s longstanding practice of construing a statute “so as to avoid not only the conclusion that it is

unconstitutional but also grave doubts upon that score.” And I would interpret the statute as requiring bail hearings, presumptively after six months of confinement. . . .

First . . . the respondents in this case are members of three special classes of noncitizens, the most important of whom (1) arrive at our borders seeking asylum or (2) have committed crimes but have finished serving their sentences of imprisonment. We also consider those who (3) arrive at our borders believing they are entitled to enter the United States for reasons other than asylum seeking, but lack a clear entitlement to enter. . . .

Fourth, detention is often lengthy. . . . [T]he Government detained some asylum seekers for 831 days (nearly 2 [and a] half years), 512 days, 456 days, 421 days, 354 days, 319 days, 318 days, and 274 days—before they won their cases and received asylum. . . .

Sixth, these very asylum seekers would have received bail hearings had they first been taken into custody within the United States rather than at the border. . . .

Eighth, all the respondents are held in detention within the geographical boundaries of the United States

Ninth, the circumstances of their detention are similar . . . to those in many prisons and jails. . . .

Consider the relevant constitutional language and the values that language protects. The Fifth Amendment says that “[n]o person shall be . . . deprived of life, liberty, or property without due process of law.” An alien is a “person.” To hold him without bail is to deprive him of bodily “liberty.” And, where there is no bail proceeding, there has been no bail-related “process” at all. The Due Process Clause—itsself reflecting the language of the Magna Carta—prevents arbitrary detention. Indeed, “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” . . .

[T]he Fifth Amendment’s protections extend to “all persons within the territory of the United States.” But the Government suggests that those protections do not apply to asylum seekers or other arriving aliens because the law treats arriving aliens as if they had never entered the United States; hence they are not held within its territory.

This last-mentioned statement is, of course, false. All of these noncitizens are held within the territory of the United States at an immigration detention facility. . . . At most one might say that they are “constructively” held outside the United States: the word “constructive” signaling that we indulge in a “legal fiction,” shutting our eyes to the truth. But once we admit to uttering a legal fiction, we highlight, we do not answer, the relevant question: *Why* should we engage in this legal fiction here?

. . . We cannot here engage in this legal fiction. No one can claim . . . that persons held within the United States are totally without constitutional protection. . . . Freedom from arbitrary detention is as ancient and important a right as any found within the Constitution’s boundaries. . . .

The question remains whether it is possible to read the statute as authorizing bail. As desirable as a constitutional interpretation of a statute may be, we cannot read it to say the opposite of what its language states. . . . [W]e . . . should[] read the relevant statutory provisions to require bail proceedings in instances of prolonged detention without doing violence to the statutory language or to the provisions’ basic purposes.

The relevant provision governing the first class of noncitizens, the asylum seekers, . . . says that, if an immigration “officer determines at the time” of an initial interview with an alien seeking to enter the United States “that [the] alien has a credible fear of persecution . . . , the alien *shall be detained* for further consideration of the application for asylum.” I have emphasized the three key words, namely, “shall be detained.” Do those words mean that the asylum seeker *must be detained without bail*?

They do not. . . .

There is nothing in the statute or in the legislative history that reveals any such congressional intent. The most likely reason for its absence is that Congress . . . believed there were no such instances, or at least that there were very few. . . . [T]he Act suggests that asylum proceedings ordinarily finish quickly. And for those proceedings that last longer than six months, we know that two-thirds of asylum seekers win their cases. Thus, legislative silence suggests not disapproval of bail, but a lack of consideration of the matter. . . . It means that Congress did not intend to forbid bail. An interpretation that permits bail—based upon history, tradition, statutory context, and precedent—is consistent . . . with what Congress intended the statutory provision to do. . . .

IN DEFENSE OF BORDERS

Resolute Enforcement Is Not Just for Restrictionists

David A. Martin (2015)*

. . . My years in government have left me with memorable evidence of the risks from real or perceived enforcement failures and the public’s negative reaction.

* Excerpted David A. Martin, *Resolute Enforcement is not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 JOURNAL OF LAW AND POLITICS 411 (2015).

As a young lawyer, . . . I became an officer in the new human rights bureau at the State Department and wound up working on what became the Refugee Act of 1980. Though the statute drew wide praise and had solid bipartisan support when it was enacted in March, 1980, the massive Mariel boatlift from Cuba, which began four weeks later, produced a public opinion turnaround. During the five months that the boatlift lasted, 125,000 Cubans arrived in South Florida by boat, in a chaotic rush and without advance screening. That protracted scene produced a steady barrage of angry, anguished, disgusted, concerned, or vituperative mail to the State Department. It also triggered calls for repeal of the brand new Refugee Act, even though the Act had little to do with the underlying problems that caused the boatlift and in fact provided a far better decisionmaking structure for refugee admissions than pre-existing law. . . .

[W]idespread and visible failures of immigration enforcement, especially when they lead to rapidly rising populations of unauthorized migrants in local communities throughout the nation, create momentum for new restrictive legislation. At the same time, they narrow the space for thoughtful deliberation over effectiveness. . . .

The actions of President Obama and his Administration through the spring and summer of 2014 graphically illustrate their understanding of . . . the importance of resolute, even severe enforcement in order to hold public support for key elements of generous immigration policy. The White House's apparent overarching immigration objective during that period was either winning congressional approval of reform legislation that would include a broad legalization program, or else, should legislation fail, laying the groundwork for unilateral executive actions. . . .

But a major complication toward winning acceptance, either of legislation or of executive action, became apparent in late spring, turning into a raging public issue by July. Record numbers of child migrants began arriving from Central America—sometimes alone and sometimes accompanied by family members. . . . The children and their family members were not trying to evade *la migra* [(Border Patrol)]. They were actually seeking officers out, in order to turn themselves in. . . .

Members of Congress clamored for a solution, and many localities resisted the opening within their boundaries of shelter care for the children. Public support for key parts of immigration reform eroded quickly. . . .

In an effort to deter new arrivals from Central America, the Administration began insisting on detention for the arriving families, opening large new centers that could house women and children. . . . Immigration court cases were held speedily, and the planes removing families with children who had received deportation orders received substantial publicity It has also enhanced cooperation with the source countries and transit countries in the region (especially Mexico) in efforts to thwart or discourage further migration. These measures appear to have succeeded in reducing the flow considerably, though whether the effect is durable remains to be seen. . . .

[T]his uncharacteristically severe reaction by the Obama Administration is explainable largely as a White House recognition that its long-term goals for dealing with the resident undocumented population can succeed only if that population exhibits no significant or visible net growth. The President’s national address on November 20, 2014 . . . acknowledged “a brief spike in unaccompanied children” over the summer, but then essentially bragged that the number of such migrants was by November the lowest it had been in two years.

Secretary Jeh Johnson, the head of the Department of Homeland Security (“DHS”), was far more direct in his remarks at the opening of a large new detention center for women and children near the Texas border in December 2014. . . . “Frankly, . . . we want to send a message that our border is not open to illegal migration.” . . .

Why Does the State Have the Right to Control Immigration?

Sarah Song (2017)*

. . . I want to suggest that self-determination is not only an element of justice; it is also a part of an ideal of *democracy*. The democratic principle of self-determination stands for the proposition that a group of people has the right to make its own decisions about policies made in its name. Self-determination is a claim about self-rule. In international law, the right of self-determination is understood as the right of a people to determine its collective political destiny through democratic means. . . .

We can build on the idea of self-determination to develop a[] . . . democratic justification for a state’s right to control immigration. My argument consists of the following claims:

1. A people/demos has the right of self-determination.
2. The right of self-determination includes the right to control admission and membership.
3. The demos should be bounded by the territorial boundaries of the state.
4. Citizens of a territorial state, in virtue of their role as members of the (territorially defined) demos, have the right to control admission and membership. . . .

To anticipate the objection that democratic self-determination is inherently incompatible with respecting individual human rights, it is important to see that self-determination can be derived from the premise that all persons . . . should be treated

* Excerpted Sarah Song, *Why Does the State Have the Right to Control Immigration?*, in NOMOS LVII: MIGRATION, EMIGRATION, AND IMMIGRATION 3 (Jack Knight, ed. 2017).

with equal concern and respect (the moral equality principle). . . . The familiar list of basic human rights includes the right to life, the right to security of the person, the right against enslavement and torture, and the right to resources for subsistence, among others. More controversially, the case can be made that respecting the moral equality of persons also requires recognition of the right to democratic governance. Equal consideration requires that all persons be regarded as equal participants in significant political decisions to which they are subject. . . .

Even if one rejects the idea of a human right to democratic governance, there are instrumental reasons for recognizing the right to democracy as a legal aspiration in international law. . . . [There is evidence] that famines are much less likely in democracies . . . [and that] democracy is the most reliable form of government for securing peace, which should lessen the violation of human rights. . . .

The right of self-determination of a people is the right to independent political control over significant aspects of its common life. . . . [T]he right of self-determination derives not out of a concern to preserve a distinctive cultural identity . . . , but rather from respecting the right of individuals to be regarded as equal participants in significant political decisions to which they are bound. . . .

The realization of political equality depends on the existence of a stable bounded demos. The modern state demarcates such a stable demos. The boundaries of the demos are already demarcated according to the boundaries of state membership, but my argument is not that we should accept the state system because it is the status quo. My point is that we have reasons internal to democracy for bounding the demos according to the territorial boundaries of state. . . .

First, . . . the modern state is the primary instrument for securing *the substantive rights and freedoms constitutive of democracy*. . . .

A second reason for bounding the demos according to the boundaries of the territorial state has to do with *solidarity*. The state is not simply an instrument of decision making or a means to securing rights; it is also a key site of solidarity, trust, and participation. Democratic participation happens not in a vacuum but in relation to a rich network of institutions. Trust plays an instrumental role here. . . . Trust is more likely among a group of people who come together repeatedly within a stable infrastructure of institutions and who share a sense of solidarity rooted in a shared political culture. . . .

A third reason for bounding the demos according to the territorial boundaries of states focuses on the connection between citizens and their *political representatives*. Democratic representatives must be accountable to a specified demos. . . . A system of territorial representation ensures that political representatives know in advance *to whom* they are accountable. . . .

Among the many objections one might raise is that . . . state action, including its border policies, always involves exercising coercive power over members and nonmembers, and such power must be justified to all subjected to coercion. . . . [W]hile I agree . . . that justification is owed to all those subject to the coercive power of the state, I disagree with the conclusion that justification must take the form of equal enfranchisement of all members and nonmembers in state policy making. . . .

[T]he state’s right to control immigration is . . . a jurisdictional right. . . . [T]he state’s right . . . is not grounded on a claim about the importance of preserving a distinctive culture or national identity; it rests on the right of members of the territorially defined demos to be self-governing as political equals. . . .

It is important to clarify the ways in which the arguments presented here are limited. In pursuing the question of why the modern state has the right to control immigration, I have not provided an answer to the important question, How should the state’s claim to control immigration be weighed against the migrant’s claim to enter? To answer this question, we need to consider not only the perspective of the political community, but also the perspective of migrants. . . . I have argued that the state has a *pro tanto* right to control immigration based on the normative requirements of democracy. This is *not* to say that this right is an absolute constraint that “trumps” all other considerations. . . .

HEALTH, MEDICINES, AND CONSTITUTIONAL OBLIGATIONS

DISCUSSION LEADERS

AMY KAPCZYNSKI, SAMUEL MOYN,
AND MANUEL JOSÉ CEPEDA ESPINOSA

IV. HEALTH, MEDICINES, AND CONSTITUTIONAL OBLIGATIONS

DISCUSSION LEADERS:

AMY KAPCZYNSKI, SAMUEL MOYN, AND MANUEL JOSÉ CEPEDA ESPINOSA

Judicial Enforcement of a Right to Medicines

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Many health systems around the world fail to provide individuals with access to medicines. In recent years, courts in several countries have concluded that such failures violate constitutional rights to health and, moreover, that courts can and should order group-based or individual remedies. As a result, hundreds of thousands—perhaps millions—of people around the world have been provided with medicines that they otherwise would not have received.

A robust debate has emerged about the implications of these cases. In some jurisdictions, they are part of a broader approach in which judges understand themselves as appropriately intervening to enforce socioeconomic rights. In others, courts are hesitant because of a backdrop premise of deference to legislatures and concerns about the challenges of enforcement.

In Part I, we consider cases in which courts debate their role in guaranteeing rights to medicines. Examples come from Colombia, Brazil, India, and the United States, where courts have recognized these claims. We then provide contrasting decisions from the United Kingdom and Chile, in which courts instead deferred to health administrators' discretion on medical and budgetary questions. These cases raise the central question of which institutions—courts, legislatures, health administrators—decide what medicines are subsidized and made, in fact, accessible. These issues have been central to debates about socioeconomic rights: How should judges respond to claims for essential services?

The contexts in which the litigations arise vary, in that some countries have more universal and state-based healthcare and others depend more on private insurance schemes. Countries also take varying approaches to how medicines are approved and added to public and private formulary lists. These lists determine what is available to the public and to members of a health insurance plan. On some accounts, the rise of judicially enforced rights has led countries to adjust and innovate by universalizing insurance programs and making systems for incorporation of medicines more systematic and inclusive. Critics argue that judicial involvement interferes with expert priority setting by agencies; that some decisions have mandated access to medicines that provide marginal or no benefits; that high costs of medicines ordered by the courts divert resources from more effective interventions; and that, while claiming to help the vulnerable, judicial involvement has resulted in transferring health resources to the middle classes.

These materials thus enable discussion of several questions. Should judges directly intervene or press other branches to respond? What are the effects when judges do require the provision of this form of socioeconomic rights? What are the implications for equity, particularly given the very high cost of certain medicines? Who benefits, and why, from individual enforcement efforts? Do responses depend on background healthcare systems, on the private market's pricing, and/or on whether the medicines sought are unusually expensive? And what broader lessons about socioeconomic rights enforcement might be gleaned from this context?

Sustained lines of cases in Brazil and Colombia have provided an empirical basis for understanding some of the effects of rights to medicine. Therefore, after examining the case law, we review studies, some of which are critical of judicial involvement and argue that, in some systems, such involvement distorts healthcare budgets and undermines rather than promotes equity. Finally, we explore the interaction of rights enforcement with the political branches to understand, from Brazil and Colombia, the responses by other branches and the degree to which inter-branch dialogue does or does not foster deliberative democracy.

In one sense, the discussion entails familiar questions about social and economic rights in the context of health: Should judges order remedies to enforce health rights or defer to legislatures? Part II frames a second and more novel set of questions focused on the role of the judiciary in shaping the relationship between market order and political life. Often, human rights are understood as operating in a realm distinct from the market and with few implications for how markets are governed. These materials explore the relationship of the background political economy to rights enforcement. Decisions requiring individual rights to medicines would not be controversial if medicines were not expensive. They often are, in both wealthy and less-wealthy countries, in part because of laws governing property rights. Patents preclude competition, so patented medicines are often expensive, resulting in the budgetary problems faced in the Brazilian and Colombian settings. Similar dynamics of monopoly pricing have triggered budgetary crises in many other countries, including in the United States and Europe. Critics of the human rights system argue that human rights cannot ultimately serve the poor or address distributive questions without engaging broader questions of political economy and point out that, because they enforce the systems and rights that constitute markets, judges inevitably shape market relations.

Here, again, our questions are about the role of courts and whether they should address these deeper structural influences on rights. In this section, we have gathered cases from India, Kenya, the United States, and Peru, in which courts ask whether they have an obligation (constitutional or otherwise) to shape intellectual property law or to encourage legislatures to do so to ensure that medicines are available to those who need them.

JUDICIAL ENFORCEMENT OF A RIGHT TO MEDICINES

Ahmed v. Union of India
High Court of India at Delhi
W.P.(C) 7279/2013 (2014)

Manmohan, J: . . .

1. The issue that arises for consideration in the present petition is whether a minor child born to parents belonging to economically weaker section of the society suffering from a chronic and rare disease . . . is entitled to free medical treatment costing about . . . [\$8,825-\$10,000] per month especially when the treatment is known, prognosis is good and there is every likelihood of petitioner leading a normal life.

2. . . . [T]he petitioner is a young boy aged about seven years and is represented through his next friend, his father, Mr. Mohd Sirajuddin. The petitioner suffers from a rare genetic disease called Gaucher Disease, which is Lysosomal Storage Disorder, wherein the body cannot process fat resulting in accumulation of fat around vital organs of the body. If this disease is left untreated, the petitioner is unlikely to survive. Petitioner is the fourth and only surviving child of his parents; his other three siblings have already succumbed to the same disease.

3. A treatment by the name of Enzyme Replacement Therapy is available for this disease. It is expected that patients receiving this treatment have a high degree of normalcy. The treatment, however, is monthly, lifelong and exorbitant. Petitioner's father, who is a rickshaw puller by profession cannot afford the same.

4. Currently the drugs required to treat this condition are manufactured by three pharmaceutical companies globally, Sanofi, Shire and Pfizer. . . . [O]nly one company, Sanofi, sells its . . . [Gaucher] drugs in India. The cost of the treatment is estimated at approximately . . . [\$8,825 to \$10,295] every month. The reason for the exorbitant cost of the treatment is that . . . [Gaucher] falls in the category of rare diseases. As small number of people suffer from rare diseases, pharmaceutical companies are unable to recover their research and development costs over a large base of patients. It is for this reason that these drugs are exorbitantly priced at a global level. No Indian drug company has developed a competing drug for this disease . . . [to] date. . . .

9. . . . [T]his Court gave an opportunity to the Central and State Governments to see if the matter could be amicably resolved. However, the meeting was not very successful. In the meeting, it was decided that:

“(i) Following the directions of the Hon’ble Court and while understanding the plights of the patients suffering from the Lysosomal Storage Disorders [LSDs] and also examining the matter from public

health point of view, existing guidelines of the available Schemes and the possibly of other further repercussions, it has not been found possible to devise a viable policy for financial assistance on recurring mode on a long term basis for the entire life-time for the patients suffering from LSDs.

(ii) It was further decided in this meeting that . . . [t]he cases may be examined by the States on Case to Case basis.

(iii) States would also be advised to examine viable means of supporting these patients through funds being pooled for available sources in the society”

18. Ms. Zubeda Begum, learned counsel for . . . [the Government] of . . . [the National Capital Territory] of Delhi stated that in comparison to other States of the country, the [Government] . . . had allocated ten per cent of its budget towards health which was highest in the country. She further stated that despite Delhi having only one per cent of the population of the country, it was spending four times on health, calculated on a pro rata basis, compared to other states.

19. Ms. Zubeda Begum pointed out that Delhi had a comprehensive drug policy. She stated that in 2013 [the] Essential Medicine List had been revised for the eighth time by an expert Committee comprising eminent Doctors. . . .

22. Ms. Zubeda Begum submitted that the right to health in a developing country like India could not be so stretched so as to mean to provide free health facilities to a terminally ill patient while other citizens were not even provided basic health care. She stated that the State had an equal obligation towards all citizens and it had to use its limited resources so as to provide the maximum benefit to the maximum number of people. . . .

42. . . . [T]he Government of India does not have any policy measure in place to address rare diseases, particularly those of a chronic nature. All the Central and State schemes at the highest provide for a one-time grant for life-saving procedures and do not contemplate continuous financial assistance for a chronic disease such as [Gaucher], which involves lifelong expenditure. There are even no incentives in place for Indian manufacturers to develop local alternatives to orphan drugs.

43. This Court is of the opinion that neither any promising orphan drug will be developed nor the prohibitive cost of ‘orphan drugs’ will see a reduction unless changes are made in the applicable laws to reduce the costs of developing such drugs and to provide financial incentives to develop such drugs like in the abovementioned countries.

44. Keeping in view the concept of separation of powers as incorporated in the Constitution, this Court cannot direct Parliament to enact a Central legislation on

Right to Public Health or with regard to rare diseases or orphan drugs, even though the same may be eminently desirable.

45. Similarly, as formulation of a policy is within the exclusive domain of the Executive, this Court refrains from issuing directions. . . .

46. . . . [T]he issue . . . to be decided [is] . . . whether the Indian Government owes a constitutional duty to provide free medical treatment to the petitioner suffering from a rare and a chronic disease, even though the treatment is expensive and recurring. . . .

49. Article 21 of the Constitution of India casts an obligation on the State to preserve life. Article 21 reads . . .

21. Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law.

50. The Indian Supreme Court in a catena of cases has held that right to health and medical care is a fundamental right under Article 21 read with Articles 39(e),^{*} 41^{**} and 43.^{***} It has further held that self-preservation of one's life is the necessary concomitant of the right to life enshrined in Article 21, fundamental in nature, sacred, precious and inviolable. . . .

52. The human right to health is also recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms:

^{*} Article 39(e) of the Indian Constitution provides:

39. Certain principles of policy to be followed by the State.
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength . . .

^{**} Article 41 of the Indian Constitution provides:

41. Right to work, to education and to public assistance in certain cases.
The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

^{***} Article 43 of the Indian Constitution provides:

43. Living wage, etc., for workers.
The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

“Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.” The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” while article 12.2 enumerates, by way of illustration, a number of steps to be taken by the States parties to achieve the full realization of this right. . . .

53. General Comment No. 14 issued by the United Nations Committee on Economic, Social and Cultural Rights in 2000 states as under:-

“12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party: . . .

36. The obligation to fulfil requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health”

62. Undoubtedly, availability of finance with the Government is a relevant factor. Courts cannot be unmindful of resources and finances. No court can direct that entire budget of a country should be spent on health and medical aid. After all competing claims like education and defence cannot be ignored.

63. Consequently, courts cannot direct that all inhabitants of this country be given free medical treatment at state expense. Even if such a direction were issued it would not be implementable as there would be neither infrastructure nor finance available for compliance of the said direction.

64. At the same time, no Government can say that it will not treat patients with chronic and rare diseases due to financial constraint. It would be as absurd as saying that the Government will provide free treatment to poor patients only for stomach upset and not for cancer/HIV/or those who suffer head injuries in an accident!

65. Disease is a natural catastrophe that fells its victims unpredictably. The right to adequate health care flows from the sanctity of human life and the dignity that belongs to all persons. Health is a fundamental human right, which has as its prerequisites social justice and equality. It should be accessible to all.

66. Healthcare access is the ability to obtain healthcare services such as prevention, diagnosis, treatment and management of diseases, illness disorders, and

other health-impacting conditions. For healthcare to be accessible it must be affordable and convenient.

67. This Court is of the view that core obligations under the right to health are non-derogable. This minimum core is not easy to define, but includes at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence.

68. In the opinion of this Court, Article 21 of the Constitution clearly imposes a duty on the Government to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. By virtue of Article 21 of the Constitution, the State is under a legal obligation to ensure access to life saving drugs to patients. A reasonable and equitable access to life saving medicines is critical to promoting and protecting the right to health. This means that Government must at the bare minimum ensure that individuals have access to essential medicines even for rare diseases like enzyme replacement for Gaucher disease. . . .

69. Government cannot cite financial crunch as a reason not to fulfil its obligation to ensure access of medicines or to adopt a plan of action to treat rare diseases. . . . [N]o government can wriggle out of its core obligation of ensuring the right of access to health facilities for vulnerable and marginalized section of society, like the petitioner, by stating that it cannot afford to provide treatment for rare and chronic diseases. . . .

80. This Court is of the view that Government needs to seriously consider expanding its health budget if their right to life and right to equality, as enumerated in Articles 14* and 21, are not to be rendered illusory. If poor patients are to enjoy [the] benefit of recent innovations in the medical field, like robotic surgery, genome engineering the Government must immediately think of increasing its investment in the health sector. . . .

85. . . . [O]n account of lack of Government planning, there is ‘pricing out’ of orphan drugs for rare and chronic diseases, like Gaucher. The enzyme replacement therapy is so expensive that there is a breach of constitutional obligation of the Government to provide medical aid on fair, reasonable, equitable and affordable basis. By their inaction, the Central and the State Governments have violated Articles 14 and 21 of the Constitution.

* Article 14 of the Indian Constitution provides:

14. Equality before law.

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

86. Just because someone is poor, the State cannot allow him to die. In fact, Government is bound to ensure that poor and vulnerable sections of society have access to treatment for rare and chronic diseases, like Gaucher especially when the prognosis is good and there is a likelihood of the patient leading a normal life. After all, health is not a luxury and should not be the sole possession of a privileged few.

87. Although obligations under Article 21 are generally understood to be progressively realizable depending on maximum available resources, yet certain obligations are considered core and non-derogable irrespective of resource constraints. Providing access to essential medicines at affordable prices is one such core obligation.

88. Since a breach of a Constitutional right has taken place, the Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement provides guidance as to the appropriate relief in a particular case.

89. As health is a State subject, the present petition is disposed of with a direction to the Government . . . of Delhi to discharge its constitutional obligation and provide the petitioner with enzyme replacement therapy at [All India Institutes of Medical Sciences] free of charge as and when he requires it.

Judgment T-760 of 2008

Constitutional Court of Colombia (Second Review Chamber)
(July 31, 2008)

[Article 49 of the Colombian Constitution, interpreted in this decision, provides:

“Public health and environmental protection are public services for which the state is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health. It is the responsibility of the state to organize, direct, and regulate the delivery of health services and of environmental protection to the population in accordance with the principles of efficiency, universality, and cooperation, and to establish policies for the provision of health services by private entities and to exercise supervision and control over them. In the area of public health, the state will establish the jurisdiction of the nation, territorial entities, and individuals, and determine the shares of their responsibilities within the limits and under the conditions determined by law. Public health services will be organized in a decentralized manner, in accordance with levels of responsibility and with the participation of the community. The law will determine the limits within which basic care for all the people will be free of charge and mandatory. Every person has the obligation to attend to the integral care of his/her health and that of his/her community.”]

Justice Manuel José Cepeda Espinosa authored the opinion for the Court, which also included Justices Jaime Córdoba and Rodrigo Escobar.

The Constitutional Court has the authority to hear actions of *tutela* ('protection writ,' a flexible jurisdictional action designed to protect fundamental rights), chosen by the Court from the decisions of all the judges of the Republic. . . . Judgment T-760 of 2008 collects 22 *tutelas* . . . relating to systemic problems in the health system, most of which addressed issues that repeatedly had been decided by the Constitutional Court. In addition, the Court addresses the resolution of a series of structural flaws in the health system. . . .

In the present judgment, the Constitutional Court examines multiple cases that invoke the protection of the right to health—specifically, the access to needed health services

The right to health is a fundamental constitutional right. . . .

3.2.2. . . . [C]onstitutional rights are not absolute, that is to say, they may be limited in accordance with criteria of reasonableness and proportionality as set by the constitutional jurisprudence. . . . [T]he possibility of enforcing the obligations derived from a fundamental right, and the merits of doing so through the action of *tutela*, are distinct and separable issues. . . .

3.3.2. The Court does not find that the positive aspects of a law are always subject to a gradual and progressive protection. “*When the failure to meet the minimum obligations places the holder of the right to health in imminent danger of suffering unreasonable harm,*” such holder can immediately claim the judicial protection of the law. The approach suggested by the case law to determine when such a situation applies is one of *urgency*

3.3.9. . . . [W]hen the effective enjoyment of a fundamental constitutional right depends on progressive realization, “the least [the responsible authority] must do to protect a programmatic provision derived from the positive dimension of a [fundamental right] under the Rule of Law and in a participatory democracy, is, precisely, to have a program or a plan designed to ensure the effective enjoyment of that right. . . .”

As a consequence, the constitutional obligations of programmatic character, derived from a fundamental right, are violated when the entity responsible for guaranteeing the enjoyment of a right does not even provide a program or a public policy that would permit the progressive advancement in the fulfillment of its corresponding obligations. . . .

3.3.15. . . . [T]here is now an open discussion in the jurisprudence and doctrine in relation to what are the obligations arising from a fundamental right. There is relative agreement as to which types of obligations would fall under the two initial

classifications, the obligations to *respect* and to *protect*, but not the third. The obligations to *fulfill*, which some authors call to *guarantee*, to *ensure* or to *satisfy*, have not been defined in a definitive way without disagreement. . . .

3.4.2.9.1. The Committee indicates that the obligation to *respect* “requires that States refrain from interfering directly or indirectly with the enjoyment of the right to health.” . . .

3.4.2.9.2. The obligation to *protect* “requires that the States take measures to prevent third parties from interfering with the implementation of the guarantees provided for in Article 12” (ICESCR, 1966). . . .

3.4.2.9.3. The obligation to *fulfill* “requires States to take appropriate legislative, administrative, budgetary, judicial or other measures towards the full realization of the right to health.” (I) For the Committee, the obligation to *fulfill* (*facilitate*) “in particular requires that the States adopt positive measures that permit and assist individuals and communities to enjoy the right to health.” (ii) States are also obligated to *fulfill* (*provide*) a specific right enshrined in the Covenant “in cases where individuals or groups are unable, for reasons beyond their control, to exercise that right themselves by using means at its disposal.” (iii) The obligation to *fulfill* (*promote*) the right to health “requires the States to undertake activities to promote, maintain and restore health to the population.” . . .

3.5.1. As the fundamental right to health is limited, the benefits plan need not be infinite but can be circumscribed to cover the health needs and priorities determined by the competent authorities in light of the efficient use of scarce resources. Consequently, the Constitutional Court has on numerous occasions denied services . . . [such as] cosmetic services. Although obesity can in the long run have consequences for the health of a person, every individual has the obligation of taking care of his own health and therefore trying to prevent the diseases that arise from being overweight. Only when obesity reaches a level where it poses definite and potentially irreversible dangers to a person’s life and personal integrity does the prescribed surgery acquire constitutional relevance The same applies to dental care, as healthy and complete teeth are desirable but are far from necessary to preserve the life or personal integrity of a person or to permit a life of dignity. The Court has even agreed that the benefits plan [financed by public resources] can exclude fertility treatments. . . .

4.4.3. . . . Currently, access to health services depends, in the first place, on whether the service is included in one of the obligatory health service plans to which the person is entitled to be affiliated. Thus, given the current regulations, the services required can be of two types: those that are included within the Obligatory Health Plan (POS) and those that are not. . . .

Currently, the jurisprudence reaffirms that the right to health of a person who requires medical services not covered by the obligatory health plan is violated, when “(i) *the lack of the medical service violates or threatens the rights to life and personal integrity of those who need it*, (ii) *the service can not be replaced by another that is included in the obligatory plan*, (iii) *the patient can not afford to directly pay for the service . . .*, and (iv) *the medical service has been ordered by a doctor.*” . . . [The Health Promoting Entities (EPS), which administer health coverage, may seek funds from FOSYGA, a fund established to finance services not covered by the health plan.]

4.4.5.1.1. Everyone has the constitutional right not to be denied access to health services, so the provision of the health services cannot be conditioned on the payment of a sum of money when the individual lacks the financial ability to pay. . . .

6.1.2.1.1. The Court recalls that in addition to the regular updating of Benefit Plans, one of the obligations under Law 100 of 1993 was their progressive unification in the contributory [for those with capacity to contribute] and subsidized [for the poor] regimes, until full unification would be achieved in 2001. . . .

Despite these intentions, derived from clear legal mandates and explicitly endorsed by the National Council on Social Security in Health, to date there has been no program realized that defines specific goals for the progressive rapprochement of the two plans nor a timetable that would support such a goal, setting clear deadlines for the accomplishment of each step. In other words, there now exists a violation by the State of its constitutional obligation of progressive fulfillment consisting in the unification of the obligatory benefit plans to guarantee the right to health on equal terms. While it is an obligation of progressive fulfillment, the State currently violates the minimum degree of compliance as it has not adopted a plan, with its own timetable, to advance the unification of the benefit plans. . . .

In view of the foregoing, the Constitutional Court . . .

Resolves: . . . [that several specific orders require EPS to authorize the medical service or drug which the claimant needs according to the affiliated physician.]

Sixteenth. To order the Ministry of Social Protection, the Regulatory Commission on Health and the National Council on the Social Security in Health to take the necessary steps, within their powers, to overcome the failures of regulation in the benefit plans, ensuring that their contents (i) are defined in a clear way, (ii) are fully up to date, (iii) are unified for the contributory and subsidized regimes, and (iv) are timely and effectively delivered by the EPS. . . .

Seventeenth. To order the National Commission on the Regulation in Health to integrally update the Obligatory Health Plans (POS). To fulfill this order the Commission must ensure direct and effective participation of the medical community and the users of the health system This integral review must: (i) clearly define what health services are included in the benefit plans, evaluating the legal criteria and

the jurisprudence of the Constitutional Court, (ii) establish what services are excluded and those which are not covered under the benefit plans but will gradually be included, indicating what are the goals for expansion and the dates by which they will be satisfied, (iii) decide what services should be deleted from the benefit plans, indicating the specific reasons for such decisions according to health priorities, so as to better protect the rights, and (iv) take into account, for the decisions to include or exclude a health service, the sustainability of the health system and the financing of the benefit plans by the UPC [unit to estimate per capita costs] and other funding sources. . . .

* * *

As in Colombia, Brazil employs a procedure by which individuals can go to court to enforce their access to healthcare and medicines. Below, we excerpt an opinion by the Supreme Federal Court of Brazil (STF), Suspension of Writ of Anticipated Protection 175 (STA 175). In addition to its primary responsibility for responding to claims of unconstitutional provisions, the STF has what could be called a hybrid system of judicial review that combines aspects of the American and European models. The STF has jurisdiction to review appeals and direct proceedings, whether they raise constitutional questions or not. The STF's jurisdiction includes requests by the government to suspend the operation of lower court decisions, as is the proceeding excerpted below, STA 175.

In STA 175, the then-President of the STF, Justice Gilmar Mendes, explained that the state's general obligation to provide medicine was limited to establishing social and economic policies for the promotion and protection of health and for hospital care. A party's request to be given medicines that were not provided for free by the public National Pharmaceutical Policy could, under certain conditions, be granted. STA 175 laid out guidelines focusing judges on evidence coverage gaps, such as whether a new drug has been approved for use but the National Pharmaceutical Policy has not yet considered whether to cover it.

Justice Gilmar Mendes's decision was challenged, and the STF thereafter affirmed his ruling. The judgment, however, was not binding precedent; under Brazilian rules, opinions in requests to suspend the effect of a judgment are binding only on the parties involved in the case.

Thereafter, in RE 566741, the STF agreed to hear an appeal of another case, also involving medicines not provided for free by the health system. As of this writing, the case (presented in a posture that would make it precedential) has not been decided.

Suspension of Writ of Anticipated Protection 175

Supreme Federal Court of Brazil

(March 17, 2010)*

[A lower court granted a writ of protection in favor of a woman suffering from Niemann-Pick Type C, a neurodegenerative disease. The court required the Federal Government to provide her with treatment free of charge. The President of the STF rejected the Federal Government's challenge to the decision, and the Government appealed to the full Court. By unanimous vote, the STF rejected the Government's appeal.]

REPORT

Justice Gilmar Mendes (President): . . .

The following facts are necessary for an analysis of the complaint:

- (a) The applicant, a young woman of 21 years of age, suffers from a rare neurodegenerative disease, called NIEMANN-PICK TYPE C . . . which causes neuropsychiatric disturbances . . .
- (c) The medical reports presented by the Sarah Hospital Network state that the use of ZAVESCA (miglustat) could facilitate an increase in the life expectancy and the quality of life of individuals suffering from Niemann-Pick Type C;
- (d) The patient's family asserted that they do not have the financial resources to pay for the medication, at an estimated monthly cost of around . . . [\$13,938];
- (e) [The lower court] established there is evidence that the medication is considered by the medical clinic as the only one capable of stopping the progression of the disease, or at least the only one to increase the patient's survival odds with an improved quality of life. . . .

The central argument presented by the [Federal Government] rests on the fact that the drug, Zavesca (miglustat) is not registered in the National Agency for Sanitary Safety (AVINSA), and that, consequently, the medication's commercialization in Brazil is prohibited.

In this case, at the time the Federal Public Ministry submitted this complaint, ZAVESCA was not registered in the AVINSA.

* Translation by Edgar Melgar (Yale Law School, J.D. Class of 2020).

Nonetheless, a search through the AVINSA's website revealed that ZAVESCA, produced by the company ACTELION, was indeed registered with number 1553800002, valid until 1/2012.

Zavesca is not part of any of the Protocols or Instructions of the [National] Consolidated Health Service (SUS), as it is a high-cost medication not contemplated by the public network's National Pharmaceutical Policy.

Although the [Federal Government] and the Municipality of Fortaleza argue that Zavesca is not an efficient treatment for Niemann-Pick Type C, no proof is presented to verify the medication's clinical effectiveness. The [Federal Government] merely infers the medication cannot be efficient, from the fact that it is not included in the SUS's Clinical Protocol.

On the other hand, documents collected by the Federal Public Ministry show an authorized physician prescribed the medication, and the same drug was recommended by the European Pharmaceutical Agency.

It also underscored that a medication's high cost is not, in and of itself, sufficient reason for it not to be administered

The anticipated decision for a writ of protection, instructing the Federal Government, the State of Ceará, and the Municipality of Fortaleza, to ensure access to the medication Zavesca, in favor of CLARICA ABREU DE CASTRO NEVES, is upheld. . . .

[Vote of Justice Gilmar Mendes (President)]

Before the Presidency of this Court, there are multiple requests for the suspension of [decisions] . . . which otherwise obligate the Public Treasury to provide varied health services (provision of medications, food supplements, prosthetics, creation of spaces in [intensive care units] and hospital beds; hiring of public health providers; execution of surgeries and exams; provision of medical treatment outside the home, even abroad, etc.).

Thus, taking into account the great number of [complaints] and the complexity of the questions involved, I summoned a Public Audience to engage with specialists in the Public Health, specifically public actors, members of the judiciary, of the Public Ministry, of the Public Advocate, and the Advocates of the Union, States, and Municipalities, in addition to academics and civil society organizations.

After hearing the depositions presented by the representatives of the diverse sectors involved, the need to [reevaluate] the question of the judicialization of the right to health in Brazil was established. That is because, in the majority of cases, judicial intervention does not take place on account of an absolute omission in regards to public policies directed towards the protection of the right to health, but in order to

make a necessary judicial determination for the [proper execution] of already existing policies. For that reason, the problem of judicial interference is not cognizable in regards to the free appreciation or the broad discretion of the other Powers [of government] to formulate public policies. . . .

[I]n Brazil, the problem is probably not the judicialization or, in simpler terms, the Judicial Power's interference in the creation or implementation of public policies on health, because what happens, in almost all cases, is merely a judicial determination of the effective execution of existing public policies. . . .

Thus, . . . the first element to be considered is the existence, or not, of a state policy that includes provision of the public health service requested by the applicant. Once the Judiciary has established a certain public health service is included within the social and economic policies formulated by the Consolidated Health Service, it is not creating new public policies, but merely determining its proper execution. In these cases, the existence of a subjective, public right to a given public policy appears to be evident.

If the requested public health service is not amongst the policies adopted by the Consolidated Health Service, it shall be necessary to distinguish whether the absence of the requested service is the result (1) of a legislative or administrative omission; (2) of an administrative decision not to provide the service; or (3) of a legal bar to its provision.

It is not rare [for applicants] to seek the Judicial Power to require the State to provide a health service that has not been registered in the National Agency for Sanitary Safety (AVINSA). . . .

After verifying its efficiency and the safety and quality of the product, and granting it a sanitary registration, ANVISA goes on to analyze the price to be fixed for the medication, taking into account the clinical benefit and the cost of the treatment. If a similar product already exists and the new medication does not confer any additional benefits, it may not cost more than the existing medication with the same indication.

For all these reasons, the AVINSA registry configures itself as a necessary condition in order to confirm the safety of the products, and its benefits. . . .

A second element to be considered is the existence of any specific reason why the Consolidated Health System does not provide a given health service or product. There are cases in which a complaint seeks to guarantee provision of a health service which the Consolidated Health Service decided not to provide, upon realizing that there was not sufficient scientific evidence to authorize its inclusion [in the National Health Policy]. . . .

It may be inferred that the State's obligation, pursuant to article 196* of the Constitution, is limited to establishing social and economic policies for health promotion, health protection, and hospital care.

That is because the Brazilian Health System is guided by "evidence-based medicine" (EBM). . . .

In addition, it can be observed that the work of the Consolidated Health System, which is mandated to observe the constitutional principle of universal and egalitarian access to public health actions and services, becomes viable through the elaboration of public policies that allocate (naturally scarce) resources in the most efficient way possible. To force the public network to finance each and every public health action or service would result in a great injury to the administrative order and would compromise the Consolidated Health System, in a way that would further prejudice medical care for the most vulnerable segment of the population. In this regard, we can conclude that, generally, treatment provided by the Consolidated Health System, must be privileged over any other option selected by the patient, so long as the inefficiency or inappropriateness of the existing health policy has not been established.

This conclusion does not remove, yet, the possibility that the Judiciary Power, or the Administration itself, may decide that a measure that is different than that funded by the Consolidated Health Service should be provided to a given person that, for reasons specific to their organism, establishes that the treatment provided by the Consolidated Health Service is not effective to their case. . . .

Experimental treatments (without scientific proof as to their efficacy) have been developed by laboratories or medical centers, and [are defined] as scientific research. Participation in those treatments is regulated by norms that direct medical research, and, for that reason, the State cannot be obligated to provide [these experimental treatments]. . . .

As regards new treatments (not yet incorporated into the Consolidated Health Service), it is important that some additional caution is taken. As emphasized by specialists in the Public Hearing, medical knowledge is not [static], its evolution is fast-paced, and the bureaucracy can hardly follow its progress. . . .

[T]he absence of a Clinical Protocol in the Consolidated Health System cannot . . . justify a difference between the options accessible to users of the public network, and users of the private network. In those cases [of new treatments not yet

* Article 196 of the Brazilian Constitution provides:

Health is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery.

incorporated into the Consolidated Health Service], an administrative omission in the treatment of a given disease might be subject to judicial review

[Justices Ellen Gracie, Celso de Mello, Eros Grau, Ayres Britto, and Marco Aurélio submitted separate votes—or concurrences—joining Justice Gilmar Mendes in the judgment denying the government’s request.]

Hoffer v. Jones

U.S. District Court for the Northern District of Florida

290 F. Supp. 3d 1292 (N.D. Fla. 2017)

Mark E. Walker, United States District Judge

The Florida Department of Corrections (“FDC”) is charged with the care of over 98,000 inmates. At least 7,000 of those inmates—and perhaps as many as 20,000—are infected with the Hepatitis C virus (“HCV”). The issue in this case is whether FDC is screening, evaluating, and treating HCV-infected inmates in a manner that comports with constitutional requirements.

After holding a five-day hearing (including testimony from expert witnesses, FDC officials, and FDC inmates), this Court finds that FDC has not treated HCV-infected inmates as required by the Constitution. . . . [T]his Court finds that a preliminary injunction is necessary to ensure that inmates with HCV receive medical care in a timely manner consistent with constitutional requirements. Accordingly, Plaintiffs’ motion for a preliminary injunction is granted. . . .

Historically, HCV has been “difficult to treat.” One old method of treatment involved the drugs Interferon and Ribavirin. That treatment required weekly injections and could take as long as twelve months to complete. The side effects were “terrible.” Taking the treatment was akin to “having the flu for a year.” “People’s hair fell out, they had rashes, they had chest pain, they felt suicidal, [and] some committed suicide.” Despite these side effects, doctors still prescribed the treatment when patients had a high level of liver scarring because “the likelihood of getting to cure, which was still only about 30 percent, was better than those terrible side effects.”

But in late 2013 a new class of drugs known as direct-acting antivirals (“DAAs”) were released to market. These DAAs proved to be “a revolution in medicine.” Treatment with DAAs consists of taking a pill once or twice a day. The treatment period with DAAs is only about twelve-weeks long. Moreover, DAAs have “very few” side effects. Most importantly, about 95% of patients who take DAAs are cured of HCV.

Unfortunately, this revolution in medicine came with a price. DAAs “are very expensive.” In September of 2016, a single course of treatment with DAAs cost

approximately \$50,000 to \$75,000. Even though prices have been going down as new DAAs are released, a single course of treatment may still cost \$37,000 today.

Despite the high cost of DAAs, the present-day standard of care is to treat chronic-HCV patients with DAAs as long as there are no contraindications or exceptional circumstances. . . .

The Eighth Amendment to the United States Constitution prohibits the government from inflicting “cruel and unusual punishments” on convicts. The Supreme Court has interpreted this prohibition to encompass “deprivations . . . not specifically part of [a] sentence but . . . suffered during imprisonment.” Accordingly, an inmate who suffers “deliberate indifference” to his “serious medical needs” may state a claim for a violation of the Eighth Amendment. . . .

Plaintiffs (by diagnosis) and Plaintiffs’ class (by definition) all suffer from chronic HCV. As a consequence, Plaintiffs and Plaintiffs’ class are faced with substantial risks of serious harm, including, but not limited to, bleeding from any site in the body, accumulation of fluid in the legs or abdomen, life-threatening infections, significant pain or discomfort, organ failure, liver cancer, and death. Accordingly, it is not surprising that Plaintiffs’ expert describes HCV as “a serious medical need.” Nor should it be surprising that this Court finds chronic HCV to be a serious medical need. . . .

[T]his Court finds as a matter of fact that FDC’s failure to treat was due to a lack of funding. . . . Here, funding is no excuse for FDC’s failure to provide treatment. Accordingly, there is no question that Defendant has been deliberately indifferent the serious medical needs of Plaintiffs and the class. . . .

The only harm facing FDC is that it will have to spend more money than it wants to.²³ . . . “The threat of harm to the plaintiffs cannot be outweighed by the risk of financial burden or administrative inconvenience to the defendants.” Contrarily, Plaintiffs and Plaintiffs’ class face great injuries. The record is rife with evidence of the harmful consequences that result from untreated HCV. Accordingly, this Court finds that the threatened injury facing Plaintiffs and Plaintiffs’ class outweighs any harm that the injunction would cause to Defendant. . . .

[T]his Court finds that an injunction is necessary to ensure that Plaintiffs and the class receive timely and appropriate medical care in a manner that complies with the Constitution.

Accordingly, with limited exceptions, this Court is ordering Defendant to ensure that FDC complies with its own expert’s recommendations. Specifically, FDC

²³ Defendant argues that any funds required to be spent by FDC are funds taken from providing care to other inmates. But that is no excuse. FDC cannot use its constitutional duty to treat a certain group of inmates as a reason not to treat a different group.

must update its HCV-treatment policy . . . in line with the shortcomings noted by [its expert] during the hearing before this Court so that there is a clear plan for doctors and practitioners to follow. Moreover, FDC must formulate a plan to implement its policy by screening, evaluating, and treating inmates in line with the directions and timelines identified by [its expert] during the hearing before this Court. To the extent FDC does not have the system capacity to meet these requirements, it must increase its capacity and outline a timetable for doing so. . . .

This Court recognizes that these directions are broad. To be clear, this was done at Defendant's request. During closing arguments before this Court, Defendant stated that she wishes to prepare a plan in light of this Court's directions. . . . Defendant shall be permitted to provide a more specific plan, and this Court will consider Defendant's plan before entering a preliminary injunction. In so ruling, this Court notes that Defendant must move with "alacrity." This Court will not tolerate further foot dragging. . . .

* * *

In December 2017, the Secretary of the Florida Department of Corrections filed the required treatment plan. Judge Walker issued a preliminary injunction ordering the Department of Corrections to comply with the plan with some modifications and requiring the state to provide treatment by December 31, 2018 to all prisoners with severe liver damage and to provide treatment in 2019 to those with significant liver damage.

In March 2018, the Florida legislature passed, and Governor Rick Scott signed, a budget that left the Department of Corrections with a \$79 million deficit in its \$2.3 billion operating budget. To address the shortfall while still complying with the Hepatitis C treatment plan, as well as two other court orders that the Department was under concerning inmate healthcare, Florida's Department of Corrections announced in May 2018 that it would substantially cut substance abuse and mental health treatment programs and re-entry programs.*

Case No. 2.186
Supreme Court of Chile (2001)**

[Three individuals in the advanced stages of HIV/AIDS filed a *recurso de protección*—a writ of protection—arguing that the government's failure to provide them with life-saving antiretroviral medication posed a risk of death in breach of Chile's constitutional and legal duties. The Court of Appeals of Santiago ruled in favor of the individuals, and the government appealed.]

* Mary Ellen Klas, *Florida Prisons Cut Programs to Cover \$28 Million Deficit*, TAMPA BAY TIMES (May 6, 2018).

** Translation by José Argueta Funes (Yale Law School, J.D. Class of 2019).

1. Under Article 20 of the Political Constitution of the Republic, the recourse of protection for constitutional guarantees enumerated thereunder constitutes a precautionary measure meant to protect the free exercise of preexisting rights and guarantees through the adoption of safeguard measures taken in the face of an arbitrary or illegal act which impedes or threatens such exercise

2. Appellees have requested . . . orders to provide madam Nayade Rojas Vera the medication she needs to survive, given her particular medical condition and in accordance with parameters for control of her disease and for the protection of her right to life . . . ; orders to submit her to the pertinent medical examinations to allow an examination of her state of health and orders that the appellees periodically and permanently monitor her state of health with the goal of securing the adequate treatment according to the development of her illness. Appellees request the same orders on behalf of [two other individuals]. . . . [All three appellees] allege that, as carriers of the [HIV] virus seeking to control and treat the development of [AIDS] . . . , they have requested the medications required for their survival, that these requests have been denied, and that that this is an illegal and arbitrary measure which represents a threat to their right to life and a disturbance of their right to equality before the law

3. Before analyzing the claims of violation of constitutional guarantees, it is necessary to determine whether the actions under scrutiny were arbitrary or illegal. . . . [U]nder Article 11 of Law 18.469 . . . the Ministry of Health shall determine the norms of access to and quality of benefits [T]he issue presented is one of public health, whose policies must be defined and applied by the pertinent authorities of the relevant Ministry, given that these authorities are the ideally situated to establish norms of access to benefits which, as in this case, requires considering several parameters[,] . . . [including] the costs associated with providing the benefits and the funds allocated for that purpose.

4. This allows this Court to conclude that in none of the three cases presented has there been illegality in the events reported, given that there is in place law that regulates with precision the award of benefits . . . which provides the power to decide whether benefits should be awarded or not [Neither] has the process been arbitrary . . . since the application of a predetermined procedure in the present case precisely avoids any arbitrariness that might result from a preference for other patients or other individuals who are convalescing but are nonetheless in better health than others

5. The . . . decision [by the Court of Appeals] achieves precisely the arbitrary result which the law seeks to avoid, because it awards benefits in an arbitrary fashion, preferring recipients on the sole basis that they have applied for constitutional protection [A] determination of who should obtain benefits in this situation should not only consider the condition of the petitioners, but also the condition of all those who are affected by the same disease which affects the petitioners Such a

consideration may only be handled by . . . authorities of the Health sector, except for situations in which there are clearly inappropriate preferences, which circumstances are absent in this case.

6. [The three appellees] may not proceed on their recourse for protection because their claims lack the prerequisites of arbitrariness and illegality [It is for] the health authorities to carry out the health policies designed and implemented by the Administration in accordance with the means at its disposal

8. For the foregoing reasons, the petitions must be dismissed. . . .

R (B) v. Cambridge Health Authority
Supreme Court of Judicature, Court of Appeal of England and Wales
(Civil Division) (1995)
[1995] EWCA Civ 43

Master of the Rolls [Sir Thomas Bingham]: . . .

The order which is the subject of appeal is an order of certiorari quashing a decision of the Cambridge Health Authority not to fund any further treatment of the child involved in this case by way of chemotherapy and a second bone marrow transplant.

B is a child now aged 10½. In September 1990 . . . [B] was first diagnosed suffering from what is technically known as non-Hodgkins lymphoma (“NHL”) with common acute lymphoblastic leukaemia (“ALL”). This was treated with chemotherapy over a period of months. In August 1992 that course of chemotherapy treatment was completed, for the time being successfully.

Unhappily, the successful treatment did not endure. In December 1993 the child developed acute myeloid leukaemia (“AML”) and was treated for the second time with a course of chemotherapy. On this occasion she underwent a course of total body irradiation, a fact of some importance since it appears to be accepted by medical opinion that that is treatment which no-one can undergo more than once.

In March 1994 B underwent a bone marrow transplant. . . . In January this year she suffered a further relapse of acute myeloid leukaemia . . . that has given rise to the present proceedings. . . .

The officer of the respondent Authority with responsibility for contracting for the purchase of medical and surgical services outside his Health Authority is a highly qualified physician named Dr Zimmern . . . [whose affidavit references opinions of other experts consulted on B’s case. His summarised conclusions are]: . . .

First and foremost I had to consider whether the proposed course of

treatment was clinically appropriate for [B]. I also had to consider whether it would be an effective use of the [Authority's] limited resources, bearing in mind the present and future needs of other patients. The opinions of [several doctors are] . . . that the treatment could not be justified purely on therapeutic grounds and that the fundamental justification would be experimentation. . . . Having considered all the medical opinions put before me I decided to accept the clinical judgment of [these doctors] that a further course of intensive chemotherapy with a view to a second transplant operation was not in the best interests of [B].

I have also been influenced in my decision by the consistent advice and directions of the Department of Health with regard to the funding of treatments which have not been proven to be of benefit. The ethical use of resources demands that new and expensive treatments are evaluated before they are transferred to the NHS for service funding. The doctors to whom I spoke were consistent in their advice that the proposed treatment was neither standard nor had been formally evaluated.

I also considered that the substantial expenditure on treatment with such small prospect of success would not be an effective use of resources. The amount of funds available for health care are not limitless. The Respondent has a responsibility to ensure that sufficient funds are available from their limited resources for the provision of treatment for other patients which is likely to be effective. . . .

The learned judge . . . acknowledged that the court should not make orders with consequences for the use of health service funds in ignorance of the knock-on effect on other patients. He went on to say that "where the question is whether the life of a 10 year old child might be saved by however slim a chance, the responsible Authority . . . must do more than toll the bell of tight resources." The learned judge said: "They must explain the priorities that have led them to decline to fund the treatment," and he found they had not adequately done so here.

I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however . . . , be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. . . . Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this Authority can be fairly criticised for not advancing before the court. . . .

[I]t would be totally unrealistic to require the Authority to come to the court with its accounts and seek to demonstrate that if this treatment were provided for B then there would be a patient, C, who would have to go without treatment. No major Authority could run its financial affairs in a way which would permit such a demonstration. . . .

While I have, as I hope is clear, every possible sympathy with B, I feel bound to regard this as an attempt, wholly understandable but nonetheless misguided, to involve the court in a field of activity where it is not fitted to make any decision favourable to the patient.

The President, [The Rt Hon Stephen Brown]:

After the most critical, anxious consideration, I feel bound to say that I am unable to say that the Authority in this case acted in a way that exceeded its powers or which was unreasonable in the legal sense. The powers of this court are not such as to enable it to substitute its own decision in a matter of this kind for that of the Authority which is legally charged with making the decision. It is a desperately sad case and all those who have heard it, particularly those who have to take some part in deciding issues concerned with it, must be aware of the gravity and anxiety which attaches to the making of such a decision. . . .

[Lord Simon Brown also granted the appeal in agreement with the reasons given by Sir Thomas Bingham MR and Sir Stephen Brown P, for overturning the lower court's order and reinstating the Health Authority's decision not to fund further treatment.]

* * *

R (B) v. Cambridge Health Authority is recognized as a turning point in healthcare litigation in England. Although the Court of Appeals ruled in the Authority's favor, the lower court's decision ordering the Authority to provide the treatment was the first to reject a health authority's rationing decision. The ruling brought the fact of healthcare rationing within the National Health Service (NHS) to the public's attention.

In the wake of the decision, as other individuals brought challenges to courts, judges required health authorities to provide reasons for decisions denying treatment. In 1999, the Secretary of State for Health established the National Institute for Clinical Excellence (NICE)—now the National Institute for Health and Care Excellence—to centralize and to improve the quality and transparency of rationing decisions. Relying on clinical and cost-effectiveness data, NICE issued recommendations on whether a given population should receive a new treatment. Since 2005, NHS has been required to cover any treatment recommended by NICE. NHS has not been bound by negative

recommendations, yet, in practice, NHS has often denied coverage of treatments that NICE did not recommend.*

The Impact of Courts

Jurisdictions have different views on the role of courts, as do constitutional theorists. In the United States, Cass Sunstein offers a variant of the view that judges should defer to legislatures in the enforcement of social and economic rights; he suggests that courts are generally ill-suited to intervene in such cases, but are well positioned to engage the political branches in dialogue and to help hold them accountable. David Landau introduces the distributive critique of individualized socioeconomic rights enforcement. And in South Africa, David Bilchitz argues that courts should take a more active and less deferential role in adjudicating these rights and monitoring the political branches' compliance. Katharine Young offers a different perspective, illustrating how rights in general, and socioeconomic rights in particular, sometimes compete with and sometimes depend upon the concept of the "queue." Judicial adjudication of individual rights-claims that permit claimants to evade queues set up by the political branches to allocate scarce resources is often critiqued as enabling "queue jumping."

We then shift to consider these views in light of the experiences with administration of the right to medicines in Brazil and Colombia. We provide a brief introduction to the empirical literature on the litigants in rights to medicines cases and then turn to analysis of the broader implications of these cases as means to prompt dialogues with the political branches and within courts' decisions over time. The Brazilian and Colombian Courts have both revised their approaches to the right to medicines and to engaging the public and lawmakers in exchanges, but the two courts have used different methods to do so. These examples enable us to examine when courts can, should, and must protect rights. In addition, they raise questions about when courts should and must involve legislatures and what "dialogue" between these two branches might entail. At issue is whether judicial rights enforcement is antithetical to, or part of, approaches that generate engagement of the political branches.

* Daniel Wei L. Wang, *From Wednesbury Unreasonableness to Accountability for Reasonableness*, 76 CAMBRIDGE LAW JOURNAL 642 (2017).

Social and Economic Rights? Lessons from South Africa

Cass R. Sunstein (2001)*

. . . In the *Grootboom* decision,** the [South African Constitutional] Court set out a novel and promising approach to judicial protection of socio-economic rights. This approach requires close attention to the human interests at stake, and sensible priority-setting, but without mandating protection for each person whose socio-economic needs are at risk. The distinctive virtue of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met. The approach of the Constitutional Court stands as a powerful rejoinder to those who have contended that socio-economic rights do not belong in a constitution. It suggests that such rights can serve, not to preempt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate. It also illuminates the idea, emphasized by the Court itself, that all rights, including the most conventional and uncontroversial, impose costs that must be borne by taxpayers. . . .

A government might attempt to meet people's needs in multiple ways, perhaps by creating incentives to ensure that people will help themselves, rather than by looking to government. Perhaps there is no special need for constitutional safeguards here; perhaps this is an issue that can be settled democratically. In any case, social and economic guarantees threaten to put courts in a role for which they are quite ill-suited. While modern constitutions tend to protect those guarantees, we can understand the judgment that, in some nations, they would create more trouble than they are worth. . . .

But by requiring reasonable programs, with careful attention to limited budgets, the Court has suggested the possibility of assessing claims of constitutional violations without at the same time requiring more than existing resources will allow. And in so doing, the Court has provided the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socio-economic rights could not possibly be a good idea. . . .

* Excerpted from Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, John M. Olin Law and Economics Working Paper No. 124 (2001).

** In *Government of the Republic of South Africa v. Grootboom*, [2000] ZACC 19 (Oct. 4, 2000), plaintiffs sought an order requiring the government to provide them with adequate basic shelter after they were forcibly evicted from the informal shacks they had built on private land. They claimed a violation of Section 26 of the South African Constitution, which provides that "[e]veryone has the right to have access to adequate housing," and that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." The Constitutional Court of South Africa held that while the Constitution did not "entitle[] the respondents to claim shelter or housing immediately upon demand," it did "oblige the state to devise and implement a coherent, co-ordinated program designed to meet its section 26 obligations."

Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance

David Bilchitz (2002)*

. . . [The Court in *Grootboom*] stated that ‘it is necessary and appropriate to make a declaratory order.’ The order requires that the state adopt ‘reasonable measures to provide relief for people in desperate need.’ The first important point to recognize about this order is its lack of specificity. The state must ‘provide relief.’ This gives the state little guidance as to what it is required to do in particular to meet basic needs. Since the reasonableness standard is slippery, it can provide the grounds for state delay, obfuscation and much else.

Imposing a minimum core obligation would have had the benefit that the state would have been provided with a more definite standard against which to judge its behaviour. Thus, instead of merely being implored to be ‘reasonable,’ the state would have been required to ensure that people have ‘effective protection from the elements and basic services, such as toilets and running water.’ These two things may in the end turn out to be identical, but surely the latter formulation grants vulnerable people greater protection and greater certainty as to what they are entitled to. It also renders the state more certain about its own obligations.

There are two additional aspects of the order that deserve criticism. The first is that the court imposes no time limit on the state’s actions in regard to the development of a programme to meet short-term needs. . . .

Finally, there is a real question about the introduction of supervisory mechanisms for the enforcement of socio-economic rights. The court refers to the fact that the Human Rights Commission will monitor and report on the compliance of the state But it is arguable that the court itself should have retained residual supervisory role in this regard. It could have done so through crafting its order so as to allow the Human Rights Commission, or an alternative body with locus standi, to approach it speedily in respect of the required governmental action under [Section] 26. The failure to craft such an ‘easy access’ order means that any body wishing to have the judges review governmental action or inaction in relation to housing will have to institute a new case and go through the High Court once again with all the time delays and expense that this entails. . . .

Reasonableness review, while of significance, does not in and of itself impel a government to prioritize fully . . . [basic] needs. It is to be hoped that in future the Constitutional Court will adopt a more robust approach to the enforcement of socioeconomic rights and recognize the existence of minimum core obligations. In this way, the court can show that it has the interests of the most vulnerable at heart, and

* Excerpted from David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 SOUTH AFRICAN LAW JOURNAL 484 (2002).

that, in their defence, it is prepared to demand that the government fulfil their basic needs.

The Reality of Social Rights Enforcement

David Landau (2012)*

. . . Scholars led by Mark Tushnet and Cass Sunstein have argued that “weak form” or dialogical enforcement of social rights, whereby courts point out political failures to fulfill these rights but generally leave the remedy to the discretion of the political branches, is the best way to balance a desire to enforce social rights and the legitimacy and capacity strains that such enforcement places on courts. The dialogue-based approach has not really been used outside of South Africa, and in that country it has not accomplished much. . . .

A large group of both South African and American scholars has argued that weak-form enforcement, as exemplified by *Grootboom*, did not work—the legislature did not produce the plan that the Court requested, and the case did virtually nothing to actually advance the right to housing. Many of these academics have argued that *Grootboom* had more or less the right idea but needed to be ratcheted up: the remedy needed to be made a little less “weak” in order to be effective. . . .

In reality, courts have found other ways to manage the tension between the enforcement of social rights and the capacity and legitimacy costs perceived to go along with that enforcement. Many courts appear to rely upon an individualized enforcement model—when an individual plaintiff comes to the court asking for provision of some particular medicine or treatment, they grant relief to that individual plaintiff. This model relieves the tension noted above by providing relief to only a single plaintiff, thus avoiding complex management issues and making it appear that the court is not intervening massively in public policy. Even though the aggregate effect of these decisions on the public budget can be very large, the individual decisions appear to be familiar court-like work; the court is simply deciding whether one plaintiff is entitled to a remedy against one defendant. A second way in which courts manage the tension is by issuing negative injunctions striking down a law and maintaining the status quo, rather than issuing positive orders forcing the state to provide a service. Again, by doing this, the courts are assimilating social rights enforcement into the enforcement of traditional first-generation rights—it is issuing a merely negative remedy for the right.

Both of these remedies allow courts to carry out social rights enforcement relatively securely and without worrying that they will be seen as overreaching beyond the traditional tasks of courts. But there is a significant cost—both tools are heavily tilted toward middle class and upper income groups rather than poor plaintiffs. In

* Excerpted from David Landau, *The Reality of Social Rights Enforcement*, 53 HARVARD INTERNATIONAL LAW JOURNAL 189 (2012).

other words, in much of the world social rights enforcement is vibrant, but accrues to the benefit of higher class groups rather than those social groups most in need. . . .

Most of the literature on social rights, whether in favor of or against enforcement, assumes that it is a counter-majoritarian exercise, and that the beneficiaries of its enforcement will be marginalized groups. This does not appear to be true—social rights enforcement is essentially majoritarian in many cases, and the beneficiaries are middle and upper class groups rather than the marginalized. . . .

Rights and Queues: On Distributive Contests in the Modern State

Katharine G. Young (2016)*

In South Africa, persons living in intolerable conditions who seek housing have been derided as “queue jumpers,” despite their claims of basic constitutional and human rights. In Canada, those who seek to access medical care outside of the State’s provided services have been labeled “queue jumpers,” again in the face of claims of basic constitutional and human rights. In Australia, persons attempting to enter the continent by sea who seek asylum are dismissed as “queue jumpers,” notwithstanding their claims of basic human rights. Deeply divisive, these distributive contests pit queues against rights, propelling the importance of the queue and objections to its evasion into the same moral, political, and legal universe as rights. As a political and legal concept, rights represent the fundamental importance of the dignity of the human person, or of their liberty, or their equality with others. But so too, as a political and legal concept, do queues represent the fundamental importance of fairness and order. . . .

The two concepts together forge an ambivalent, interdependent relation: to be realized, rights appear sometimes to prohibit, sometimes to permit, and sometimes to require queues; queues, in their turn, appear to create, institute, or displace rights. . . . [Q]ueues implement a principle of “first come, first served,” and allocate first to those who have waited longest, while at the same time often controlling for other modes of ordering preferences by allowing for exemptions (on grounds of need or other criteria) or by setting categories of recipients in line with each other, using “first come, first served” within each category. In turn, rights operate as political “trumps” when certain important values, such as liberty or dignity, are infringed, or at least require an appropriate reason, over majoritarian or utilitarian objections, before such infringement is justified. The mechanisms of rights and queues sometimes compete and sometimes work together in settling distributive questions

From the perspective of rights, the use of queues points immediately to the distinction between so-called positive and negative rights . . . : negative rights are subject to a duty of immediate respect; positive rights, in their turn, are subject to a

* Excerpted from Katharine G. Young, *Rights and Queues: On Distributive Contests in the Modern State*, 55 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 65 (2016).

duty to realize rights progressively, over time. Thus, so-called positive rights seem . . . to require . . . a waiting priority system. Yet commentators have long noted the “positive” obligations underlying the so-called “negative” civil and political (and property) rights, in the sense that they all require an extensive state apparatus to enforce. . . . The analytical sorting of state duties—to respect, protect, and fulfill—has helped to clarify this dichotomy. . . . [Yet,] as we will see, the concept of the queue confounds the clarity of this typology

Taking first the duty to respect rights, this obligation is perceived as negative . . . and is usually termed an immediate one, such that any queueing system would be prohibited. A framework of queues for . . . the exercise of free speech, would seem absurd. . . . One can imagine, however, secondary queues in such contexts, such as . . . a reasonable waiting procedure for accessing particular city permissions for staging a political demonstration. As soon as scarce resources are implicated, some kind of subordinate priority-setting is required. . . .

Secondly, the duty to protect rights is often understood as an obligation concerning third parties. In this sense, it requires the state to ensure that third parties do not deprive people of the guaranteed right [A] relatively uncontroversial example would be a duty on the state to regulate hazardous chemicals that are a risk to public health Yet again, queues may be permissible to establish agency priorities within certain timelines, or to sort out compensation claims, in the event that third parties infringe such laws in the face of illegality. . . .

Finally, the duty to fulfill is understood as a positive obligation. It requires the state to establish political, economic, and social systems that provide access to the good, service, or opportunity at issue in the guaranteed right for all members of society. . . . Queues provide such rights a tangible presence in the world: the right to food, for example, may require a delivery system of queueing in order to be realized While an inordinately long queue for essential services would suggest an infringement of the duty to fulfill such rights, there is nothing in the structure of the queue itself that is objectionable. . . .

[Despite the] incongruity between rights and queues, . . . the two do share an interdependent relation, and . . . even the duty to immediately respect rights carries with it an understanding that enforcement might have to depend on particular priority setting. . . . We might say that queues—or a person’s place in them—are rights-realization-in-waiting, where the allocative priority that a person is given within a waiting system gives rise to a legitimate expectation that she or he can rely on this method of allocation.

Yet this creation of an ancillary right . . . may create a conflict between rights and queues. Queueers and others police the distributive channel and deride “queue jumpers” if they access such goods or services before them. . . . [I]t is the pernicious relation between ancillary rights-realization-in-waiting and rights that sets out the

condition in which the former displaces the latter, or, at least, in which such displacement is claimed to be justified. This is the basic structure of what I identify as “queue talk.” . . .

[I]n Canadian political discourse[,] . . . the metaphor of the queue, and its evasion, is used to describe a subversion of the public health care system. The queue is the waiting list established for this publicly-funded care: services deemed “medically necessary” under the Canada Health Act, whose scarcity requires some mechanism for distribution for patients in need. . . . Jumping the queue is the act of subverting the planned distribution system by “purchasing” hospital or physician services outside of the waiting list

“Queue jumpers” are therefore deemed the especially privileged or politically influential in society The victims of “queue jumping” are imagined, not only as the . . . proportion of people on the waiting list at any one time, but also the access of Canadian citizens as a whole, and particularly lower-income Canadians, given the potential effects on the long-term sustainability of the “single-tier” model of health care financing in Canada. In some cases, such as for access to scarce vaccines, this is because the “queue jumper” directly diverts resources away from those on the government wait list. But in others, it is understood that the evasion of the queue undermines the solidarity, and, more indirectly, the resources that support public health care. . . .

Defenders of privatized access to health care do not . . . see the practice in “queue jumping” terms; theirs, rather, are claims of right. The most well-known manifestation of this defense involved the constitutional challenge mounted by a doctor, Dr. Jacques Chaoulli, and a patient, Mr. George Zeliotis, on the ban by Quebec on private health insurance. . . . By a 4-3 majority, the Supreme Court [of Canada, in *Chaoulli v. Quebec (AG)* (2005),] accepted that the health care financing system had required patients to endure long wait times in the public system, which interfered with their rights to life and personal security in violation of the Quebec Charter, although only three Justices accepted that an infringement of the Canadian Charter had occurred, thus limiting the national effect of the judgment. The Supreme Court thus overturned the legislative ban on private health insurance, holding that it infringed the constitutional rights of Quebeckers. The dissent . . . noted the inevitability of waiting lists; that “rationing occurs on the basis of clinical need rather than wealth and social status”; and that “who should be allowed to jump the queue . . . [in] a public system founded on the values of equity, solidarity and collective responsibility . . . can and should be addressed on a case by case basis.”

The *Chaoulli* decision has been criticized as representing an unwarranted judicial intervention in social policy Under this view, the Supreme Court of Canada committed three prominent mistakes . . . [:] first, in overreaching in the judicial role; second, in enacting a theory of economic libertarianism; and third, when read in comparison with other contemporary *Charter* decisions implicating economic

and social rights, in suggesting a bias in favor of middle class claimants over earlier unsuccessful claimants. . . .

[T]he fact that *Chaoulli* established only a narrow “negative” right tied to the Quebec system has limited its effect. Similar prohibitions in other provinces remain in force. Moreover, the form of remedy issued in the *Chaoulli* case—a declaration against the impugned legislation, stayed for one year—provided Quebec with “some room for policy maneuver.” In 2006, . . . [Quebec] passed an amending statute that . . . empowered the Health Minister to identify and circumvent long wait lists by implementing alternative procedures, and established a specific market for the sale and purchase of insurance “for hip, knee, and cataract surgeries.” . . . Quebec also instituted a mechanism by which demand for private health insurance would be kept low by guaranteeing public payment for private admission if the wait for certain surgery exceeded six months.

Thus, ten years after the *Chaoulli* decision, the provincial single-payer universal health insurance plans have not changed, in part, perhaps, because the constituency for reform—either private life and health insurance firms or politicians—appears to have had little incentive to challenge it. Nonetheless, a reframed discourse of rights, and with it the counter-discourse of “queue jumping,” now set the parameters of much of the political discourse around health care in Canada. . . . [T]he collective social right to health care in Canadian Medicare has been transformed into “health care as an individual’s *civil right*—that is, something that individualized consumers have the right to obtain freely in a marketized society.” This case study shows the deep, but also deeply contingent, ideological and political aspects of queue talk. . . .

When rights claimants—“queue jumpers”—bring their claims to courts, they are seen as jumping a queue devised elsewhere [T]his complaint accords with common understandings of the way in which the adjudication of rights is understood to “judicialize” the complex political decisions that go into the basic question of distribution and redistribution. . . . This criticism has been a main source of the long-standard argument against the “justiciability” of economic and social rights, and its strands relate to the distortion of public debate, the usurpation by the judiciary of the role of the elected branches, the inevitable vagueness and indeterminacy of such rights, and the uneven access to the courts as between the poor and middle class. . . .

In Canada, the original debates against the Supreme Court judicial review of rights under the Canadian Charter have been resuscitated in the “queue jumping” guise. The dissent written in the *Chaoulli* . . . was taken up mainly with the urgency of keeping courts out of social questions and thus exclusively focused on legal questions. Such debates have continued to surface and are unresolved in Canada. The early *Charter* cases involving support for positive obligations under the right to life in Canada have not been developed, and there is a preference for “dialogic” remedies, which avoid the perception of individual remedy. While this remedial form has its

costs, advocates of the “weak-form” approach point to the fact that even unsuccessful cases in court have sometimes changed public opinion in the long run, particularly in the health care scenario. . . .

[T]he focus on queues conceals many of the more important questions about the socio-economic distributions at stake. . . . Three issues, arguably more central to the realization of such rights, relate to the decision as to what is . . . included in the publicly financed system First, the demarcation of what should be publicly funded, “medically necessary” hospital care and “medically required” physician services are annually negotiated at the provincial level by Health Ministries and Medical Associations. But these negotiations are primarily limited to costs rather than what aspects of care and services are to be included or excluded. . . . Secondly, . . . Canada is only nominally a “single payer” system, with 30% of health care privately financed, and 65% of Canadians holding private insurance for such services as prescription drugs and dental care. [Treatment] . . . not deemed medically [necessary] . . . is “left largely to the free market to determine . . . access, leading to serious inequalities . . .” in critical areas of health care, exemplified by the issue of access to pharmaceuticals. . . . Thirdly, . . . public spending across a range of social services vital to health, such as the provision of water and sanitation, is barely registered as a health-related decision. . . .

Harming the Poor Through Social Rights Litigation: Lessons from Brazil

Octavio Luiz Motta Ferraz (2011)*

The constitutionalization of social and economic rights, although still a contentious issue in some countries, is no longer as controversial and exceptional a practice as it once was. Several constitutions around the world currently recognize, in varying formulations, one or more so-called social and economic rights such as health, education, work, housing, food, and water. But one of the common effects of constitutionalization, the increase of litigation invoking these rights (I shall call it “judicialization”), remains a highly contentious subject. Constitutional theorists disagree on whether it is appropriate for courts to adjudicate these rights, and those who support courts’ involvement disagree about how far adjudication should go (often along a spectrum that goes from procedural to substantive review, or from weak to strong review). I shall call this the “justiciability debate.”

The recent literature in English has overwhelmingly focused on the South African Constitutional Court and has been mostly critical of its perceived deferential approach, which is based largely on the traditional administrative law model of reasonableness review. For those critics, such an approach renders social and economic rights meaningless and represents an abdication by the judiciary of its

* Excerpted from Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEXAS LAW REVIEW 1643 (2011). © 2011 by Texas Law Review Association.

constitutional duty to protect these rights. In their view, once social rights are constitutionalized, courts should determine their content and enforce them assertively without being too worried about a duty of deference to the political branches.

Participants on both sides of the justiciability debate rely mostly on theoretical arguments about the legitimate role of courts in a democracy and on abstract discussions of their institutional capacity. Very little, if anything at all, is said about the actual effects of justiciability on the ground. I believe this is an important omission. In my view, there is no *a priori* legitimate role for courts in a democracy with respect to the adjudication of social and economic rights, at least where these rights have been constitutionalized as rights and not as directive principles of state policy. Courts' legitimate role hinges strongly, in my view, on whether they can do a good job, i.e., on whether they can contribute to the protection of social and economic rights.

. . . I try to shed light on the justiciability debate from this different, more empirical perspective. My focus is the burgeoning, yet much less known, jurisprudence of the Brazilian courts and the empirical data that is gradually becoming available on the actual effects of that jurisprudence. For over ten years now, the Brazilian judiciary, led by its Supreme Federal Court (STF), has consistently adopted an assertive stance in the adjudication of some social and economic rights, particularly education and health. Unlike its South African counterpart, it has not shied away from determining the content of these rights and from issuing mandatory injunctions to compel the state to immediately provide the corresponding goods and services to litigants. This seems to be exactly the role that some social rights supporters want the judiciary to play, and many commentators have indeed applauded the Brazilian court's assertive approach. However, . . . it is at best debatable whether this assertive judicialization enhances the protection of social rights. . . .

Brazil is internationally recognized as a success story in the fight against AIDS due to its state-funded drug distribution program set up by the government in the 1990s. What is less well-known is that many HIV-infected Brazilian citizens were and are given HIV drugs due to court orders and not through federal, state, or municipal government programs, which are very large but not fully comprehensive due to resource limitations. The impact of these court orders is significant. Estimates of the Federal Ministry of Health for the state of São Paulo, the most densely populated state in Brazil with close to 40 million people, show that BRL85 million (approximately USD43 million)—the equivalent of 30% of the overall budget for high-cost drugs and more than 80% of the original budget for AIDS drugs—was spent in 2005 to comply with injunctions ordering the funding of new AIDS drugs not included in the government's health policy for more than 10,000 individuals.

This same pattern . . . has now spread to several other conditions, including diabetes, hypertension, rheumatoid arthritis, cancer, eye diseases, and many others. According to the most recent and still incomplete estimates, there are at least 40,000

lawsuits yearly against the Brazilian government in which claimants rely, almost always successfully, on the right to health, generating growing administrative burdens and significant costs to the already strained Brazilian public health system . . .

It is not clear from the constitutional norm alone which specific treatments, equipment, and medicines individuals are entitled as a corollary to the right to health. These norms are often vague and indeterminate, and the Brazilian constitution is no exception. Here are the two most relevant provisions addressing the right to health:

Art. 6. Education, health, nutrition, labor, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth in this Constitution.

Art. 196. Health is the right of all and the duty of the state and shall be guaranteed by social and economic policies aimed at reducing the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery.

Indeterminateness is, of course, not a fatal obstacle to justiciability. But it does pose an important difficulty for it and for our task of evaluating its effects. . . .

For some time, it was largely agreed that the 1988 constitutional norms recognizing social and economic rights did not have an immediate effect, but were rather “programmatic,” i.e., were aimed at the political branches and depended, for their full efficacy, on the adoption of legislation specifying the details of their implementation. As a consequence, they were seen as inappropriate for direct adjudication by the courts. . . .

[But, s]ince 1997, . . . [the Brazilian judiciary] has been consistently applying a highly assertive and substantive model of review in which the content of the right to health is defined by the judiciary against the will of the political branches and forcefully imposed upon them through mandatory injunctions. . . .

The first, and probably most important, mistake of the majority of Brazilian courts is to interpret the right to health in a way that effectively turns it into an absolute right. . . . [T]he current, overwhelmingly prevalent interpretation regards the right to health as an “inviolable” and “inalienable” right, a “fundamental prerogative,” inextricably linked to the right to life and thus never to be set aside or even limited by “a financial and secondary interest of the state.” Interpreted in this manner, the right to health becomes a right to any health good (treatment, equipment, etc.) that an individual can prove she needs, irrespective of its cost. . . . Not even highly developed countries would be able to afford it. To defend such a right in middle-income countries like Brazil is therefore utterly unreasonable. . . .

If a significant portion of right-to-health cases decided against the state by the Brazilian judiciary concerned elementary, low-cost health goods for the most

disadvantaged groups of the Brazilian population, the expansive interpretation and assertive stance of the courts would be perhaps less objectionable. It is plausible to argue that in a reasonably wealthy but highly unequal country like Brazil (GDP per capita around USD10,000)—where the richest 10% of the population amasses more than fifty times the income of the poorest 10%, where the infant mortality rate of the poorest 20% is nearly three times higher than that of the richest 20%, and where a large part of the population does not yet have access to basic sanitation and primary health care—the public health system should prioritize the basic needs of the most disadvantaged. . . .

On the contrary, there is empirical evidence showing that the vast majority of cases are for high-cost medicines, such as new types of insulin for diabetes and new cancer drugs. The most recent and comprehensive study analyzed all 23,003 lawsuits currently active (with ongoing orders favoring claimants) in the state of São Paulo. It found, confirming previous studies, that 66.1% of the suits involved medication (22.3% of that being insulin for diabetes), and 30.5% involved materials and equipment such as insulin pumps and gastric tubes. Some of the drugs claimed have not been incorporated in the public health system for cost-effectiveness reasons (such as analog insulin), while others are not even available in the Brazilian market. In terms of costs, these latter imported drugs represent the bulk of the expenditure generated by litigation—over 78.4% according to recent estimates by the Ministry of Health.

It is not difficult to guess who benefits from this type of litigation. It would be highly surprising if those families at the bottom of society, where living conditions are worst and health needs are greatest (where basic sanitation is not available and infant mortality is highest), were litigating for these high-tech, state-of-the-art drugs, procedures, and equipment. As expected, there is instead a high concentration of right-to-health litigation in the richest states, cities, and districts of Brazil. In a recent study of litigation against the federal government . . . the ten states with the highest [scores on the United Nations' Human Development Index (HDI)] have generated 93.3% of lawsuits, whereas the other seventeen states with the lowest HDI . . . together have originated only 6.7% of lawsuits. The same pattern occurs in most studies of litigation against states and municipalities.

The explanation for this high concentration of litigation in developed states, cities, and districts is hardly surprising: access to courts and lawyers is beyond the means and reach of most poor Brazilians. . . . The empirical data shows that health litigation in Brazil has clearly not benefited the poor. It has by and large benefited a minority of individuals who are able to access lawyers and courts to force the state to provide expensive treatment that the public health system should not provide under any plausible interpretation of the constitutional right to health. . . .

In fields where social rights (such as housing) are not of interest to the middle classes, not much judicialization takes place. If it did, however, it is very likely that courts would be neither willing nor able to adopt an assertive stance similar to what

they have done in the field of health. This is because enforcement of such rights would demand a radical redistribution of wealth for which there is no current normative or political consensus in Brazilian society. Neither judges, legislators, public administrators, nor probably even the poor would support such radical measures.

Insisting that courts should adopt an assertive role in social rights adjudication in order to protect the poor is therefore unjustified. As much as social rights supporters (like me) might wish to eradicate poverty and inequality from our societies, this depends strongly on the political will to radically change the inegalitarian ethos that supports the current regressive taxation structure and expenditure policies of the state, not on the unlikely will and ability of courts to do so. We should spend more time and effort trying to change that ethos than putting our faith in social rights litigation.

**The Judicialization of Health and the Quest for State Accountability:
Evidence from 1,262 Lawsuits for Access
to Medicines in Southern Brazil**

João Biehl, Mariana P. Socal, and Joseph J. Amon (2016)*

. . . [We analyze] a previously unpublished systematic sample of 1,262 lawsuits seeking access to medicines filed in 2008 against the southern Brazilian state of Rio Grande do Sul. With a population of 11 million people, Rio Grande do Sul has seen a sharp increase in health-related lawsuits in the past decade, rising from 1,126 new cases in 2002 to 17,025 new cases in 2009. Roughly 70% of these lawsuits were for access to medicines. By 2011, the state had the highest number of health-related lawsuits in the country, with 113,953 pending cases.

Our findings demonstrate that the arguments decrying judicialization as a phenomenon that is driven by the rich, private lawyers, and pharmaceutical companies in order to access brand-name and high-cost medicines are, at least in Rio Grande do Sul, largely false. Our research found that right-to-health litigation in this state is a widespread practice that is utilized by low-income plaintiffs including the very poor. . . .

[J]udicialization is widespread in both metropolitan and rural areas, and . . . individuals who filed lawsuits seeking access to medicines were predominantly of lower socioeconomic status. . . . Around half of the plaintiffs were either retired (32%) or unemployed (21%). Manual or service sector workers, including farming and domestic workers, made up 15% of the sample. Less than 5% of the plaintiffs were professionals, or administrative or technical workers.

* Excerpted from João Biehl, Mariana P. Socal, and Joseph J. Amon, *The Judicialization of Health and the Quest for State Accountability: Evidence from 1,262 Lawsuits for Access to Medicines in Southern Brazil*, 18 HEALTH AND HUMAN RIGHTS JOURNAL 211 (2016).

Although we did not have access to data on income, the plaintiffs' legal representation offers indirect evidence of their economic status. . . . [M]ore than half of the plaintiffs were represented by the Public Defender's Office, which, according to Brazilian law, provides free legal assistance to people classified as low-income Brazilian law also allows for individuals without the ability to pay to request that the state pay legal fees. In 91% of the lawsuits . . . plaintiffs requested this support. . . .

Our study found that the majority of patients requested low-cost drugs that were part of governmental drug formularies and that should have been publicly available. . . . [T]he plaintiff-reported median monthly cost of treatment was US\$185 (range: US\$10–US\$89,172). . . . Overall, a minority of lawsuits drove most of the costs: 1.6% percent of the lawsuits (20 cases) had monthly costs above US\$10,000 and 0.8% percent (10 cases) had monthly costs above US\$30,000. . . .

[O]ur study also found that the majority of plaintiffs initially tried to secure their treatments through local administrative channels, and that they provided proof of medical need once they brought their claims to court. . . .

In addressing a dysfunctional health system that fails to provide for their needs, low-income patients face the option of exiting the public system (seeking private sector alternatives), or voicing concerns through cumbersome and slow political and participatory mechanisms like voting or community councils. Our study shows that through right to health litigation, some Brazilian citizens are finding new ways of concretizing voice through a process of entering justice, acting as political subjects to hold the state accountable, and exposing the realpolitik of executive and legislative bodies. As subjects who cannot resort to the health market but expect, as citizens, that the state care for them, they are using judicialization to simultaneously demand services and to make the system respond to their expressed needs and its own failures. . . .

**Right to Health Litigation in Brazil:
The Problem and the Institutional Responses**
Daniel Wei L. Wang (2015)*

. . . Right to health litigation is mainly driven by individual claims for new health technologies, especially drugs, which have not been incorporated in the national public health system's (SUS) pharmaceutical policy. The percentage of cases involving claimants demanding drugs not incorporated in the SUS's pharmaceutical policy is high: 80.6 per cent in the state of Rio de Janeiro and 92.5 per cent in the city of Rio de Janeiro. Other articles, instead of analysing the percentage of lawsuits in which a non-incorporated drug was demanded, have assessed the percentage of non-incorporated drugs among all drugs judicially claimed—62.2 per cent in the state of

* Excerpted from Daniel Wei L. Wang, *Right to Health Litigation in Brazil: The Problem and the Institutional Responses*, 15 HUMAN RIGHTS LAW REVIEW 617 (2015).

Santa Catarina; 68 per cent in the city of Florianopolis; 77 per cent and 66.2 per cent in the state of São Paulo; and 38 per cent in the city of São Paulo. . . .

[Some studies instead count] the number of non-included drugs among all those judicially claimed[,] . . . [but this] underestimates the importance of claims for non-incorporated drugs as the main driver of right to health litigation. In many cases, patients demand more than one drug. . . . [I]n many cases, patients [also] went to court claiming drugs that belong to the pharmaceutical policy because they were prescribed for off-label or off-protocol use. The former means the prescription of a drug for unapproved clinical indications or to unapproved subpopulations; the latter is the prescription of drugs that are incorporated in the SUS to patients who do not meet the clinical criteria established by clinical protocols and guidelines. . . .

There is also a small percentage of litigation claims concerning drugs that are not registered with the Brazilian National Health Surveillance Agency (ANVISA), the agency responsible for barring unsafe and unproven drugs for use in the country. In cases where courts order the provision of drugs not registered with the ANVISA or where they authorize off-label use, the court is ordering the provision of treatments of which the safety and effectiveness has not been evaluated or approved by the agency.

In these cases, besides the risk to patients, the cost of providing these treatments can be very high. For example, in the state of São Paulo, R\$40 million (around US\$19 million) was spent to comply with judicial decisions ordering drugs for cancer from 2005 to 2006. However, 17 per cent of this amount was spent on drugs without scientific evidence that they could bring any benefit to patients who were claiming them, either because the drug was not registered with the ANVISA or because it was not recommended for the claimants' condition according to the existing clinical guidelines and protocols (off-protocol use). . . .

The safety and effectiveness of treatments should be the first things to be considered when designing healthcare policies. However, there is another element that cannot be neglected: cost-effectiveness. . . . Concerns about courts' lack of institutional capacity and the limits of the adjudicative process are some of the most common criticisms of courts deciding on the provision of welfare benefits via social rights adjudication. . . . On the other hand, those who advocate for a more active role of courts in social rights adjudication affirm that courts, when protecting civil and political rights, also deal with complex issues that may be very similar to those raised by social rights adjudication. Thus, the judicial protection of social rights creates challenges for courts that are not so different from those they commonly face. . . .

The response to right to health litigation advanced by the . . . [Supreme Federal Court (STF)] and the . . . [National Council of Justice (CNJ)] can be contextualized in this debate about the capacity of courts and of the adjudicative process to decide properly on the provision of welfare policies. Both institutions recognize that courts

have institutional limitations and therefore can only be secondary decision-makers on the issue of healthcare provision. . . .

The STF is the last court of appeal in the Brazilian judiciary and the constitutional court. It held a public hearing in 2009 with over 50 experts (including healthcare professionals, public authorities, legal scholars and civil society representatives), heard over a period of six days, to supply the STF with ‘technical, scientific, administrative, political and economic’ information related to the right to health litigation phenomenon.

The public hearing was motivated by the acknowledgement that litigation has a significant impact on the public health system and that the court needed support from different specialists and stakeholders to make better decisions. . . . Initiatives like public hearings can be seen as a device to defend more activist courts against critics concerning their institutional capacity, but also as a tool for helping them to implement their potential for enhancing democracy and participation. Accordingly, there is an expectation that courts can be a forum to ensure that norms are created and applied through a ‘collective and inclusive discussion.’ . . . [One] outcome of the public hearing discussed here was the establishment of a test to define those duties citizens can immediately demand from the SUS. [The test sets out criteria to distinguish between cases where courts should defer to SUS and where courts should make demands of SUS.] . . .

The first criterion establishes that the government cannot deny citizens treatments already incorporated in the SUS, namely, those on the official lists or recommended by clinical protocols and guidelines. If the treatment being claimed has not been incorporated, then there is a duty to provide it only where it has been registered with the National Health Surveillance Agency (ANVISA); there is no adequate alternative treatment provided by the SUS; and the treatment has been available in the market for a long time. . . . Even though this test would rule out the provision of treatments without evidence of effectiveness and safety, or those that are not superior to the existing alternatives, it still ignores policy considerations and allows the adjudication of the right to health as an individual trump. . . .

The CNJ is part of the Brazilian judicial branch, but has no judicial power and cannot review judicial decisions. It is an agency responsible for regulating the administrative and financial activities of the judiciary and for the enforcement of judges’ professional duties. . . . Following the public hearing held by the STF, the CNJ issued Recommendation 31/2010 Recommendation 31/2010 ‘recommends to courts the implementation of measures aiming at supporting judges and other legal professionals in order to assure better solution for the judicial claims related to healthcare.’ It affirmed that the main problems caused by right to health litigation in Brazil were due to the lack of clinical information available to judges in the claims for drugs not approved by the ANVISA. It also stated that the health authority’s managerial capacity, the existing public policies, the organization of the SUS and the

need to guarantee the sustainability and manageability of the SUS all have to be taken into consideration by courts.

Therefore, the CNJ recommended that Brazilian courts:

- a. make technical support from doctors and pharmacists available to assist judges in assessing the clinical evidence presented by the litigants in healthcare-related cases;
- b. advise judges to analyse the cases based on complete and comprehensive information; to avoid the provision of drugs not registered with the ANVISA or experimental drugs; and to consult, whenever it is possible, health authorities before an interim decision be made;
- c. include health law legislation as a subject to be examined in the public entrance exams for judges; and
- d. take judges to visit public health units. . . .

The CNJ . . . innovated in trying to build courts' institutional capacity to decide on the provision of health treatments. . . . [J]udges with more information will be able to filter out claims based on poor evidence. Moreover, the more courts know about healthcare policies, the more wary they should be in reviewing the health authorities' rationing decisions because they will be given a broader perspective on the problem than one that is confined to their decision on a claim for the fulfilment of an individual need. . . . Secondly, by building courts' institutional capacity the CNJ tries to create better conditions for judges to second-guess health authorities' decisions concerning the provision of health treatments. . . .

However, it is questionable whether better trained judges assisted by doctors and pharmacists will be able to acquire and evaluate factual information to make sound policy decisions. Even if we reduce these decisions to a mere medical/scientific issue, it would be unrealistic to expect that a group of doctors and pharmacists will have the necessary diversification of expertise to be able to make a comprehensive scientific assessment of all the treatments that are being litigated for. . . .

Priority setting involves problems of social fact . . . , polycentricity . . . , politics . . . and morality . . . that cannot be reduced to a technical decision that can be objectively made by a body of experts attached to courts. . . .

**Colombia—Judicial Protection of the Right to Health:
An Elusive Promise?**

Alicia Ely Yamin, Oscar Parra-Vera, and Camila Gianella (2011)*

. . . Although [through 2010] there has been nominal compliance with many of the orders in . . . [Judgment T-760 of 2008 (T-760/08)], from the outset the Uribe administration demonstrated reluctance to implement [it] At times the administration made arguments based upon lack of resources; at others it stated that the time line for implementation was unrealistic. . . .

[T]he most telling governmental response to T-760/08 was then president Uribe's "Declaration of a Social Emergency" in December 2009. Among other reasons, the government alleged that the reimbursement costs for non-POS care were bankrupting the system. Pursuant to this declaration, the government moved swiftly to issue a series of decrees that circumvented any popular discussion whatsoever. Some of these decrees were aimed at injecting much-needed resources into the health system through centralizing reimbursements, eliminating fraud and corruption, and imposing new taxes on beer, cigarettes, and gambling However, efforts to control costs notably did not attempt to re-regulate the pharmaceutical industry. Nor were emergency powers used to attempt to restrict the irregularities and arbitrary behavior of the [Health Promoting Entities (EPS), which administer health coverage].

In total, the government issued thirteen decrees that implied a substantial reform to the health system, while circumventing public debate as called for under T-760/08. The decrees created a furor among both patient and medical associations, as well as the general public. By February 2010, mass protests were taking place across Colombia using the slogan "health is not a favor; it's a right." Importantly, these protests included people who were not typical social dissidents, such as physicians and members of the Catholic hierarchy.

If the initial implementation of the judgment seemed to entrench rather than destabilize the steep asymmetries of power in the Colombian health-care context, the government's declaration of a state of social emergency changed the dynamic for a variety of interest groups—and even for the legislature and the Court itself. Indeed, one effect of T-760/08 may well have been to create what Charles Sabel and William Simon refer to as "destabilization rights":

claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.

* Excerpted from Alicia Ely Yamin, Oscar Parra-Vera, and Camila Gianella, *Colombia—Judicial Protection of the Right to Health: An Elusive Promise?*, in *LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH* 103 (Alicia Ely Yamin and Siri Gloppen eds., 2011).

For the first time, the right to health became a matter of broad public debate in Colombia, and the design and feasibility of the entire health system were being actively discussed. . . .

In April 2010, the Court declared the emergency decrees unconstitutional while allowing a provision relating to sin taxes to remain in effect temporarily. The Santos administration, which assumed power in August 2010, faced health system reform as one of the first major issues it had to tackle, given the financial crisis within the system. . . .

* * *

In December 2011, the Colombian government updated the POS as required by T-760/08. In that decision, the Court had also focused on the fact that the POS for the poor (the subsidized regime) covered half the health services covered by the POS available for middle- and upper-income households (the contributory regime), and held that the difference violated an aspect of health rights—equal protection of the right of health. The Court ordered the government not to continue the inequality between the subsidized plan and the contributory plan; in May 2012, the differences between the two plans ended. As of 2014, coverage extended to 95% of Colombians.

Nevertheless, after the Court struck down emergency decrees aimed at subordinating the enjoyment of the right to health to the availability of resources in a special fund in 2009 (a decision discussed in the Yamin, Parra-Vera, and Gianella reading), right-to-health litigation continued. The government in turn continued to struggle to meet the requirements of T-760/08. In response, in 2013, the government proposed and Congress enacted a statutory law to overhaul the healthcare system under the premise that the right to health was a fundamental right and that equality in access to medical services should be guaranteed.

Statutory laws, which regulate a fundamental right in Colombia, are *ex officio* sent to the Constitutional Court for constitutional review before such laws take effect. With some changes, the Court in Judgment C-313 of 2014 approved the reform, which was enacted in 2015 as Law 1751. As Lamprea, Forman, and Chapman describe, the law's central change was to switch the health benefit plan from a list of included services and medicines into a plan that covered all authorized services available in the country; an exception was provided by listing non-essential medical services that were not covered by public funds.* Examples included procedures or medicines that were cosmetic, sumptuary, experimental, unauthorized by the competent authority, provided overseas, or that lacked scientific evidence concerning safety, clinical efficacy, or clinical effectiveness.

* Everaldo Lamprea, Lisa Forman, and Audrey R Chapman, *Structural reform litigation, regulation and the right to health in Colombia*, in *COMPARATIVE LAW AND REGULATION*, at 347 (2016).

In Judgment C-313, the Constitutional Court found permissible Law 1751's consideration of financial sustainability in the design and reform of the health system and in the authorization of new medicines (including cost-effectiveness analysis), but the Court prohibited the use of financial considerations as a reason to deny costly treatments in any particular case. After the election of June 2018, the new president spoke about the importance of ensuring that vulnerable people in rural areas had access to medicines.

Essay on Decision T-760 (2008)

Alicia Ely Yamin*

. . . 36. The far-reaching impacts of the decision could only be seen after 2010, when the Santos Administration came to power. In 2012, the Ministry of Health issued a decree unifying the benefits packages. In 2012 and 2013, the Ministry of Health also adopted more robust regulation of pharmaceutical prices.

37. A Statutory Framework Law (Law 1751 (2015) (Colom)) that places the right to health, with its inter-related aspects under international law, at the centre of the health system was passed by Congress in May 2014. The law was reviewed and declared to be constitutional by the Court in Judgment C-313/14, with modifications. In C-313/14, the Court provided for greater deference to medical autonomy; limited restrictions on care by administrative mechanisms and bodies; stipulated that the system be based on a presumption of inclusions rather than exclusions; and asserted the need for comprehensiveness and continuity of care. . . .

40. T-760/08 challenges accepted wisdom in legal scholarship, in that it bridges both individual and structural remedies, and blurs facile taxonomies of legal functions and impacts, as it simultaneously: resolved specific disputes, oriented social norms, and led to restructuring of institutions.

41. The first 16 orders of T-760/08 addressed concrete cases and directly affected the effective enjoyment of the right to health by individual litigants, or the conditions necessary to ensure that effective enjoyment of rights ('goce efectivo de derechos'). More structurally, Decision T760/08 was intended to impact not merely service utilization, but also equity, accountability, regulation and oversight of the system; and even public perceptions of entitlements to health. . . .

43. First, although the high use of tutelas for health persists, the judgment transformed the claims that are being made. There has been a clear shift from claims for access to medicines and treatments, to claims concerning ancillary services and devices and the like.

* Excerpted from Alicia Ely Yamin, *Essay on Decision T-760 (2008)*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Rainer Grote, Frauke Lachenmann, and Rüdiger Woldrum eds., 2017). By permission of Oxford University Press, USA.

44. Second, while there is evidence that marginalized groups still face exclusion from the health sector, the unification of regimes increased equitable access to care, and also had a substantial budgetary impact, since the POS-S originally had a capitation rate set at approximately one-half that for the POS-C.

45. Third, the Santos administration has responded to T-760/08 by increasing regulatory oversight regarding pharmaceuticals and EPSs. For example: . . . in 2012 a National Pharmaceutical Policy that likely would not have happened but for the judgment

46. An important impact of the judgment was the explosion in legislation and other laws as a result of the executive branch's strategies to implement the judgment and restrain the financial instability of the system. Among them were:

- The 13 social emergency decrees issued by Uribe's government.
- Law 1393 (2010) (Colom) that includes measures to generate income for the health system.
- Law 1438 (2011) (Colom) that inter alia aims at promoting fiscal sustainability, and created National Health Observatory.
- Law 1608 (2013) (Colom) that includes measures for the financial solvency of the health system
- Law 1751 (2015) (Colom) that enshrines health as a fundamental right, and subsequent regulations.

47. Without question, the principal legislative and public policy impact of the judgment was the enactment of Law 1751 of 2015, which made Colombia the first country in the world to adopt a Statutory Framework Law on Health organized around the right to health [A]mong the most important regulations issued to implement the new law are Decrees 3951 (2016) (Colom), 5884 (2016) (Colom) and 0532 (2017) (Colom) which establish procedures for accessing services and medications, as well as monitoring and oversight of costs, and analysis of information related to those services and technologies excluded under the new regime Mi prescripción ('mi-PRES'). Nonetheless, at the time of writing, many financing, priority-setting and regulatory aspects have yet to be addressed, and it remains unclear what effect the system of exclusions will have on the intensity of litigation. . . .

49. After T-760/08, civil society groups were quick to appropriate the definition of health as a fundamental right, which led civil society organizations and academia to focus on institutional and legal reforms to guarantee it. On the other hand, the 'structured participation' called for in the judgment has arguably co-opted more radical social mobilization around opposition to the underlying health system model. . . .

JUDICIAL ENGAGEMENT WITH THE POLITICAL ECONOMY OF MEDICINES

The structural critiques of judicial intervention in healthcare services and medicines arise against the backdrop of rapidly rising drug prices. Some critics see courts as ill-equipped to make assessments of the trade-offs between access to costly drugs and constrained healthcare systems. A second, more innovative set of critiques sees this problem as one generated not just by courts' enthusiasm to intervene, but also the inability of human rights law as a movement and/or as law to grapple with deeper structural inequities. The concern is that, absent a consideration of the market conditions that give rise to high drug prices, universal access to medicines will remain prohibitively costly.

How ought such analyses of market forces affect our conceptions of the judicial role in enforcing socioeconomic rights, especially rights to healthcare and medicines? Human rights organizations have advised countries to take steps to minimize the impact of existing intellectual property regimes, such as the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other free trade agreements. The United Nations Special Rapporteur, for example, has found such property regimes "have had an adverse impact on prices and availability of medicines, making it difficult for countries to comply with their obligations to respect, protect, and fulfil the right to health."^{*} The Special Rapporteur has advised middle- and low-income countries to make use of so-called "flexibilities" within these regimes that allow countries to adjust enforcement based on their "economic and development needs." Courts too have begun to take cognizance of these political economy questions in the context of access to medicine and have taken up the ways in which the enforcement of intellectual property and patent laws may sit in tension with constitutional guarantees to socioeconomic rights.

Ochieng and Others v. Attorney General High Court of Kenya at Nairobi Petition No. 409/09 (2012)

[Before Judge Mumbi Ngugi:]

[In 2008, Kenya passed the Anti-Counterfeit Act. The Act identified its aims as protecting the health of Kenyans by preventing the trafficking of potentially dangerous counterfeit drugs. Petitioners, Kenyan citizens living with HIV/AIDS who used a daily generic drug to treat their condition, challenged the "anti-counterfeiting" law for failing to serve public health ends. They argued that its definition of "counterfeit" was

^{*} Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Human Rights Council (11th Session), United Nations General Assembly, A/HRC/11/12, at *28 (March 31, 2009), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.12_en.pdf.

too broad, targeting not only products that were substandard or violated trademarks, but also generic drugs that violated patents. The petitioners argued that the law was irrational because its broad reach resulted in bans of safe drugs that were in violation of patents, including patents of other countries.]

. . . 44. In considering the issues that arise in this petition, it is important to bear in mind the socio-economic context in which they arise.

45. There can be no dispute that HIV/AIDS constitutes a serious threat to the health and life of the petitioners in particular but to others within the general public who may be infected by the virus. This is particularly so with regard to children and women. . . . [As one amicus brief noted:]

‘Approximately 110,000 children are born with HIV as a result of mother to child transmission of HIV. Scientists have accumulated significant research-generated evidence to show that with appropriate and affordable treatment this could be cut by between 30 and 50%.’

46. The state also recognises the challenges that HIV poses. In the Kenya National Aids Strategic Plan 2004-2009 that was made within the same period that the Anti-Counterfeit Act was enacted and commenced operation, the state notes that HIV/AIDS continues to be a major challenge to the country’s socio-economic development. It notes that since the first case was discovered in the country in 1984, over 1.5 million people have died due to AIDS-related illnesses. This has resulted in 1.8 million children left as orphans. The state notes, however, that a combination of factors, including antiretroviral therapy, have led to a decrease in the incidence and the numbers of those dying from HIV/AIDS. . . .

50. In light of the above statistics, it is not hard to see the socio-economic implications of HIV/AIDS. It is now commonly acknowledged that without medical intervention and treatment, a person infected with HIV ultimately succumbs to the opportunistic infections that occur as a result of the compromised immune system. Many of those who are infected with the virus are, like the petitioners, unemployed and therefore financially incapable of procuring for themselves the anti-retroviral branded medication that they need to remain healthy. They are therefore dependent on generic anti-retroviral medication which is much cheaper and therefore more accessible to them.

51. . . . [U]ntil the passage of the Industrial Property Act in 2001, . . . [g]eneric anti-retroviral drugs were not available in Kenya as the existing legislation did not allow parallel importation of generic drugs and medicines. . . . It is on the basis of this legislation that availability and access to anti-retroviral drugs has increased and greatly enhanced the life and health of persons such as the petitioners who have been living with HIV/AIDS.

52. It is against this context that any legislative measure that would affect accessibility and availability of anti-retroviral medicines must be viewed. If such measure would have the effect of limiting access, then such measure would ipso facto threaten the lives and health of the petitioners and others infected with HIV and . . . [AIDS], and would be in violation of their rights under the Constitution. . . .

56. In my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life is in jeopardy, and where one has an illness that is as debilitating as HIV/AIDS is now generally recognised as being, one's inherent dignity as a human being with the sense of self worth and ability to take care of oneself is compromised. What may not be agreed upon by the parties is the meaning and implication of the right to health, and the nature and implication of the positive obligation that recognition of this right in the Constitution and international treaties places on the state. . . .

63. The 'socio-economic factors that promote conditions in which people can lead a healthy life' imply, in my view, a situation in which people have access to the medication they require to remain healthy. If the state fails to put in place such conditions, then it has violated or is likely to violate the right to health of its citizens. . . .

66. The state's obligation with regard to the right to health therefore encompasses not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines. Any legislation that would render the cost of essential drugs unaffordable to citizens would thus be in violation of the state's obligations under the Constitution.

67. The crux of the dispute before this court is whether, by enacting [certain sections of] . . . the Anti-Counterfeit Act, the State is in violation of its duty to ensure conditions are in place under which its citizens can lead a healthy life

78. . . . [T]he definition of 'counterfeit' in . . . the Act is likely to be read as including generic medication. I would therefore agree . . . that the definition 'would encompass generic medicines produced in Kenya and elsewhere and thus . . . adversely affect the manufacture, sale, and distribution of generic equivalents of patented drugs. This would affect the availability of the generic drugs and thus pose a real threat to the petitioners' right to life, dignity and health under the Constitution.' . . .

82. Clearly, . . . the tenor and object of the Act is to protect the intellectual property rights of individuals. This explains the rights granted to the intellectual property holder to complain about suspected violation of Intellectual property rights through trade in counterfeit goods Had the primary intention been to safeguard

consumers from counterfeit medicine, then the Act should have laid greater emphasis on standards and quality. . . .

84. However, the right to life, dignity and health of people like the petitioners who are infected with the HIV virus cannot be secured by a vague proviso in a situation where those charged with the responsibility of enforcement of the law may not have a clear understanding of the difference between generic and counterfeit medicine. The primary concern of the respondent should be the interests of the petitioners and others infected with HIV/AIDS to whom it owes the duty to ensure access to appropriate health care and essential medicines. It would be in violation of the state's obligations to the petitioners with respect to their right to life and health to have included in legislation ambiguous provisions subject to the interpretation of intellectual property holders and customs officials when such provisions relate to access to medicines essential for the petitioners' survival. There can be no room for ambiguity where the right to health and life of the petitioners and the many other Kenyans who are affected by HIV/AIDS are at stake. . . .

86. While such intellectual property rights should be protected, where there is the likelihood, as in this case, that their protection will put in jeopardy fundamental rights such as the right to life of others, I take the view that they must give way to the fundamental rights of citizens in the position of the petitioners. . . .

88. It is incumbent on the state to reconsider the provisions of [certain sections] . . . of the Anti-Counterfeit Act alongside its constitutional obligation to ensure that its citizens have access to the highest attainable standard of health and make appropriate amendments to ensure that the rights of petitioners and others dependent on generic medicines are not put in jeopardy. . . .

* * *

In 2014, the National Assembly of Kenya passed several amendments to the Anti-Counterfeit Act. None directly addressed the potential application of the Act's restrictions to generic pharmaceuticals, but the amendments did specify that only violations of Kenyan patent law—rather than patents of other countries, as in the original version—would qualify a drug as counterfeit.

Human Rights Are Not Enough

Samuel Moyn^{*}

. . . [W]ithout reflecting on why human-rights movements have been able to coexist so comfortably with neoliberal regimes, there is no way to redirect our politics toward a new agenda of economic fairness.

^{*} Excerpted from Samuel Moyn, *Human Rights Are Not Enough*, THE NATION, March 16, 2018.

In the 19th century, the idea of liberties as inherent to an individual was strongly linked to classical liberalism and the rule of markets. This meant that a rights-based rhetoric was mainly used to justify free contracts and private property. It's no wonder Marx concluded that human rights often served as an apologia for the narrow protections of capitalists. . . .

[When] neoliberalism came, . . . [h]uman-rights law and politics never reverted to the narrow protection of contracts and property, but they were lifted out of their midcentury alliance with redistributive politics and condemned to a defensive and minor role in pushing back against the new political economy.

The classic examples of global rights activism, organizations such as Amnesty International and Human Rights Watch, dropped the emphasis on economic and social rights proclaimed by the UN's Universal Declaration and converted the idea of human rights from a template for citizenship into a warrant for shaming state oppressors. And while human-rights movements gingerly took on economic and social-rights advocacy after the Cold War, they never attacked the hierarchy of wealth erected by neoliberalism. With only rare exceptions, material equality is not something that human-rights law and movements ever set out to defend.

The results have been grievous and spectacular. Great advances were made when it came to establishing a sense of global responsibility and status equality, but at the high price of economic fairness at every scale. Human-rights law lacked the norms, and human-rights movements the will, to advocate for a serious redistributive politics. Even in theory, with their focus on ensuring a bare floor of material protection for individuals in a globalized economy, human-rights movements did nothing to prevent the obliteration of a wealth ceiling. With the decline of the welfare state, human-rights movements both failed to attack the victory of the rich and struggled to cope with the poverty of the rest. . . .

That human-rights ideals have spread across the world in tandem with neoliberalism does not mean we should blame—let alone ditch—those high ideals. Instead, it means that human rights only makes sense as one partner in a new politics of fair distribution.

Today's galloping inequality has helped drive the rise of populist leaders, who have hardly been friends of human rights. It is tempting in response to double down on human-rights strategies. And it is honorable to climb the ramparts to indict the grim outcomes when regimes slide into evil, and to keep hope alive for the weak and vulnerable living in penury. Indeed, despite the fact that human rights have accompanied and helped prettify neoliberalism, the lesson is surely not that activists should stop denouncing repression or withdraw their pressure on behalf of people living in abject circumstances.

Human-rights activists do need to think twice, however, about the circumstances of their success in defining good and evil so powerfully around the globe. As for the rest of us, we must recognize the limits of human rights, and admit *our own failure* to contribute bold visions and projects outside of the rights framework. Human-rights movements were latecomers to the era of distributional concerns. Even when they did take an interest, they set a low bar, focusing only on saving the worst off from destitution. . . .

Inequality is a problem that human-rights movements are unlikely to solve on their own. Advocacy organizations today barely make a dent in the political evil, and they lack the features of unions and other local actors that have attacked inequality successfully in the past. But we can keep the benefits of the human-rights movements of the past 40 years while rejecting neoliberalism. . . . A larger community within which egalitarian agitation can emerge may not be part of the history of the human-rights movement, but it must become its future. . . .

The Right to Medicines in an Age of Neoliberalism

Amy Kapczynski*

. . . Today, many countries in the world have embraced socioeconomic rights in their constitutions, and more than a few have interpreted these rights to give very strong remedies to individuals seeking medicines. . . . The trend is most prominent in Brazil and Colombia, but not limited to these two countries. Courts in Argentina, Costa Rica, India, and South Africa have also ordered governments to provide medicines to individuals to vindicate rights to health and life. [The 2002 decision of *Minister of Health v. Treatment Action Campaign (TAC)* provides a prominent example. The Constitutional Court of South Africa found that government restrictions on the availability of Nevirapine—a drug used to prevent the transmission of HIV/AIDS from mothers to children—unconstitutionally violated the right to access healthcare services, despite legitimate government interests in testing the drug’s efficacy.]

For critics and defenders of human rights both, these cases are an important instance. They construct a serious, judicially enforceable right—a socioeconomic right—that has taken root in several countries and provided life-sustaining medicines to tens of thousands, even millions of people. They are an aspect of the broader access to medicines movement, the one that is most clearly within the domain of human rights. If these cases succeed in *some* meaningful sense, it would be hard not to count them as a great achievement for the cause. But what in fact are their implications?

There is today sharp debate in human rights circles about precisely this question, mostly focused on the Brazilian and Colombian experiences. Critics like

* Excerpted from Amy Kapczynski, *The Right to Medicines in an Age of Neoliberalism*, HUMANITY (Forthcoming 2018).

Octavio L. Motta Ferraz argue that the right to medicines cases in Brazil “almost inevitabl[y]” undermine health equity because courts demand that medicines be provided regardless of their cost, but health budgets are necessarily limited. The lion’s share of the benefits of these cases, he argues, will accrue to those who litigate, who are unlikely to be the very poorest. Similar arguments have been made about the Colombian cases. This critique echoes a broader one made by Daniel M. Brinks and Varun Gauri: social rights litigation in general, they contend, benefits those in the “middle of the social spectrum” because the poor have less access to courts.

The response . . . has been twofold. Some scholars have sought to refute the narrow empirical claim by showing that a substantial number of litigants in at least some settings are poor. Other defenders of the right to medicines point out that these cases can effect other institutions, and at least sometimes prompt reforms that benefit a broader class than the specific litigants alone. Scholars have also argued that the implications of these cases would be far more progressive if courts were to embrace a less individualistic model of rights enforcement [B]roader engagement with health policy and remedial use of structural injunctions would go some way to rendering more equitable the implications of justiciable socioeconomic rights.

So framed, the debate about right to medicines cases has failed to engage a foundational aspect of their logic: the political economy of medicine that they assume. These cases operate against a background of market ordering and intellectual property rights that they typically neither see nor disturb—one that is profoundly shaped by both domestic law and international trade law. Since 1995, a core World Trade Organization treaty, the “TRIPS” Agreement, has required patents on medicines.* TRIPS also allows members to override patents, using “compulsory licenses” (which give patentees royalties instead of exclusive rights), but these have been complex to use, and wealthy countries have retaliated against countries that have sought to use these measures.

Overriding patents can substantially reduce the cost of medicines, because the expense of a medicine rarely is attributable to its cost of manufacture. New hepatitis C medicines, for example, cost around \$100 per course of treatment to make, but have a list price of \$84,000 in the United States, where patents preclude competition. It is the right to exclude, granted by states and enforced by courts, that is the overwhelming determinant of the budgetary implications of the right to medicines, as empirical evidence from Brazil and Colombia both affirm.

* Article 27.1 of the World Trade Organization’s Trade-Related Aspects of Intellectual Property Agreement (TRIPS) provides:

. . . [P]atents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. . . . [P]atents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

Unfortunately, patent rights do not ensure commensurate investment in new medicines for the global poor. Patents drive investment via high prices, but the poor cannot pay such prices. The global market is highly concentrated in the North (all of India is 1% of the world's pharmaceutical market), and high . . . [research and development] costs and barriers to entry have focused the industry on the regions where the greatest profits are available. This is why CEOs of major pharma companies admit that prices in the developing world have almost no implications for [research and development]. As the CEO of Bayer recently put it, when addressing the implications of a decision in India to compulsorily license a Bayer cancer drug: "Is this going to have a big effect on our business model? No, because we did not develop this product for the Indian market. . . . [W]e developed this product for Western patients who can afford this product, quite honestly."*

Put starkly, the existing political economy of medicines, constructed by the national and international law of intellectual property, fails *by design* to provide the world's poor with affordable medicines: it mandates that countries adopt systems for the development and distribution of medicines that are market-led, and so prioritize according not to need but rather to "market demand"—demand that the most vulnerable have no means to display.

A robust right to medicines layered atop this regime is plausibly regressive: it places significant strain on healthcare budgets, likely transfers wealth from the global South to North, and provides medicines only on terms dictated by industry—in this instance, one of the most profitable in the world. This right to medicines, in short, takes a neoliberal form. It mandates discrete individual relief, but rarely sees, much less disrupts, the underlying legal structures that have made many medicines profoundly inaccessible, particularly to the poor. . . .

Is this the best that we can imagine? Or might human rights claims in this context also have more liberatory potential? There is indeed another possible version of the right to medicines. . . . Tracing a series of cases and arguments built by access to medicines activists and their supporters, we can see that courts or other human rights bodies might interpret the right to health not to merely *permit* but to *encourage* or even *require* states to intervene to promote a more just political economy. With a few notable exceptions, though, courts have resisted such claims, revealing the difficulties of building out a vision of human rights that actively invites a more just political economy of medicines. [For example, activists in Colombia brought a claim arguing that access to an HIV/AIDS medicine, Kaletra, could not be systematically assured (given how many did not have the resources to litigate), without a compulsory license that authorized affordable generics. The executive had refused to act, and the move was permitted under TRIPS, but their claim was nonetheless dismissed by a

* In the global North, patents are key to Research and Development allocations, but there is increasing interest in alternative modes of Research and Development (from government grants to financial inducement prizes) that might produce better medicines that are also more affordable to patients.

Colombian court. Similar cases have been brought in Brazil, where they have languished without decision for close to a decade.] . . .

As a domain of law, human rights cannot be neutral on the question of neoliberalism: as the legal realists recognized long ago, law constructs markets, including by constructing them as beyond the reach of certain kinds of decisions by courts But human rights as law is also not static. It is a terrain of struggle, as this example shows in vivid detail. In the end, the present and future that we make is not produced by human rights. Rather, it is produced by us. . . .

F. Hoffmann-La Roche Ltd. and Anr. v. Cipla Ltd.

High Court of Delhi at New Delhi

148 (2008) DLT 598, MIPR 2008 (2) 35

[Judgment of Mr. Justice S. Ravindra Bhat:] . . .

1. The Plaintiffs in this suit seek [a] permanent injunction restraining infringement of their patent rights in the drug Erlotinib, rendition of accounts, damages and delivery up of the infringing goods. . . .

2. . . . It is claimed that this drug marked a major breakthrough and innovation in the treatment of cancer; it is used to destroy some types of cancer cells while causing little harm to normal human cells. . . .

3. . . . It is alleged that . . . the Plaintiffs had entered into a Development Collaboration and Licensing Agreement, through which the first Plaintiff has a license to use, sell and offer for sale, the licensed products including the drug Erlotinib marketed as Tarceva. It is also submitted that the first plaintiff is further licensed and authorized to cause enforcement of any intellectual property rights for any of their products. The first Plaintiff is actively engaged in the manufacture, marketing and sale of the innovative drug Tarceva in various countries including India and it introduced Tarceva in India sometime in April 2006.

4. The Defendant, CIPLA, is the second biggest pharmaceutical company in India. . . . In December 2007 and January 2008, various news reports appeared in the print as well as the electronic media about the defendant's plans to launch a generic version of Erlotinib in India and also for exporting it to various countries. . . .

5. . . . It is submitted that this innovation is duly protected under the provisions of law and no person except those authorized to exercise the legal rights associated with the patented drug can be allowed or permitted to copy/simulate and/or re-create it in any manner or in any other name. . . .

13. . . . [T]he plaintiff does not manufacture the product in India. Though it applied for patent in 1996, it got an approval for importing and selling the drug only in

December 2005. Even now, the product, due to its high pricing, is not easily available on a commercial scale in India. . . .

14. It is alleged that apart from the defendant, it is in the interest of the patients that no injunction should be granted. The plaintiff's capsule costs . . . [\$70] per tablet and the equivalent tablet of the defendant costs . . . [\$24]. Thus, a month's dosage for a patient undergoing treatment for cancer is . . . [\$2050] whereas the equivalent cost of the defendant would be . . . [\$677]. It is alleged that in the area of life saving drugs, it [is] in the public interest of the general public and patients suffering from diseases like cancer that medicines are made available at cheap and affordable prices so long as the defendant is not a 'fly-by-night' operator. In such cases, an injunction ought not to be granted due to the overwhelming interest of society. . . .

41. . . . It was contended that . . . [i]f the defendant is restrained from manufacturing and marketing their anti-cancer drug in the market it would cause great prejudice to public health and public interest and create a grave public health crisis with disastrous consequences. In such cases, where the balance of convenience is heavily tilted towards the defendant an injunction ought not to be granted due to the overwhelming interest of society. The Plaintiff justifies the huge price of Tarceva on the ground that it includes huge customs duties by the plaintiff. Counsel submits that Defendant also pays huge excise duties on the drugs manufactured by it and thus the price differential is extremely high despite the said duties paid by parties. . . .

82. In a [previous decision] . . . , the Court of Appeal observed that even a limited injunction ensuring that a patient already on the drug in question should be continued to be supplied, as a condition for interlocutory restraint of the defendant, could prove inadequate. The court further said that such a limitation cannot deal with the issue where members of the public, whether they are already patients on the drug or not, should be deprived of the benefit of it. The court went on to observe that in such cases the onus must be on the plaintiffs to show that there is little if any likelihood of the public being injured, 'by their inability to obtain the drug in question when necessary. A life-saving drug is in an exceptional position. There are often cases where a number of drugs exist alongside each other and are in general all equally efficacious for a particular ailment or disease. If the evidence shows it to be the fact that there may well be cases where it would make little, if any, difference to the public, apart from satisfying personal preference, whether a particular drug was no longer available or not, then in such a case it may well be proper to grant an injunction. At the other end of the scale, however, there is the unique life-saving drug where, in my judgment, it is at least very doubtful if the court in its discretion ever ought to grant an injunction and I cannot at present think of any circumstances where it should. There are infinite variations between these two limits.' . . .

84. The plaintiff's counsel had at some stage argued eloquently about the country's entry into the TRIPS regime and its commitment to integrate with the global patent regime. He discounted the price differential between the plaintiffs Tarceva and

the defendant's product Erlotinib as being 'dangerous' and 'jingoistic.' As noticed with reference to the two judgments cited above, price differential in the case of a life saving drug—or even a life improving drug in the case of a life threatening situation[—] . . . is an important and critical factor which cannot be ignored by the court. The materials before the Court in the form of documents undoubtedly show that the plaintiff does not have any manufacturing unit in India, for producing Tarceva. The defendant, on the other hand, manufactures and markets it. The plaintiff has not—apart from blandly asserting in its affidavit about the volume of sales being [\$1.94 million]—disclosed by any independent, objective material about its sales. Even if, its assertions are accepted, roughly 1,000 patients have perhaps benefited from its drug on a rough conclusion so far. . . .

85. Undoubtedly, India entered into the TRIPS regime, and amended her laws to fulfill[] her international obligations, yet the court has to proceed and apply the laws of this country, which oblige it to weigh all relevant factors. In this background the Court cannot be unmindful of the right of the general public to access life saving drugs which are available and for which such access would be denied if the injunction were granted. The degree of harm in such eventuality is absolute; the chances of improvement of life expectancy; even chances of recovery in some cases would be snuffed out altogether, if injunction were granted. Such injuries to third parties are uncompensatable. Another way of viewing it is that if the injunction in the case of a life saving drug were to be granted, the Court would in effect be stifling Article 21* so far as those would have or could have access to Erlotinib are concerned. . . .

86. The last and also significant factor that has to be examined is the question of irreparable hardship. . . . Neither party has produced any evidence as to the number of patients suffering from small cell lung cancer. Yet in one of the Newspaper articles produced by the plaintiff, states that about 90,000 men and 79,000 women in India suffer annually from lung cancer. The National Cancer Registry Report released by the Indian Medical Council in 2007 states that every hour 50 persons are diagnosed of cancer in the country. . . . The figures of those suffering from the ailment that Tarceva and Erlotinib seek to alleviate therefore, are significant. There is no empirical material, or statistical method by which the Court can deduce the numbers of such patients who would be using the plaintiff's product if injunction is refused; on the other hand, it is plain that a large number of them would be deprived of access to a life saving drug if injunction is granted. Therefore, this Court is of the opinion that as between the two competing public interests, that is, the public interest in granting an injunction to affirm a patent during the pendency of an infringement action, as opposed to the public interest in access for the people to a life saving drug, the balance has to be tilted in favor of the latter. The damage or injury that would occur to the plaintiff in such case is capable of assessment in monetary terms. However, the injury to the public

* Article 21 of the Constitution of India provides:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

which would be deprived of the defendant's product, which may lead to shortening of lives of several unknown persons, who are not parties to the suit, and which damage cannot be restituted in monetary terms, is not only uncompensatable, it is irreparable. Thus, irreparable injury would be caused if the injunction sought for is granted. . . .

[The Court denied the injunction but preserved the possibility of a later damages action by F. Hoffmann-LA Roche by including in its order that Ciplao "maintain faithful accounts of its sale of . . . Erlocip" and file with the Court both quarterly and annual statements of those sales figures.]

eBay Inc. v. MercExchange, L.L.C.
Supreme Court of the United States
547 U.S. 388 (2006)

Justice Thomas delivered the opinion of the Court. . . .

[eBay operates a popular website enabling private sellers to list goods they wish to sell, either through an auction or at a fixed price. MercExchange held several patents, "including a business method patent for an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants," and sued eBay for patent infringement. . . . Following a jury verdict upholding MercExchange's patent, the District Court denied MercExchange's motion for permanent injunctive relief. The Court of Appeals for the Federal Circuit subsequently reversed the ruling. The court emphasized that patents were property rights and held that, in the case of an infringement of a property right, injunctions should only be denied in the "unusual" case and under "exceptional circumstances."]

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. . . .

These familiar principles apply with equal force to disputes arising under the Patent Act. As this Court has long recognized, "a major departure from the long tradition of equity practice should not be lightly implied." Nothing in the Patent Act indicates that Congress intended such a departure. To the contrary, the Patent Act expressly provides that injunctions "may" issue "in accordance with the principles of equity."

To be sure, the Patent Act also declares that "patents shall have the attributes of personal property," including "the right to exclude others from making, using,

offering for sale, or selling the invention.” According to the Court of Appeals [for the Federal Circuit], this statutory right to exclude alone justifies its general rule in favor of permanent injunctive relief. . . .

Just as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief. . . .

Because we conclude that neither court below correctly applied the traditional four-factor framework that governs the award of injunctive relief, we vacate the judgment of the Court of Appeals, so that the District Court may apply that framework in the first instance. . . .

[The two concurring opinions, while in agreement that no “general rule” exists as to the issuance of an injunction, debated the usefulness of historical practice as a guide in light of new technologies and trends in patent litigation. Chief Justice Roberts, joined by Justices Scalia and Ginsburg, emphasized that since “at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases.” Although district courts should “exercis[e] equitable discretion pursuant to the established four-factor test,” they should not consider themselves to be “writing on an entirely clean slate.” Historical practice provides an important guide and suggests an injunction to be appropriate in most circumstances. Justice Kennedy, joined by Justices Stevens, Souter, and Breyer, argued that historical practice “is most helpful and instructive when the circumstances of a case bear substantial parallels to litigation the courts have confronted before”—a situation that, Justice Kennedy suggested, might not exist amidst “the rapid technological and legal developments in the patent system,” such as the rise of so-called patent trolls, or aggressive patent litigators who attempt to enforce patents rights far beyond the underlying technology’s actual value.]

* * *

Since 2006, some courts in the United States have relied on the fourth prong of the *eBay* test to reject injunctive relief in cases involving medical devices and medicines. While not invoking a right to medicines, the U.S. approach has certain parallels to the approach of the Indian court in *Roche*. For example, in *Smith and Nephew, Inc. v. Interlace Medical, Inc.*, 955 F. Supp. 2d 69 (D. Mass. 2013), a U.S. district judge for the District Court for Massachusetts found that concern for the public interest weighed against issuing an injunction in a case concerning arthroscopic surgical equipment:

. . . The final part of the *eBay* test looks to whether a permanent injunction would disserve the public interest. On the one hand, the public interest generally favors protecting the rights of patentees and enforcing the patent system. But here, there is a strong countervailing public interest in making Hologic’s device available for medical

treatment. Hologic has presented evidence showing that at least some doctors consider its product more effective than . . . [Smith and Nephew]’s for intrauterine tissue removal. Of course, . . . [Smith and Nephew] disputes that evidence . . . I am nevertheless convinced that at least some doctors and their patients will suffer a negative impact if Hologic is enjoined from selling its medical device. Because different doctors may find one device or the other more suitable for particular intrauterine tissue procedures, health providers and patients benefit substantially from having both products available in the market. Given the importance of optimal patient care, the public interest weighs against granting a permanent injunction here. . . .

Judgment C-620/16
Constitutional Court of Colombia
No. D-11374 (CC) (2016)*

[Presenting Magistrate: Maria Victoria Calle Correa:]

[The applicant, Gustavo Morales Cobo, President of the Association of Pharmaceutical Laboratories for Research and Development, brought a constitutional challenge to Colombia’s Law 1753, which implemented centralized negotiations of drug prices and the evaluation of drugs for efficacy and cost-effectiveness by government agencies.]

. . . 3.1.2. The applicant claims that Art. 71 of the challenged law,** infringes on the rights of economic freedom, private enterprise, and free competition, because it does not differentiate between the public sector, and private [purchasers of medications, medical supplies and devices]. In his brief, the claimant asks: “why should a price defined through negotiations between pharmaceuticals and the State become a binding standard on private, third-party actors, that do not rely on the [public] system’s resources? . . . [C]an a law require third-parties to trade at a given price, simply because the State, as a market actor, previously agreed to trade at that price? . . . What’s the constitutional principle that justifies the imposition of a price defined by two market actors, on all actors in the same market?”

* Translation by Edgar Melgar (Yale Law School, J.D. Class of 2020).

** Article 71 of Law 1753 provides:

. . . The Minister for Health and Social Welfare (MSPS) shall establish mechanisms to initiate centralized negotiations of the prices of medications, [medical] supplies and devices. The prices that are established through centralized negotiations shall be obligatory on suppliers and purchasers of medications, [medical] supplies and devices, and these may not be transacted at a higher price [than that established through centralized negotiations]. The National Government may, in a subsidiary manner, seek to purchase medications, [medical] supplies, and devices.

3.2.1. The applicant claims . . . [that under Art. 72*] [a cost-effectiveness] assessment by the Institute for Evaluation of Health Technology (IETS) is a prerequisite for any . . . [pharmaceutical] registration, because . . . the Institute . . . determin[es] . . . which items should be purchased for the public healthcare system, using state funds. This means, however, that while a sanitary registration is pending, private actors are unduly impeded from purchasing new technologies at their own expense, thus infringing their right to enjoy the highest attainable standard of healthcare possible. The applicant states: “The material effect of this regulation is a disproportionate restriction on the production, importation, exportation, processing, bottling, packaging, distribution and sale of medications and medical devices if the IETS, in its evaluation of a given product, determines that it should not be purchased for the public healthcare system, using state funds” Moreover, requiring a price [assessment] before the issuance of a sanitary registration . . . has no relation to the goal of a sanitary registration itself, which is only to guarantee the safety and efficacy of the product. . . .

16. Under a broad understanding of the right to health, which takes into account individual responsibility, as well as biological and socioeconomic circumstances, as well as the State’s wide variety of immediate and progressive obligations, a national plan for providing the highest attainable level of healthcare possible, shall be composed of a variety of different elements, which shall include a pharmaceutical policy

17. A pharmaceutical policy must fairly consider, at least, the following three elements: public health, innovation and development, and the rights of property, which must be recognized as an important limitation on a government’s free scope of action, for example, based on obligations derived from international commitments. . . .

22. . . . The first systematic pharmaceutical policy in Colombia was developed in 2003, by the Ministry of Public Welfare [, now the Ministry of Health and Social Welfare] [T]he document states that the country must develop a system of direct control over products with few suppliers, and a system of controlled freedom over other products, in a broad scheme that aims at gradual market liberalization The policy’s central goal was to distinguish between essential and non-essential medications, and stimulate competition through generic medications. . . .

* Article 72 of Law 1753 provides:

An evaluation by the Institute for Evaluation of Health Technology (IETS), and a statement of the price set by the Ministry of Health and Social Welfare (MSPS) based on said evaluation, shall both be required before the National Institution of Medication and Food Oversight (INVIMA) issues or renews the sanitary registration for any medication or medical device. A sanitary registration shall be processed at the same time as the MSPS determines the price of the medication or medical device. . . . Upon a request from the MSPS, the INVIMA may modify a given medication’s indications, counter-indications, or interactions, on the basis of scientific evidence, and in order to [protect] public health.

31. . . . The norm establishes an instrument for the centralized negotiation of the prices of medications, supplies, and devices, as a public policy measure. It confers on the Ministry of Health and Social Welfare the power to establish mechanisms for regulating said negotiations. It also anticipates that, as a consequence of said negotiations, [all] suppliers and purchasers of medications, supplies, and devices, shall be bound by those prices. . . .

33. Article 71 [of Law 1753] is set as part of a strategy of “social mobility,” which sets out to promote “an integral social security: universal access to a quality health care system,” and to ensure the financial stability of the health system. Centralized price negotiations were to be understood as a supplement to other existing strategies, including the international price of reference.

The applicant submits that this norm would make sense, with reference to the requirement that all sales and purchases be conducted at the set price, if it were only applied to those parties who rely on state funds, but not to those who have to use their own financial resources to pay for medications, supplies, or medical devices. . . .

However, the applicant’s understanding of the National Development Plan ignores one of the primary axes of its strategy for “social mobility”: equity, the goal of guaranteeing access to healthcare, under conditions of equality

In this regard, even in those cases in which no [state resources] are used directly, the right to health is understood to be universal, and the State, therefore, must meet its obligations towards anyone who may require [medical] services.

34. The norm under review, therefore, holds a clear relationship to the foundations of the National Development Plan, which recognizes equity as one of its foundational axes. The norm contributes to the direct and effective satisfaction of that obligation. It is direct, because it has an effect on the price to be paid for medication, supplies, and devices, and it can be affirmed that negotiations seek to establish a fair price, that may be applicable to all parties. It is also immediate, because it has an impact on the system’s equity and sustainability, without requiring additional measures. . . .

36. The Constitutional Court’s jurisprudence has recognized that the [political] model of a social and democratic State, subject to the rule of law, adopted by our Constitution, implies a preference for a social market economy, which guarantees economic freedom, primarily through free enterprise and free competition, but also establishes the state’s obligation to intervene, in order to correct market errors, and to achieve a scenario of the greatest equity and justice, that may enable the effective realization of fundamental rights. . . .

37. With regard to public services, such as healthcare, the Court has affirmed that economic freedom is highly susceptible to state intervention, as [such services] involve the protection of a fundamental right. . . .

38. . . . The Court must conduct a light test to determine whether the restriction on economic freedom imposed by the norm is consistent with the law [T]he basic proposition is that the norm seeks to advance [the right to] public healthcare, and for that reason, the State has a broad power to intervene.

38.1. The Court reaffirms . . . that the scheme for centralized price negotiations, and the mandate requiring all market actors to trade on the price set by these centralized negotiations, is to guarantee the sustainability of the public healthcare system. . . .

Consistent with article 333 of the Constitution, economic freedom must develop within the limits imposed by common welfare, and the right to free competition includes certain responsibilities The legislation's restriction on the price of medications, is understood as part of the application of principles of universality, solidarity, and efficacy, to access to a public service, like health. [It advances universality because it] expands the coverage provided by the right to health. It also develops the principle of solidarity, because it allows actors within the health system to improve the services they offer, through fair prices, in a way that does not intensely affect their rights and freedoms. Savings will also strengthen the long-term sustainability of the health care system, and shall guarantee efficacy, by allowing for a more effective use of available resources.

38.2. The restriction is reasonable if two other aspects are considered: (i) The centralized negotiation of prices is not a measure that shall be applied to all medications on the market. The Government shall establish norms that determine under what objective circumstances shall the Government turn to centralized price negotiation. (ii) A centralized negotiation of prices does not necessarily entail an "unfair" price for the manufacturer, distributor, or retailer [T]he State has a responsibility to guarantee access to a regular supply, and quality [of the product purchased]

41. . . . The applicant claims that the law includes two new requirements for the issuance of a sanitary registration for medications and medical devices: an assessment by the Institute for Evaluation of Health Technology, and a price determination by the Ministry of Health and Social Welfare, and that these new conditions restrict the entry and development of new technologies, curtailing the right of access to the highest attainable standard of health. . . .

49. The Court believes that the law's requirement that an assessment be provided by the IETS is not unconstitutional, as it provides a scientific contribution to the valuation of medications and technologies that is necessary in order to guarantee the quality of the products used by the national health care system.

50. The need to determine the price of medications through a cost-effectiveness formula, justifies the intervention by the IETS, as a public policy tool

that may, in the long-term, increase access to medications, to the extent that setting a product's price at the time it first enters the market officially, may make it easier to rationalize public expenditures.

An effective control of the price of medications and medical devices, at the point when they first enter the market, also responds to a state obligation to provide access to public health in a manner that is consistent with principles of universality, solidarity, and efficacy, and primarily for the benefit of segments of the population with the most limited purchasing power, and who may require health treatments.

51. The Court finds that the challenged law has been issued within the framework of a national healthcare system which has introduced important norms aimed at advancing the guarantee of a fundamental, autonomous, and renounceable right, that includes aspects which necessitate positive State actions, under the principle of progressive development. . . .

During Congressional deliberation on the law, a question arose as to whether the requirements of an assessment by the IETS, and the cost-effectiveness test by the Ministry of Health, may establish a barrier to the procurement of medications for rare diseases, that may have a high cost and benefit only a very limited segment of the population. . . .

Access to medications that are required, and those that are required and needed, shall not be restricted on the basis of Article 72 [I]t cannot be interpreted as a barrier to limit access to medication for rare diseases, or to high-priced medication for more common diseases. . . .

A reading of the law may lead to the conclusion that only those treatments that satisfy a cost-efficacy criterion . . . may be purchased by the National Health System, excluding those which, while necessary for the treatment of ailments of some part of the population, are too costly for the system. [The Court rejects such a reading.] . . .

58. Article 72 is constitutional, to the extent that it is understood that the two new requirements for issuance of a . . . [pharmaceutical] registration, the evaluation by the Institute for Evaluation of Health Technology, and the cost-effectiveness analysis for price determination developed by the Ministry of Health and Social Welfare, cannot be construed as a barrier to restrict access to medications required by the general population, including high-priced medication that may be necessary to treat rare diseases.

The Court recognizes that the law may be understood as a measure controlling a medication's access to the market, guaranteeing the product's quality and its economic accessibility, aimed at benefiting the sustainability of the national health system. Nonetheless, [the Court] also recognizes that the norm could lead to other interpretations, as suggested by the applicant, which would restrict the entry of new

technologies, especially those that might require a significant government expenditure, yet are likely to help only a very small part of the general population.

The existence of the second possibility, that could significantly affect the right of access to the highest attainable standard of health, and other fundamental rights like life, requires an intervention by the Court.

For that reason, [the constitutionality of Article 72 is premised] on the understanding that the additional requirements it includes to the issuance of the registry cannot affect the availability or accessibility of medications and medical devices for the population. . . .

Meza García v. Ministry of Health
Constitutional Tribunal of Peru (First Chamber)
FILE N.º 2945-2003-AA-TC (2004)*

[Magistrates Alva Orlandi, Gonzales Ojeda, and García Toma:]

The applicant presented a request for a writ of protection, asking that she be granted an integral medical attention, as required by her condition as an HIV/AIDS patient, and which should consist of: (a) constant provision of the medications required for treating HIV/AIDS, which shall be carried out through a program at the Dos de Mayo Hospital; (b) periodic exams, such as CD4 and viral load exams, upon request of the treating physician, and/or when urgent need arises.

The applicant states that . . . the State has failed to give her a holistic treatment, prescribing only medications that address minor ailments, and, not having the financial resources to manage the high costs of treatment for this disease, which has since become aggravated by thyroid cancer, demands that the State meet its obligation to provide medical assistance, in the same way as treatment is provided to patients suffering from tuberculosis, yellow fever, and other diseases, in a manner consistent with the principle of respect to human dignity, protection of the right to health and the right to life, and the right to a holistic medical treatment for HIV/AIDS. . . .

6. While . . . the right to health is included in the Constitution in the section concerning economic and social rights, and not as one of the fundamental rights . . . , this Court, like our sister court in Colombia, considers that when a restriction on the right to health threatens other fundamental rights, such as the right to life, physical integrity, or the free development of personality, [the right to health] acquires the character of a fundamental right, which may be safeguarded through a writ of protection.

* Translation by Edgar Melgar (Yale Law School, J.D. Class of 2020).

7. That being said, given the particular nature of this case, including a request for free, holistic medical treatment, the Court should address the nature of social and economic rights, like the right to health, and their relationship with other rights. At the same time, it is appropriate to analyze the State's affirmative obligations, in particular with regards to health care services. . . .

16. It is undeniable that any form of communitarian life requires an organization driven towards a shared goal, and whose achievements can reach all of its members. For this reason, when the so-called social rights are established as fundamental goals of the entire community, it is deduced that every person or group shall regulate their relationships with one another through the principle of solidarity.

Solidarity implies the creation of a new ethical, shared nexus, which ties together all the members of a political society. . . . The principle of solidarity promotes the fulfillment of certain duties, including:

(a) The duty of all members of a collective to support its activities geared towards a common end

(b) The duty of the leading core of the political collective to adequately redistribute the benefits reputed by its members

22. It is undeniable that in the case of people diagnosed with HIV/AIDS and suffering from that disease, it would be unrealistic to suppose they can enjoy freedom and personal autonomy, when, as in the case of the applicant, a lack of financial resources means it is impossible for them to afford medical treatment that would allow them to endure the toils of their disease with dignity.

[In the case of HIV-positive persons who are unable to receive medical treatment], dignity, liberty, and personal autonomy become compromised, as a result of a breakdown in health, and an increased risk to the patient's life, turning these individuals into a form of social pariah, which is unacceptable from the perspective of the Constitution. . . .

24. In a democratic and just society, responsibility for taking care of the most needy does not fall exclusively on the State, but on each individual as a social actor. . . .

38. . . . Social and economic rights, essential to the achievement of the common good, must not be understood as a mere statement of good intentions, but as a commitment with society that includes concrete and clear goals. In this regard, the progressive realization of human rights over an extended period of time, should not be interpreted in a way that deprives the state's obligations under international agreements of any significant content.

39. As a result, constitutional judges, without examining health policy, *per se*, believe it is necessary to analyze the state's actions, in the present case, given the applicant's claim that impairments to her right of health now endanger her life. While it is true that in certain developing countries, like our own, it is difficult to demand the immediate formulation and execution of a social policy that favors the entirety of its population, this Court reiterates that such a justification is valid only when the State has already taken concrete steps that evince an attempt to bring about some results, otherwise the State's ambivalence would bring about a condition of unconstitutionality by omission.

40. While the issue does not directly arise out of the present plea for protection, this Court considers it a convenient opportunity to address issues related to the rights to intellectual property recognized by international agreements, as well as exceptions [to these commitments] formally established by [other] international documents within the framework of the World Trade Organization, of which Peru has been a member state since 1995.

The Doha Ministerial Declaration of 14 November 2001 regarding intellectual property and public health establishes that, while the protection of intellectual property is important for the development of new medications, the effect which [intellectual property rights] may have on prices should not be ignored, especially when states may face difficulties in meeting their obligations with regards to public health, impairing a citizen's right to health and right to life, as in the case of diseases such as HIV/AIDS, tuberculosis, malaria, and other epidemics. Therefore, international agreements regarding the protection of intellectual property would not imply a barrier on the ability of member states to take necessary measures to protect public health, including the provision of medicines to all.

41. In this respect, given the difficulties faced [by the state] in providing essential medicines for the treatment of diseases like HIV/AIDS, it is advisable that Peru, within the framework of its health policy regarding prevention and protection against AIDS, and bearing the rights and duties of a member state of the WTO, should make the greatest possible use of the provisions and measures which may allow the state to meet the objectives defined in its health policy, through a flexible reading of treaties regarding intellectual framework, within the bounds set by the Doha agreement.

42. It is important to remember, therefore, that the Doha agreement provided that the least developed member states, such as Peru, are not obligated, with respect to pharmaceutical products, to implement [all aspects of TRIPS and other free trade agreements.] . . .

48. Holistic treatment for a disease . . . must be understood to include the continuous provision of all medical treatments (exams, medications, etc.), required to overcome the ailment. . . .

49. . . . Social rights, like the right to public health, do not stipulate, in and of themselves, an explicit, affirmative requirement, because they depend on the State's limited financial resources. Nevertheless, such a limitation does not in any way justify prolonged inaction by the State

It is necessary, therefore, to recommend concrete actions to be taken by the State in order to satisfy these rights, either through legislative actions, or the execution of certain policies

The court resolves:

1. To establish the writ of protection is well-grounded.
2. To order that the applicant be considered as one of those patients who shall receive a holistic treatment against HIV/AIDS from the Ministry of Health, which shall include provision of medications and corresponding analysis, under the indications and supervision of physicians at the treating hospital. . . .

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The Honorable Helen Keller is a judge at the European Court of Human Rights.

Judge Keller studied law at the University of Zurich and was subsequently a research associate at the Institute of Law of the University of Zurich from 1989 to 1993. She obtained her doctorate in 1993, followed by an LL.M. at the Collège d'Europe in Bruges, Belgium, a research fellowship at the European Law Research Center at Harvard Law School in 1995, and a research fellowship at the European University Institute in Florence in 1996. In 2001, she was a visiting fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. In 2002, she completed her habilitation at the Faculty of Law of the University of Zurich. From 2002 to 2004, she held the position of professor (ordinaria) of constitutional law at the University of Lucerne, Switzerland, followed by serving as a professor at the University of Zurich, where she taught constitutional, European, and international law until 2011. Keller spent most of 2009 at the European Court of Human Rights in Strasbourg, where she worked on a research project concerning friendly settlements before the Court. In 2010, she completed a fellowship at the Centre for Advanced Studies in Oslo, where her research centered on the question of why states ratify human rights treaties. From 2008 to 2011, she was a member of the United Nations Human Rights Committee. In April 2011, the Parliamentary Assembly of the Council of Europe elected her as a judge at the European Court of Human Rights, and she began her term as in October of 2011.

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About the Student Editors

José Argueta Funes is a third-year J.D. student at Yale Law School and a Ph.D. candidate in history at Princeton University. He attended the University of Virginia as a Jefferson Scholar and graduated with Highest Distinction with a B.A. in history and philosophy. Before law school, he received an M.A. in history from Princeton University. His dissertation is titled “The Water of Life: Making Property in Hawai‘i, 1848-1930.” At Yale, José has served as Executive Editor for the *Yale Journal of Law & the Humanities*, and is currently President Emeritus of the Yale chapter of the Asylum Seeker Advocacy Project. José spent the summers of 2017 and 2018 working at Paul, Weiss, Rifkind, Wharton & Garrison in New York City. He will serve as a law clerk for the Honorable Guido Calabresi on the United States Court of Appeals for the Second Circuit during the 2020-2021 term.

Matt Butler graduated from Yale Law School in 2018. He received his A.B. *magna cum laude* from Princeton University’s Department of Art and Archaeology. Prior to law school, he attended Yale Divinity School, receiving his M.A.R. in Christian Ethics, and worked in the white-collar unit of the Suffolk County District Attorney’s Office in Boston, MA. At Yale Law School, he served as Executive Editor of the *Yale Journal of Law and Technology* and as Executive Editor of the *Yale Journal on Regulation*. Matt spent his summers working at Davis Polk & Wardwell in New York City and in the Office of then-Commissioner Ajit Pai at the Federal Communications Commission in Washington, D.C. He currently serves as a law clerk for the Honorable Steven Colloton on the United States Court of Appeals for the Eighth Circuit.

Catherine Crooke is a third-year J.D. student at Yale Law School. She received her B.A. *cum laude* from Columbia University’s Department of Comparative Literature and Society. Prior to law school, she attended St. Antony’s College at the University of Oxford, receiving her M.Sc. in Refugee and Forced Migration Studies, and worked at the International Refugee Assistance Project (IRAP) in New York City. At Yale Law School, she serves as a Second Year Editor on the *Yale Law Journal* and previously served as Co-Chair of the Visual Law Project and Diversity and Inclusion Chair of Yale Law Women. Catherine spent last summer researching *prima facie* refugee status determination procedures and the previous summer in the Caribbean Protection Unit of the United Nations High Commissioner for Refugees (UNHCR) in Washington, D.C.

Kyle Edwards is a 2018 graduate of Yale Law School. At Yale, she served as Executive Editor for Articles and Essays of the *Yale Law Journal*, board member of the Morris Tyler Moot Court of Appeals, co-director of the Yale Health Law and Policy Society, and a clinical student in the Worker and Immigrant Rights Advocacy Clinic and the Global Health Justice Practicum. Kyle spent her first-year summer working at the Department of Justice in the Civil Division’s Appellate Staff and her second-year summer at O’Melveny, both in Washington, D.C. Prior to law school, Kyle received an A.B. *summa cum laude* from Princeton University’s Woodrow Wilson School of Public and International Affairs, with a certificate in Gender and Sexuality Studies, and a D.Phil. in Public Health from the University of Oxford where she was a Marshall Scholar. She currently serves as a law clerk for the Honorable Leandra Kruger on the Supreme Court of California and will serve as a law clerk for the Honorable Raymond Lohier on the United States Court of Appeals for the Second Circuit during the 2019-2020 term.

David Louk is a 2015 graduate of Yale Law School and a Ph.D. Candidate in the Jurisprudence and Social Policy Program at the University of California, Berkeley. He graduated with honors and distinction from Stanford University with a B.A. in Political Science and also holds an M.Phil in International Relations from the University of Oxford, where he was a Clarendon Scholar. He is currently a post-doctoral research scholar and lecturer in law at Columbia Law School, having previously clerked for Chief Judge Robert A. Katzmann on the U.S. Court of Appeals for the Second Circuit and Judge James E. Boasberg on the U.S. District Court for the District of Columbia. For the October 2020 term, he will serve as a law clerk on the U.S. Supreme Court for Justice Ruth Bader Ginsburg.

Edgar Melgar is a second-year J.D. student at Yale Law School and a Ph.D. Candidate in Near Eastern Studies at Princeton University. Edgar spent the summer of 2017 as an intern in the Research Division at the European Court of Human Rights.

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