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David Dolinko

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Expert Evidence and Scientific Proof in Criminal Trials
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Theoretical Foundations of Criminal Trial Procedure
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The Structure and Limits of Criminal Law
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Series Preface

This series, consisting of six volumes, brings together some of the most significant and influential writings to have been published in the field of criminal law, criminal procedure, and criminal justice in the last century or so. Individually, each volume illuminates many of the key debates that have ebbed and flowed in the field; collectively, they provide the conceptual, theoretical, and structural tools we need to understand how contemporary criminal law works. That understanding is further advanced by the fact that each volume begins with a synthetic introduction which places the selected essays in their context and explores the connections and contrasts between them.

The Theoretical and Philosophical Foundations of Criminal Law (David Dolinko) includes 19 path-breaking essays on criminal law theory. These essays consider demanding questions such as: What conduct should and should not be criminalised? What authority does the state have to respond to various criminal wrong doings by inflicting intentional harm on perpetrators in the form of criminal punishment? What role do the concepts of individual 'choice', 'capacity' and 'character' play in the ascription of moral and criminal responsibility? What is the relevance of mental state to culpability judgement and how should this judgement change when we have full information about the reasons someone had for acting as they did? What liability should be imposed on people for the crimes they seek to bring about but fail? and, more generally, What place should luck and happenstance have in the criminal law?

In *The Structure and Limits of Criminal Law* (Paul H. Robinson) a further 19 essays confront a series of important foundational questions regarding how we should best understand the architecture of the criminal law: Is it possible to construct a single, unified, conceptual framework into which all criminal law rules fit? if it is, What value does such a framework have? Can we identify a set of necessary and sufficient conditions for criminal liability? and, if we can, What are the proper limits of these doctrines and how should they be expressed?

In the volume on *The Codification of Criminal Law* (Michael Bohlander and Daley Birkett) issues concerning the development of criminal codes are considered by another 24 essayists. The apparently simple question 'What is a criminal code?' turns out to be frustratingly difficult to answer, as is the question whether it is sensible for every country to adopt one. Most authors in this volume, whether approaching the topic from a theoretical, historical, or comparative perspective, answer the latter question in the affirmative. But a few are more sceptical. For them, whatever approach is taken, the promised benefits of full codification – simplicity, accessibility and comprehensibility – will always remain tantalisingly out of reach or be undermined or negated by the likely loss of flexibility and responsiveness that codification brings.

Concern with human rights has been present in one form or another in all human societies since time immemorial. Yet, despite these deep roots, the notion that every human being is a rights-bearer by virtue of their humanity, and that certain of these rights are universal and inalienable, has been taken up in the last 100 or so years in a way that has no parallel in any previous historical period. This explosion of interest in human rights thinking raises

difficult questions for the doctrines, rules, and principles of criminal law, criminal procedure, and criminal justice. It creates tensions between the instrumental aims of crime reduction and public safety embraced by all criminal justice systems and the protection and safeguards that human rights discourse seeks to achieve. So how are these tensions to be eased? This is the key question that lies at the heart of the 14 essays included in *Criminal Law and Human Rights* (P.H.P.H.M.C. van Kempen). Through the lens of human rights discourse, central criminal law conundrums are considered: What are the implications of the right to be presumed innocent? How should the conflict between the right to liberty and the use of preventive detention be resolved? How should the protection we offer to privacy affect the way criminal investigations are conducted? What is the impact of human rights protection on the scope of legitimate criminalisation? and What is its impact on the doctrines, principles, and rules of substantive criminal law, criminal procedure, and sentencing?

In *Theoretical Foundations of Criminal Trial Procedure* (Paul Roberts) 19 essays are gathered together with a focus on the criminal trial and its theoretical underpinnings. The reflection in these pieces embraces the detail of the trial process and the law of evidence as well as discussing the values that ought to be honoured in criminal trials, casting light on these issues through case analysis, the use of interdisciplinary methods, and insights drawn from international comparisons.

Finally, in the volume of essays on *Expert Evidence and Scientific Proof in Criminal Trials* (Paul Roberts), 26 essays focus on the rôle that science plays in the modern criminal trial. Here abstract discussions of the concepts of truth, fallibility, and authority nestle side by side with analyses of data collected from interviews and psychological experiments, including the use of mock juries, discussion of major decided cases, surveys of solutions found in other legal systems, and consideration of practical questions such as the admissibility of scientific evidence in criminal trials and issues regarding how expert evidence and scientific proof are portrayed in the media and on television.

Taken as a whole, the volumes in this series serve up more than 100 essays written by leading scholars in the field of criminal law, criminal procedure, and criminal justice. Reading or re-reading them will inform (and, I trust, entertain) both the novice reader and the expert alike. But, whatever their distinction and significance, no set of essays can - or should - mark the end of debate in these important areas. My hope, therefore, is that this series will spark yet more intellectual inquiry which will continue to advance our knowledge and understanding of these fields, something which becomes more of a necessity as each day passes.

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Series Editor

Introduction

The significance of fundamental individual rights for national criminal justice systems is not new. For example, the 1215 Magna Carta sets down the rudiments of the right to liberty, the right to a fair criminal trial, the principle of legality and the right to proportional sentences. Particularly since the Second World War, that relevance has increased significantly through the development of international human rights law. There is in fact hardly any other legal area in which human rights have become so influential in recent decades as the criminal justice system. This is not surprising, as the following paragraphs illustrate.

The criminal justice system encompasses the most severe instrument at the state's disposal in times of peace. It is principally coercive in nature. The intrinsic violation by the criminal law and criminal procedure of an individual's freedom and social sphere is a universal characteristic. Utilization of a criminal justice system is at best a necessary wrong that must be maintained and applied to repress other, more severe wrongs and to protect that freedom against even greater intrusions. A central function of the state is to provide security to its citizens (see Glanville, 2011, p. 233 and, for example, Crawford, 2007, pp. 6–10), and up to the present it seems impossible for states to offer adequate security without having criminal justice mechanisms at their disposal, so the criminal justice system belongs at the core of the state's power. For that reason, and considering the nature of the criminal justice system, the state has a monopoly of criminal justice, or at least dominates over it, in any state based on the rule of law (*Rechtsstaat*).

Human rights, by contrast, do not accrue to the state, but to individuals and peoples.[1] They are commonly said to be inalienable fundamental rights to which a person is inherently entitled simply because he or she is a human being (Donnelly, 2003, pp. 10–13; Sepúlveda *et al.*, 2004, pp. 3–6). But, even in a more positivistic sense, human rights entail fundamental norms that purpose to protect the individual against the virtually infinite power of the state. Such protection has become legally more effective for individuals by the adoption of international human rights instruments – including individual complaint procedures – and developments in national constitutional law. In view of the criminal justice system's repressive nature, the protective purpose of these fundamental norms and their increasing legal enforceability, it can be seen why human rights may be expected to exert a powerful influence on criminal justice.

The above argument, however, does not necessarily mean that human rights are fully antipodal to criminal law – that is, substantive criminal law, criminal procedure law and sentencing law – the combination of which primarily constitute the legal basis, content and scope of the criminal justice system. In fact, there are significant harmonies between the values on which criminal law and human rights law that is relevant to the criminal justice system are based. For example, proportionality, subsidiarity/necessity, truthfulness and fairness are values that underlie both criminal law and human rights law. What is more, since human

[1] Under some conventions, private legal entities – such as corporations – can also find human rights protection (see van Kempen, 2011).

rights law only sets minimum guarantees, criminal law often encompasses more checks and balances to protect the individual defendant than human rights law, which is as it should be. Human rights alone would be woefully inadequate to ensure the values just mentioned. Acknowledgement of human rights might therefore even be counterproductive, since it can easily result in the position that their formal observance suffices. Human rights, moreover, can only be effective within the structure of a comprehensive criminal justice system.

The following paragraphs serve three general purposes. First, they portray the meaning and rationale of those human rights that are most relevant to the criminal justice system, and their significance to criminal procedure, substantive criminal law and criminal sentencing. Second, this tripartite structure serves as a framework for the fourteen essays republished in this volume, as a result of which it also becomes clear how their subject matter relates to the human rights they enlarge upon, and to the criminal justice system in general. Many of these essays reiterate the tensions and similarities between criminal law and human rights law to which I refer above. Third, the intention is to present the reader with other significant English literature on the various themes under discussion, for which reason many supplementary references to publications are made.[2] In combination, this introduction and the various essays in this volume – which collectively cover almost the entire criminal justice system – offer both a general overview and an in-depth examination of criminal law and human rights.

It should be noted that I use the term human rights in a broad sense, including fundamental individual rights, civil rights and constitutional rights, which may thus be established either by international human rights instruments or under national constitutions. The essays in this volume are concerned with human rights in at least one of these senses. However, in the following paragraphs reference will only be made to provisions in general human rights instruments – that is, the 1948 Universal Declaration of Human Rights (UDHR),[3] the 1966 International Covenant on Civil and Political Rights (ICCPR),[4] the 1948 American Declaration of the Rights and Duties of Man (ADRDM),[5] the 1969 American Convention on Human Rights (ACHR),[6] the 1950 European Convention on Human Rights (ECHR),[7] the 2000 Charter of Fundamental Rights of the European Union (EU Charter),[8] the 1981 African Charter on Human and Peoples' Rights (African Charter),[9] the 2004 Arab Charter on Human Rights (Arab Charter),[10] the 1995 Commonwealth of Independent States Convention

[2] For general literature relevant to human rights and criminal law, see particularly Bassiouni (1993), Burgorgue-Larsen and Úbeda de Torres (2011), Evans and Murray (2008), Harris *et al.* (2009), Joseph *et al.* (2005), Okere (1984), Trechsel (2006) and van Dijk *et al.* (2006).

[3] GA Res 217A (III), 10 December 1948, A/810 at 71.

[4] 999 UNTS 171.

[5] OAS Res. XXX (1948); *American Journal of International Law Supplement*, 43 (1949), p. 133; OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 17 (1992); OEA/Ser.L.V/II 6 rev.1 at 17.

[6] 1144 UNTS 123; OASTS 36; OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 25 (1992). The ACHR is also referred to as the Pact of San Jose.

[7] 213 UNTS 221; 312 ETS 5.

[8] 2010/C 83/02, OJ C 83/389, 30 March 2010.

[9] 1520 UNTS 217; OAU CAB/LEG/67/3 rev. 5; 21 ILM 58 (1982). The African Charter is often also referred to as the Banjul Charter.

[10] *International Human Rights Report*, **12** (2005), p. 893; also reprinted in *Boston University International Law Journal*, **24**, 2 (2006), pp. 147–64 (with introduction by Mohammed Amin Al-Midani).

on Human Rights and Fundamental Freedoms (CIS Convention)[11] and the Association of Southeast Asian Nations' 2012 ASEAN Human Rights Declaration (ASEAN Declaration).[12]

The fourteen essays republished in this volume have been chosen for their high quality, fairly timeless approach and general attention to issues that are of universal interest and thus not too closely related to the technicalities of a specific criminal justice system. The focus is moreover on national legal systems, as a result of which the essays do not specifically consider international criminal law, although the topics discussed in many essays are also relevant to that. Another important characteristic is that all the essays are in English. Despite the fact that many important and profound essays on human rights and criminal law have been written in almost all other languages, they were ineligible for selection simply because that would excessively restrict the usefulness of this volume. A consequence of this choice is that authors from non-English countries are underrepresented – but certainly not entirely absent – here.

Criminal Procedural Law

Human rights have touched on almost every aspect of criminal procedure law and practice, regardless of the specifics of any given criminal justice system (cf. Brants and Franken, 2009). Particularly the right to liberty (which governs all forms of deprivation of liberty within the criminal justice system), the rather broad right to a fair trial (which covers the entire trial process and is also of some interest to the pre-trial criminal investigation phase) and the right to private life (which rules over many investigation powers) are relevant in almost every criminal case. These, as well as several other rights, are further discussed below. An important characteristic of these rights is that their primary purpose is to protect against the state's power, thereby limiting and controlling – *inter alia* – the use of powers against suspects, the collection of evidence, criminal prosecution and the trying of defendants. Human rights relevant to criminal procedure also indirectly limit to some extent the application of substantive criminal law. Quite recently, however, appeals have been made to human rights to obligate states to criminally investigate, prosecute, try and punish certain types of criminal conduct by state officials or private individuals. Below I shall also reflect briefly on these so-called positive obligations to apply the criminal justice system, after first examining several more classical human rights requirements.

Presumption of Innocence

The presumption of innocence is one of the most elementary legal principles of a civilized criminal justice system and ultimately of the state based on the rule of law. First of all, the principle influences the basis and the organization of criminal proceedings: until proven guilty in a criminal trial according to the law, the authorities are bound to treat the accused as innocent; for the establishment of someone's guilt, the authorities must present convincing

[11] Available at: http://www.refworld.org/; also reprinted in van Kempen (2010).

[12] Available at: http://www.refworld.org/; www.asean.org/.

evidence against that person.[13] In that respect, the principle provides a legal counterbalance to the so-called 'presumption of guilt' that may actually often exist against suspects.[14] In a more general sense, the principle is potentially suitable to protect society against the application of criminal justice powers, as a result of which anyone against whom there is no suspicion would be shielded from the power of the state and attacks on his or her honour and reputation (cf. Heerema, 2005). The principle also limits the possible reach of the criminal justice system because the legislator and judiciary have to take it into account when establishing the contents and scope of the system. Meanwhile – unlike most other fundamental rights and principles that are relevant to criminal justice – the presumption of innocence reaches out to cover all phases of criminal proceedings and contributes to the quality thereof. Although the principle is principally procedural in nature, it even has some relevance to substantive criminal law since, for example, it may oppose strict criminal liability. Given the various fundamental interests the presumption of innocence seeks to protect, it is not surprising that it is explicitly acknowledged in all general human rights treaties under consideration here – see Articles 11 (1) UDHR, 14 (2) ICCPR, 16 ADRDM, 8 (2) ACHR, 6 (2) ECHR, 48 (1) EU Charter, 7 (1) (b) African Charter, 16 Arab Charter, 6 (2) CIS Convention and 20 (1) ASEAN Declaration. In all these provisions the principle is formulated in a broadly similar way.

In spite of the fundamental nature, broad range of application and universal recognition of the presumption of innocence, its precise rationale, meaning, content and scope are still rather uncertain. For example, how does the principle regulate the application of criminal investigation powers against suspects? Does the presumption of innocence suggest that non-convicted suspects may not be treated differently from non-suspects? This cannot be the case since it would render application of such powers unacceptable and would thus obstruct efficient and effective criminal investigation. Does the principle then require a certain degree of suspicion for the applications of these powers? Such an approach would be much more feasible, but does not relate very well to the formulation of the principle in most human rights instruments, under which the right to be presumed innocent applies 'until proved guilty' – thus not 'until a sufficient degree of suspicion exists'. So how must one assess which restrictions of the presumption of innocence are justifiable and which are not? Many other questions arise. How does pre-trial detention relate to the presumption of innocence (see, for example, Baradaran, 2011; Stevens, 2009)? Does the principle prohibit all presumptions of fact or law in criminal cases? How does the principle apply to defendants who have confessed their guilt or even pleaded guilty? In what sense and to what extent does the presumption of innocence entail that serious offences must comprise a culpability requirement? How far outside the scope of the criminal justice system does the principle regulate state behaviour? It is exactly because of these and many other uncertainties that the presumption of innocence is threatened with marginalization by policies to increase the severity of penal responses, to widen the net of risk-based strategies and to rebalance the criminal justice system towards victims and away from offenders. It is against that background that Andrew Ashworth's essay 'Four Threats to the Presumption of Innocence' (Chapter 1) offers a profound search for the

[13] On the origins of the presumption of innocence as a rule of proof and a shield against premature punishment, see Quintard-Morénas (2010).

[14] See Corcos (2003), who – following Scott Turow's novel *Presumed Innocent* (1987) – speaks of a 'legal fiction'.

rationale, meaning and scope of the presumption of innocence, and for the proper nature and extent of any limitations on, or exceptions to, the presumption that ought to be recognized.[15]

Preventive Detention and the Right to Liberty

Arrest and pre-trial detention – more broadly, preventive detention – are the severest powers that the authorities have at their disposal against individuals during a criminal investigation. These not only constitute the most literal restriction of a person's liberty; perhaps more than any other group, detainees are also extremely vulnerable to abuse by the state because they are entirely in the power of the authorities who have an interest in gaining information or a confession (Birk *et al.*, 2011, p. 18). The application of arrest and particularly pre-trial detention is therefore problematic in the context of human rights norms (see further van Kempen, 2012). The principal considerations in this respect of course are the right to liberty and security, and additionally the presumption of innocence and the right to humane treatment, while the prohibition of torture and ill treatment may become relevant in more specific circumstances. The right to liberty is universally recognized – see Articles 3 and 9 UDHR, 9 ICCPR, 1 and 15 ADRDM, 7 ACHR, 5 ECHR, 6 EU Charter, 6 African Charter, 14 Arab Charter, 5 CIS Convention and 12 ASEAN Declaration. However, the codifications of the right to liberty and the requirements for its limitation differ quite a lot between these provisions, varying from a very detailed exposition in the European Convention to an exceptionally brief one in the EU Charter. Nevertheless, stressing the principle of subsidiarity/necessity, it is generally accepted under international human rights law that preventive deprivation of liberty may only be resorted to if all less severe avenues – such as unqualified liberty, conditional liberty or alternatives to detention – are inadequate to sufficiently control the suspect.

Nevertheless, pre-trial detention is commonly used in ordinary criminal cases against suspects of at least moderately serious crime. It is estimated that on any given day around 2.5 million people are being held in pre-trial detention and other forms of remand imprisonment throughout the world (Walmsley, 2008) and that in the course of a year approximately 10 million people will pass through pre-trial detention (see Berry, 2011, pp. 12 and 15): these numbers largely exclude arrest and police custody. More than with any other security threat, in terrorism cases governments and legislators have been searching for – or in several instances knowingly overstepping – the ultimate limits that the right to liberty sets for pre-trial detention and other forms of preventive deprivation of liberty (see, for example, Elias, 2009; Shute and Mora, 2012). Precisely because the high security interests in terrorism cases genuinely put the right to liberty to the test, it is instructive to see how this right is applied under different international human rights instruments. In Chapter 2, 'Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law', Douglass Cassel analyses the grounds, procedures and conditions required by international human rights and humanitarian law for pre-trial detention of suspected terrorists for purposes of criminal prosecution, and for their preventive detention for security and intelligence purposes (see also Hakimi, 2008). Cassel notes important differences between relevant human rights instruments and sets out which approach he views as preferable.

[15] A slightly different version of this article was published in *International Journal of Evidence and Proof*, **10** (2006), pp. 241–79.

Criminal Investigation and the Right to Privacy

The notion of privacy is impossible to articulate precisely (see, for example, Solove, 2006, pp. 477–82), one important reason being that privacy covers a broad web of interests and values, which may be different in nature but which may also overlap. Another reason is that different cultures may view the meaning of privacy differently (Whitman, 2004). As a result it is equally unattainable to define accurately what exactly the right to privacy or private life encompasses. Some even question whether the right to privacy is a genuine right at all, or merely a cluster of interests that are already covered by other rights (Thomson, 1975, pp. 295–314; cf., for example, Alfino and Mayes, p. 3; Rachels, 1975). Nevertheless, the importance of privacy to individuals, groups and society is undeniable, also in relation to the criminal justice system. For all such parties, the interest in protecting privacy may be concerned with access to individuals themselves, to their domains and possessions, and to their personal information (including the collection, processing and dissemination of that information). However, the manner in which privacy is important to individuals, groups and society may vary.[16]

From the viewpoint of the individual, for example, privacy is vital to a person's capacity to construct autonomy, develop a self-identity, be intimate with others, secure anonymity, feel free, be at ease, seek solitude, protect one's dignity and reputation, and control one's life. To groups privacy may be relevant for somewhat different reasons, as Andrew E. Taslitz points out in his essay 'Privacy as a Struggle' (Chapter 3). Taslitz stresses that groups require shielding from the judgmental eyes of the broader society or the intimidating stare of the state for their coherence and for their effectiveness in serving their particular social function, and that group privacy encourages the free exchange of ideas among group members, a process that can stiffen their resolve to stand fast in favour of their dissenting views against the enormous majority pressures to social conformity. Finally, privacy is constitutive of society (Solove, 2006, p. 488). It promotes rules of behaviour, etiquette and civility and thus makes it possible to uphold social norms and to enforce a kind of order in the community (Post, 1989, pp. 959–69). Furthermore, having one's self protected by privacy and a private domain – rather than being fully exposed in all personal aspects to others and to society – makes it possible for a person to interact with others, to strike a posture appropriate to the circumstances and thus to contribute to society and the greater common good, for privacy shields personal and sacred aspects of one's identity that are irrelevant but perhaps still disruptive when engaging in contact with others. Even the revelation of certain private information about a person hinders his or her functioning within society, because he or she may be excessively harshly defined or judged by that certain aspect alone.[17] Privacy protects property, which is also in the public interest (cf. Heffernan, 2001, pp. 15, 23–24, for example). Privacy can even be said to be essential to democratic government since it fosters and encourages the citizen's moral autonomy, which is a central requirement of a democracy (Gavison, 1980, p. 455).

[16] For a review of the literature on the meaning of privacy and various reasons why privacy is important, see Magi (2011).

[17] See Taslitz (2002, p. 131): 'Each of us wears many masks wherein each mask reflects a different aspect of who we really are. We do not want our entire natures to be judged by any one mask, nor do we want partial revelations of our activities to define us in a particular situation as other than who we want to be.'

The above implies that privacy is not only significant to individuals and groups, but also fundamental to society itself and thus to the public interest. Privacy thus not only inheres in individuals alone, as Taslitz emphasizes in 'Privacy as a Struggle'. However, as his essay sets out, a fundamental right to privacy can only protect those interests if privacy it is not too narrowly defined. The arguments Taslitz advances are therefore of particular importance to criminal investigation, since privacy is relevant to many investigative powers and therefore to almost every criminal case. It is not only the use of covert investigation methods – such as bugging, interception of communications (via telephone, fax, e-mail, mail, internet and other private or public networks), observation, electronic surveillance, running informants, infiltration, front-store operations and running agents provocateurs – that interferes with privacy; the same applies to more regular investigation powers, such as entries and searches (including persons, premises, objects and electronic data), seizures and retention of fingerprints, samples of blood, urine, breath, cellular material and DNA profiles.

The application of these and many other investigative powers potentially interferes with the right to a private life – including family life, home and correspondence or communications – as is explicitly recognized in Articles 12 UDHR, 17 ICCPR, 5, 9 and 10 ADRDM, 11 ACHR, 8 ECHR, 7 EU Charter, 16 (8) and 21 Arab Charter, 9 CIS Convention and 21 ASEAN Declaration (but not in the African Charter) (see, for example, Bygrave, 1998; Trechsel, 2006, pp. 534–59; Vassilaki, 1994, pp. 39–49; Winter, 2009). Under several of these provisions a broad definition of privacy is applied. So, according to, for example, the European Court of Human Rights, the notion of private life not only covers a person's physical and psychological integrity and can therefore embrace multiple aspects of the person's physical and social identity, but also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.[18] Nonetheless, whichever broad definition of privacy is acknowledged, the right to private life can never apply absolutely. That would render the criminal justice system virtually impossible. Infringement of the fundamental right to privacy through criminal investigative powers is therefore permitted under international human rights law, provided it has a basis in national law, serves a legitimate aim and is proportionate and necessary.

When considering whether an infringement of privacy meets these requirements, a broad definition of privacy offers the option to take a wide variety of individual, group and public privacy interests into account. It can prevent assessment being limited to balancing criminal justice and security interests solely against the individual's interests. 'After all', as Taslitz warns, 'if the harm the state inflicts is to but one person while the gains the state makes are portrayed as to all of society, it would intuitively seem to be the rare case where the state should lose' (p. 92). Such an approach ultimately also threatens privacy as a foundation of society. This does not mean, however, that the broad definition in international human rights law fully enables the human right to private life to protect adequately all prevailing privacy interests. A major concern in this regard is that international human rights case law deals with human rights intrusions on a case-by-case basis and hardly ever decides on a general development as such. Yet the public privacy interest is threatened not so much by singular

[18] *S. and Marper* v. *the United Kingdom*, ECtHR (GC) Judgement of 4 December 2008, Appl. No. 30562/04, at par. 66.

egregious acts but by a slow series of relatively minor acts, which gradually begin to add up (see Solove, 2007, pp. 768–72).

Fair Criminal Procedure

The criminal trial is at the heart of the criminal justice system, and so is the associated right to a fair trial, which is universally recognized as a human right – see Articles 10 and 11 UDHR, 8 and 16 ADRDM, 8 ACHR, 14 ICCPR, 6 ECHR, 47 and 48 EU Charter, 7 African Charter, 12 and 13 Arab Charter, 6 CIS Convention and 20 (1) ASEAN Declaration. In fact, these are only the chief fair trial provisions, of which the International Covenant's provision is the most complete, since the right to a fair trial actually encompasses a broad range of different rights. Rights that are universally recognized as fundamental fair trial entitlements include, for instance, the right to a fair and public hearing, to be tried by an independent and impartial tribunal, to be informed promptly of the charges, to be tried within a reasonable time, to a variety of defence rights (such as the right to adequate time and facilities to prepare the defence, to be tried in one's presence, to defend oneself in person or through legal counsel of one's own choosing and to examine witnesses) and to an appeal.[19] The right to trial by jury is not universally recognized as a human right, however.[20]

Since the right to a fair trial has had and still has a major influence on the criminal justice systems of many jurisdictions, the question arises 'Why Must Trials be Fair', which is also the title of Chapter 4, by Stefan Trechsel. Trechsel approaches the question from different but ultimately not strictly separated perspectives, including the law, history, philosophy, sociology and psychology. He contends that whether justice has been done cannot be decided by mere reference to the outcome of criminal proceedings. Analysing 'outcome-justice' (which evaluates the final result of criminal proceedings) versus 'procedural justice' (which examines the proceedings as a result of which the final outcome was reached) Trechsel concludes that fairness of proceedings is an important value in itself and not just instrumental to the outcome of criminal proceedings. This does not alter the fact, as Trechsel appropriately acknowledges, that procedural justice – which is what fair trial rights are primarily designed to establish – can contribute to achieving substantive justice, including the correct application of the law and conformity with the relevant facts. In that sense, too, the right to a fair trial is in the interest of both the individual suspect and the public at large. In fact, it must be observed that, for example, Article 6 of the European Convention and the associated case law of the European Court have done much for the quality of criminal justice systems in Europe, by making these systems procedurally fairer, less vulnerable to wrongful convictions and in some aspects more effective.

Fair trial rights are not only relevant during the criminal trial as such; several of them – at least to some extent – also regulate pre-trial criminal investigation. This applies particularly to the right or privilege against self-incrimination (the *nemo tenetur* principle) and the right

[19] For a review and comparison of several international human rights instruments, see Harris (1967).

[20] For literature on the right to jury trial and lay participation in trials, see the collection of essays in Brooks (2009). On the relation between human rights and lay adjudication models, see Jackson and Kovalev (2006).

to silence.[21] It is interesting to examine those rights more closely because it is less instantly evident than with other fair trial rights why fair procedure demands them. Some have inferred the privilege (including that of silence) historically and philosophically from the rule of law as constitutive for protection against state violence (Zupančič, 2004, p. 15).[22] This substantiates the importance of the rights, but does not as such explain their prominence in the fairness debate. It is perhaps also for this reason that the rights' justification has been the object of fierce debate in the academic literature, especially in the USA. It has, for example, been argued that protection of the guilty, of the innocent, of privacy (with which the rights are indeed connected; see Roxin, 1997, p. 74), of the defendant's dignity or autonomy and against state tyranny, as well as ensuring public belief in the fairness and legitimacy of the criminal justice system, are all unsatisfactory as justifications for the privilege (Dolinko, 1986; see also Schulhofer, 1991, pp. 316–25). Others, disagreeing, see its importance in securing fundamental adversarial fairness between state and defendant (O'Brien, 1978, pp. 36–37) or hold that it is essential for elementary fairness because of the serious risks for the innocent that forced testimony can pose in practice due to the authorities' manipulation, intimidation or misunderstanding of the defendant (Schulhofer, 1991, pp. 325–36). John Jackson, in 'Re-conceptualizing the Right of Silence as an Effective Fair Trial Standard' (Chapter 5), approaches the matter differently, as he distinguishes the right to silence from the privilege against self-incrimination. He contends that within the criminal process (only) the right to silence is entitled to be given special weight in order to uphold the procedural rights of the defence, which exist to safeguard institutional values such as the need for accurate findings of fact and the protection of the innocent.

International human rights law on fair trial rights does not require states to implement a certain evidentiary system, nor does it instruct the courts on how they should select and assess evidence. Human rights instruments and case law do, however, set several evidentiary standards, which each criminal justice system must guarantee one way or another.[23] For example, prosecution authorities have the obligation to disclose to the defence all material evidence for or against the accused.[24] Of vital importance for the fairness and quality of evidence gathering is also the defendant's right to examine the witnesses and experts arrayed against him or her and to secure the attendance and examination of witnesses and experts on his or her behalf. It has been found to be 'beyond any doubt the greatest legal engine ever invented for the discovery of truth' (Dean Wigmore, quoted in Pollitt, 1959, p. 381). Nevertheless, there is no agreement on what the justification of the right is, not even on one of its core elements, the defendant's right to confront the witnesses arrayed against him or

[21] For comparative law appraisals of these rights, see Berger (2006), Stuesser (2002–2003) and van der Walt and de la Harpe (2005).

[22] For an Anglo-Saxon focus in a historical approach, see Helmholz *et al.* (1997) and Moglen (1994).

[23] As a result of the freedom of states to choose the means and forms by which the standards are met, human rights law does not lead to any clear convergence of evidentiary practices (see, for Europe, Jackson, 2005).

[24] See, for example, HRC, *General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial (Art. 14)*, 23 August 2007, CCPR/C/GC/32, at par. 33; *Edwards* v. *the United Kingdom*, ECtHR Judgement of 16 December 1992, Appl. No. 13071/87, at par. 36.

her.[25] One reason for this is that the right to confront witnesses is not absolute. This raises difficult questions, such as how the right relates to the use of hearsay evidence or testimony given to the police during the preliminary criminal investigation or, in some jurisdictions, the examining magistrate, which has been recorded in a report. Richard D. Friedman's influential essay 'Confrontation: The Search for Basic Principles' (Chapter 6) discusses the historical meaning of the confrontation right, its scope and possible exceptions to it. Friedman proposes that the right should be understood narrowly, as applying only to testimonial statements, and that it in that sense should be absolute: if a person's testimonial statement is to be introduced against an accused, the accused must have an opportunity to confront the testifier (for a more European perspective, see Dennis, 2010).

International human rights law furthermore offers directions on the extent to which the authorities may use evidence against the defendant when that evidence is obtained through a violation of human rights, such as the right to privacy (for example in case of unlawful searches or surveillance) or fair trial rights (for example in case of violation of the right to silence or the right to legal assistance). A question of fundamental interest is which obligations states have in cases where they have obtained evidence of a serious crime by the application of interrogation methods that contravene the prohibitions against torture and ill-treatment. The dilemmas in such cases are formidable. Some suggest, however, that the defendant's human rights not to be ill-treated and to a fair trial may be balanced against those interests of the victim that are to be protected (see, for example, Greer, 2011). Such an approach not only involves indirect horizontalization (that is, application between individuals) of human rights to a rather extreme extent, but also ignores that the interest in ensuring the defendant's rights exists not merely in the concrete interest of the individual but in securing the integrity of criminal investigation in the present case as well as future ones. Such a narrow balance-test thus simplifies what is actually at stake and would ultimately undermine the human rights protection of suspects and defendants in general. Chapter 7, 'The Protection of Human Dignity in Interrogations: May Interrogative Torture Ever Be Tolerated? Reflections in Light of Recent German and Israeli Experiences', offers a detailed and more balanced account of competing interest. Its authors, Miriam Gur-Arye and Florian Jessberger, conclude that keeping the ban on interrogative torture intact may require the exclusion of all evidence resulting, directly or indirectly, from such interrogations.

Non bis in idem/Double Jeopardy Rule

Both the civil law *non bis in idem* rule and the common law 'double jeopardy' rule – which are not entirely similar in scope and application (Bassiouni, 1993, pp. 288–89; see also Costa, 1998) – signify the principle that no one shall be tried more than once for the same cause. Generally the principle prohibits someone who has been finally acquitted or convicted of an offence from again being prosecuted (*nemo debit bis vexari*) or punished (*non bis puniri*) for that same offence. The scope of the right depends on what is to be considered as 'the same offence' and the extent to which exceptions to the principle are allowed. Explicit acknowledgment of the right may be found in Articles 14 (7) ICCPR, 8 (4) ACHR, 4 Protocol

[25] See, for example, Clark (2003), who asserts that the confrontation principle ought to be understood as primarily an accuser's obligation rather than primarily a defendant's right.

No. 7 to ECHR, 50 EU Charter, 19 Arab Charter, 7 (2) CIS Convention and 20 (3) ASEAN Declaration (the UDHR, ADRDM and African Charter contain no codification of it). The principle meets the legal maxim *lites finiri oportent*: trials must come to a final end. It has several rationales. First, it serves to protect individual liberty – also in the sense of rest, peace, certainty – by offering former defendants security against both the threat of a new trial (which is caused by the mere existence of the legal possibility that a finalized trial might be reopened) as well as the actual effectuation of a new trial (that is, that the trial is reopened). Second, the principle might similarly protect victims and their families against further distress, and against groundless hope and optimism that a conviction is still conceivable. Third, the principle meets the public interest objective of peace and quiet in society: the legal order would be seriously challenged if finalized criminal trials could be and were constantly reopened. Fourth, the principle encourages efficient investigation and prosecution.[26] It is also in the public interest that, fifth, the principle protects the state and the administration of justice, the authority and integrity of which would be threatened if overturning *res judiciata* judgments were to become customary. Sixth, it reduces the risk of wrongful conviction. Seventh, the fact that the principle has been enclosed in the right to a fair trial in the ICCPR and the ACHR seems to imply that it also serves the fairness of criminal proceedings (see Wasmeier, 2006, p. 121) – but it is hard to explain exactly how the principle protects fair trial directly. Meanwhile, it is also clear that the principle may have as a result that someone who has been unjustly acquitted will permanently go scot-free, even if new evidence were indisputably to prove his or her guilt. It is against this background that Ian Dennis' 'Rethinking Double Jeopardy: Justice and Finality in Criminal Process' (Chapter 8) discusses in depth several of the justifications for the principle mentioned above, and whether it is justified to provide exceptions to it.

Positive Human Rights Obligations to Apply the Criminal Justice System

Human rights have their origin in the defence of individual liberty against oppression and the iniquitous exercise of power by the sovereign and later the state. In line with this, it is central to civil human rights to limit and control the power of the authorities in their actions against individuals. This clearly also applies to the criminal justice system: all the human rights discussed above limit, control or regulate the authorities' application of the system of criminal investigation, prosecution and trial proceedings against individuals, with the aim of protecting individuals against the power of the state. Given that that power as such is infinite, human rights are of great importance in this sense. Nevertheless, through extensive interpretation of human rights provisions, international human rights monitoring bodies have relatively recently commenced formulating expressly positive obligations on the state to apply the criminal justice system against individual officials and – particularly remarkably – other private parties who have been acting contrary to the values on which these rights are based. The positive obligations include duties of the state to criminally investigate, prosecute, criminally try, convict and punish these individuals for offences such as killing, grievous

[26] See, however, Levmore and Porat (2011), in which it is asserted that double-jeopardy protection likely generates overinvestment in the preparation of prosecution and defence, and that the prosecutor and defendant should therefore be given room to bargain for a waiver of double-jeopardy protection in order to allow the possibility of a second trial.

bodily harm, human trafficking, rape, child pornography and abduction. The rationale underlying these positive obligations is evident: they offer additional protection to (especially vulnerable) individuals against severe mischief by others.[27]

The aforementioned duties may be found in the case law of, for instance, the Human Rights Committee[28] and the African Commission.[29] The concept of positive obligations in respect of the application of the criminal justice system against both individual state officials and private parties seems to be most developed in the case law of the European Court.[30] The most far-reaching approach, however, is adopted by the Inter-American Court, as Fernando Felipe Basch explains in his critical essay 'The Doctrine of the Inter-American Court of Human Rights regarding States' Duty to Punish Human Rights Violations and Its Dangers' (Chapter 9). Basch is correct in warning that the 'duty to punish doctrine' is dangerous because it promotes violation of the presumption of innocence and the suspect's right to defence in a fair trial. He points out that the European Court's approach is less punitive than that of the Inter-American Court. That may be so, but the European approach also constitutes a fundamental shift within the concept of human rights. In my view, the most alarming consequence of that shift is that civil human rights no longer serve only to control and restrain the power of the state, but that henceforth, and to a significant degree, they also legitimize and even require the use of that power.[31] As a result, the human rights concept of positive security offers the authorities the possibility – which they are actually utilizing – to adduce human rights in defence of all kinds of measures that restrict liberty and it makes it easier for them to politicize or even exploit the human rights argument. Human rights can thus be turned in on themselves, neutralizing their principles.

[27] For literature supportive of positive obligations, see, for example, Bettinger-López (2008), Campbell (2006) and Gallagher (2008).

[28] See HRC, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, at par. 8; see furthermore, for example, *Bleier* v. *Uruguay*, HRC View of 29 March 1982, Comm. No. 30/1978, CCPR/C/15/D/30/1978, at par. 11–15; *Bautista de Arellana* v. *Colombia*, HRC View of 27 October 1995, Comm. No. 563/1993, CCPR/C/55/D/563/1993, at par. 8.6, 10; *Arhuaco* v. *Colombia*, HRC View of 29 July 1997, Comm. No. 612/1995, CCPR/C/60/D/612/1995, at par. 8.8.

[29] *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*, ACmHPR Report of 11–25 May 2006, Comm. No. 245/2002, at par. 143, 146, 153, 160; see also 204 et seq. See furthermore, for example, *Art. 19* v. *The State of Eritrea*, ACmHPR Decision of 16–30 May 2007, Comm. No. 275/ 2003 (2007), under: Decision on admissibility; *Amnesty International and Others* v. *Sudan*, ACmHPR Report of 1–15 November 1999, Comm. No. 48/90, at par. 50, 51, 56; *Commission Nationale des Droits de l'Homme et des Libertes* v. *Chad*, ACmHPR Report of 2–11 October 1995, Comm. No. 74/92, at par. 20 et seq.

[30] See, for example, *Osman* v. *United Kingdom*, ECtHR (GC) Judgement of 28 October 1998, Appl. No. 23452/94, at par. 115–16 (killing and attempted killing by private individual). See also *M.C.* v. *Bulgaria*, ECtHR Judgment 4 December 2003, Appl. No. 39272/98, at par. 148–53, 185–86 (rape by private individuals); *Siliadin* v. *France*, ECtHR Judgement of 26 July 2005, Appl. No. 73316/01, at par. 89, 143–44 (slavery by private individuals); *97 Members of the Gldani Congregation of Jehovah's Witnesses and Others* v. *Georgia*, ECtHR Judgement of 3 May 2007, Appl. No. 71156/01, at par. 133–35 (private violence against religious community); *Opuz* v. *Turkey*, ECtHR Judgment of 9 June 2009, Appl. No. 33401/02, at par. 128–30, 159 (domestic violence).

[31] More elaborately on this and other problems arising from positive obligations to apply criminal law, see van Kempen (2013).

Substantive Criminal Law

Although the predominant relevance of human rights concerns criminal procedure as far as the criminal justice system is concerned, they have also assumed increasing importance in substantive criminal law topics. In this respect, too, human rights are primarily intended to protect against the state's power, thereby limiting and controlling the scope and application of offences, punishments and criminal liability. So, for example, the chiefly procedural presumption of innocence (see above), the right to freedom and security (see above), and the right to dignity (see Articles 1 UDHR, 1 EU Charter, 11 ACHR, 5 African Charter and 1 ASEAN Declaration) can be understood to involve requirements concerning culpability and fault (see, respectively, Ashworth, Chapter 1 in this volume, pp. 17–19; Kremnitzer and Hörnle, 2011; Ramraj, 2002). Related issues are that human rights law presupposes the minimum age of criminal responsibility (see further Cipriani, 2009) and that criminal liability is personal. The following paragraphs, however, focus on several other important limitations on the state to utilize substantive criminal law. The topics examined are the principle of legality, offences the substance of which is contrary to human rights and freedoms, and defences of justification and excuse. Before commencing that examination, though, it is noted that human rights no longer only limit and control the state in applying criminal law. Instead, criminal law is increasingly coming to be influenced by positive human rights obligations: associated with all states' duties to investigate criminally, prosecute, try and punish certain conduct by state officials and private individuals, there is an obligation adequately to criminalize that conduct through appropriate offences and corresponding punishments.

The Principle of Legality

The principle of legality not only entails the most fundamental human right relevant to substantive criminal law but also constitutes a classic criminal law dogma.[32] The principle in fact covers several rules, which are interconnected and sometimes overlapping (for a review, see Gallant, 2009, pp. 11–14). A number of these meet with general acknowledgement. First, the rule that no act may be punished as a crime which was not a criminal offence under a law applicable to the actor at the time of the act and that it may not attract a higher penalty than that provided for in law when the action took place (the principle of non-retroactive application; see Atrill, 2005; Popple, 1989). Second, the rule that the criminal law must be sufficiently clear to provide notice that the act was prohibited at the time it was committed (the principle of *lex certa*). Third, the rule that a crime may not be created through analogous application of criminal law (the prohibition against analogy or *lex stricta*). Fourth, in line with these rules it is often also accepted that only statutes can define a criminal offence and prescribe a penalty (the principle of *lex scripta*) (see, for example, Murphy, 2010, pp. 193–202). With the exception of the ADRDM, the principle of legality is contained in all the general human rights treaties under consideration, although the relevant provisions differ in their wording

[32] Interestingly, Mokhtar (2005, pp. 49, 50), seems to distinguish between a criminal law approach to the principle and a human rights approach, the latter of which in his view should put stronger emphasis on interpreting the principle in such a way that it best guarantees that the application of the law is fair to the defendant. See furthermore Boot (2002; on the legality principle in national law and human rights law, see pp. 75–126, 127–78).

and scope (see Articles 11 (2) UDHR, 15 (1) ICCPR, 9 ACHR, 7 ECHR, 49 EU Charter, 7 (2) African Charter, 15 Arab Charter, 7 (1) CIS Convention and 20 (2) ASEAN Declaration). For example, the rule that the offender shall benefit from a legislative change if it is in his or her favour is not expressly acknowledged in the UDHR, ECHR and ASEAN Declaration (for elaboration on this rule, see Mokhtar, 2005, pp. 49–50; Opsahl and de Zayas, 1983). It should furthermore be noted that, apart from the general legality provisions just mentioned, several human rights provisions also encompass specific legality requirements that apply to criminalizations that infringe the particular human right guaranteed by that provision (for example, offences that limit freedom of speech, as discussed in the next section; see Articles 19 (3) ICCPR, 10 (2) ECHR, 13 (2) ACHR and 11 (2) CIS Convention).

In Chapter 10, the now classic essay 'Nulla Poena Sine Lege', Jerome Hall examines the principle's origins, development and rationales. Subsequently, he analyses and problematizes retroactivity, analogy and extensive interpretation, the *Rechtsstaat*'s (rule of law) requirement of certainty and thus an as specific as possible formulation of the law, and the centring on the personality of the offender. Hall's observations, the basis of which is the view that the principle constitutes a necessary constraint on state power and consequent protection of the individual, are still of great value today. This is, for example, the case where, relative to the prohibition of analogy, he remarks that one must not confuse the deliberate invention of new rules with the relatively unconscious subsumption of unanticipated or even unintended sets of facts under old prescriptions – a process found in both criminal code and common law adjudication, and a phenomenon inseparable from the endless interaction of a growing language and changing socioeconomic institutions. But of still more elementary importance is Hall's discussion of the dilemma caused by the fact that the abolition of *nulla poena* may provide a sieve through which not only repression and stupidity can flow (as a result of insufficient constraint on courts with authoritarian leanings) but also humanity and science (for it may offer freedom to courts for more individualized punishment and treatment of offenders). Nevertheless, Hall's analysis finally leads him to conclude that there should be a strong presumption in favour of legal control of penalization.

Human Rights as Limitations on the Criminalization of Conduct

Criminal law prohibitions and commands – that is, offences or crimes – limit individuals' freedom to act or be passive. In some instances, that freedom is protected under human rights law. Of particular relevance in this respect are the freedoms of expression and of religion and belief – which are discussed further below – and the freedom of assembly and the right to a private life. So, individuals' privacy is, for example, interfered with by criminal prohibitions on specific sexual behaviour (homosexual activities, sado-masochism, bestiality, adultery), on abortion, suicide and euthanasia, as well as on the use of narcotics for health reasons.[33] Similarly, criminalization of public demonstrations, public or private gatherings and of certain organizations in principle impede freedom of assembly and association. Under the different human rights instruments, all criminal offences that restrict human rights must generally fulfil three conditions in order to be justified: the restriction – that is, the offence – should have a

[33] Some of these topics are discussed in, for example, Ermanski (1992) and Moreham (2008, pp. 72–75, 77–79).

basis in national law (principle of legality), must serve a legitimate aim and needs to meet a high standard of necessity.

At the heart of the debate seems to be freedom of expression, which may be restrained by offences that, for instance, ban pornography (for example photography, film, paintings and literature), usage of certain languages, blasphemy, defamation, anti-establishment speech or terrorist language (see, for example, Adler, 1996; Boyne, 2010; de Varennes, 1994; Nowlin, 2002). The same applies to hate speech prohibitions (see McGoldrick and O'Donnell, 1998). These are particularly interesting because they find themselves at the interface where two doctrines fundamental to pluralistic democracy collide: freedom of expression and non-discrimination. This is a collision, moreover, that is regarded completely differently in the United States and other Western democracies. It is exactly that difference that Michel Rosenfeld thoroughly examines in his essay 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (Chapter 11) (see also Tsesis, 2009). He finds that the various approaches taken are all imperfect, for all have both advantages and disadvantages. None of them can be assessed merely in the abstract, but instead they depend on the contemporary social context. Rosenfeld asserts that in the present stage of history, the threat that hate speech causes to minority discourse seems a much greater problem than government-prompted censorship in contemporary, pluralistic constitutional democracies.

An equally complicated question is how criminal law and religion should or should not be involved with each other from the point of view of the right to freedom of religion and belief. Although the involvement of criminal law with religion (as well as vice versa) is always a precarious matter, much depends on how the relationship between state and religion is envisaged. On the basis of two fundamental views, Piet Hein van Kempen's essay 'Freedom of Religion and Criminal Law: A Legal Appraisal. From the Principle of Separation of Church and State to the Principle of Pluralist Democracy?' (Chapter 12) examines the extent to which the right to freedom of religion opposes, allows or requires criminal law measures that deal explicitly with religion or belief. Various themes are reviewed, including the prohibition of blasphemy, apostasy and proselytism. Based on a comparative analysis of four general human rights treaties and associated case law, the essay asserts that criminal law should be as religiously-neutral and impartial as possible. This is best guaranteed by taking as the basic principle the concept of strict separation between church (religion) and state, rather than the principle of pluralist democracy. The approach implies that there is in principle no room for criminal law offences that expressly concern religion or belief.

Defences of Justification and Excuse

While not obvious at first glance, human rights may be germane to defences of justification and excuse. Handbooks on criminal law usually pay scant attention to this, but not necessarily deservedly so. For example, insofar as the presumption of innocence opposes strict criminal liability offences, it could be argued that it also protects the principle of *nulla poena sine culpa* (see Trechsel 2006, pp. 156–58). As a result, the presumption would require recognition of defences of excuse, since such defences refute the defendant's moral culpability or his or her ability to possess the requisite *mens rea* for criminally wrong conduct. Human rights law might, however, also restrict the possibility of acknowledging defences of excuse. For instance, the right to freedom from arbitrary deprivation of liberty presupposes a restriction

on accepting insanity defences, at any rate when this subsequently leads to the defendant's detention on the basis of his or her unsound mind (cf. Boland, 1996; Hopper and McSherrry, 2001). As a general limitation, excuses (but the same applies to justifications) may not be abused to circumvent the positive obligation to convict and adequately punish perpetrators of particularly serious crimes against individuals.

In some instances specific human rights may also be relevant to defences of justification – that is, defences that deem conduct that is *prima facie* criminally wrong to be socially acceptable and non-punishable under the specific circumstances of the case. In fact, the only defence expressly referred to in human rights instruments is a justification defence, namely where Article 2 (2) ECHR and Article 2 (4) CIS Convention accept that deprivation of life does contravene the right to life when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence. That these provisions acknowledge self-defence does not, however, necessarily imply that they require national law to grant it. Self-defence is not itself expressly identified as a right. However, it could be argued that a state violates the right to life by withholding a right to self-defence from someone whose life is under immediate risk by an attacker while the state is not immediately capable of providing the necessary protection. In that case the state cannot fulfil its positive obligation to secure the person's life, while it further endangers that life by suppressing self-defence. Along these lines, it could be contended that the state then becomes co-responsible for a violation of that person's right to life. It is not clear, though, whether human rights monitoring bodies would follow such reasoning.[34] What is clear is that the aforementioned provisions restrict possibilities for defences of self-defence by requiring absolute (or extreme) necessity. A firm emphasis is thus put on the avoidance of deadly violence and with that on the obligation to withdraw from the attacker if possible, rather than allowing a person being attacked to stand his or her ground and use such force against the attacker as is needed to make the attacker desist or depart (see Ashworth, 1975, pp. 289–90, 293).

Of particular interest here are cultural defences – that is, defences to escape criminal liability asserted by, for example, immigrants, refugees, indigenous people or subcultures based on their customs or customary law. Such defences may or may not be articulated in the form of classical defences of justification or excuse, like self-defence, necessity, duress or mistake of law. But no matter the legal qualification under which they are presented, they are quite regularly advanced in criminal trials in countries with multicultural societies, and often confront the authorities and courts with difficult legal and factual questions. The same difficulties are no less acute from a human rights perspective. While culture is a value protected by many human rights instruments (such as the UDHR, ICCPR, ADRDM, ACHR, EU Charter, African Charter, Arab Charter, CIS Convention, ASEAN Declaration and furthermore the UN International Covenant on Economic, Social and Cultural Rights 1966[35]), it may be difficult to accept culture-driven conduct that is in violation of criminal law or even contrary to human rights values. In Chapter 13, 'The Human Rights Implications of a "Cultural Defense"', Michaël Fischer distinguishes between 'cognitive' and 'volitional' cultural defences, both of which may serve as either an affirmative or a derivative defence and

[34] See conversely Cerone (2006, pp. 322–26), who firmly asserts that the right to life does not require states to acknowledge self-defence, but who neglects to discuss the argument just posed.

[35] 993 UNTS 3.

furthermore as a complete or a mitigative defence. He discusses examples of all variations and consequently examines how the cultural defence relates to retribution, deterrence and rehabilitation as generally accepted objectives of the criminal justice system, as well as to several other relevant interests. The argument Fischer sets out is one of support for the cultural defence so long as no human rights are infringed, particularly not human rights that protect life or are against bodily harm.

Sentencing

Although the outcome of the trial is not necessarily decisive for whether the public, victims and defendants judge criminal trials as legitimate and satisfactory, sentencing is undeniably an aspect of criminal justice in which they all have a great interest. Sentencing is also a popular topic. Politicians (particularly, but not only populist representatives) and certain parts of society (but never all of society, and in many countries not even a considerable majority) frequently employ noisy rhetoric to press for harsher penalties in general and, specifically, for concrete criminal cases. It is therefore all the more relevant that human rights law entails some rules against excessive and extreme sentencing practices, some of which apply generally to all criminal penalties and others only in more specific situations.

A first general restriction is that the authorities may only apply criminal penalties in conformity with the principle of legality discussed above. Some human rights instruments furthermore expressly emphasize that punishment is personal and may not be extended to any person other than the offender (see Articles 5 (3) ACHR and 7 (2) African Charter). Relative to instruments that do not contain such a rule, it is sometimes derived from the presumption of innocence.[36] A third general rule concerns proportional sentencing. Although explicitly recognized in Magna Carta (1215), the only contemporary general human rights instrument that expressly provides for such a requirement is the EU Charter, of which Article 49 (3) states: 'The severity of penalties must not be disproportionate to the criminal offence' (see Frase, 2005; van Zyl Smit and Ashworth, 2004). Nevertheless, relative to convictions for offences that restrict, for example, the right to privacy, the freedoms of expression, religion or assembly or the right to property, the severity of the punishment is sometimes taken into account when assessing whether the infringement of the right was proportionate to its aim.[37] Whether – as a fourth general rule – proportionality also requires that a punishment shall not exceed the culpability of the offender is more debatable and does not seem to be accepted as a general human rights norm.[38]

[36] See, for example, *A.P., M.P. and T.P.* v. *Switzerland*, ECtHR Judgement of 29 August 1997, Appl. No. 19958/92, at 48.

[37] See, for example, European Court case law: *Handyside* v. *the United Kingdom*, ECtHR Judgement of 7 December 1976, Appl. No. 5493/72, at 49 (privacy); *Kanellopoulou* v. *Greece*, Judgement of ECtHR 11 October 2007, Appl. No. 28504/05, at 38–40 (expression); *Moon* v. *France*, ECtHR Judgment of 9 July 2009, Appl. No. 39973/03, at 46–51 (property).

[38] See Kremnitzer and Hörnle (2011, pp. 139–40), who assert: 'One of the most important principles of a just system of criminal law is that an imposed punishment should not exceed the culpability of the offender.'

More specifically, human rights law generally limits or opposes capital punishment, as is emphasized by Articles 6 ICCPR, 2 ECHR, 4 ACHR, 5, 6 and 7 Arab Charter and 2 CIS Convention. However, the UDHR, the ADRDM, the African Charter and the ASEAN Declaration do not contain any provisions limiting or prohibiting the death penalty. By contrast, Protocol No. 13 to ECHR (see also Protocol No. 6 to ECHR) and Article 2 (2) EU Charter even require abolition of the death penalty in all circumstances. Moreover, Articles 4 (3) ACHR and 2 (1) CIS Convention imply that the death penalty shall not be re-established in states that have abolished it.

Another specific human rights norm is the prohibition against cruel, inhuman or degrading punishment, which is accepted by all general human rights instruments under anti-torture provisions (see Articles 5 UDHR, 7 ICCPR, 16 ADRDM, 5 (2) ACHR, 3 ECHR, 4 EU Charter, 5 African Charter, 8 (1) Arab Charter, 3 CIS Convention and 14 ASEAN Declaration). Interestingly, the ADRDM also expressly prohibits infamous or unusual punishment. Punishments may be unacceptable under these provisions because of their nature (such as corporal punishment or imprisonment under inhuman conditions) or because they are excessively disproportionate in a given case. As opposed to Article 37 of the UN 1989 Convention on the Rights of the Child,[39] which states that 'life imprisonment without possibility of release shall [not] be imposed for offences committed by persons below eighteen years of age', none of these provisions declares anything about life imprisonment. The justification of this sentence is nevertheless increasingly being called into question. The European Court has recently ruled that an Article 3 ECHR issue may arise when it can be shown that the sentence of an individual to life imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation) and the sentence is irreducible *de facto* and *de iure*.[40] The question remains whether life imprisonment is acceptable at all from a human rights point of view, as Dirk van Zyl Smit examines in the comparative law essay 'Life Imprisonment: Recent Issues in National and International Law' (Chapter 14) (see also Bernaz, 2013; Snacken, 2006). Van Zyl Smit emphasizes that life sentences – as well as other forms of preventive detention that may well end up being life imprisonment under another name – are always very harsh penalties because of their potential to deny liberty indefinitely. Therefore, procedural guarantees can and must be built into the process to ensure proportionality and that prisoners serving life sentences are protected against the excesses of arbitrary decisions.

Final Remarks

The foregoing discussion exemplifies that criminal justice and human rights law have become intrinsically intermingled with each other. Criminal procedure, substantive criminal law and sentencing have challenged human rights law to become a mature legal field, which it has – although under some human rights instruments more than others. In turn, human rights law has confronted criminal justice systems with a need to promote restraint, truthfulness, fairness and even effectiveness in increasingly complex societies. Many systems have been

[39] 1577 UNTS 3.

[40] *Vinter* v. *the United Kingdom*, ECtHR Judgment of 17 January 2012, Appl. No. 66069/09, at 92; *Kafkaris* v. *Cyprus*, ECtHR (GC) Judgment of 12 February 2008, Appl. No. 21906/04, at 97–99.

benefiting from this for many decades, while others are still very much struggling. For all systems, though, difficult and fundamental questions remain concerning the relation between criminal law and human rights, as well as the rationale and scope of human rights protection within the criminal justice system. The fourteen essays in this volume not only illustrate this convincingly, they also provide profound analyses of the basis thereof. These essays are therefore fundamental to the discourse on criminal law and human rights.

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Part I
Criminal Procedural Law

[1]

FOUR THREATS TO THE PRESUMPTION OF INNOCENCE

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I am deeply honoured to have been invited to Cape Town to give the third Beinart lecture. My choice of subject calls for an explanation, since I appear to have selected one of the most obvious and non-contentious topics possible. Does not every international human rights document and every constitutional bill of rights take the presumption of innocence as a basic requirement of civilized existence? The Bill of Rights in the South African Constitution states in section 35(3) that 'every accused person has a right to a fair trial, which includes the right . . . *(h)* to be presumed innocent'. The European Convention on Human Rights declares, in art 6(2), that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. Can we not therefore take it for granted that the prosecution bears the burden of proving criminal charges beyond reasonable doubt?

The answer, as many people here realize, is no. In this late modern era, constitutional rights are not always placed on a pedestal and tend sometimes to find themselves in the swirling waters of politics, in a struggle against demands for greater security and other manifestations of what has been termed 'the risk society' — a social and political context in which both governments and individuals are constantly thinking about the risks of harm and how to minimize them. Assessing situations and persons from the point of view of perceived risk sits rather awkwardly with respecting the dignity of others as full, rights-bearing citizens. My argument tonight is that the presumption of innocence needs to be debated and defended because there are threats to it from at least four sources — *confinement*, by defining offences so as to reduce the impact of the presumption; *erosion*, by recognizing more exceptions; *evasion*, by introducing civil law procedures in order to circumvent the rights conferred on accused persons; and *side-stepping*, by imposing restrictions on the liberty of unconvicted persons but not depriving them of their liberty.

In order to assess the significance of what I describe as threats to the

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presumption of innocence, a central part of this lecture will examine the *reasons* for respecting the presumption as fundamental. These have not received sufficient attention and, if people do not accept the reasons for upholding the presumption, they may be much more willing to relegate or circumvent it. I approach the subject with some modesty, since the presumption of innocence is a subject on which South Africans have made their mark internationally, in both scholarly writings[1] and judicial reasoning,[2] and as your guest this evening I hope that I can succeed in building on those achievements rather than merely carrying 'coals to Newcastle.'

1 CONTROLLING CRIME: THE CONTEXT

It has long been assumed that one of the basic functions of the modern state is to ensure that citizens are reasonably protected from crime. In a crude sense, each of us may be said impliedly to agree not to use physical force against others (except in extreme circumstances of self-defence) in return for the promise of protection from the state. Recent decades have seen growing difficulties for states in meeting this obligation. Despite the professional organization of the police, prosecutors, courts, prisons and so forth, the crime rate seems to have grown during the second half of the twentieth century and to be at a level, in most countries, that is thought to be unacceptably high. Of course states cannot be expected to eradicate crime entirely, but the problem in recent years has been that it has appeared difficult to control it to any degree.[3] The mass media frequently publicize the most terrible examples of criminality, and so, even in countries where recorded crime has stabilised or is declining,[4] there is still a heightened public concern about crime to which politicians feel they have to respond.

The response is generally to create tougher measures in the name of increasing public protection and security, and this is where many threats to the presumption of innocence originate. In Britain this response has tended to take two related forms. The first is simply to increase severity, by means of higher maximum penalties, new offences, tightening criminal procedure and new forms of sentence, bolstered by much tough talking from the government.[5] From reading Jonathan Burchell's inaugural lecture at UCT in

[1] Notably P J Schwikkard *The Presumption of Innocence* (1999).

[2] Probably the most widely cited passages are from the Constitutional Court's judgment in *S v Coetzee and others* 1997 (3) SA 527 (CC).

[3] For elaboration and analysis, see Pat O'Malley *Crime and the Risk Society* (1998); David Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (2001); and I Loader & R Sparks 'Contemporary landscapes of crime, order and control' in Mike Maguire, Rod Morgan & Robert Reiner (eds) *Oxford Handbook of Criminology* 3 ed (2002).

[4] Both in the United States and in England and Wales the crime rate has been declining in recent years, although in England and Wales the figures are complicated by a continued rise in violent crimes recorded by the police. The British Crime Survey affirms that all personal crime (including violence, robbery and thefts from the person) declined by some 35 per cent between 1995 and 2003–04: Tricia Dodd, Sian Nicholas, David Povey & Alison Walker *Crime in England and Wales 2003/2004* Home Office Statistical Bulletin 10/04 (July 2004).

[5] To add to the initiatives surveyed in Andrew Ashworth 'Criminal Justice Act 2003:Criminal justice reform: Principles, human rights and public protection' [2004] *Criminal Law Review* 516, we now have the Serious Organized Crime and Police Act 2005 and the Prevention of Terrorism Act 2005.

2002 I note that some similar trends have been evident in South Africa.[6] The second approach is to focus on risk, and to direct the severity at those persons who are thought to present particular risks to social order and security — by adopting a broad notion of anti-social behaviour against which measures are taken, and through the proliferation of preventive orders, new dangerousness provisions, new mandatory minimum sentences, and the targeting of persistent offenders.

Let us first consider the policy of increased severity. There are many problems of principle with such initiatives, particularly where they impose sentences disproportionate to the crimes committed. But even taken on their own premises, are these initiatives likely to deliver? The awkward truth is that governments are willing to pursue measures of these kinds even when they know that there is little chance of them having much impact at all on public protection. For example, the figures in England and Wales are absolutely clear from government statistics: of the offences committed in any one year, so few are reported, recorded and detected by the police that only about 2 per cent result in a conviction in court. The proportion rises to about 10 per cent for offences of violence, but even then we have to ask how the sentences handed down by the courts in such a small number of the total cases are likely to provide public protection. A possible answer is that severe sentences for this small percentage of offenders have a deterrent effect in preventing crime: however, the evidence fails to support that, although there is some evidence that increasing the (perceived) risk of being caught may have a deterrent effect.[7] To put it another way, the simple deterrence hypothesis that might seem obvious to us when sitting in an armchair (ie higher penalties mean lower crime) appears not to exert a powerful effect in many cases, perhaps because it is eroded by the low (perceived) risk of getting caught, perhaps because the emotions of the moment prevail over it. Governments are well aware of this evidence, but they persist in the false conversion of increased punitiveness into increased protection — because it sounds good to the electorate. Government figures in England show that quite significant rises in the rate of imprisonment have such a slight effect on the crime rate in society that they are not a productive means of achieving that goal, as well as being objectionable in principle.[8]

What about the risk-based policies and the delivery of greater security? There are formidable ethical problems in taking away rights, for example by imposing disproportionate sentences, in the hope of preventing future

[6] Jonathan Burchell 'Criminal justice at the crossroads' (2002) 119 *SALJ* 579; for reflections from earlier times, see Albie Sachs *Justice in South Africa* (1973) 231–9.

[7] See Andrew von Hirsch et al *Criminal Deterrence and Sentence Severity: an Analysis of Recent Research* (1999); and A Doob & C Webster 'Sentence severity and crime: Accepting the Null Hypothesis' in Michael H Tonry (ed) *Crime and Justice: a Review of Research vol 30* (2003).

[8] For a short official survey, see Appendix 6 of the 'Halliday Report': Home Office *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (2001).

crimes.[9] But, again, let us tackle the 'new penology' of risk on its own ground: does it deliver? It might be thought obvious that putting a minority of dangerous offenders in prison incapacitates them and increases public protection: but the evidence does not support that, because predictions of which offenders are dangerous are rather inexact in the sense that they miss people who are dangerous and capture some who are not.[10] The same applies to mandatory minimum sentences and what the Americans call 'three strikes and you're out' legislation: the evidence demonstrates that, tough as they sound and often are, they heap unfair sentences on offenders without improving general protection from those crimes.[11] The targeting of persistent offenders raises two further problems with current crime control policies. One problem is that, in England at least, the government believes that there is a minority of prolific offenders who are responsible for a disproportionate amount of crime. When one enquires who these people are, however, this is the answer:

> 'The 100,000 most persistent offenders share a common profile. Half are under 21 and nearly three-quarters started offending between 13 and 15. Nearly two-thirds are hard drug users. More than a third were in care as children. Half have no qualifications at all and nearly half have been excluded from school. Three-quarters have no work and little or no legal income.'

This description comes, not from a criminology textbook, but from a major Home Office framework document.[12] What greater evidence do we need that this is a social problem rather than one that the criminal justice system should meet with severe sentences? The other problem in targeting persistent offenders is that it is generally the least serious offences that are committed the most frequently. What happens, therefore, is that a policy of targeting persistent offenders is announced with a great fanfare, and when the results begin to be analysed it is clear that it has netted the least serious offenders. History provides abundant confirmation.[13] These policies — incapacitating sentences for dangerous offenders, mandatory minimum sentences, harsher sentences for persistent offenders — all sound good and play well in the media, but the truth is that they have little effect on public protection.

That brief outline of risk-based sentencing highlights some important features of much public discussion of risk. It tends to be used as if it were an objective, even scientific concept: probabilities can be measured, and so this approach fulfils the aspiration to evidence-based policy. But there are two good reasons why we are not dealing with an objective concept when we

[9] See e g Andrew von Hirsch & Andrew Ashworth *Proportionate Sentencing: Exploring the Principles* (2005) chap 4.

[10] The criminological literature is immense: see J Monahan 'The future of violence risk management' in Michael Tonry (ed) *The Future of Imprisonment* (2004); and more briefly the Halliday Report op cit note 8, chap 6.

[11] See Michael H Tonry *Sentencing Matters* (1996) chap 5; and Tomislav V Kovandzic, John J Sloan III & Lynne M Vieraitis, '"Striking out" as crime reduction policy: The impact of "three strikes" laws on crime rates in U S cities' (2004) 21 *Justice Quarterly* 207.

[12] Home Office *Criminal Justice: The Way Ahead* (2001) Appendix B para B.7

[13] Andrew Ashworth *Sentencing and Criminal Justice* 4 ed (2005) chap 6, especially at 182–4.

discuss risk and security. The first good reason is that governments tend to be concerned about *perceived* risks rather than actual risks.[14] People are worried by what they fear, and that derives from what they think the risks are. The perceived risks may be inaccurate (e g the greatest fear of violence is among the elderly, who have the lowest rate of victimization; the lowest fear is among males aged sixteen to twenty–five, who have the highest rate of victimization), but governments are often drawn into dealing with perceived problems, particularly where the media spotlight a few bad cases. The second good reason for scepticism is that the concept of risk is not only about frequency, or the probability that an event will occur. We also need to know about the magnitude of the harm that will result if the risk materializes.[15] This is the very problem with many policies of severe sentencing for persistent offenders: since such sentences tend to fall upon those who steal from shops — probably the most common offence — the policy's prospect of reducing risk has little relevance to the security of citizens. In other words, risk also incorporates a value-judgment, a normative element, and we must debate what risks we most want to reduce. The obvious answer may be that most people want to reduce risks to their physical safety, and so we have to look carefully at the most promising ways of doing that — injuries in the home come first, then in the workplace, on the roads, and finally criminal violence. Of course there is more culpability in most of the criminal injuries, so there is good reason to punish people for them. But if our main objective really is to reduce risk, simple tough-sounding measures through the criminal justice system are not likely to be the most productive.

The same applies to government claims that they intend to 're-balance the criminal justice system' towards victims and away from offenders.[16] This may be the prelude to various changes in criminal procedure, for example curtailing the privilege against self-incrimination, abolishing restrictions on the use of character evidence against defendants, and even altering the burden of proof. Once again, there are strong objections of principle to such measures, but there are also grounds for believing they will not have much effect anyway. If the point of the exercise is to improve the protection of victims and other citizens, then we must attend to the evidence that, for instance, restrictions on the right to silence have had little effect on the conviction rate, and that tougher disclosure requirements imposed on the defence are unlikely to increase convictions.[17] Moreover, insofar as such measures do increase convictions, might they not result in convicting some innocent people? The English legal system has a history of miscarriages of

[14] For a helpful discussion, see Lucia Zedner 'The concept of security: An agenda for comparative analysis' (2003) 23 *Legal Studies* 153.

[15] See Loader & Sparks op cit note 3 at 104, emphasizing the representations of risk in the popular media.

[16] Home Office *Justice for All* (Cm 5563, 2002) 11. The implication that victims and offenders are mutually exclusive classes is not sustainable: about one-third of males aged twenty-five have a conviction for an indictable offences, and males aged sixteen to twenty-feve are both the most frequent perpetrators and the most frequent victims of violence.

[17] John D Jackson 'Justice for all: Putting victims at the heart of criminal justice?' (2003) 30 *Journal of Law and Society* 309.

justice stemming from procedural deficiencies such as inadequate disclosure by the prosecution, and it must be emphasized that victims of crime have no interest in seeing unsafe convictions increase. So getting tough on the few defendants brought to court sounds good politically and undoubtedly plays well in the media, but it is unclear what practical benefits to victims (if any) such changes will bring.

If what I say is true, why do governments promote such policies? The answer seems to be that they accept that it is largely a governmental responsibility to provide safe and secure living conditions. Much as contemporary trends are for governments to devolve some crime prevention tasks to local organizations or to private companies, and to place more responsibility on citizens themselves,[18] providing security remains a core governmental task. But if honesty is to be regarded as important, then governments should surely re-assess the above policies of severity, risk-reduction and alleged re-balancing when even their own research reports tell a different story. The fact is that such a small proportion of all offences result in criminal proceedings against a suspect that we must question the linkage between punishment policy and crime prevention. Governments have much greater *control* over punishment policy than they do over crime rates, of course, and that is why they are tempted to assert that increasing the severity of punishments will be effective — because it is within their power to increase punishment levels, and it sounds good. Governments are also tempted to toughen up procedural rules, at the pre-trial and trial stages, but we must question the linkage between making those stages tougher and influencing the crime rate in society. Again, governments have much more *control* over the criminal process than over crime rates, and that is why they are tempted to pursue these policies.[19] However, if the aim is to maximize effectiveness in delivering protection, then neither sentencing policy nor the criminal process should be the main theatre of operations.

The emphasis needs to be brought back to much broader social and political policies — employment, education, social security, and even foreign policy — and on to macro-social trends relating to the changing nature of the family, the role of communities, the place of religion, and so forth. These broader social issues are much more amorphous and therefore much less attractive to politicians, because they are unlikely to yield rapid solutions. But their relevance is undeniable, and the complexities they reveal make it seem all the more naïve to expect changes in sentencing policy to have a significant effect on crime rates.[20] The objective should be to turn attention away from sentencing and the criminal process towards the prior and broader issues of prevention and detection, and to seek greater protection and

[18] Nikolas Rose 'Government and control' (2000) 40 *British Journal of Criminology* 321at 323–4.

[19] Garland op cit note 3, chaps 5 and 6; cf Lucia Zedner 'Dangers of dystopias in penal theory' (2002) 22 *Oxford Journal of Legal Studies* 341. For such an analysis of criminal procedure and evidence law, see Caroline Fennell *The Law of Evidence in Ireland* 2 ed (2003) chap 2.

[20] The literature is large, but for a good discussion see Lucia Zedner 'Too much security?' (2003) 31 *International Journal of Sociology of Law* 155.

security there. It should not be thought that this is merely a technical matter of devising schemes and then implementing them, because (as we saw when discussing the concept of risk) there are huge normative questions about our priorities for security and for risk reduction. Moreover, we must not overlook the danger that,

> '[s]tandards of instrumental effectiveness . . . displace standards of normative legitimacy which are proper for deciding whether the policies should be introduced, and for ensuring that their operation complies with legal standards and moral values'.[21]

What I am contending for is measures that are normatively legitimate — compliant with constitutional values and human rights — and that can realistically be expected to deliver greater security. It is along these two axes that we must assess proposals for identity cards, for greater CCTV surveillance of public places, for increased police powers to question suspects, for increased police powers to mount surveillance operations, for increased police numbers and visibility, and so forth. The precondition is that the proposed measures must be compatible with fundamental rights; after that, the search must be for the most effective approach.

The purpose of these opening reflections on government policies has been to demonstrate that some of the central ideas — crime control, crime prevention, risk and security — are much less straightforward than might appear. Governments may make claims on which they are unable to deliver, because this appears good for electoral purposes and because there are very few votes to be won in promoting policies that favour the rights of suspects and defendants. All the while, fundamental rights are being threatened by these policies.

2 INTRODUCING THE PRESUMPTION

Let us start with a working definition of the presumption of innocence, focussing on the most accepted and least contestable formulation. Let us say that the presumption of innocence means that, where a person is charged with a criminal offence, the prosecution must bear the burden of proving the elements of the offence, and that proof must be beyond reasonable doubt. So the central issue is the *proof* of guilt; and the opposite of the presumption of innocence would be a system that required a defendant to prove that he was not guilty of the offence charged.

Now, even that general formulation raises questions. If we say that the prosecution has to prove the elements of the crime charged, what does that mean if the offence is an assault, and the defendant puts forward self-defence? Does the prosecution have to disprove self-defence, or does the defendant have to prove self-defence after the prosecution have proved the offence itself? Again, what if the offence is something like 'driving a car on a public road without a valid licence': does the prosecution simply have to prove that

[21] Barabra Hudson *Justice in the Risk Society: Challenging and Re-affirming Justice in Late Modernity* (2003) 169.

the defendant drove a car on a public road — itself an everyday and non-criminal act — leaving the defendant to prove that he had a valid licence? I will not labour the point, but it is clear that there are contentious issues here about what the presumption of innocence means in practice.

Despite these and other contentious issues, the presumption of innocence itself is widely accepted as a fundamental principle. I could have come here tonight to salute the famous House of Lords decision in *Woolmington v Director of Public Prosecutions*,[22] in which the then Lord Chancellor, Lord Sankey, made two oft-repeated declarations:

> 'No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.'
>
> 'Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to . . . the defence of insanity and subject also to any statutory exception.'

Epoch-making as these statements were, I have great reservations about this decision. I recognize that, at the time, it was a bold and important break with the past, particularly in relation to practice in murder cases.[23] Its longer-term effect, however, has been confusing and, in some respects, malign. Lord Sankey excluded the defence of insanity from the common law principle, but did so on inadequate grounds and there are powerful reasons for suggesting that this part of the decision should be overturned.[24] The wider problem was that Lord Sankey, for all his romantic imagery about webs and golden threads, failed to give an account of the reasons why the presumption of innocence was important. And then he gave it all away by stating that the presumption was subject 'to any statutory exception' — *any*. So the legislature might decide, for the most inadequate reason or for no particular reason at all, to place a burden of proof on the defendant. Glanville Williams pointed out more than 40 years ago that Parliament often cast the burden of proof on the defendant 'through carelessness and lack of subtlety' rather than through any reasoned assessment.[25] For the judges simply to stand by and do nothing was a distinctly pusillanimous treatment of a principle that Lord Sankey had described as a 'golden thread'. In other areas of criminal law, the courts have been more proactive.[26] At the very least Lord Sankey should have declared a strong principle of interpretation that statutes would be presumed, unless the wording is absolutely clear, not to impose a legal burden of proof on the defendant, unless there were strong and specific reasons for doing so. He did not, and that is why I have reservations about the high status widely accorded to this decision.

[22] [1935] AC 462 at 481.

[23] See J C Smith 'The presumption of innocence' (1987) 38 *Northern Ireland Legal Quarterly* 223.

[24] Cf the Canadian decision in *R v Chaulk* (1991) 65 CCC (3d) 353 (Nfld CA) and the critique by Timothy H Jones 'Insanity, automatism, and the burden of proof on the accused' (1995) 111 *LQR* 475.

[25] Glanville Williams *The Proof of Guilt: A Study of the English Criminal Trial* 3 ed (1963) 185.

[26] Two related examples would be in interpreting 'strict liability' statutes (e g *Sweet v Parsley* [1970] AC 132) and in interpreting statutes silent as to any requirement of knowledge of a victim's age (e g *B v DPP* [2000] 2 AC 428).

Right from the outset, therefore, the *Woolmington* decision was problematic. Its throw-away reference to statutory exceptions helped to induce a lack of care for the presumption and the values it enshrines. Now the British courts are in a different position, because they are under a duty to interpret statutes 'so far as possible' in a way that complies with the European Convention on Human Rights,[27] and so they have an opportunity to retrieve the situation. They have exercised their power to be more proactive, although, as we shall see, there remain problems about respect for the presumption of innocence in English law.

3 THE RATIONALE OF THE PRESUMPTION OF INNOCENCE

I am not intending to discuss the historical development of the presumption, but rather to assess the reasons that may be advanced for recognizing it today and in the foreseeable future. Some reasons will be stronger than others, but what we need to ask is whether a particular reason supports the principle that, where a person is charged with a criminal offence, the prosecution must bear the burden of proving the elements of the offence, and that proof must be beyond reasonable doubt.

(a) Censure and punishment

We have already established that the modern state has a responsibility to maintain a criminal justice system that, among other things, has a reasonably efficient machinery for investigating, prosecuting, trying and sentencing for those wrongs that are labelled criminal offences. Conviction involves official censure of a citizen for criminal conduct, and sentencing may involve punishment of the offender. These are especially strong measures for the State to take against an individual.[28] They are measures that may strike at some central rights of the individuals concerned — the right to personal property (if an offender is fined), the right to respect for private life (if an offender is subjected to the requirements of a community sentence or to imprisonment), and the right to liberty (if an offender is imprisoned). If these fundamental rights are to be curtailed, as most human rights instruments accept that they may be after 'conviction by a competent court',[29] there must be fair procedures. What is fair, in this context, involves giving due weight to the rights being sacrificed and also to what Ronald Dworkin has advanced as the fundamental right of an innocent person not to be convicted.[30] Dworkin is surely correct in arguing that being wrongly convicted is a deep injustice and a substantial moral harm. It is avoidance of this harm that underlies the universal insistence on respect for the right to a fair trial, and with it the

[27] Human Rights Act 1998 (UK) s 3(1).

[28] See Paul Roberts 'Taking the burden of proof seriously' [1995] *Criminal Law Review* 783 at 785.

[29] The words of art 5(1)(a) of the European Convention on Human Rights, providing an exception to the right to liberty.

[30] R M Dworkin 'Principle, policy and procedure' in C F H Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981).

presumption of innocence. Criminal justice systems must strive to ensure that the public censure of a conviction, and the ensuing sentence, should not be imposed on an innocent defendant.

The innocent should therefore be protected from conviction, but how far should this protection be taken? Must we invest more and more millions in our system of investigation and trial, in an attempt to ensure that every possibility of error is removed? In the real world that cannot be done, because of the competing demands of education, housing, health and many other public services. What we must do, however, is to ensure that we set a proper valuation on fundamental moral harms such as the right not to be wrongly convicted. This means having in place a number of procedural protections, of the kind found in human rights documents such as the Constitution of South Africa. And it points, particularly, in the direction of the presumption of innocence and the related principle that the prosecution should bear the burden of proving guilt beyond reasonable doubt — not absolute proof, but a suitably high degree of certainty. Thus, to summarize, it is because a criminal conviction constitutes public censure and leads to liability to punishment, both invasions of what are normally rights, that the presumption of innocence becomes a vital protection. The argument is strengthened if one considers the legal consequences that may flow from conviction, such as disqualification from certain forms of employment or registration as a sex offender,[31] as well as other social consequences such as stigma and disadvantages in employment and housing. These arguments are strong in relation to any criminal conviction. They are overwhelming where deprivation of liberty, in the form of imprisonment, is possible.

(b) The fragility of fact-finding at trials

No jurisdiction has yet devised a form of criminal trial that can guarantee absolute accuracy in fact-finding. It is often difficult to establish the truth after the event, not least when the system depends on oral evidence given many months (sometimes years) later. Scientific evidence is playing an increasingly important role,[32] but even that calls for interpretation in many cases, and notoriously fallible evidence such as eye-witness identification plays an important part in some cases. Criminal practitioners can always be relied upon for stories of astonishing outcomes to cases,[33] and in England and Wales there has been a succession of highly-publicized miscarriages of justice.[34] In a context of escalating penal severity (in terms of the use of prison sentences) such errors can be especially costly for defendants.[35] The

[31] Now termed 'notification requirements' under the Sexual Offences Act 2003 (UK), Part 2.

[32] See Mike Redmayne *Expert Evidence and Criminal Justice* (2001).

[33] Cf the empirical research by Michael Zander & Paul Henderson *Crown Court Study* Royal Commission on Criminal Justice Research Study No 19 (1993), showing that both prosecuting (2 per cent) and defending lawyers (17 per cent) thought that some convictions were problematic.

[34] For an overview, see Andrew Ashworth & Mike Redmayne *The Criminal Process* 3 ed (2005) chap 1.

[35] Sir James Fitzjames Stephen, writing before the defendant was able to give evidence himself, referred in his *A History of the Criminal Law* vol 1 (1883) 438 to both the level of punishments and the fragility of

burden of proof then becomes a device for allocating the risk of misdecision: insofar as such a risk is widely recognized, should it fall predominantly on one side or the other? The reasoning in (a) above, recognizing a fundamental right not to be wrongly convicted, suggests that where there is a choice between maximizing the chances of acquitting the innocent and maximizing the chances of convicting the guilty, the criminal justice system ought to adopt what Paul Roberts has termed a 'principled asymmetry' and favour the protection of the innocent. It is there that the highest injustice — convicting an innocent person — may be risked. Of course the system should strive to ensure the conviction of the guilty too, but it should be borne in mind that no-one, and certainly not the victims of crime, has any interest in the conviction of innocent people.

(c) Proper relationship between state and citizen

There are good reasons for arguing that the presumption of innocence is inherent in any proper conception of the relationship between the state and its citizens in an 'open and democratic society'. The state ought to treat each citizen as if he or she were innocent (no matter how strong the apparent evidence), unless and until that particular citizen is convicted of a criminal offence. It is a basic moral and political principle that no person should be expected to respond to accusations in the absence of reasonable grounds for suspicion.[36] Of course there are several preliminaries to conviction which may require the exercise of power over a suspect, but the proper approach is to require the state to provide acceptable reasons for exercising such power — notably, in relation to detention for questioning, reasonable grounds for suspecting involvement in the particular crime.[37] Similarly, public prosecutors should not charge a person with an offence unless they are satisfied that there is sufficient evidence (a 'realistic prospect of conviction'),[38] and a defendant should not have to answer a charge at trial until the prosecution have produced sufficient evidence to establish a *prima facie* case.[39] As a matter of reality one might argue that, as each of these stages is passed, the strength of the evidence in favour of the defendant's guilt is becoming higher and higher. But the significance of the presumption is that the defendant should be treated *as if* innocent, right up until the point of the verdict at trial.[40] The alternative would be to adopt a presumption of guilt, applicable to anyone

fact-finding when he commented that support for the presumption of innocence was 'due to a considerable extent to the extreme severity of the old criminal law, and even more to the capriciousness of its severity and the element of chance which . . . was introduced into its administration'.

[36] Kent R Greenawalt 'Silence as a moral and constitutional right' (1981) 23 *William and Mary LR* 15.

[37] Most human rights documents require 'reasonable suspicion' (or the equivalent) before allowing such detention. This is far from being a perfect test in practice — see note 38.

[38] In England, the crown prosecutor must be satisfied that there is a 'reasonable prospect of conviction' on the charge laid: for critical appraisal, see Ashworth & Redmayne op cit note 34 chap 7.

[39] The English authority is *R v Galbraith* [1981] 1 WLR 1039, discussed by Ashworth & Redmayne, op cit note 34 at 312–4.

[40] See the discussion of the legal status of innocence (as distinct from the presumption of innocence) at note 60 below and accompanying text.

whom the state decides to prosecute, requiring that person to establish innocence of the charge. That should be rejected as inappropriate in an 'open and democratic' rather than an authoritarian or totalitarian state, since it would fail adequately to respect the liberty and autonomy of each citizen, not least where deprivation of liberty is at stake.[41]

In addition to this normative argument arising from the proper conception of the relationship between state and citizen, there is also another normative argument related to the huge disparity of resources between state and defendant. We noted earlier that one of the state's responsibilities is to maintain a criminal justice system with police, prosecutors, courts and what are sometimes known euphemistically as 'offender management services' (usually, prisons and probation services). The staffing and facilities of these organizations make them particularly powerful, not least in relation to the individual defendant. One of the purposes of the right to legal aid and assistance is to redress this imbalance,[42] but in practice the defence is unlikely to be able to call upon the range of investigatory or other supporting services that the prosecution can muster. There will still therefore be what Paul Roberts has called an 'adversarial deficit',[43] which is unfair and potentially productive of wrongful convictions. This further supports the need for the presumption of innocence, redressing the imbalance of power and resources by requiring the prosecution to prove a defendant's guilt and to do so beyond reasonable doubt.

(d) Proof beyond reasonable doubt

Many discussions of the presumption of innocence assume or stipulate that proof beyond reasonable doubt is a necessary part of the presumption and in no way separate from it.[44] However, it is certainly possible to conceive of a presumption that merely placed on the prosecution the burden of proving guilt on a balance of probabilities, and so it is worth devoting some brief discussion to the rationale for requiring a higher standard of proof. The reasons lie in reinforcement of the values spelt out above — the justification for public censure and state punishment, proper respect for the right not to be wrongly convicted, the fragility of fact-finding and the disparity of resources. Putting the standard of proof at the level of 'beyond reasonable doubt' is further recognition of those values: as the Supreme Court of the United States expressed it, 'a society that values the good name and freedom of every individual should not condemn a man for commission of a crime where there is reasonable doubt about his guilt'.[45] This does not argue in favour of requiring absolute certainty — which is an unrealistically high

[41] See eg the classic article by George P Fletcher 'Two kinds of legal rules: A comparative study of burden-of-persuasion practices in criminal cases' (1968) 77 *Yale LJ* 880 at 933.

[42] As declared by the Bill of Rights, s 35(3)(g), and the European Convention on Human Rights, art 6(3)(c).

[43] Paul Roberts & Adrian Zuckerman *Criminal Evidence* (2004) 15.

[44] E g Colin Tapper *Cross and Tapper on Evidence* 10 ed (2004) chap III.

[45] *Re Winship* (1970) 397 US 358 at 363.

standard to require, even in such important matters. The 'beyond reasonable doubt' standard is sufficiently demanding, in terms of taking seriously the fundamental moral harm of a wrongful conviction, by requiring the jury or magistrates to be 'satisfied so that they feel sure' of the defendant's guilt before they proceed to convict.[46]

4 THE PRESUMPTION OF INNOCENCE AS A HUMAN RIGHT

Why should the presumption of innocence be regarded as a human right or constitutional right? A powerful link between the presumption and the conception of a fair trial emerges from the foregoing analysis: because the presumption is inherent in a proper relationship between state and citizen, because there is a considerable imbalance of resources between the state and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct, it is surely fundamental that the prosecution should establish guilt beyond reasonable doubt. The defendant should have the right to put the prosecution to proof: any system in which the state could simply bring a charge and then require the citizen to establish innocence would contradict the ideal of an 'open and democratic society' declared in the Preamble to the Bill of Rights, and would equally contradict the ideal of 'freedom and the rule of law' that characterizes the European Convention on Human Rights. At a pragmatic level it is apparent that the presumption of innocence is one of the least controversial rights, since it forms part of every known human rights document, unlike several other potential criminal process rights.

Recognizing that the presumption of innocence deserves its status as a fundamental right is only the beginning, however. It leaves unresolved a range of questions about the precise meaning and scope of the presumption of innocence, and also about the proper nature and extent of any limitations on, or exceptions to, the presumption that ought to be recognized. Controversies such as these demonstrate that, while the values underlying the presumption of innocence may be widely accepted, their implications are open to debate. In this lecture the focus will be upon what may be regarded as four threats to the presumption. The term 'threat' is used, in this context, as a convenient short expression for the thrust of the enquiry. Four 'threats' will be examined — confinement of the presumption to its narrowest sense, erosion of the presumption through exceptions, evasion by using non-criminal orders, and side-stepping by the use of preventive mechanisms. Each of these may be seen as a potential threat to the proper operation of the presumption of innocence. However, since the precise definition of the presumption is contested, and since the presumption is rarely advanced as an absolute and non-derogable right, discussion of each of the four threats involves an examination of what may be regarded as the proper scope of the presumption. The discussion is conducted in the context of a modern state

[46] For full discussion, see Roberts & Zuckerman op cit note 43 at 366–73.

concerned about the security of its citizens, or at least wishing to appear to be taking measures that show an appropriate concern for security. It remains to be concluded whether or not particular threats to the presumption are major or minor, substantial or capable of being regarded as consistent with respect for the presumption as a fundamental right.

5 CONFINING THE PRESUMPTION TO ITS NARROWEST SENSE

The first threat to the presumption raises directly the issue of its true definition. There is widespread agreement that the presumption may be phrased in a narrow procedural sense, but there are some who argue for a more expansive, substantive version of the presumption.[47] If one reads the presumption of innocence as it stands — particularly in the fuller European declaration, 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law' — then it appears that the concept of innocence in this context is simply the opposite of guilt 'according to law'. In other words, the contents and requirements of the particular crime charged determine what 'guilt' means in this case; the impact of the presumption of innocence is to insist that the prosecution should establish beyond reasonable doubt that the defendant's conduct fulfilled the offence requirements. Thus the presumption of innocence means that the prosecution must prove the elements of the offence; but that says nothing about what those elements are. As with many formal principles relating to what is sometimes termed 'the rule of law', a legislature could comply meticulously with the presumption and yet introduce draconian laws that would, in most people's eyes, punish the innocent.

Most penal codes have an offence of intentionally or recklessly causing serious injury to another. When serious violence has taken place, there will usually be prosecutions for this offence, and the prosecutor will have to prove that the serious injury was caused intentionally or recklessly — not difficult if weapons, feet or fists were used. But let us suppose that a few bad cases are highlighted in the media, and the government responds by promoting legislation to 'stamp out violence' by requiring the accused person to disprove intention or recklessness, once the prosecution has proved that serious injury was caused by the accused. If the presumption of innocence means anything, then the courts of both South Africa and the U K would not allow this 'reverse onus' provision. It contravenes the presumption of innocence by placing on the defendant the burden of disproving an essential element of the offence. Suppose, then, that the legislature retaliated by enacting a new and simpler offence of causing serious injury to another person, which eliminated entirely the requirement that the defendant intended or was reckless as to causing the injury. This would widen the offence considerably, bringing within it people who injure others in car

[47] See the discussion by Schwikkard op cit note 1 chap 4.

accidents, people who unintentionally bump into others, house owners whose broken paving stone causes someone to trip, and so forth. Accidentally causing injury would be an offence, and all manner of people would find themselves convicted of crime — we might say, innocent people. Yet the offence is simply one of causing serious injury to another, and if the burden of proving that the defendant caused the injury lies on the prosecution, the offence is a shining example of compliance with the presumption of innocence. The weakness of the presumption, on this view, is that it is simply procedural. The prosecution bears the burden of proof, but it only has to prove what the legislature requires, and the legislature may impose liability without fault.

This does not imply any support for criminal offences without a culpability requirement. If such an offence carries the possibility of a substantial sentence, and particularly imprisonment, it is strongly objectionable. But the objection is that it is wrong to convict people of serious offences without proof of culpability, and that is a separate argument from the presumption of innocence. It is not an argument about evidence and procedure at all, but an argument about the proper preconditions of criminal liability.[48] What one needs here, then, is a robust fundamental principle of 'no criminal liability without fault', a principle applicable to the substantive criminal law and not to procedure and proof. However, the counter-argument is that the two principles go hand-in-hand and that, if legislatures manipulate the definitions of offences in order to introduce no-fault criminal liability, courts may justifiably look behind the legislative device and focus on the substance of what has been done.[49] In relation to the example given above — where a legislature creates an offence of causing serious injury with the onus of disproving intention or recklessness on the defendant, which reverse onus the courts strike down, and then replaces it with an offence of causing serious injury (with no culpability requirement at all) — there are two comments. One is that, as argued above, it is not implicit in the presumption of innocence that fault should always be required and therefore that courts should not decline to accept the new formulation unless it is interpreted as including a fault element that the prosecution must prove. The other response would be to argue that the very possibility of this legislative manoeuvre shows why the reverse onus provision should not have been regarded as violating the presumption of innocence. Thus Kentridge AJ in *S v Coetzee*[50] and Lord Bingham in *Attorney-General's Reference No 4 of 2002;*

[48] See the meticulous reasoning of Paul Roberts in his 'Strict liability and the presumption of innocence: An exposé of functionalist assumptions' in A P Simester (ed) *Appraising Strict Liability* (2005).

[49] For arguments along these lines, see John Calvin Jeffries & Paul B Stephan 'Defenses, presumptions and burden of proof in criminal law' (1979) 88 *Yale LJ* 1325; Andrew Paizes 'A closer look at the resumption of innocence in our Constitution: What is an accused presumed to be innocent *of*?' (1998) 11 *SACJ* 409; Victor Tadros & Stephen Tierney 'The presumption of innocence and the Human Rights Act' (2004) 67 *MLR* 402. See also the judgment of O'Regan J in *S v Coetzee* supra note 2 at 599–603.

[50] Supra note 2.

Sheldrake v Director of Public Prosecutions[51] argued that the reverse onus provision should be upheld because the legislature could do something even worse — they could remove the defence altogether. Lord Bingham upheld the reverse onus provision because the offence, when originally introduced, had not provided for any defence at all. By adding the possibility of a defence, albeit with a reverse onus, Parliament was doing a limited favour to defendants, and the courts should not widen that favourable provision by placing the burden on the prosecution. The problem with this reasoning is that it proves too much. Since many reverse onus provisions could simply be abolished by legislatures, leaving the accused without any possibility of defence at all, it would spell the death of the presumption of innocence as a general principle. To prevent this, however, one needs a vigorous principle of 'no criminal liability without fault' and not merely the presumption of innocence.

The argument here, then, is not that the principle of 'no criminal liability without fault' is wrong or unsustainable. It is that it is separate from, and not necessarily implied by, the presumption of innocence. Those who take a different view and regard the principle of 'no criminal liability without fault' as implicit in the presumption of innocence (or as implied into it by 'rule of law' principles)[52] have a further hurdle to surmount, however. If there were to be a substantive principle of that kind, the meaning of the concept of fault would have to be settled. In much criminal law discourse, in common law countries at least, it is assumed that fault requires intention or recklessness; in the present context, however, negligence would probably be regarded as sufficient by many commentators.[53] But even if that debate were satisfactorily resolved, two further contentious issues would remain. One is that there are situations in which the legal fault requirement is fully satisfied, by proof of intention, and yet it is arguable that there is no fault in the particular circumstances — as where a law enforcement officer operating undercover participates in a crime to which there is no defence in order to expose another.[54] That demonstrates that there may be a gap between legal fault and moral fault that is problematic for the substantive approach. The second and related contentious issue is that conceptions of fault do not only concern intention, recklessness and negligence. What about vicarious liability in criminal law, or restrictions on the availability of defences to criminal liability for those who are intoxicated, or labouring under a mistake of law, or

[51] [2004] UKHL 43.

[52] See Tadros & Tierney op cit note 49 at 404, citing the 'tantalising' reference to the rule of law in the Strasbourg decision in *Salabiaku v France* (1991) 13 EHRR 379.

[53] For extensive discussion of this and related points, see Simester op cit note 48, notably the essays by Green, Simester, Husak, Duff and Michaels.

[54] The facts of *Yip Chiu-Cheung v R* [1995] 1 AC 111, discussed with similar cases by A Ashworth 'Testing fidelity to legal values: Official involvement and criminal justice' in Stephen Shute & A P Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002).

mentally disordered, and so forth?[55] Whether it is legal fault or moral fault that is the benchmark, there is ample room for vigorous debate on its meaning and scope, and that renders any substantive doctrine of innocence especially contestable.

If pursuit of a fully substantive doctrine of innocence soon turns into a re-examination of the foundations of the whole of the criminal law, is there any alternative to the procedural conception of the presumption of innocence? One might be to adopt a particularly vigorous approach to scrutinizing the reasons offered for making exceptions to the presumption, and this debate is conducted in part 6 below. Another alternative would be to re-assert the connections between the presumption and other doctrines of the laws of evidence and criminal procedure. In one sense, as Patrick Healy argued some years ago, the presumption of innocence 'could be invoked as a reason for any decision or rule that seeks to control the jeopardy of the accused by minimising the risks of prejudice, unfairness error, or miscarriage of justice'.[56] Rules requiring corroborative evidence or excluding hearsay evidence are often justified by references to the promotion of accuracy in fact-finding; in that sense they promote the same ends as the presumption of innocence, in terms of placing a high value on the right not to be wrongly convicted and demanding that steps are taken to reduce the fragility of fact-finding and to enhance accuracy at trials. The Bill of Rights in the Constitution of South Africa lists the presumption of innocence alongside the right to silence and the privilege against self-incrimination. Some may argue that this does not establish any connection: the right of silence means that adverse inferences should not be drawn from a person's failure to answer questions, whereas the presumption of innocence is concerned with ensuring that the prosecution ought to prove the defendant's guilt, and not with the *means* by which that guilt is proved. However, a law that permits adverse inferences from a defendant's failure to answer questions may well have a strong impact on the presumption of innocence, by effectively reducing the prosecution's burden in matters of proof.[57] There is an important normative distinction here between drawing adverse inferences from a failure to give evidence at a trial, which is not inconsistent with the presumption because the prosecution must first establish a case to answer, and drawing adverse inferences from a failure to answer questions from the police or other investigators at an early stage, which is objectionable because at that stage the case against the defendant has not been made and the power differential between police and suspect may be considerable.

[55] See e g Stefan Trechsel *Human Rights in Criminal Proceedings* (2005) at 157–8; and A P Simester 'Is strict liability always wrong?' in Simester op cit note 48 at 19–20, suggesting that a more appropriate topic than strict liability might be 'moral deficiency in the criminal law'.

[56] Patrick Healy 'Proof and policy: No golden threads' [1987] *Criminal Law Review* 355 at 365.

[57] See further Schwikkard op cit note 1 at 118–32; Fennell op cit note 19 at 80–9, and the analysis of the Strasbourg Court in *Telfner v Austria* (2002) 34 EHRR 207. See also *Beckles v United Kingdom* (2003) 36 EHRR 162.

Does the presumption have any implications outside the trial itself? It may be thought that it has repercussions for pre-trial procedure, in the sense that people should be treated as if they are innocent throughout those investigatory procedures no less than during the trial. Thus in European human rights law compulsory detention is only justifiable if there is at least 'reasonable suspicion' that the detainee has committed an offence,[58] and even then the detainee must be 'brought promptly before a judge'. European human rights law makes it clear that when a court is considering whether to grant the defendant bail or to remand in custody pending trial, the presumed innocence of the defendant should be the starting point and therefore strong and specific reasons for depriving the defendant of liberty are required.[59] None of these procedures concerns proof of guilt, of course, and it is therefore not a question of the 'presumption of innocence' but rather of the state's duty to recognize the defendant's legal status of innocence at that stage of the process.[60] But the same questions about the proper relationship between the state and suspect/defendants are raised as those that were submitted, in part 3 above, to be fundamental. Similarly, when Stefan Trechsel refers to 'reputation-related' aspects of the presumption — that no public figure should make statements imputing guilt to the defendant before trial and conviction, and that in principle a court should not require an acquitted defendant to pay the costs of the trial[61] — these are really about respecting the legal status of innocence, though no less important for that.

Finally, we must return to the presumption's European formulation, 'presumed innocent until proved guilty'. How does this relate to the majority of criminal cases in England and Wales, in which the defendant pleads guilty and has no trial? Such a person is not 'proved guilty according to law', but it seems straightforward to argue that the plea of guilty amounts to a voluntary waiver of the right to trial. However, European human rights law suggests that where a substantial incentive is offered in order to induce a guilty plea, this may violate the presumption of innocence.[62] English law now offers a discount of up to one-third off a custodial sentence, and (in appropriate cases) a non-custodial sentence rather than a custodial one, in return for a timely plea of guilty.[63] Is a plea of guilty in these circumstances, and particularly where a judge is involved, sufficiently free from 'constraint'

[58] For doubts about the application of this test, see Ashworth & Redmayne op cit note 34 at 183.

[59] Much of the authority is drawn together in the opinion of the Commission in *Caballero v United Kingdom* (2000) 30 EHRR 643, re-stating (at para 43) that the judge 'must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty'. See further Ashworth & Redmayne op cit note 34 chap 8.

[60] On this, see Schwikkard op cit note 1 at 75–80.

[61] Stefan Trechsel *Human Rights in Criminal Proceedings* (2005) 178–91.

[62] *Deweer v Belgium* (1980) 2 EHRR 439.

[63] See s 144 of the Criminal Justice Act 2003 (UK), establishing the principle of sentence reduction; Sentencing Guidelines Council *Reduction in Sentence for a Guilty Plea* (2004), giving guidance to courts on when to give the maximum reduction and when to give a lesser reduction; and *R v Goodyear* [2005] 3 All ER 117, introducing a procedure whereby a defendant can ask the judge for an advance indication of sentence based on a plea of guilty.

to ensure compatibility with the presumption of innocence? It is not so much the possibility of pleading guilty (which is now known to many European systems) but rather the incentive, in the form of a substantial sentence reduction held out by the law itself, that suggests incompatibility.

Let us, then, review this first threat to the presumption of innocence. If the presumption is interpreted in its narrow procedural sense, as placing on the prosecution the burden of proving the elements of offences as set out by the legislature, then the main threat to this comes from an expansion in the range of exceptions, and that is discussed in part 6 below. However, there is a potential threat in the principle that those who plead guilty (rather than putting the prosecution to proof) should receive a sentence reduction, since that principle compromises the voluntariness of the plea of guilty and hence the presumption of innocence, and also in any broad provision on allowing adverse inferences from silence, which lightens the prosecution's burden. There are others who see a great threat to the presumption of innocence arising from the proliferation of criminal liability without fault, which results in many criminal offences for which the prosecutor may obtain a conviction without proving culpability. It was argued here that this 'substantive' notion of innocence belongs to a separate principle — no criminal liability without fault — which requires separate justifications and separate recognition. It is a principle of some importance, particularly where deprivation of liberty is a possible sentence, but it is not necessarily implied by the presumption of innocence that is widely recognized as a human or constitutional right.

6 EROSION OF THE PRESUMPTION THROUGH EXCEPTIONS

In no system of human or constitutional rights is the presumption of innocence regarded as absolute. There is some variation in the ways by which various constitutional or human rights documents allow for dilution of the presumption, but it is possible to treat South Africa, Canada and European human rights law as broadly concordant in the result. The Constitution of South Africa takes a similar route to the Charter of Rights in Canada. Thus, whereas s 35(3)(h) of the Constitution declares the right to be presumed innocent, s 36(1) provides that this and other rights may be limited,

> 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . . .'[64]

This assumes that there should be two stages in decision-making about the presumption of innocence. The first is whether a given provision violates it. The second is whether the violation can be justified on the grounds set out in s 36. The approach of European human rights law is somewhat less rigorous, since the European Convention does not on its face allow for any exception

[64] The provision goes on to list various factors to be taken into account. For the differences between this formulation and that in s 33 of the interim Constitution, see Schwikkard op cit note 1 at 141–4.

to the presumption. The Strasbourg Court decided that the presumption of innocence is not so invariable as to prohibit all presumptions of fact or law in criminal cases. However, states are required 'to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.[65] In practice, both the Strasbourg Court and some British courts have subsequently applied a rather loose concept of proportionality to such decisions, although the British courts are now moving towards less amorphous and more structured arguments.

Before considering the possible justifications for exceptions to the presumption, it is important to reconsider the presumption's precise meaning. Thus far we have adopted a working definition: that where a person is charged with a criminal offence, the prosecution must bear the burden of proving the elements of the offence, and that proof must be beyond reasonable doubt. We passed over the word 'elements' without further comment, but now is the time to point out two possible meanings. One approach is to seek a distinction between the elements of the offence and other matters relevant to the charge, notably defences, exceptions and provisos. This would enable a court to say that, so long as all the elements (or 'essential elements')[66] have to be proved by the prosecution, it is permissible for the burden of proving defences or exceptions to be placed on the defendant. The main alternative approach is to adopt what may be termed the absolutist interpretation, set out most vigorously by Dickson CJ in the Supreme Court of Canada:[67]

> '[T]he distinction between elements of the offence and other aspects of the charge is irrelevant . . . The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.'

On this purist view, the presumption is violated whenever the defendant has to prove some fact in order to avoid conviction. No matter that it is drafted as a defence or exception: it is the effect that is determinative. For the courts in Canada or South Africa to adopt this approach does not dispose of the cases they decide, because this is only the first stage of a two-stage enquiry. They then have to decide whether the violation of the presumption can be justified by reference to the constitutional test. Adopting this absolutist approach means that no exceptions 'slip through' at the first stage, and that they are all measured against the constitutional test for justifiable limitations. If it were otherwise, much would turn on whether, for example,

[65] Taken from the leading decision in *Salabiaku v France* (1991) 13 EHRR 379.

[66] The term adopted by Lord Woolf when delivering the opinion of the Privy Council in *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951 at 969–70; Lord Woolf also emphasized that the enquiry was as to the substance of the offence, rather than the form in which it is drafted.

[67] In *R v Whyte* 51 DLR (4th) 481 at 493.

a particular provision were characterized as part of the offence or as a defence. Even if it may be possible to fashion a conceptual distinction between offences and defences,[68] the fact is that no legislature enacts only crimes that conform to any such distinction. There has never been a firm legislative convention about the division of crimes into offence-elements and defence-elements, and it should therefore not be regarded as a sound basis for allocating the burden of proof.[69]

Adopting the absolutist interpretation — that the presumption of innocence is violated whenever the defendant has to prove some fact in order to avoid conviction — we now go on to consider four reasons that tend to be advanced to justify imposing a burden (exceptionally) on the defendant. It is here that public protection arguments based on risk tend to appear. The first relates to the seriousness of the offence, whereas all the others are arguments internal to proof of facts of a particular kind — ease of proof, the doctrine of 'peculiar knowledge', and the 'rational connection' test.

(a) The seriousness of the offence

In the present day there is bound to be pressure to sacrifice or modify the presumption of innocence in the face of terrorism, drug trafficking, organized crime, and so forth. This is a stern test for the constitutional right to the presumption of innocence, and the English courts have moved rather slowly towards the right answer, with help from the Constitutional Court of South Africa. The English courts have only given themselves the opportunity to address these issues since the Human Rights Act 1998 placed on them the duty to interpret statutes 'so far as possible' in a way that renders them compatible with the European Convention. In practice this has given the British courts considerable leeway in relation to the presumption of innocence because, as already indicated, the leading Strasbourg decision on the point is broadly worded and not particularly helpful.[70] In the first major decision, Lord Hope demonstrated what I believe to be the wrong approach, when he said that in determining the justification for exceptions to the presumption of innocence one factor was 'the nature of the threat faced by society which the provision is designed to combat', and that 'a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual'.[71]

[68] Glanville Williams 'Offences and defences' (1982) 2 *Legal Studies* 233; K Campbell 'Offence and defence' in I H Dennis (ed) *Criminal Law and Justice: Essays from the W G Hart Workshop, 1986* (1987).

[69] Thus English courts have run into difficulties by placing weight on offence-defence distinctions, notably in *R v Edwards* [1975] QB 27 and to some extent in *R v Hunt* [1987] AC 352. For criticism, see A A S Zuckerman 'The third exception to the *Woolmington* rule' (1976) 92 *LQR* 402; and Glanville Williams 'The logic of "exceptions"' [1988] 47 *Cambridge Law Journal* 261. These articles appear to have been partly responsible for the courts' recent coolness towards this approach.

[70] See note 65 and accompanying text.

[71] In *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 at 384.

The reason for rejecting such an approach had been given some years earlier by Sachs J in *S v Coetzee*:[72]

> 'Reference to the prevalence and severity of a certain crime therefore does not add anything new or special . . . The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put in the scales as part of a justificatory balancing exercise.'

To put the matter bluntly, if a constitutional right could be balanced away by showing that 'the general interest of the community' tended against it, then the whole purpose of human rights would be undermined.[73] If constitutional or human rights mean anything, it must be that they are rights against the polity and that 'public interest' balancing is not in itself sufficient to outweigh them. This does not mean that a right may not give way in exceptional circumstances: that point is well illustrated by s 36 of the Constitution, giving some structure to the required type and level of countervailing considerations. But a right is not a right if it can simply be defeated by the public interest.

The highest court in England and Wales is now on the way to taking these points in the context of the presumption of innocence. In *Lambert* the defendant had been arrested with two kilos of cocaine in his rucksack, and he denied all knowledge of the drugs. Section 28 of the Misuse of Drugs Act 1971 placed on the defendant the burden of proving that he neither knew nor had reason to suspect that he was in possession of drugs, but the House of Lords held that this reverse onus provision was in violation of the presumption of innocence, and re-interpreted it as a mere evidential burden.[74] In *Attorney-General's Reference No 4 of 2002* the defendant was charged with belonging to a proscribed terrorist organization, and s 11 of the Terrorism Act 2000 placed on the defendant the burden of proving that he had not taken part in any of the organization's activities whilst it was proscribed. The House of Lords held that this reverse onus provision was in violation of the presumption of innocence, and re-interpreted it as a mere evidential burden.[75] While acknowledging the strong public interest in combating drug dealing and terrorism, in both these cases the House of Lords treated the high maximum sentence (life imprisonment, 10 years' imprisonment) as a factor in favour of insisting on the presumption of innocence. However, in a third House of Lords case (decided between the other two), *Johnstone*, the approach was less clear-cut. Lord Nicholls held that there must

[72] Supra note 2 para 220.

[73] Even political rights such as freedom of expression and respect for private life do not give way to simple balancing: in European human rights law the balancing process has some rigour. See Andrew Ashworth 'Crime, community and creeping consequentialism' [1996] *Criminal Law Review* 220; Andrew Ashworth *Human Rights, Serious Crime and Criminal Procedure* (2002) 110–18; and also Jeremy Waldron 'Security and liberty: The image of balance' (2003) 11 *Journal of Political Philosophy* 191.

[74] *R v Lambert* [2002] 2 AC 545. Lord Steyn quoted from Sachs J in *S v Coetzee*. Note that in the Court of Appeal Lord Woolf had used a simple balancing approach and had reached the opposite conclusion: *R v Lambert and others* [2001] 1 Cr App R 201.

[75] *Attorney-General's Reference No 4 of 2002; Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; note that, again, the Court of Appeal, at *Attorney-General's Reference No 4 of 2002* [2003] 3 WLR 1153, had used a more crude balancing approach.

be 'a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence', and that 'the more serious the punishment which may flow from conviction, the more compelling must be the reasons',[76] and yet he concluded that the strong public policy against counterfeiting and trade mark 'piracy' justified upholding the statutory provision placing on the defendant the burden of proving reasonable belief that he was not infringing a trade mark. This is an offence for which the maximum penalty is 10 years' imprisonment, and for that reason the presumption ought surely to have been accorded much greater weight.[77]

These decisions of high authority do not leave the relevant English law in a clear state, but there is at least some evidence of a movement away from what Sachs J referred to[78] as 'the ubiquity and ugliness argument' — to the effect that if an offence is particularly serious or is thought prevalent, this is a strong reason for allowing an exception to the presumption of innocence. But what about the opposite argument, that exceptions to the presumption may be accepted more easily among offences with low maximum penalties? Such offences, sometimes unhelpfully described as 'regulatory offences',[79] are numerous in most legal systems. In some countries they form a different category of offence, such as the French *contraventions*,[80] whereas in English law they are part of the general criminal law. It could be argued that where the element of censure and the penalty level are low, there is no great injustice in lightening the prosecution's burden of proof and requiring more of defendants — the first rationale offered in part 3 above for the presumption of innocence would be rather less strong.[81] But one would need to be satisfied that the injustices from which the presumption promises protection are not likely to be perpetrated or may be regarded as minimal. It ought surely to be insisted that, where deprivation of liberty is a possible penalty, there is no place for a reversal of the burden of proof. This re-asserts the first and most powerful justification for the presumption of innocence set out in part 3 above, that the right not to be wrongly convicted should be accorded special priority when a severe punishment is provided. Unfortunately, as we saw from the *Johnstone* decision,[82] English courts are still a

[76] *R v Johnstone* [2003] 1 WLR 1736 paras 49–50.

[77] Considerations of ease of proof also played a significant part in the *Johnstone* decision: see below, note 85.

[78] In *S v Coetzee* supra note 2.

[79] Unhelpfully, because some offences that regulate trades, businesses, etc carry the possibility of significant prison sentences.

[80] These *contraventions* do not carry imprisonment, and effectively the burden of proving any defence is on the defendant: see J R Spencer and Antje Pedain 'Approaches to strict and constructive liability in continental criminal law' in Simester op cit note 48 at 262. But perhaps the possibility of imprisonment is an insufficiently rigorous requirement: as Elias J pointed out in a case on parental liability for child truanting, there is a real stigma in being convicted of such an offence (*Bamfather v London Borough of Islington Education Authority* [2003] EWHC 418 para 57).

[81] For the position in South Africa, see Schwikkard op cit note 1 at 129–30 and 173–4.

[82] Supra note 76. In the case of *Sheldrake v Director of Public Prosecutions*, decided in the same appeal proceedings as *Attorney-General's Reference No 4 of 2002* (supra note 51), the House of Lords upheld a reverse burden for the offence of being drunk in charge of a motor vehicle, which carries a possible prison sentence.

considerable distance from accepting deprivation of liberty as the appropriate threshold.

(b) Ease or difficulty of proof

Since the presumption of innocence is centrally about the burden of proof, one might expect arguments internal to proof to carry greater weight when considering the justification for an exception. In several decisions it has been argued that one reason for placing a burden of proof on the defence is that a particular fact presents the prosecution with acute difficulties of proof. Such an argument was pressed strongly before the House of Lords in *Lambert*, but the leading speech of Lord Steyn concluded that the reverse burden of proof was 'a disproportionate reaction to perceived difficulties facing the prosecution in drugs cases'.[83] A similar argument was put to the Constitutional Court in *S v Mbatha*, in relation to the offence of possessing a firearm and the presumption that presence on premises where a firearm was found established possession; but Langa J responded that the difficulties that the prosecution would sometimes encounter in proving possession were simply part of the price paid in a democratic society for the presumption of innocence.[84] In the House of Lords case of *Johnstone*, however, Lord Nicholls was much influenced, in allowing an exception to the presumption, by the belief that if the burden of proving dishonesty had been on the prosecution this would reduce the number of cases brought to court, because it is notoriously difficult to trace the suppliers of counterfeit goods.[85] Some may take the view that it is fair to impose extra obligations of this kind on the sellers of goods; but the prospect of a custodial sentence of up to 10 years ought to rule out a reverse burden of proof here.[86] Is it more persuasive to argue, not that proof of a particular fact is very difficult for a prosecutor, but that such proof is conspicuously easy for the defendant? The Supreme Court of Canada has held that a provision in a firearms offence requiring the defendant to prove possession of a valid licence did not violate the presumption of innocence, largely because the accused is in the best position to resolve the question whether a valid licence exists or not.[87] This 'ease of proof' argument does not always work against the defendant,[88] but the question is whether it is persuasive — that what is in practice a lighter burden is more acceptable, since it places less strain on the fundamental right not to be wrongly convicted or unjustifiably punished. In principle that is a stronger

[83] Supra note 74 para 41.
[84] 1996 (2) SA 464 (CC).
[85] Supra note 76 para 52.
[86] Lord Nicholls did argue that most of these counterfeiting cases are dealt with in the magistrates' courts. But those courts may impose imprisonment, and on principle the operation of a reverse onus should not condemn a person to loss of liberty.
[87] *R v Schwartz* (1988) 55 DLR (4th) 1. In this decision the Court did not hold that the presumption of innocence was violated but that this was justifiable under the Charter: cf *Whyte* supra note 67 and accompanying text.
[88] Cf the House of Lords decision in *R v Hunt* [1987] AC 352, where one factor was that it was easier for the prosecution to have the drug analysed.

argument, since the debate is about the relationship between the right not to be wrongly convicted and the magnitude of any obligation placed on a defendant. If the obligation amounts to less, that is surely relevant.

(c) Matters 'peculiarly within the defendant's knowledge'

Closely allied to the 'ease of proof' argument is the more specific doctrine that it is acceptable for a party to bear the burden of proof of a matter of which he or she has peculiar knowledge. References to such a doctrine are scattered among judicial decisions throughout history, but there have been at least two authoritative rejections of it in England since Wigmore denounced it as unhelpful.[89] Thus in *Spurge*[90] Salmon J in the Court of Criminal Appeal stated that 'there is no rule of law that where facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on these facts shifts to the accused'. And in *Edwards*,[91] a case where the Court of Appeal did place the burden on the defendant, Lawton LJ rejected the relevance of this doctrine, commenting — as have many others — that to apply such a doctrine consistently would mean that the defendant would have to prove lack of intent, lack of provocation, and a whole host of other culpability issues. That would turn the whole presumption of innocence upside down, and would go against the one clear and persuasive point established by the *Woolmington* decision. It is therefore sad to have to report that the doctrine of 'peculiar knowledge' has again become popular among English judges, not so much as a conclusive argument but certainly as a motivating factor in several decisions allocating the burden of proof to the defendant.[92] The greatest disappointment is that Lord Bingham, in his leading speech in *Attorney-General's Reference No 4 of 2002; Sheldrake v Director of Public Prosecutions*, found the doctrine helpful. When justifying placing on the defendant the burden of proving that there was no likelihood of his driving the vehicle in which he lay drunk, Lord Bingham stated that this was 'a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities' than for the prosecution to disprove.[93] In that decision, as in many others, the 'peculiar knowledge' argument is simply used as one among other reasons. But it is a fallacy, if the presumption of innocence is to be taken seriously, because of the effect it would have on proof of all the other culpability elements in criminal cases. Even if there are arguments in favour of relaxing the presumption where it is easy for the

[89] John Henry Wigmore *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1961–1988) vol 4 at 3525.
[90] *R v Spurge* [1961] 2 QB 205.
[91] *R v Edwards* [1975] QB 27.
[92] Four examples should suffice: see the judgments of Auld LJ in *R v Daniel* [2003] 1 Cr App R 99; of Pill LJ in *L v Director of Public Prosecutions* [2002] 2 All ER 852; of Field J in *R v Matthews* [2003] EWCA Crim 813; and of Rose LJ in *Sliney v London Borough of Havering* [2002] EWCA Crim 2558.
[93] Supra note 51 para 41.

defendant to prove a matter, this particular — peculiar — doctrine should be abandoned.

(d) The rational connection test

Less common in the British decisions but mentioned in some leading Canadian judgments is the 'rational connection' test. This is an essentially negative test applicable to presumptions: the principle is that a reverse onus provision cannot be justifiable unless there is a rational connection between the basic fact that gives rise to the presumption and what is presumed from it.[94] Thus in the leading Canadian decision of *Oakes*[95] the offence was the possession of cannabis for the purpose of trafficking, and the legislation included a presumption that a person found in possession was a trafficker unless the defendant proved otherwise. The Supreme Court held that this failed the 'rational connection' test, because there was insufficient strength in the connection between possessing a small amount of drugs and engagement in trafficking. On the other hand, it might be thought that two English provisions on adverse inferences from silence might pass the test — where there are objects, substances or marks on the defendant or his clothing and where he was present at the time and place of the offence, adverse inferences may be drawn if the defendant fails to offer an explanation.[96] The rational connection test is entirely internal to proof, that is, it demands a clear link between the basic fact and the presumed inference. European human rights law has always recognized a limitation of this kind since the right of silence was first set out in *Murray v United Kingdom*:[97] that right should not prevent 'that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution'. No full specification has been given of the circumstances that 'clearly call for an explanation,' but it is thought that the two English examples just given might fall within this category, whereas it is clear that being asked questions by the police is not, of itself, such a situation.[98]

(e) The evidential burden

In the shadows of much that has been written so far is the evidential burden. This is not a burden of proof, but a burden of adducing sufficient evidence on a point to make it a live issue. Imposing an evidential burden on the defendant is a common and logical way of dealing with defences, exceptions and provisos to offences. An example is provided by self-defence as a defence

[94] Thus it was used as a screening test in *S v Zuma and others* 1995 (1) SACR 568 (CC); cf *S v Ntsele* 1997 (11) BCLR 1543 (CC), and Schwikkard op cit note 1 at 152–3.

[95] *R v Oakes* [1986] 1 SCR 103.

[96] Sections 35 and 36 of the Criminal Justice and Public Order Act 1994 (UK); see I H Dennis *The Law of Evidence* 2 ed (2002) 151.

[97] *Murray v United Kingdom* (1996) 22 EHRR 29 para 47.

[98] See e g *Condron v United Kingdom* (2001) 31 EHRR 1; *Beckles v United Kingdom* (2003) 36 EHRR 162.

to a crime of assault: where there is a charge of assault the prosecution must prove the ingredients of the offence itself, and if the defendant wishes to raise self-defence, he or she must adduce some credible evidence of this, in which event it is then for the prosecution to establish beyond reasonable doubt that the assault was not committed in lawful self-defence. Discharging the evidential burden does place an obligation on the defendant, and for that reason it requires justification and should not be casually imposed. But it is much lighter than the burden of proving an issue on the balance of probabilities, and hence it is less objectionable, certainly as a means of dealing with offences to which various possible defences may be raised and where it would clearly be inappropriate to expect the prosecution to negative all of them if the defendant did not wish to rely on some of them.[99] Its existence, as a hurdle or trigger that is much less burdensome, ought to mean that even stronger reasons are required to justify the imposition of a reverse onus on the defendant. In other words, and as courts have stated in numerous decisions, arguments for the reverse onus based on ease or difficulty of proof or on rational connection must be arguments that establish the need to impose on the defendant the burden of proving that issue rather than merely the evidential burden of raising the issue credibly.[100] Where courts have found the reverse onus of proof incompatible with the presumption of innocence, the relevant provision has generally been re-interpreted as imposing only an evidential burden.[101]

Let us, then, review this second threat to the presumption of innocence. Contemporary conditions mean that there is likely to be an increasing clamour for exceptions to be made in response to global concerns about terrorism, organized crime, drug trafficking, people trafficking, serious fraud and so on. Many of the people committing these offences are professionals, in the sense that their lawbreaking is planned and organized and usually difficult to detect. This may be an additional reason why legislators may wish to impose the burden of proof on persons charged with such offences, either by means of presumptions or in relation to defences of exceptions. Thus legislatures and some courts may be tempted to argue that exceptions to the presumption of innocence should be made where the offence is a particularly serious one, but this line of argument should be resisted. If it were not, then the presumption of innocence (and other constitutional or human rights) would be undermined, since the whole significance of the presumption (or right) is that it should operate as a restraint on the pursuit of 'public interest' arguments. More persuasive as justifications for creating exceptions to the

[99] Is this as strong an argument as it is often assumed to be? A procedural rule could provide that, where a defendant wishes to raise a particular defence, the defendant could notify the court and this would cast on the prosecution the burden of disproving it. Presumably it is feared that such a procedural approach would be abused, with defendants requiring the prosecution to waste their resources negativing all kinds of remote possibilities (while, at the same time, making the tribunal of fact more confused).

[100] E g in the House of Lords in the *Kebeline* decision supra note 71.

[101] E g *R v Lambert* supra note 74; *Attorney-General's Reference No 4 of 2002; Sheldrake v Director of Public Prosecutions* supra note 51. This is also the general approach in Ireland: see Fennell op cit note 19 at 78–80.

presumption are arguments internal to proof, such as the comparative ease of proof by the defendant rather than the prosecution or the compromising nature of the situation which may be said to 'call for an explanation' from the defendant. However, even if such reasons are regarded as convincing, it is necessary to take the further step and enquire whether they constitute a good reason for imposing the burden of proving a certain matter on the defendant, rather than imposing a mere evidential burden. If the presumption of innocence is to be accorded proper weight, this further justification must be demanded.

7 EVADING THE PRESUMPTION THROUGH THE USE OF CIVIL ORDERS

A third threat to the presumption of innocence comes from the use of civil orders to exert control over the lives of certain individuals. The presumption of innocence arises only in criminal proceedings, as is apparent from the Bill of Rights in South Africa and also from the wording of art 6(2) of the European Convention on Human Rights, which applies the presumption to 'everyone charged with a criminal offence'. What could be simpler, then, than for a government to circumvent the presumption by promoting legislation that provides for the imposition of civil orders on citizens? And if this is such a simple manoeuvre — since the presumption is only relevant to criminal proceedings which, unlike civil proceedings, may lead to censure and punishment — why is the word 'evading' used to describe this tactic? The answer to the latter question will be left until the nature and implications of these new civil orders have been described.

English law now contains a large number of orders that are regarded as non-punitive and civil. The reasoning behind this trend is firmly located in the government's desire to be seen to be taking steps to protect its citizens from risk — in some instances risk of sexual molestation, in others risk of harassment or distress through what has come to be termed 'anti-social behaviour'. Many of these orders may be imposed either by a civil or by a criminal court, although some may only be made by a criminal court after conviction. An example of the former is the risk of sexual harm order (RSHO):[102] a chief officer of police may apply to a magistrates' court for such an order to be imposed on a person who has on at least two occasions been involved in sexual activity with a child, if there is reasonable cause to believe that the order is necessary. An RSHO prohibits the defendant from doing anything described in the order for a minimum of two years, insofar as such a prohibition is necessary in order to protect children. No criminal conviction is required, but the police applicant must prove the doing of at least two sexual activities involving a child or children. Any breach of the

[102] Sexual Offences Act 2003 (UK), s 123; for discussion, see Stephen Shute 'The Sexual Offences Act 2003: New civil preventative orders: Sexual offences prevention orders, foreign travel orders, risk of sexual harm orders' [2004] *Criminal Law Review* 417.

terms of an RSHO amounts to a criminal offence with a maximum sentence of five years' imprisonment.[103] A particularly significant order of this kind is the anti-social behaviour order (ASBO),[104] introduced in the same year as the Human Rights Act. This order may also be made by magistrates in their civil jurisdiction, or after a criminal conviction. If they are satisfied that a person has acted in a manner likely to cause harassment, alarm or distress to another and that an order is necessary to protect local people from similar anti-social acts, the court may make an ASBO prohibiting the person from doing anything described in the order, for a minimum period of two years. If the order is breached, this is a criminal offence with a maximum penalty of five years' imprisonment. Many of these orders impose a whole range of restrictions, and it is hardly surprising that the breach rate is around 42 per cent and the imprisonment rate on breach is 55 per cent. Moreover, around a half of the orders are made on youngsters under 18.[105]

In relation to the presumption of innocence, however, the key element is that the ASBO was designed in order to by-pass the criminal process and thereby to avoid the presumption of innocence and all the other rights that arise specifically in criminal proceedings. A major reason for using a civil order imposed in civil proceedings, with civil rules of evidence, was to avoid the presumption of innocence and related rights.[106] In English law, applying the European Convention on Human Rights, this legislative gambit can be attacked in two ways. One line of attack is to argue that, even though the proceedings are civil, the standard of proof required should be as high as the criminal standard of 'beyond reasonable doubt', because of the potentially severe consequences of the order and of breach. Another, more fundamental line of attack is to invoke the 'autonomous meaning' of the words 'charged with a criminal offence' in European human rights law. The Strasbourg Court has, in effect, developed an 'anti-subversion device' that prevents national legislatures from evading the extra safeguards for criminal proceedings by simply designating proceedings as civil. The Strasbourg Court has a three-part test for determining whether, in substance, proceedings should be regarded as criminal or civil, and much turns on the third part of the test (the severity of the potential sanction).[107]

Both lines of attack were attempted by the appellants in *Clingham v Royal Borough of Kensington and Chelsea; R (on behalf of McCann) v Crown Court of*

[103] For discussion of these and other preventive orders, see Ashworth op cit note 13 chap 11.

[104] Crime and Disorder Act 1998 (UK), s 1.

[105] See further Ashworth op cit note 13 at 203–6.

[106] For fuller discussion, see Andrew Ashworth 'Social control and "anti-social behaviour": The subversion of human rights?' (2004) 120 *LQR* 263. Another major reason was said to be that the criminal law deals only with discrete offences, and these may individually appear to be minor, whereas many of these cases involve continuing courses of conduct which cumulatively amount to serious behaviour.

[107] The leading decision is *Engel and others v Netherlands (No 1)* (1979) 1 EHRR 647; many of the decisions in which this test has been applied are discussed in Ben Emmerson & Andrew Ashworth *Human Rights and Criminal Justice* (2001) chap 4.

Manchester,[108] where the House of Lords had to determine whether the proceedings for the making of an anti-social behaviour order under s 1 of the Crime and Disorder Act 1998 are indeed civil, as the Act states, or criminal in substance, as the appellants claimed. The unanimous decision was that the proceedings are civil: no breach of the criminal law need be proved, no criminal conviction results, the Crown Prosecution Service is not involved, and the purpose of the order is preventive. The first two of those factors are not really relevant, because the question ought to concern the substance of the proceedings rather than their form, but there are two other issues meriting scrutiny. First, the House of Lords also concluded that the civil standard of proof (on the balance of probabilities) should be applied in such a way as to be sensitive to the 'seriousness of the matters to be proved and the implications of proving them',[109] which in effect means proof beyond reasonable doubt (ie the criminal standard).[110] This demonstrates judicial awareness of the conflicting considerations: the law was designed to exert the maximum social control without the 'interference' of the safeguards applicable in criminal cases, yet it provides for a swingeing sanction for breach by invoking the criminal law and a high maximum penalty. The result of this part of the decision is that these proceedings occupy a position mid-way between the civil and the criminal paradigms — the rules of civil evidence apply, so that hearsay evidence can be admitted (in order to address concerns about witness intimidation),[111] but the standard of proof relevant when weighing the evidence is that applicable to criminal cases.[112]

The second point arising from this decision is that the House of Lords was considering the classification of civil proceedings that might result in a preventive order, backed up by a provision that breach constitutes a criminal offence with a maximum penalty of five years' imprisonment. This is a particularly vigorous example of an attempt to exploit the civil/criminal distinction, and it involves de-coupling the two sets of proceedings. The order is made in civil proceedings. If there is a breach, this is a criminal offence and all the extra safeguards apply. However, in the case of ASBOs, the criminal offence is virtually one of strict liability, committed when 'without reasonable excuse a person does anything which he has been prohibited from doing by an anti-social behaviour order'. The prosecution

[108] [2003] 1 AC 787, on which see the notes by Stuart Macdonald 'The nature of the Anti-Social Behaviour Order — *R (McCann & Others) v Crown Court at Manchester*' (2003) 66 *MLR* 630 and by Chara Bakalis 'Anti-social behaviour orders-criminal penalties or civil injunctions' [2003] 62 *Cambridge Law Journal* 583.

[109] Per Lord Hope of Craighead in *Clingham* supra note 108 para 83; see also Lord Steyn para 31. Cf the reasoning of the House in the earlier deportation decision of *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] 1 AC 74.

[110] Cf Schwikkard op cit note 1 at 65–7.

[111] Since the decision, the hearsay rule in criminal cases has been considerably relaxed by the Criminal Justice Act 2003 (UK): see Di Birch 'Criminal Justice Act 2003: Hearsay: Same old story, same old song?' [2004] *Criminal Law Review* 556.

[112] The same conclusion has been reached in respect of the football banning order, under the Football Spectators Act 1989 (UK): the Court of Appeal in *Gough v Chief Constable of the Derbyshire* [2002] QB 459 held that the order is essentially preventive but that courts should 'apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard' (per Lord Phillips MR para 66).

needs to prove a breach of the terms of the order (no fault element is required), and, if the defendant adduces some evidence of a 'reasonable excuse', it seems that the prosecution must persuade the court that there was no such excuse. All the substantial arguments about the grounds for making the order and the scope of the order made will have been dealt with in the civil proceedings. Moreover, the civil court may impose prohibitions that go beyond the kind of behaviour proved to it, since the only limitation in the Act is to prohibitions 'necessary for the purpose of protecting persons from further anti-social acts by the defendant'.[113] This may include conditions such as not entering the whole of a specified housing estate, not entering or remaining on any shop premises when asked to leave by a member of staff, and not engaging in behaviour likely to be threatening, abusive or insulting to others.[114] Breach of one such condition amounts to a criminal offence with a maximum sentence of five years' imprisonment — even if the conduct itself is either non-criminal or, if criminal, is non-imprisonable.[115] If the principle applied by the Strasbourg Court is one of substance over form, then one might expect close scrutiny of this new hybrid, which consists of a de-coupling of two sets of proceedings and applying the criminal safeguards only after the terms of the order have been determined in civil proceedings and then breached. As the European Commissioner for Human Rights commented in a recent report that referred critically to ASBOs, it is possible for 'a very broad, and occasionally, excessive range of behaviour' to fall within their scope, and this,

> 'makes it difficult to define the terms of orders in a way that does not invite inevitable breach. This is particularly important as the breach of an order is a criminal offence with potentially serious consequences. At first sight, indeed, such orders look rather like personalised penal codes, where non-criminal behaviour becomes criminal for individuals who have incurred the wrath of the community.'[116]

Reviewing this third threat, therefore, what we see is that it was the government's intention that the use of these new civil orders would avoid the presumption of innocence and all the other additional safeguards conferred by human rights documents on criminal defendants. In England and Wales this tactic has so far been successful only in part: the House of Lords has declined to hold that the civil proceedings are criminal in substance (a point that awaits further determination by the Strasbourg Court), but it has held that the standard of proof to be applied in ASBO proceedings should be as high as that in criminal proceedings, ie beyond reasonable doubt. To that extent the direct threat to the presumption of innocence has been much

[113] Crime and Disorder Act 1998 (UK), s 1(6).

[114] See Elizabeth Burney 'Talking tough, acting coy: What happened to the Anti-Social Behaviour Order?' (2002) 41 *Howard Journal of Criminal Justice* 469 at 476–7.

[115] Examples of this are soliciting for prostitution and begging, for both of which imprisonment has been abolished; but if included in the prohibition of an ASBO, a substantial term of imprisonment becomes available.

[116] Office of the Commissioner for Human Rights, Strasbourg *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom* (2005) para 110. The observations of the UK government are appended to the report.

reduced, although other safeguards applicable in criminal cases are still evaded.[117] The British government has accepted this, and has recognized that the standard of proof to be applied in proceedings to obtain a risk of sexual harm order (RSHO) should also be equivalent to the criminal standard.[118] However, it remains determined to exploit the idea of civil preventive orders to the maximum effect,[119] and this tendency demonstrates that its commitment to the presumption of innocence is so low that it will try to avoid its application where possible.

8 SIDE-STEPPING THE PRESUMPTION BY USING PREVENTIVE MECHANISMS

A fourth threat to the presumption of innocence comes at the stage of pre-trial detention. This is one sphere in which anti-terrorist measures, strengthened in the UK after the events of 11th September 2001 and now prominently on the agenda again after the bombings in London on 7th July 2005, will be urged strongly. The Anti-Terrorism, Crime and Security Act 2001 (UK) introduced indefinite detention without trial for persons categorized as suspected international terrorists, but in December 2004 the House of Lords held that these powers were incompatible with the European Convention on Human Rights because their extent went beyond what was strictly necessary in the public emergency, and it was discriminatory to limit the powers to non-nationals.[120] The government thought it necessary to bring forward further legislation to deal with the apprehended threat from these individuals, and so the Prevention of Terrorism Act 2005 (UK) now provides for a 'control order' against a person whom there are reasonable grounds for suspecting of involvement in 'terrorism-related activity', and the order may be made if it is thought necessary for 'protecting members of the public from the risk of terrorism'.

There are two procedural alternatives: if the restrictions to be included in the order infringe the person's right to liberty, a 'derogating control order' is required and the Home Secretary must satisfy a court on the balance of probabilities that the necessary conditions are fulfilled.[121] If the Home Secretary decides that a non-derogating control order is sufficient, he may make that order himself if he has reasonable grounds for suspecting the defendant's involvement in terrorist-related activity and if he considers the order necessary to protect members of the public from a risk of terrorism. When the Home Secretary makes a non-derogating control order the

[117] Thus the European Commissioner for Human Rights commented adversely on the wide reliance on hearsay evidence and 'professional witnesses', and concluded that 'proper evidential requirements and a sensible control of what actually constitutes anti-social behaviour are essential as ASBOs can bring their subjects, literally, a mis-placed step away from the criminal justice system, op cit note 116 paras 115–16.

[118] Shute op cit note 102 at 430.

[119] See the criticisms by Ashworth op cit note 106 at 280–3.

[120] *A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 WLR 87.

[121] Prevention of Terrorism Act 2005 (UK), s 4(7). A defendant may be excluded from the control order proceedings and prevented from seeing the evidence adduced in support of the order.

decision must be reviewed by a court, but it may be overturned only if the decision is unreasonable.[122] It will be evident that these measures stretch the legal status of innocence considerably at the pre-trial stage. The British government believes that, by authorizing *restrictions* on liberty rather than the *deprivation* of liberty through detention, it has headed off the prospect of a successful challenge to the new legislation. But our concern here is the evidential requirements for making such restrictive orders: 'reasonable grounds for suspicion' is sufficient for arrest and for short-term detention pending the first court appearance, as art 5 of the European Convention states, but should it be enough for restrictions on behaviour that may last for up to 12 months (non-derogating orders) and may prohibit the use of communications such as telephone or the internet, may prohibit meetings with certain other people, and may require electronic monitoring of movements? And on what reasoning should proof on the balance of probabilities, rather than beyond reasonable doubt, be regarded as sufficient for a derogating control order of up to six months, which may also impose swingeing restrictions?[123] It can be answered that the presumption of innocence is inapplicable because the proceedings cannot lead to a conviction, but that kind of side-stepping may not impress a Strasbourg Court that looks to the substance of the matter and takes account of the significant restrictions involved in many such orders. In principle, therefore, the new machinery for control orders may be held to be in conflict not just with art 5 on the right to liberty (as the government accepts in relation to derogating control orders) but also with art 6(2) on the presumption of innocence. And, following the argument set out in part 6 above, an exception cannot be justified simply by referring to the prevention of terrorism, and any arguments of ease or difficulty of proof need to be fully elaborated and justified.

Reviewing this fourth threat, then, we note the actions of a government that purports to be protecting the public from terrorism and to find it necessary to create extraordinary powers in order to restrict the activities of individuals believed to pose a danger to national security. Whether 'control orders' constitute a threat to the presumption of innocence itself or to the legal status of innocence is a matter for debate and, as with the third threat described above, much depends on the willingness of a reviewing court to consider the substance of the legislation.

9 CONCLUSIONS

In the United Kingdom, South Africa and many other nations, governments are confronted with threats of terrorism and serious crime and naturally wish to take — or, to be seen to be taking — steps to reduce the danger and

[122] Ibid, s 3.

[123] In another decision, *A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123, the Court of Appeal held that the standard of proof applicable to the power to detain suspected international terrorists under the 2001 Act was the civil standard, the balance of probabilities.

increase public protection. The pressures to increase the severity of penal responses or to widen the net of risk-based strategies grow more urgent when there are dramatic incidents touching the lives of ordinary citizens. In a context such as this, human or constitutional rights are sometimes not mentioned at all or regarded as after-thoughts or minor inconveniences: the main aim is to improve public confidence by taking measures that are regarded as decisive. Governments succumb to the temptation to announce more severe measures which are *expressive* but are (often dubiously) promoted in the language of effectiveness.[124] Such claims for extra effectiveness need to be scrutinized with care, but the focus of this lecture has been on the other types of reason offered for attempting to override, side-line or ignore the presumption of innocence, one of the most widely accepted fundamental rights the world over.

Four sources of threat or potential threat to the presumption of innocence have been discussed (no-fault criminal liability, exceptions to the presumption, the use of civil orders, and imposing controls without conviction). This is not intended to be an exhaustive list: for example, no less controversial is the extent to which the presumption of innocence (or a related principle) should apply at the sentencing stage, not just to the factual basis for passing sentence but also to determinations made for the purpose of confiscating an offender's assets.[125] Underlying all the discussions of detail is the question of what obligations it is right and proper to place upon a citizen. What obligations, if any, should a person reasonably suspected of crime have? We have noted that the presumption of innocence is sometimes expressed as 'the right to put the prosecution to proof' or, more fully, the right to require the prosecution to prove the case without assistance from the accused person — but is that a necessary implication? It is for debate whether a person whose conduct gives rise to reasonable suspicion should not bear any burdens at all. It is taken for granted in human rights documents that such a person may be detained for questioning, within limits of time. The privilege against self-incrimination makes it clear that there is no obligation to speak to the police or other investigators, and the right of silence declares that no adverse inference may be drawn from a failure to speak unless the circumstances 'call for an explanation'. Incriminating situations may therefore cast upon the defendant the burden of offering some explanation, or at least the risk of conviction if none is offered. More generally, where a person is charged with an offence to which there are various possible defences, is it not administratively appropriate to place on the defendant the evidential burden

[124] As Garland puts it, such measures 'can be represented as an immediate, authoritative intervention . . . [which] give the impression that something is being done': Garland op cit note 3 at 134–5.

[125] The Strasbourg Court held in *Phillips v United Kingdom* [2001] Crim LR 817 that the presumption of innocence does not apply at the sentencing stage or, if it does, that the presumptions contained in the then British legislation on the confiscation of an offender's assets did not impose an unfair burden on the offender. See now the Proceeds of Crime Act 2002 (UK), especially s 10, and generally on the Act see *R v Montila* [2004] UKHL 50.

of adducing some credible evidence sufficient to make the issue live?[126] We have observed that the burden here is a lighter one, not being a burden of proof, but it still imposes an obligation on a citizen. Presumably the justification for this is that an evidential burden of this kind will only arise after the prosecution has made out a case to answer, by adducing sufficient proof of the elements of the offence as charged. Nonetheless this may be a tactically vital issue, since it may transpire that the only available means of the defendant satisfying the evidential burden is to give evidence herself or himself, and there may be other reasons (trepidation, inarticulacy, fear of reprisals, etc) militating against this. Many of these questions concern the implications of the legal status of innocence, rather than the presumption of innocence at trial, but they are none the less testing.

The drift of this lecture is that a cherished value, with fundamental international recognition and strong justifications, is being undermined through the alledged imperatives of governance in the risk society. The problem should be recognized, and the presumption of innocence re-asserted. Perhaps it is appropriate to end with a thought experiment, turning away from the criminal procedure of 'the other' that characterizes official statements in the context of terrorism and organized crime, and turning towards the criminal procedure of the self. If you or I, or a friend or relative, were suddenly seized by the forces of law enforcement in potentially incriminating circumstances, what rights would we expect to have?

ACADEMIC LAWYERS

'Whatever they call themselves, the majority of academic lawyers occupy the middle ground between the two extremes of pure doctrinal analysis and a highly theoretical approach to the study of law. Arguably, law is a discipline in transition, with a culture where a small group still clings to a purely doctrinal approach, but a very large group (whether they call themselves socio-legal or not) are mixing traditional methods of analysis drawn from a range of other disciplines among the social sciences and humanities.'

— Fiona Cownie *Legal Academics: Culture and Identities* (2004) 58.

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[126] See also supra note 100.

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PRETRIAL AND PREVENTIVE DETENTION OF SUSPECTED TERRORISTS: OPTIONS AND CONSTRAINTS UNDER INTERNATIONAL LAW

DOUGLASS CASSEL*

This article analyzes the grounds, procedures and conditions required by International Human Rights Law and International Humanitarian Law for pretrial detention of suspected terrorists for purposes of criminal law enforcement, and for their preventive detention for security and intelligence purposes. Recognizing the difficulties in securing sufficient admissible evidence to prosecute terrorists within the tight time limits imposed by international law, the Article nonetheless suggests that indefinite detention, solely or primarily for purposes of intelligence interrogation, is probably not lawful under U.S. or international law. Preventive detention for security purposes, on the other hand, is generally permitted by international law, provided that it is based on grounds and procedures previously established by law; is not arbitrary, discriminatory or disproportionate; is publicly registered and subject to fair and effective judicial review; and that the detainee is not mistreated and is compensated for any unlawful detention. In Europe, however, even with these safeguards, preventive detention for security purposes is generally not permitted, unless a State in time of national emergency formally derogates from its obligation to respect the right to liberty under the European Convention on Human Rights. The Article concludes that if preventive detention of suspected terrorists for security purposes is to be allowed at all, its inherent danger to liberty must be appreciated, its use kept to an absolute minimum, and the European model should be followed, that is, such detention should be permitted only by formal derogation in time of national emergency, and then only to the extent and for the time strictly required.

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I. DETAINING SUSPECTED TERRORISTS: SCENARIOS UNDER INTERNATIONAL LAW

On what grounds, by what procedures, and within what limits under international law, may the United States lawfully detain suspected terrorists in order to interrogate or prosecute them, or to prevent them from planning future attacks? The actual detention practices of the United States in response to the terrorist attacks of September 11, 2001 (9/11) are now largely matters of public record. Suspected terrorists have been detained in the United States for purposes of deportation and criminal justice (whether as suspects or as material witnesses). They have been captured overseas on the battlefield, in occupied territory or elsewhere, and then detained by the military or CIA for purposes of interrogation and preventive security. A minority have eventually been held for military trial. Detentions of suspected terrorists have taken many forms, including the following examples.

Prosecutions. Caught on a flight to the United States with a lit match in his explosive-laden sneaker, so-called "shoe bomber" Richard Reid pled guilty and was sentenced to prison.[1] Al Qaeda collaborator Zacarias Moussaoui pled guilty to conspiracy to commit terrorist offenses and was sentenced to life in prison.[2] However, most successful federal prosecutions since 9/11 have targeted not terrorists, but persons who provide material support to terrorist groups.[3] These prosecutions have been relatively successful, despite recurrent problems of prosecutorial misconduct[4] and difficulties in reconciling the rights of the accused with the government's need to maintain confidential information.[5]

Material Witnesses. Where additional time was needed to investigate a suspect, prosecutors appear to have held some suspects temporarily as material witnesses in other criminal cases.[6]

Deportation. More than a thousand foreign citizens were detained in the United States in connection with the 9/11 investigation, including nearly

[1] *See* United States v. Reid, 369 F.3d 619, 619-20 (1st Cir. 2004).

[2] United States v. Moussaoui, 483 F.3d 220, 223 n.1 (4th Cir. 2007).

[3] *See* Adam Liptak, *Impressions of Terrorism, Drawn from Court Files*, N.Y. TIMES, Feb. 19, 2008, at A15.

[4] *See, e.g.*, Philip Shenon, *Ex-Prosecutor 'Crossed Over the Line,' Jury is Told*, N.Y. TIMES, Oct. 31, 2007, at A16.

[5] *See* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

[6] *See* United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003), *cert. denied*, 543 U.S. 1056 (2005).

800 for civil immigration violations.[7] Even after immigration judges ordered some of them deported, some were kept in continued detention pending FBI clearance.[8]

Battlefield. The military detained suspected Taliban and Al Qaeda fighters at Bagram Air Base and elsewhere in Afghanistan.[9]

Occupied Territory. The military detained suspected terrorists and other suspected security risks (along with common criminals) at Abu Ghraib and other prisons in Iraq.[10]

Military Detention for Prosecution. The military detained at least two dozen, and perhaps as many as 80 prisoners, at the United States Naval Base in Guantanamo Bay, Cuba, for prosecution before military commissions.[11] As of this writing, military commissions have tried only two prisoners, one of whom pled guilty and the other of whom was convicted only of a lesser charge.[12]

Military Detention of Foreign Citizens for Security and Interrogation. The military detained hundreds of other suspected foreign terrorists at Guantanamo,[13] most captured in the Afghan war or neighboring Pakistan, but some picked up in countries far from any recognized battlefield.[14] These prisoners were held without charges and without access to lawyers or courts until the Supreme Court ruled in 2004 that federal courts have jurisdiction to hear petitions for habeas corpus brought on their behalf.[15] Many were then afforded access to counsel[16] and to formal

[7] ELEANOR ACER, LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES x-xi, 34 (2003).

[8] *See, e.g.*, Richard A. Serrano, *Rights Ensnarled in Dragnet: Immigration Statutes Used to Hold Suspects Indefinitely and Detain Material Witnesses*, SEATTLE TIMES, Sept. 27, 2001, at A6.

[9] *See generally* JOHN SIFTON, ASIA DIVISION, HUMAN RIGHTS WATCH, "ENDURING FREEDOM:" ABUSES BY U.S. FORCES IN AFGHANISTAN (2004), *in* 16 HUMAN RIGHTS WATCH 3 (2004).

[10] *See, e.g.*, Douglas Jehl & Kate Zernike, *The Reach of War: Abu Ghraib; Scant Evidence Cited in Long Detention of Iraqis*, N.Y. TIMES, May 30, 2004, at A1.

[11] By mid-July 2008 only twenty or so Guantanamo prisoners had been referred for trial by military commission. W. Glaberson & E. Lichtblau, *Guantanamo Detainee's Trial Opens, Ending a Seven-Year Legal Tangle*, N.Y. TIMES, July 22, 2008, at A12.

[12] *Id.*; W. Glaberson, *Panel Sentences Bin Laden Driver to Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1.

[13] Glaberson & Lichtblau, *supra* note 11.

[14] *See, e.g.*, Boumediene v. Bush, 127 S. Ct. 1478, 1479-80 (2007) (Breyer, J., dissenting from denial of cert.) (noting that petitioner prisoners are "natives of Algeria, and citizens of Bosnia, seized in Bosnia" and other detainees are citizens of other "friendly nations," and "many were seized outside of any theater of hostility"), *reh'g and cert. granted*, 127 S. Ct. 3078 (2007); *rev'd and remanded*, 128 S. Ct. 2229 (2008).

[15] Rasul v. Bush, 542 U.S. 466 (2004).

administrative review by Combatant Status Review Tribunals composed of military officers.[17] In 2005 and 2006, however, Congress purported to deny them habeas corpus, offering instead an alternative statutory mechanism for limited judicial review.[18] In 2008 the Supreme Court ruled that foreign citizens detained as enemy combatants at Guantanamo are constitutionally guaranteed the privilege of habeas corpus, and that the alternative statutory review was not an adequate substitute.[19] The Court then vacated and remanded a separate case, involving the adequacy of the administrative review, to the United States Court of Appeals for the District of Columbia Circuit.[20] As of mid-July 2008 some 265 prisoners were still detained at Guantanamo.[21]

Military Detention of U.S. Citizens. The military also attempted to detain at least two U.S. citizens indefinitely on security grounds, without criminal charges and without access to lawyers, at military brigs in the United States.[22] That practice ended after the Supreme Court held in 2004 that due process of law requires, at minimum, that detained Americans be informed of the grounds for their detention and have an opportunity to rebut the grounds before an impartial decision maker,[23] possibly with assistance of counsel.[24]

[16] *See* Bismullah v. Gates, 501 F.3d 178, 188-90 (D.C. Cir. 2007), *reh'g denied*, 503 F.3d 137 (D.C. Cir. 2007), *reh'g en banc denied*, 514 F.3d 1291 (D.C. Cir. 2008), *cert. granted and judgment vacated*, 128 S. Ct. 2960 (2008).

[17] Memorandum from the Deputy Sec'y of Defense to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

[18] *See* Detainee Treatment Act of 2005, Pub. Law 109-148, § 1005(e), 119 Stat. 2739 (2005); *see also* Military Commissions Act of 2006, Pub. L. 109-366, § 7, 120 Stat. 2600 (2006).

[19] Boumediene v. Bush, 128 S. Ct. 2229, 2240, 2274 (2008). The Court noted that under Article 1, Section 9, clause 2 of the Constitution, the writ may be suspended when required by the public safety in cases of rebellion or invasion. *Id.* at 2240. *See also* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (*en banc*) (allowing indefinite detention in the U.S. as an enemy combatant of a Qatari citizen suspected of terrorism, provided the government can prove its allegations in further habeas proceedings), *petition for cert. filed*, Sept. 19, 2008.

[20] Gates v. Bismullah, 128 S. Ct. 2960 (2008) (mem.).

[21] Glaberson & Lichtblau, *supra* note 11.

[22] *See* Padilla v. Hanft, 547 U.S. 1062, 1062-63 (2006) (Kennedy, J., concurring in denial of *cert.*); Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004).

[23] *Hamdi*, 542 U.S. at 533.

[24] *Id.* at 539.

Secret CIA Detention Overseas. The CIA detained, and continues to detain, suspected Al Qaeda leaders and top operatives incommunicado in secret detention centers overseas.[25]

Except for detentions pending deportation, the purposes of these post-9/11 detentions fall into two broad categories: criminal law enforcement and preventive detention for security and intelligence purposes. This article analyzes the permissible grounds, procedures and conditions of both categories of detention under International Human Rights Law (IHRL) and (in cases of armed conflict) under International Humanitarian Law (IHL).[26] Where IHRL allows States to "derogate" from, that is, to suspend, the right to personal liberty, in war or other national emergency,[27] the limits on detentions under derogation are analyzed as well.

The focus of this article is on detention. Related issues, such as the rights of suspected terrorists in criminal trials,[28] or their right not to be sent to countries where they would likely be tortured,[29] are not addressed.

There are four main international law settings in which suspected terrorists may be detained. They are: (1) peacetime, (2) public emergencies short of war, in which States derogate from the right to liberty, (3) armed conflicts of an international character, and (4) armed conflicts of a non-international character. IHRL governs the first two settings: peacetime and public emergencies short of war. IHRL and IHL, read together and in harmony, govern the other two situations: armed conflict, both international and non-international. Thus, there are basic substantive and procedural

[25] Amnesty International, *USA: Off the Record: U.S. Responsibility for Enforced Disappearances in the "War on Terror,"* AI Index No. AMR 51/093/2007, June 6, 2007; M. Mazzetti, *Officials Say C.I.A. Kept Qaeda Suspect in Secret Detention*, N.Y. TIMES, Mar. 15, 2008, at A6.

[26] Battlefield detentions and detentions of prisoners of war (POWs) are excluded from this analysis. Immediate detention of captured combatants on or near the battlefield involves military exigencies requiring separate legal analysis. Detained prisoners of war are protected by special provisions of the Geneva Conventions. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva III]. However, detention of enemy combatants who are suspected terrorists, and who do not qualify for the special treatment accorded prisoners of war by IHL, is not excluded from the analysis here.

[27] *See infra* Part II.

[28] International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[29] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3.1, Dec. 10, 1984, S. Treaty Doc. No. 100.20, 1465 U.N.T.S. 85 [hereinafter CAT].

international law norms that govern detentions of suspected terrorists in all situations.[30]

Part II below identifies the sources and applicability of relevant IHRL and IHL. Part III summarizes the "consensus" of IHRL and IHL instruments governing detentions of suspected terrorists in all four settings. Part IV addresses detentions for purposes of criminal prosecution. Part V considers preventive detention for security purposes. Part VI discusses minimum requirements for treatment of all detainees and the right of compensation for all persons unlawfully detained. A concluding section reviews the options for detaining suspected terrorists, and asks whether preventive detention for security purposes, outside the context of armed conflict, should be permitted at all.

II. RELEVANT INTERNATIONAL LAW

This article derives the elements of the IHRL consensus on norms governing detention of suspected terrorists from the following instruments.

- International Covenant on Civil and Political Rights (ICCPR),[31] joined by 162 State Parties including the U.S.,[32]
- Universal Declaration of Human Rights[33] (UDHR) (largely evidence of customary international law),[34]

[30] The International Committee of the Red Cross (ICRC) has recently adopted the principles and safeguards proposed by an ICRC Legal Adviser, which take a similar view. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 380 (2005). Throughout this Article the common principles and safeguards thus identified by the ICRC are noted. The ICRC's new institutional guidelines, originally published as Pejic's Article, "set out a series of broad principles and specific safeguards that the ICRC believes should, at a minimum, govern any form of detention without criminal charges." Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 30IC/07/8.4 at 11, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/30-international-conference-working-documents-121007/$File/30IC_8-4_IHLchallenges_Report&Annexes_ENG_FINAL.pdf [hereinafter ICRC Guidelines] (document prepared by the ICRC for the 30th International Conference of the Red Cross and Red Crescent).

[31] ICCPR, *supra* note 28.

[32] *See* Office of the United Nations High Commissioner for Human Rights, ICCPR, http://www2.ohchr.org/english/bodies/ratification/4.htm (last visited Aug. 22, 2008).

[33] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., UN Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

[34] *See, e.g.*, Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 394 (1985).

- United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment (CAT),[35] joined by 145 State Parties including the U.S.,[36]
- United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment[37] (BP) (arguably evidence of customary international law),[38]
- Regional instruments:
  - European Convention on Human Rights (ECHR),[39] joined by 47 State Parties,[40]
  - American Convention on Human Rights (ACHR),[41] joined by 24 State Parties,[42]
  - American Declaration of the Rights and Duties of Man (ADHR),[43] an authoritative interpretation of the human rights commitments in the Charter of the Organization of American States (OAS),[44] a treaty to which the U.S. is a party; the Declaration is used by the Inter-American Commission on Human Rights as the yardstick to monitor American States that are not parties to the ACHR,[45]

[35] CAT, *supra* note 29.

[36] *See* Office of the United Nations High Commissioner for Human Rights, CAT, http://www2.ohchr.org/english/bodies/ratification/9.htm (last visited Aug. 8, 2008).

[37] G.A. Res. 43/173, 76th plen. mtg., UN Doc. A/RES/43/174 (Dec. 9, 1988) [hereinafter BP].

[38] Many provisions of the BP appear as well in numerous IHRL instruments, including those reviewed in this Article.

[39] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 232 [hereinafter ECHR].

[40] *See* Council of Europe, Ratification Table, http://www.coe.int/T/e/com/about_coe/member_states/default.asp (last visited Aug. 8, 2008).

[41] American Convention on Human Rights Organization of American States Treaty, Nov. 22, 1969, B-32, O.A.S.T.S. 36 [hereinafter ACHR].

[42] *See* Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica," Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* http://www.oas.org/juridico/English/sigs/b-32.html (last visited Aug. 8, 2008) (ratification table).

[43] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Int'l Conference of Am. States, 9th Conference, OEA/Ser.L/V/I.4 Rev. XX (May 2, 1948) [hereinafter ADHR].

[44] Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am. Ct. H.R. (Ser. A) No. 10, ¶ 43 (July 14, 1989).

[45] Statute of the Inter-American Commission on Human Rights, art. 1(2)(b), O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979).

- Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (BP Americas), adopted by the Inter-American Commission on Human Rights in 2008,[46]
- African Charter on Human and Peoples' Rights (ACHPR),[47] joined by 53 State Parties.[48]

In international armed conflict, this IHRL consensus is complemented by two IHL treaties: the Fourth Geneva Convention of 1949 on Protection of Civilians (Geneva IV),[49] joined by 194 State Parties including the U.S.,[50] and Additional Geneva Protocol I of 1977 (Geneva Protocol I),[51] with 167 State Parties.[52] During non-international armed conflict, Common Article 3 of the 1949 Geneva Conventions (Common Article 3)[53] and Additional Geneva Protocol II of 1977 (Geneva Protocol II),[54] with 163 State Parties,[55] govern in addition to IHRL.

IHRL and IHL apply in differing ways in the four international law settings. During peacetime IHRL applies to State Parties that have joined IHRL treaties, and to other States to the extent IHRL norms are recognized as customary international law. Despite unpersuasive objections by the United States[56] and Israel,[57] IHRL governs detentions of suspected terrorists

[46] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Inter-Am. C.H.R., Res. 1/08 (Mar. 13, 2008) [hereinafter BP Americas].

[47] African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), 21 I.L.M. 58 (1982) [hereinafter ACHPR].

[48] *See* African Union, ACHPR, http://www.africa-union.org/root/AU/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf (last visited Aug. 8, 2008) (ratification table).

[49] Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

[50] This information is correct as of February 20, 2008. *See* Ratification Table at http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/ (last visited Aug. 8, 2008) [hereinafter Ratification Table].

[51] Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, U.N. Doc. A/32/144 Annex I, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Geneva Protocol I].

[52] *See* Ratification Table, *supra* note 50.

[53] Common Article 3 is the identical Article 3 in each of the four 1949 Geneva Conventions, e.g., Geneva IV, *supra* note 49, art. 3.

[54] Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, U.N. Doc. A/32/144 Annex II, *reprinted* in 16 I.L.M. 1442, 1444 [hereinafter Geneva Protocol II].

[55] *See* Ratification Table, *supra* note 50.

[56] Rasul v. Bush, *Brief for the Respondents*, 2003 U.S. Briefs 334, at 38-39. The Government has taken the position that foreign citizen prisoners held outside the United States have no "substantive rights." *See, e.g., In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 454 (D.C. 2005), *vacated on other grounds sub nom* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd and remanded*, 128 S. Ct. 2229 (2008).

[57] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Op., 2004 I.C.J. 136, ¶ 110 (July 9) [hereinafter *Palestinian Wall*].

outside a State's territory, so long as the detainees are within the effective custody and control of the State.[58]

During public emergencies short of armed conflict, IHRL treaties continue to apply, subject to any derogation from the right to liberty lawfully made by State Parties.[59]

During armed conflict, not only IHL, but also IHRL, applies. Contentions to the contrary by the United States[60] and Israel[61] are not persuasive. For example, two IHRL treaties, the ECHR and ACHR, both expressly permit derogations from certain human rights in time of war.[62] If they did not apply in war at all, no such treaty provisions would be necessary. In addition, the Convention Against Torture, to which the U.S. is a party, expressly prohibits torture even in a "state of war."[63]

After canvassing the authorities, the International Court of Justice explained the relation of IHRL and IHL in international armed conflict as follows: some rights are exclusively matters of IHL, some are exclusively matters of IHRL, and some are matters of both IHL and IHRL. Where both

[58] *Id.* ¶ 111 (explaining that ICCPR is "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"); U.N. Human Rights Committee, General Comment no. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter HRC GC 31].

Extraterritorial application of the ECHR does not extend, however, to extraterritorial detentions carried out by State forces acting for the United Nations under a Chapter VII Security Council mandate. *See* Behrami v. France, App. No. 71412/01, 45 Eur. Ct. H.R. 41 (2007) (Grand Chamber), ¶¶ 144-52. In contrast, the ICCPR does apply to those "within the power or effective control of the forces of a State Party acting outside its territory, . . . such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." *Id.* ¶ 10.

See also R. (on the application of Al-Skeini et al.) v. Sec'y of State for Defence, (2007) U.K.H.L. 26, ¶¶ 6, 33, 84, 92, 99 & 151 (stating there is no jurisdiction under ECHR over killings of Iraqis shot by British patrols in Iraq, but jurisdiction over killing of Iraqi prisoner in British military detention).

[59] ICCPR, *supra* note 28, art. 4.1; ECHR, *supra* note 39, art. 15.1; ACHR, *supra* note 41, art. 27.1.

[60] Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba, 41 I.L.M. 1015, 1019 (2002) ("It is humanitarian law, and not human rights law, that governs the capture and detention of enemy combatants in armed conflict.").

[61] *Palestinian Wall*, Advisory Op., 2004 I.C.J. 136, ¶ 102.

[62] ECHR, *supra* note 39, art. 15.1; ACHR, *supra* note 41, art. 27.1.

[63] CAT, *supra* note 29, art. 2.2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war . . . may be invoked as a justification of torture.").

apply, IHL supplies the *lex specialis*,[64] that is, the specific norm that prevails in the face of a more general IHRL norm.[65]

However, the fact that IHL is *lex specialis* does not mean that it always prevails over IHRL. IHL not only sets its own standards for detention, but also expressly adopts IHRL norms, where those set higher bars. The "minimum"[66] IHL requirements for detention are set forth in Article 75 of Geneva Protocol I, a treaty ratified by the overwhelming majority of States.[67] Article 75 also represents customary international law, binding even those States, including the U.S., which are not parties to Geneva Protocol I.[68] It appears in a section of Geneva Protocol I whose rules are "additional" to "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict,"[69] meaning IHRL.[70] Moreover, it provides that it does not limit "any other more favourable provision granting greater protection, under any applicable rules of international law . . . ."[71]

Thus, whenever IHRL grants greater protection than IHL to persons detained in international armed conflict, IHL mandates that the detainees benefit from any more favorable provisions of IHRL.

In non-international armed conflict, Geneva Protocol II recognizes that persons may be deprived of liberty for reasons related to the armed conflict,[72] and mandates that they be treated humanely,[73] but does not specify the grounds or procedures for detention. In the resulting absence of IHL *lex specialis*, IHRL norms govern the grounds, substantive limits and procedures for detention in non-international armed conflict.

This conclusion is reinforced by the Preamble to Geneva Protocol II, which recalls that "international instruments relating to human rights offer a basic protection to the human person."[74] The authoritative Commentary by the International Committee of the Red Cross (ICRC) notes that such

[64] *Palestinian Wall*, Advisory Op., 2004 I.C.J. 136, ¶ 106.

[65] *Lex specialis* is short for *lex specialis derogate generali*, or, roughly translated from the Latin, "the special rule overrides the general rule." Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 115, 132 (Malcolm D. Evans ed., 2d ed. 2006).

[66] Geneva Protocol I, *supra* note 51, art. 75.1.

[67] Geneva Protocol I has 167 State Parties. Ratification Table, *supra* note 50.

[68] Brief for Louise Doswald-Beck et al., as Amici Curiae Supporting Petitioner at 6-7 & nn.15-16, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184).

[69] Geneva Protocol I, *supra* note 51, art. 72.

[70] ICRC Guidelines, *supra* note 30, at 378.

[71] Geneva Protocol I, *supra* note 51, art. 75.8.

[72] Geneva Protocol II, *supra* note 54, art. 2.

[73] *Id.* arts. 4-6.

[74] *Id.* second preambular paragraph.

human rights instruments include the ICCPR, the Convention Against Torture, and regional human rights treaties.[75]

In war or other emergency threatening the life of a nation, some IHRL rights—such as the rights not to be tortured or enslaved—cannot be suspended.[76] However, States may derogate from certain rights,[77] subject to the following limitations.

- Only certain rights are subject to derogation. These include the right to liberty of person,[78] but not the right of the detainee to seek prompt judicial review of the lawfulness of the detention.[79]
- The nature, geographical scope and duration of the derogation must be no more than "strictly required" to meet the exigencies of the situation.[80]
- The derogation must be non-discriminatory.[81] For example, it may not impermissibly discriminate against foreign citizens.[82]
- The derogation must not violate other norms of international law,[83] such as IHL, which continues to apply even if a State derogates from an IHRL treaty guarantee of the right to personal liberty.
- The derogating State must file a document with the treaty depository informing other State Parties of the articles from which it has derogated and the reasons why.[84]

[75] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949 [hereinafter ICRC COMMENTARY], *Commentary on Protocol II*, ¶¶ 4428-30 (Yves Sandoz et. al. eds., 1987).

[76] *E.g.*, ICCPR, *supra* note 28, art. 4.2 (providing that no derogation is allowed from provisions providing for right to life; freedom from torture and cruel, inhuman, or degrading treatment or punishment; freedom from slavery, slave trade, and servitude; freedom from imprisonment for debt; freedom from retroactive criminal laws; right to legal personality; and freedom of thought, conscience, religion, and belief).

[77] *Id.* art. 4.1 ("In time of public emergency which threatens the life of the nation"); ECHR, *supra* note 39, art. 15.1 ("[I]n time of war or other public emergency threatening the life of the nation"); ACHR, *supra* note 41, art. 27.1 ("In time of war, public danger, or other emergency that threatens the independence or security of a State Party").

[78] *E.g.*, ICCPR, *supra* note 28, art. 4.2.

[79] *See infra* note 130.

[80] Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), ¶ 4, CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter HRC GC 29].

[81] *See, e.g.*, ICCPR, *supra* note 28, art. 4.1 (allowing derogation, provided, among other conditions, that the measures taken "do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin").

[82] A. v. Sec'y of State for the Home Dep't., [2004] UKHL 56, ¶ 67.

[83] *See, e.g.*, ICCPR, *supra* note 28, art. 4.1 (allowing States to derogate from ICCPR rights, provided, among other conditions, that the measures taken "are not inconsistent with their other obligations under international law").

[84] *See, e.g.*, *id.* art. 4.3.

Because of these restrictions on derogation, as discussed below, derogating from the right to personal liberty does not give a State *carte* blanche to detain suspected terrorists.

III. CONSENSUS OF IHRL AND IHL NORMS ON DETENTION

A consensus of norms in IHRL instruments, supplemented by IHL norms during armed conflict, provides a minimum core of protections for persons detained as suspected terrorists, in each of the four international law settings.[85] These core protections are as follows.

Grounds.[86] Under IHRL the detention must not be arbitrary, and must be based on grounds previously established by law. Under IHL, detentions of foreign citizen non-combatants are permitted only where "absolutely necessary" to security,[87] or where "necessary, for imperative reasons of security."[88]

Substantive Restrictions.[89] The detention must be proportional, that is, no more restrictive or prolonged than strictly required by the exigencies of the security situation. It must also be non-discriminatory, including as between citizens and foreigners.

Procedures.[90] The detention must be based on procedures previously established by law and:

- Must be registered,
- Must not be incommunicado for more than a few days,
- Must inform the detainee of the reasons for detention and, if she is foreign, of her right to communicate with her consulate for assistance,
- Must be subject to prompt and effective judicial control, at least on the initiative of the detainee, and
- Must afford the detainee a fair judicial hearing on the lawfulness of the detention.

[85] Most elements of this consensus may also represent customary international law, binding even when the instruments themselves are not binding or where binding treaties have not been ratified by some States. However, one would have to analyze the extent of State practice and *opinio juris* to determine whether all elements of the consensus amount to customary law. *See generally* Thirlway, *supra* note 65, at 121-27 (explaining formation of customary international law).

[86] *See infra* Part V.b–c.

[87] Geneva IV, *supra* note 49, art. 42.

[88] *Id.* art. 78.

[89] *See infra* Part V.b–c.

[90] *See infra* Part VI.

Treatment of Detainee.[91] The conditions of detention must be humane, and the detainee must be provided with access to regular medical evaluation and treatment.

Compensation.[92] The detainee must have a right to be compensated for unlawful detention.

Other International Law. Under IHRL the detention must comply with all other applicable requirements of international law, including IHL in armed conflict.[93] Likewise, under IHL the detention must respect any "more favourable" provisions of IHRL.[94]

Additional safeguards protect persons detained for purposes of criminal prosecution. They must be promptly informed of the criminal charge,[95] their detention must be no more restrictive or prolonged than justified by such "essential reasons" as the risks of flight, repetition of the offense, or interference with justice,[96] and they must in any event be brought to trial with reasonable expedition.[97]

In Europe, additional restrictions are imposed on preventive detentions for security purposes. Such detentions are permitted in Europe, if at all, only by temporary and limited derogation from the right to liberty.[98]

The following Parts elaborate on the legal and policy implications of the consensus of IHRL and IHL norms in the contexts of detention for criminal law enforcement (Part IV) and preventive detention for security purposes (Part V).

IV. DETENTION OF SUSPECTED TERRORISTS FOR PURPOSES OF CRIMINAL PROSECUTION

A. UNDER IHRL

Prosecution of suspected terrorists, as opposed to prosecutions of those who provide "material support" to terrorist groups,[99] can be exceedingly difficult for a number of reasons. The grounds for suspicion may be based on inadmissible intelligence information. For instance, intelligence

[91] *See infra* Part VII.

[92] *See infra* Part VII.

[93] *See, e.g.*, ICCPR, *supra* note 28, art. 4.1 (in derogation).

[94] *See supra* notes 69-70 and accompanying text.

[95] ICCPR, *supra* note 28, art. 9.2.

[96] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 233 (2d rev. ed. 2005).

[97] ICCPR, *supra* note 28, art. 9.3.

[98] *See infra* Part V.e.

[99] Liptak, *supra* note 3.

agencies may be reluctant to allow prosecutors to reveal the nature and targeting of electronic and other means of surveillance, or the identities of human intelligence agents, or the fact that these agents have infiltrated or otherwise have access to information about terrorist groups. Information received from foreign intelligence agencies may have been procured by torture, rendering it inadmissible in court.[100] Secretive terrorist operatives may leave little evidentiary trail, perhaps enough to raise a reasonable suspicion but not enough to show probable cause, let alone guilt beyond a reasonable doubt. Interrogation may be frustrated because terrorists are trained to resist standard interrogation techniques. Witnesses may fear to testify. Proving international terrorism may require witnesses from overseas, who may be unwilling or unable to come to court.

Prosecutions do sometimes succeed. Shoe bomber Richard Reid, Zacarias Moussaoui, and the 1993 World Trade Center bombers were all convicted and sentenced to prison.[101] So, too, was Jose Padilla, although the wide conspiracy net used to convict him, on very little evidence, is troubling.[102] German courts eventually found a way to convict Mounir El Motassadeq, after initially acquitting him, because the U.S. refused at first to provide statements from Al Qaeda prisoners in secret CIA prisons, before finally agreeing to provide summaries of the interrogations.[103] Still, the difficulties remain daunting.

When prosecutions are attempted, pretrial detention must comply with the consensus of IHRL and IHL norms summarized in Part III above. Most countries easily meet the requirement that the grounds[104] and procedures[105]

[100] *See* A. v. Sec'y of State for the Home Dep't. (No 2), [2005] UKHL 71, [2006] 2 AC 221.

[101] *See* United States v. Moussaoui, 483 F.3d 220, 220 n.1 (4th Cir. 2007); United States v. Reid, 369 F.3d 619 (1st Cir. 2004); United States v. Yousef, 327 F.3d 56, 78, 80 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003).

[102] *E.g.*, John Farmer, Op-Ed., *A Terror Threat in the Courts*, N.Y. TIMES, Jan. 13, 2008, 4-14.

[103] Associated Press, *9/11 Suspect's Acquittal Is Overturned*, CHI. TRIB., Nov. 17, 2006, at 14; John Crewdson, *Only 9/11 Conviction Tossed Out in Germany; Judges Cite Lack of Cooperation by U.S. Government*; CHI. TRIB., Mar. 5, 2004, at 1; *U.S. Offers Evidence for Sept. 11 Retrial*, CHI. TRIB., May 14, 2005, at 6.

[104] ICCPR, *supra* note 28, art. 9.1; ACHR, *supra* note 41, art. 7.2 ("No one shall be deprived of his physical liberty except for the reasons . . . established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."); ACHPR, *supra* note 47, art. 6 ("No one may be deprived of his freedom except for reasons . . . previously laid down by law."); ADHR, *supra* note 43, art. XXV ("No person may be deprived of his liberty except in the cases . . . established by pre-existing law.").

Pejic asserts the general principle that "[i]nternment/administrative detention must conform to the principle of legality." Pejic, *supra* note 30, at 383. In this context, the principle of legality "means that a person may be deprived of liberty only for reasons (substantive aspect) and in accordance with procedures (procedural aspect) that are provided for by domestic and international law." *Id.*

for pretrial detention be previously established by law. Prosecutions in US federal court plainly meet these requirements.[106] Detention for trial by military commission, however, may not.[107]

IHRL also prohibits "arbitrary" pretrial detention.[108] This prohibition incorporates the principle of proportionality. Detention is not permitted except to the extent necessary to achieve a purpose relevant to the criminal prosecution, such as avoiding flight, repeating the offense or interference with witnesses.[109] The ICCPR states that pretrial detention must not be the "general rule."[110] The Human Rights Committee elaborates that pretrial

[105] ICCPR, *supra* note 28, art. 9.1 ("No one shall be deprived of his liberty except . . . in accordance with such procedures as are established by law."); ACHR, *supra* note 41, art. 7.2 ("No one shall be deprived of his physical liberty except . . . under the conditions established beforehand by the constitution . . . or by a law . . . ."); ACHPR, *supra* note 47, art. 6 ("No one may be deprived of his freedom except for . . . conditions previously laid down by law."); ADHR, *supra* note 43, art. XXV ("No person may be deprived of his liberty except . . . according to the procedures established by pre-existing law."); BP, *supra* note 37, princ. 2 ("[D]etention . . . shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."); BP Americas, *supra* note 46, princ. IV. The ICRC treats this procedural requirement as the procedural aspect of the more generally applicable "principle of legality." ICRC Guidelines, *supra* note 30, at 383.

Although, as noted in the preceding text, the ECHR does not allow security detention except, perhaps, by derogation. ECHR Article 5.1 states generally, "No one shall be deprived of his liberty save . . . in accordance with a procedure prescribed by law." ECHR, *supra* note 39. In view of the emphasis in Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A, no. 3) 15, ¶ 37 (1961), on the procedural "safeguards" for the Irish security detention under derogation from Article 5, one might expect the European Court, if it were to allow a security detention under derogation today, to require that it be done pursuant to a procedure prescribed by law.

[106] *E.g.*, 18 U.S.C. § 3041 (2008) (granting federal judges and magistrates the power to order pretrial detention).

[107] *E.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (finding that military commission's structures and procedures violated Uniform Code of Military Justice).

[108] ICCPR, *supra* note 28, art. 9.1; UDHR, *supra* note 33, art. 9; ACHR, *supra* note 41, art. 7.3; ACHPR, *supra* note 47, art. 6; BP Americas, *supra* note 46, princ. III.1. The ADHR Article XXV is entitled "Right of Protection from Arbitrary Arrest." ADHR, *supra* note 43, art. XXV. Although protection against arbitrary detention is not explicit in ECHR Article 5, it is doubtless implicit. *E.g.*, Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260, ¶ 76 ("Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 § 3, which is intended to minimise the risk of arbitrariness and to ensure the rule of law.").

[109] NOWAK, *supra* note 96, at 233; BP Americas, *supra* note 46, princ. III.2.

[110] ICCPR, *supra* note 28, art. 9.3; BP Americas, *supra* note 46, princ. III.2.

detention must be the exception, not the rule.[111] Even so, when there is enough evidence to initiate criminal proceedings against terrorists, prosecutors should be able to justify pretrial detention. Most courts readily accept that alleged terrorists, especially international terrorists, pose a flight or danger risk.

A more problematic norm for prosecuting terrorists is the requirement that pretrial detainees be brought "without delay" before a judge to determine the lawfulness of their detention, and to order release if the detention is not lawful.[112] The Human Rights Committee interprets "without delay" in this context to mean not more than a "few days."[113]

This leaves prosecutors scant time after arrest to assemble sufficient admissible evidence to persuade a judge to order pretrial detention. Because of this time squeeze, British legislation in the 1980s allowed suspected terrorists in Northern Ireland to be detained for up to seven days before being brought before a judge. This practice was challenged before the European Court of Human Rights, for failure to bring suspects "promptly" before a judge. In defending the seven-day maximum period of police detention, the British government argued that:

> [I]n view of the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, the maximum statutory period of detention of seven days was . . . indispensable . . . . [T]hey drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism. Time was also needed to undertake necessary scientific examinations, to correlate information from other detainees and to liaise with other security forces. . . .
>
> [T]he Government pointed out the difficulty, in view of the acute sensitivity of some of the information on which the suspicion was based, of producing it in court. Not only would the court have to sit in camera but neither the detained person nor his legal advisers could be present or told any of the details. This would require a fundamental and undesirable change in the law and procedure of the United Kingdom under which an individual who is deprived of his liberty is entitled to be represented by his legal advisers at any proceedings before a court relating to his detention. If entrusted with the power to grant extensions of detention, the judges would be seen to be exercising an executive rather than a judicial function. It would add nothing to the safeguards against abuse . . . and could lead to unanswerable criticism of the judiciary.[114]

[111] U.N. Human Rights Committee, General Comment No. 8, Right to Liberty and Security of Persons, Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40, Annex V, ¶ 3 (June 30, 1982) [hereinafter HRC GC 8].

[112] ICCPR, *supra* note 28, art. 9.4.

[113] HRC GC 8, *supra* note 111, ¶ 2.

[114] Brogan v. United Kingdom, 11 Eur. H.R. Rep. 117, ¶ 56 (1988).

In response, the European Court accepted that "the investigation of terrorist offences undoubtedly presents the authorities with special problems."[115] It further agreed that, "subject to the existence of adequate safeguards, the context of terrorism . . . has the effect of prolonging the period during which the authorities may . . . keep a person suspected of serious terrorist offences in custody before bringing him before a judge . . . ."[116] Even so, these difficulties could not justify "dispensing altogether with 'prompt' judicial control."[117] The Court held that even a detention as brief as four days and six hours, without the suspect's being brought before a judge, failed to meet the test of "promptly."[118]

Both U.S. law and IHRL,[119] for good reason, guarantee suspects in serious criminal cases the right to counsel. This right, however, poses a further obstacle to prosecuting suspected terrorists. In the U.S. at least, counsel routinely advise suspects in custody not to talk to police or prosecutors. Thus prosecutors must obtain the evidentiary basis for pretrial detention, and for eventual trial, from other sources, subject to all the difficulties noted above.

Prompt access to counsel may also disrupt the psychodynamics of the interrogation process. Successful interrogation may turn on the suspect's developing a degree of rapport, even a relationship of dependency, with the interrogator. That process takes time. If suspects believe they can turn instead to their lawyers and to the courts for assistance, some argue that they are less likely to provide useful information to interrogators.[120]

These points were detailed by the Director of the Defense Intelligence Agency (DIA), Vice Admiral Lowell E. Jacoby, in support of an unsuccessful effort by the government to deny counsel access to Jose Padilla, a U.S. citizen held in military detention. Admiral Jacoby explained:

> DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of

[115] *Id.* ¶ 61.

[116] *Id.*

[117] *Id.*

[118] *Id.* ¶ 62.

[119] *See, e.g.*, FED. R. CRIM. P. 44(a) (providing for right to counsel "at every stage of the proceeding from initial appearance through appeal"); BP Americas, *supra* note 46, princ. V ("All persons deprived of liberty shall have the right to . . . legal counsel . . . without delays . . . from the time of their capture or arrest and necessarily before their first declaration before the competent authority.").

[120] Hamdi v. Rumsfeld, 542 U.S. 507, 598 (2004) (Thomas, J., dissenting).

> situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began.
>
> Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process. Therefore, it is critical to minimize external influences on the interrogation process.[121]

The District Court was not persuaded. In the absence of any examples of interrogations disrupted by access to counsel, or of specific information about Padilla's interrogation, the Court viewed the Admiral's statements as "speculative."[122] They were not "wrong"; indeed, they were "plausible," albeit not convincing.[123] In any event they could not overcome Padilla's statutory right to counsel.[124]

For suspects detained for purposes of criminal prosecution in the U.S., IHRL adds no new obstacles in this respect because the suspect is already entitled by the U.S. Constitution to a lawyer's assistance while in custodial interrogation.[125] But it is not clear that this constitutional safeguard protects foreign suspects detained outside the U.S.[126] In such cases IHRL, which protects persons outside the U.S. who are in the effective custody and control of the U.S.,[127] makes it difficult to interrogate a suspect long enough to get good information before allowing him assistance of counsel and bringing him "without delay" before a judge.

B. UNDER DEROGATION

One might imagine that by derogating from the right to liberty, or at least from the requirement to bring suspects "without delay" before a judge, a State could escape from the tight time periods allowed by IHRL for police interrogation before suspected terrorists must be afforded access to counsel and court. But derogation does not gain police much more time.

[121] Padilla v. Rumsfeld, 243 F. Supp. 2d. 42, 49 (S.D.N.Y. 2003).

[122] *Id.* at 51-52.

[123] *Id.* at 53.

[124] *Id.* at 53-54.

[125] Escobedo v. Illinois, 378 U.S. 478, 487 (1964).

[126] *Compare* United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (holding that Fourth Amendment protection against unreasonable searches and seizures does not protect aliens outside the U.S.) *with* Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008) (holding that constitutional privilege of habeas corpus protects alien prisoners detained under de facto U.S. sovereignty at Guantanamo).

[127] HRC GC 31, *supra* note 58, ¶ 10.

Derogation is not a carte blanche. Measures adopted under derogation—such as pretrial detention without judicial control—must be no more long-lasting than "strictly required" by the exigencies of the emergency justifying derogation.[128]

A threshold obstacle is that a detainee's right to go before a judge, secured by the writ of habeas corpus in common law systems, is non-derogable. Although the ICCPR does not list the rights to liberty and to appear before a judge as non-derogable,[129] the U.N. Human Right Committee takes the view that the right of access to a court is essential to guarantee *other* non-derogable rights, such as the right not to be tortured. Therefore, in the Committee's view, the right of access to a judge is itself non-derogable.[130] This view is in accord with the language of the ACHR[131] and with the jurisprudence of the Inter-American Court of Human Rights.[132]

Even if the right of access to a court is non-derogable, States may nonetheless attempt to derogate from the requirement that such access be afforded "promptly," or at least as promptly as would ordinarily be required. If they succeed, this would allow police additional time to detain a suspect before bringing him before a judge.

Additional time, yes, but not much. After British police detentions of terrorists for periods as brief as four and a half days were invalidated by the European Court, the UK derogated from the right to liberty under the ECHR in order to authorize detention of terrorist suspects for up to seven days without judicial supervision. In *Brannigan v. United Kingdom*,[133] the European Court upheld this derogation measure. The Court stressed the availability of safeguards, especially the detainee's access to habeas corpus, his absolute and legally enforceable right of access to a lawyer within forty-

[128] *See supra* note 80 and accompanying text.

[129] ICCPR, *supra* note 28, art. 4.2.

[130] HRC GC 29, *supra* note 80, ¶ 16.

[131] ACHR, *supra* note 41, art. 27.2 (establishing that States may not derogate from the "judicial guarantees essential for the protection of . . . [non-derogable] rights.").

[132] Habeas Corpus in Emergency Situation, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (Ser. A) No. 9 (Oct. 6, 1987) (stating that habeas corpus is non-derogable).

[133] 17 Eur. H.R. Rep. 539 (1993). The British statute did not purport to authorize security detention in the sense used in this Article, i.e., not related to criminal prosecution. Rather, the statute extended the time during which police could detain a suspect while gathering evidence for criminal prosecution. *Id.* ¶ 13-17. But nothing in the court's opinion suggests that it would have allowed a longer detention, or one with fewer procedural safeguards, if there had been no connection to a possible criminal prosecution. Thus *Brannigan*'s strict scrutiny of the length and procedures for police detention may be taken to apply, with at least equal force, to security detentions where no criminal prosecution is contemplated.

eight hours of detention, his right to inform a friend or relative of his detention, and his right to have access to a doctor.[134]

This was not much of a victory for police and prosecutors. Britain's derogation gained only a few additional days before suspects had to be brought before a judge. Even this extension depended in part on the suspect's right to see a lawyer within forty-eight hours, as well as his right to file a habeas petition.

Although it upheld British police detentions of up to seven days, the European Court later ruled that the detentions without judicial control authorized by Turkish derogations were too lengthy. In *Aksoy v. Turkey*,[135] the Court found that a detention of a suspected terrorist for fourteen days without judicial supervision was "exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture."[136] Moreover, the Government failed to adduce any "detailed reasons . . . as to why the fight against terrorism . . . rendered judicial intervention impracticable."[137] In subsequent cases the Court ruled against Turkey's detentions of as few as eleven days without judicial supervision.[138]

Whether or not a State derogates from the right of detainees to be brought promptly before a judge, then, the strict time limits for police detention allowed by IHRL may make prosecution of suspected terrorists very difficult. When police catch the suspect in the act, as in the shoe bomber case discussed above, a conviction or guilty plea may be obtained anyway. But in many cases, the obstacles to prosecution may lead States to look for other, more practical ways to remove suspected terrorists from the streets.

V. PREVENTIVE DETENTION FOR SECURITY PURPOSES:

In part to avoid legal constraints on pretrial detention of suspected terrorists for prosecution, the U.S. and other States have resorted to preventive detention of suspected terrorists as threats to security.

[134] *Id.* ¶ 62-64.

[135] [1996-IV] Eur. Ct. H.R. 2260.

[136] *Id.* at 2282, ¶ 78.

[137] *Id.*

[138] Sen v. Turkey, [2003] Eur. Ct. H.R. 41478/98, ¶ 28 (2003), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=671607&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (holding that eleven days detention without judicial intervention not justified under derogation from Article 5); Demir v. Turkey, [1998] Eur. Ct. H.R. 21380/93, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696107&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (holding that sixteen to twenty-three days incommunicado detention without judicial supervision not justified under derogation from Article 5).

A. DETENTION FOR INTERROGATION

Suspects detained for security purposes are also interrogated for intelligence purposes. However, it is important to distinguish preventive detention for purposes of security from detention for purposes of interrogation. Indefinite detention solely or primarily for purposes of intelligence interrogation is probably not lawful under U.S. or international law.[139] In the U.S., in response to an argument that the Congressional resolution authorizing use of military force after 9/11 does not authorize indefinite detention, a Supreme Court plurality commented, "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized."[140]

IHL also forbids indefinite detention for purposes of interrogation. In the opinion of the Chairperson of the U.N. Working Group on Arbitrary Detention and the U.N. Special Rapporteur on the independence of judges and lawyers, "The indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the . . . Geneva Conventions."[141] An ICRC lawyer has likewise argued that detention should never be permitted "for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security."[142]

In peacetime, IHRL does not explicitly forbid detention solely for purposes of intelligence interrogation. But detention solely or primarily for purposes of intelligence gathering may be "arbitrary" and thus violate IHRL. The two U.N. experts mentioned above concluded that at Guantanamo, "Information obtained from reliable sources and the interviews . . . with former Guantanamo Bay detainees confirm, . . . that the objective of the ongoing detention is not primarily to prevent combatants

[139] This excludes persons subject to finite detentions for interrogation as possible material witnesses in connection with criminal proceedings, which in the U.S. are governed by statute. *See generally* 18 U.S.C. § 3144 (2007); United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003), *cert. denied*, 543 U.S. 1056 (2005). The concept of "security detention" used here corresponds to the IHL terms used interchangeably by the ICRC, namely *internment* and *administrative detention*, except that they are used only for detentions in "armed conflict and in other situations of violence." ICRC Guidelines, *supra* note 30, at 376.

[140] Hamdi v. Rumsfeld, 542 U.S. 509, 521 (2004).

[141] Chairperson of the Working Group on Arbitrary Detentions et al., *Report: Situation of Detainees at Guantanamo Bay*, ¶ 23 & n.23, *delivered to the U.N. Comm. on Human Rights*, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006) [hereinafter *Guantanamo Bay*] (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 17(3), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force for the United States Feb. 2, 1956) [hereinafter Geneva III]; Geneva IV, *supra* note 49, art. 31); *see also* Geneva IV, *supra* note 49, arts. 42 (permitting detention only if "absolutely necessary" for security), 78 (allowing detention only if "necessary, for imperative reasons of security").

[142] Pejic, *supra* note 30, at 380.

from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaida network."[143] This finding was one factor in their determination that "the ongoing detention of Guantanamo Bay detainees as 'enemy combatants' does in fact constitute an arbitrary deprivation of the right to personal liberty."[144]

If detention solely or primarily for interrogation is to be permitted at all—a doubtful proposition—the IHRL proportionality standard discussed in detail below suggests, at minimum, that both the probability of obtaining, and the security value of expected intelligence, must be very high to warrant prolonged detention.

B. PREVENTIVE DETENTION FOR SECURITY UNDER IHRL.

The general consensus of IHRL instruments on security detention was summarized a quarter century ago by the Human Rights Committee, which interpreted the ICCPR as follows:

> [I]f so-called *preventive detention* is used, for reasons of public security . . . it must not be arbitrary, and must be based on grounds and procedures established by law . . . information of the reasons must be given . . . and court control of the detention must be available . . . as well as compensation in the case of a breach . . . .[145]

The prohibition on "arbitrary" detention has both a substantive and a procedural dimension. The substantive dimension requires, among other things, that detentions be *proportional* to their security justification.[146] In his treatise on the ICCPR, Manfred Nowak reports that the majority of delegates in the ICCPR drafting debates stressed that the concept of "arbitrary" contained "elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality, as well as the Anglo-American principle of due process of law."[147] Taking into account this "historical background," Nowak concludes that "the prohibition of arbitrariness is to be interpreted broadly. Cases of deprivation of liberty . . . must not be manifestly disproportional, unjust or unpredictable . . . ."[148]

Even under derogation from the right to liberty, IHRL treaty derogation provisions require that security detention must be proportional, that is, no more restrictive or long-lasting than "strictly required" by the

[143] *Guantanamo Bay*, *supra* note 141, ¶ 23.
[144] *Id.* ¶ 20.
[145] HRC GC 8, *supra* note 111, ¶ 4.
[146] BP Americas, *supra* note 46, princ. III.2.
[147] NOWAK, *supra* note 96, at 225, ¶ 29.
[148] *Id.* at 225, ¶ 30.

exigencies of the situation.[149] This is consistent with IHL substantive standards, which allow security detention of foreign nationals in a party's territory only if "absolutely necessary" to security,[150] or in occupied territory only if "necessary, for imperative reasons for security."[151]

Interpreting the ECHR "proportionality" requirement for derogations, the British Law Lords explain:

> In determining whether a limitation is arbitrary or excessive, the court must ask itself:
>
> > Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[152]

Prevention of terrorism is plainly a "sufficiently important" legislative goal to justify limiting personal liberty. Preventive detention is "rationally connected" to the goal. The issue is whether the means, deprivation of a fundamental right to liberty,[153] are "no more than is necessary."

The prohibition of arbitrary detention also has a procedural dimension. In a 2002 legal opinion on U.S. security detentions, the U.N. Working Group on Arbitrary Detention considered two persons allegedly detained on U.S. territory for fourteen months in solitary confinement, without being officially informed of any charges, without being able to communicate with their families, and without a court being asked to rule on the lawfulness of their detention. The Working Group found their detentions "arbitrary," in view of ICCPR articles 9 and 14, which "guarantee, respectively, the right

[149] ICCPR, *supra* note 28, art. 4.1 ("to the extent strictly required by the exigencies of the situation"); ECHR, *supra* note 39, art. 15.1 (same); ACHR, *supra* note 41, art. 27.1 ("to the extent and for the period of time strictly required by the exigencies of the situation"). The Inter-American Commission on Human Rights recognizes that deprivation of liberty may be justified in connection with the "administration of state authority" outside the criminal justice context where such measures are "strictly necessary." Inter-Am. C.H.R., *Report on Terrorism and Human Rights*, OAE/Ser.L/V/II.116, doc. 5, rev. 1 corr., ¶ 124 (Oct. 22, 2002) [hereinafter *Report on Terrorism and Human Rights*].
[150] Geneva IV, *supra* note 49, art. 42.
[151] *Id.* art. 78.
[152] A. v. Sec'y of State for the Home Dep't., [2004] UKHL 56, ¶ 30.
[153] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *A.*, [2004] UKHL 56, ¶ 190 (Lord Walker, J.) (noting "one of the most fundamental human freedoms—freedom from imprisonment for an indefinite period, without indictment, trial or conviction on a criminal charge").

to a review of the lawfulness of detention by a competent judicial authority and the right to a fair trial."[154]

The Working Group also addressed the situation of persons detained at Guantanamo Bay. In the absence of a determination of their prisoner of war status by a competent tribunal, and without the procedural guarantees of ICCPR articles 9 and 14 having been afforded to detainees not determined to be POWs, the Working Group found the Guantanamo detentions to be "arbitrary."[155]

In sum, detentions are prohibited as "arbitrary" by IHRL, either because they are disproportionate or otherwise substantively unreasonable, or because they are procedurally deficient.

C. SECURITY DETENTION UNDER IHL

In international armed conflict, Geneva IV allows internment of foreign nationals in a State's territory only if "absolutely necessary" to security, or in occupied territory only if "necessary, for imperative reasons of security."[156]

These demanding standards, however, apply only to "protected persons" under Geneva IV.[157] They do not apply to the detaining State's nationals, or to citizens of neutral or co-belligerent States that maintain normal diplomatic relations with the detaining State.[158] These citizens were omitted from protection because the 1949 Geneva Conventions, which predate modern IHRL, assumed that sovereign States could be left unencumbered to protect their own citizens. Not until after IHRL treaties were adopted in the 1960s and 1970s[159] did Article 75 of Additional Geneva Protocol I of 1977 grant even minimal protections to non-enemy citizens who are "detained or interned for reasons related to the armed conflict."[160]

Yet Article 75 did not specify the permissible grounds for such detention. Detainees who are not "protected persons" under IHL are thus left to the protection of IHRL with respect to the grounds of detention, namely that the detention not be arbitrary and that it be proportional and based on grounds and procedures previously established by law. The

[154] U.N. Comm. on Human Rights, Report of the Working Group on Arbitrary Detention, ¶ 64, U.N. Doc. E/CN.4/2003/8 (Dec. 16, 2002).

[155] *Id.*

[156] Geneva IV, *supra* note 49, arts. 42, 78. The ICRC derives from these Articles the general principle that "Internment/administrative detention is an exceptional measure." ICRC Guidelines, *supra* note 30, at 380.

[157] Geneva IV, *supra* note 49, arts. 42, 78.

[158] *Id.* art. 4.

[159] The ICCPR was adopted in 1966 and went into force in 1976. *See supra* note 28.

[160] Geneva Protocol I, *supra* note 51, art. 75.6.

resulting protection against unnecessary deprivation of liberty under IHRL is comparable to that which the 1949 Geneva Convention (Geneva IV) provides to "protected persons."

Both aspects of the IHRL ban on arbitrary detentions—substantive and procedural—are consistent with IHL. The proportionality requirement is consistent with the Geneva IV detention standards of "absolutely necessary" or "necessary, for imperative reasons of security." It is further consistent with the Geneva IV requirements of periodic review of the justification for detention,[161] and of mandatory release as soon as the needs of security allow.[162]

From the IHL standards for detention, and from IHL rules against collective punishment, the ICRC derives the general principle that "Internment or administrative detention can only be ordered on an individual case-by-case basis . . . ."[163] The IHRL requirement of proportionality is consistent with this IHL principle as well.

Security detention in international armed conflict must also be non-discriminatory,[164] including as between citizens and foreigners.[165] This does not mean that there can be no distinction based on nationality; as noted above, the very definition of "protected person" under Geneva IV turns on the nationality of the detainee. However, any difference in treatment based on nationality must be justified by "very weighty reasons."[166] In the case of Geneva IV, these reasons reflect the relevant purpose of IHL in 1949—to protect citizens of one party to the conflict from detentions by an opposing party unless "absolutely necessary" to security—while leaving a State's own citizens to its presumed solicitude, and leaving citizens of neutral or co-belligerent States to the shelter of "normal diplomatic relations."[167]

In non-international armed conflict, Additional Protocol II contemplates that persons may be deprived of liberty "for reasons related to

[161] Geneva IV, *supra* note 49, arts. 43, 78.

[162] *Id.* arts. 43, 132; Geneva Protocol I, *supra* note 51, art. 75(3). The ICRC asserts the general principle that "Internment/administrative detention must cease as soon as the reasons for it cease to exist." ICRC Guidelines, *supra* note 30, at 382.

[163] ICRC Guidelines, *supra* note 30, at 381.

[164] ICCPR, *supra* note 28, arts. 2.1, 26; ACHR, *supra* note 41, arts. 1.1, 24; ADHR, *supra* note 43, art. II; ACHPR, *supra* note 47, arts. 2, 3; BP, *supra* note 37, 5.1; BP Americas, *supra* note 46, princ. II. The ICRC likewise adopts the general principle that "Internment/administrative detention can only be ordered on an individual case-by-case basis, without discrimination of any kind." ICRC Guidelines, *supra* note 30, at 381.

[165] *See* A v Sec'y of State for the Home Dep't., [2004] UKHL 56, ¶¶ 45-69; HRC GC 29, *supra* note 80, ¶ 8.

[166] *A.*, [2004] UKHL 56, ¶ 48; Gaygusuz v. Austria, 23 Eur. Ct. H.R. 364, ¶ 42 (1996).

[167] Geneva IV, *supra* note 49, art. 4.

the armed conflict,"[168] but does not spell out on what grounds this may occur. IHRL therefore governs in this IHL vacuum: the detention must not be arbitrary and must be proportional and based on grounds previously established by law.

D. SECURITY DETENTION OUTSIDE OF EUROPE

Outside Europe, the question is not whether security detention of suspected terrorists is permitted, but whether it meets the IHRL criteria summarized above, or satisfies comparable IHL criteria in wartime. The detention must not be arbitrary or disproportionate (i.e., it must be no more than strictly necessary to the objective of preventing terrorism), it must rest on grounds[169] and procedures[170] previously established by law, and it must not be discriminatory.[171]

Is prolonged or indefinite deprivation of the fundamental right of liberty, without criminal charge or conviction, ever a proportionate response to terrorism? If so, the proportionality of the detention, and hence its lawfulness under IHRL, depends in part on whether there is sufficient evidence against a particular suspect.[172] But how much evidence is enough? Here we encounter a notable gap in current IHRL: the absence of a standard for the quantum or quality of evidence needed to justify a security detention. A standard of "some evidence" is palpably too low.[173] So is a standard of mere "reasonable suspicion," which is the standard required by the Fourth Amendment to the U.S. Constitution for police to conduct a brief "stop and frisk."[174] A standard of "credible evidence"

[168] Geneva Protocol II, *supra* note 54, art. 5.1.

[169] ICCPR, *supra* note 28, art. 9.1; ACHR, *supra* note 41, art. 7.2 ("No one shall be deprived of his physical liberty except for the reasons . . . established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."); ACHPR, *supra* note 47, art. 6 ("No one may be deprived of his freedom except for reasons . . . previously laid down by law."); ADHR, *supra* note 43, art. XXV ("No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.").

The ICRC asserts the general principle that "Internment/administrative detention must conform to the principle of legality." In this context, the principle of legality "means that a person may be deprived of liberty only for reasons (substantive aspect) and in accordance with procedures (procedural aspect) that are provided for by domestic and international law." ICRC Guidelines, *supra* note 30, at 383.

[170] ICCPR, *supra* note 28, art. 9.1.

[171] *A.*, [2004] UKHL 56, ¶¶ 46, 67.

[172] *See* BP Americas, *supra* note 46, princ. III.2 (noting that "sufficient evidentiary elements" are required for any preventive detention of liberty).

[173] Hamdi v. Rumsfeld, 542 U.S. 509, 537 (2004) (noting that the "some evidence" standard is "inadequate" because it is a "standard of review, not a standard of proof").

[174] Terry v. Ohio, 392 U.S. 1 (1968).

should, at most, merely shift the burden to the detainee to refute the government's evidence.[175] A standard of "probable cause," enough to justify an arrest or search warrant under the Fourth Amendment, seems hardly sufficient for a prolonged deprivation of liberty. Arguably nothing less than a "preponderance of the evidence," the standard for civil liability, should be required to justify a prolonged or indefinite deprivation of liberty.[176]

Whatever the standard for an initial, brief detention—perhaps "probable cause"—proportionality counsels that the standard should be higher for a prolonged detention. But how much higher? IHRL jurisprudence needs to fill this gap with a standard sufficiently respectful of the fundamental nature of the right to liberty.[177]

E. SECURITY DETENTION IN COUNCIL OF EUROPE MEMBER STATES

In Europe the legal restrictions on security detention are stricter. ECHR Article 5, which guarantees the right to liberty, prohibits preventive detention for security purposes. If security detention in Europe is permitted at all, it is allowed only by derogation from Article 5.

In its very first judgment in 1961, the European Court of Human Rights upheld Ireland's security detention of an IRA activist, carried out by derogation from Article 5.[178] Four decades later, however, the British Law Lords interpreted the ECHR and ruled that a British law allowing security detention of foreign nationals, enacted by derogation from Article 5, failed the tests of proportionality and non-discrimination required of derogations, and was thus incompatible with the ECHR.[179] In light of the recent British ruling, as well as recent rulings of the European Court of Human Rights, it is unclear whether prolonged security detention can still be justified by derogation from the ECHR.

1. Right to Liberty Under the ECHR

Unlike the other IHRL instruments considered here, the ECHR enumerates an exclusive list of permissible grounds for detention. Article 5.1 provides, "No one shall be deprived of his liberty save in the following

[175] The Supreme Court plurality in *Hamdi* suggested that credible evidence should suffice to shift the burden to the detainee to rebut the evidence that he is an enemy combatant. 542 U.S. at 534.

[176] *Hamdi*, 542 U.S. at 550 (Souter and Ginsburg, JJ., concurring and dissenting) (citing standard used by army regulations for military tribunals to determine prisoner of war status).

[177] *See supra* note 154.

[178] Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A, no. 3), ¶ 15 (1961).

[179] A. v. Sec'y of State for the Home Dep't., [2004] UKHL 56.

cases" and then lists six grounds.[180] Only two are plausibly relevant to security detention. However, neither was intended, or has been interpreted, to permit security detention.

The first is Article 5.1 (b), which authorizes detention "in order to secure the fulfillment of any obligation prescribed by law." This refers, however, to a specific legal obligation, such as the duty to perform military service or file a tax return.[181] It does not extend to "obligations to comply with the law generally, so that it does not justify preventive detention of the sort that a state might introduce in an emergency situation."[182]

The other facially relevant provision is Article 5.1(c), which authorizes detention "when it is reasonably considered necessary to prevent [a person's] committing an offence." However, this provision "concerns only detention in the enforcement of the criminal law."[183]

In the 1961 *Lawless* judgment, the European Court of Human Rights considered Ireland's detention of an IRA activist for five months under a statute, activated only in emergencies, that authorized a Minister of State to order detention whenever the Minister "is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State."[184] The Minister of Justice ordered Lawless detained because Lawless was, in his opinion, engaged in such activities.[185]

[180] ECHR, *supra* note 39, art. 5.1 provides:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[181] DAVID JOHN HARRIS, MICHAEL O'BOYLE & COLIN WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 112-13 (1995).

[182] *Id.* at 113 n.3 (citing *Lawless*, 1 Eur. Ct. H.R., ¶¶ 15, 51; Guzzardi v. Italy, 3 Eur. Ct. H.R. (ser. A, no. 39) 333, ¶ 101 (1980)).

[183] *Id.* at 117.

[184] *Lawless*, 1 Eur. Ct. H.R. at pt. III, ¶ 12(1).

[185] *Id.* at pt. VI, ¶ 20.

The European Court ruled that the security detention could not be justified by Article 5.1(c) of the ECHR.[186] Commenting on the ruling, one group of scholars explains that even though the language of Article 5.1(c):

> [A]t first sight . . . could be read as authorizing a general power of preventive detention . . . [t]his interpretation was rejected in *Lawless v. Ireland*, as "leading to conclusions repugnant to the fundamental principles of the Convention." . . . [T]he Court rejected the defendant government's argument that the detention of the applicant, a suspected IRA activist, under a statute that permitted the internment of persons "engaged in activities . . . prejudicial to the . . . security of the state," could be justified as being "necessary to prevent his committing an offence". . . . [T]he detention of an interned person under the statute was not effected with the purpose of initiating a criminal prosecution.[187]

In this judgment, signed by eminent human rights jurist René Cassin, among other judges, the Court repudiated security detention in strong terms. If Article 5.1(c) were not read restrictively, the Court warned:

> anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision . . . ; [whereas] [s]uch an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention . . . .[188]

Correctly interpreted, then, as the Court explained in a later case involving a suspected *mafioso*, Article 5.1(c) does not authorize:

> [A] policy of general prevention directed against an individual or a category of individuals who, like mafiosi, present a danger on account of their continuing propensity to crime; it does no more than afford the contracting [parties] a means of preventing a concrete and specified offence.[189]

Thus, while article 5.1(c) may authorize "preventive detention" for purpose of criminal law enforcement in regard to a particular crime, it is not relevant to "security detention" in the sense of preventive detention for security purposes, rather than for purposes of criminal prosecution.

2. Derogation from the ECHR Right to Liberty

After rejecting security detention as a violation of the right to liberty, the Court in *Lawless* then considered whether the detention was justified by virtue of the Irish government's derogation from Article 5, and concluded that it was.[190]

[186] *Id.* ¶¶ 8-15.

[187] HARRIS, O'BOYLE & WARBRICK, *supra* note 181 (footnotes omitted) (citing *Lawless*, 1 Eur. Ct. H.R., ¶¶ 51-53).

[188] *Lawless*, 1 Eur. Ct. H.R., ¶ 14.

[189] Guzzardi v. Italy, 3 Eur. Ct. H.R. (ser. A, no. 39), 333, ¶ 102 (1980).

[190] *Lawless*, 1 Eur. Ct. H.R. at pt. VI, ¶¶ 20-47.

The substantive standard for derogation from the ECHR appears in Article 15.1:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[191]

Pursuant to this provision, the Court framed the substantive question as whether the Irish security detention measure was "strictly required by the exigencies of the situation."[192] The Court noted that some members of the European Commission of Human Rights believed the security detention was not necessary because the Irish government could have used a variety of alternatives instead, including bringing an ordinary criminal prosecution or a prosecution before special criminal courts or military courts, or sealing the border between Ireland and Northern Ireland.

In the Court's view, however, none of these means was adequate to deal with the situation confronting Ireland in 1957. The "military, secret and terrorist" nature of the IRA, the fear it inspired in witnesses, and the fact that most of its activities were cross-border raids into Northern Ireland, caused "great difficulties" in gathering evidence for any sort of criminal prosecution. Sealing the border would have imposed "extremely serious repercussions on the population as a whole."[193]

"Moreover," the Court noted, the Irish security detention law had a number of "safeguards designed to prevent abuses in the operation of the system of administrative detention:"[194]

- The Act was subject to constant supervision by Parliament, which not only received detailed reports but could also, at any time, annul the government's declaration triggering the emergency powers of security detention.
- A "Detention Commission" consisting of a military officer and two judges had been set up, which could hear complaints from detainees and, if its opinion was favorable to release, was binding on the government.
- The ordinary courts could compel the Detention Commission to carry out its functions.
- The government publicly announced that it would release any detainee who gave an undertaking to respect the law and the security

[191] ECHR, *supra* note 39, art. 15.1.
[192] *Lawless*, 1 Eur. Ct. H.R. at pt. III, ¶ 31.
[193] *Id.* ¶ 36.
[194] *Id.* ¶ 37.

act. This was a government commitment which the European Court considered to be legally binding, and that led to the release of Lawless after he gave such an undertaking.[195]

"Subject to the foregoing safeguards," the Court concluded, the security detention appeared to be a measure strictly required by the exigencies of the situation.[196]

One may question, however, whether the nearly half-century-old judgment in *Lawless* affords continuing assurance of the validity of prolonged security detention by derogation from the ECHR. In part the doubt arises from the very short time periods, no more than a week or so, now allowed by the European Court for police detention of suspected terrorists in criminal cases, even under derogations from the right to liberty.[197]

In part, too, doubt arises from the rejection of security detention, even under derogation, in a recent judgment of the highest court of Britain, which interpreted the ECHR in light of the jurisprudence of the European Court. Following the terrorist attacks of September 11, 2001, the British government derogated from ECHR Article 5 in order to impose prolonged security detention on foreign nationals suspected of international terrorism, who could not or would not be deported.[198] Under the legislative scheme, foreign citizens suspected of involvement in international terrorism, but not equally suspect British citizens, could be indefinitely detained, until such time as the government or the detainee could find another country willing to accept them.[199]

In *A. and Others v. Secretary of State*, decided in 2004, the House of Lords heard a challenge to this scheme, which they deemed to be a security detention system.[200] The Law Lords evaluated the system in light of the derogation provisions of the ECHR,[201] which they considered to have the same effect as those of the ICCPR with regard to discrimination.[202] Even

[195] *Id.* ¶ 27.
[196] *Id.* ¶ 38.
[197] *See supra* Part IV.
[198] A. v. Sec'y of State for the Home Dep't., [2004] UKHL 56, (2004), ¶ 11.
[199] *Id.* ¶ 12.
[200] *Id.* ¶ 55.
[201] *Id.* ¶ 16.
[202] *Id.* ¶¶ 46 ("The United Kingdom did not derogate from art 14 of the European Convention (or from art 26 of the ICCPR, which corresponds to it) . . . ."), 62 ("The Attorney General . . . accepted that art 14 of the European Convention and art 26 of the ICCPR are to the same effect."), 67 ("To do so was a violation of art 14. It was also a violation of art 26 of the ICCPR and so inconsistent with the United Kingdom's other obligations under international law within the meaning of art 15 of the European Convention."), 68(4) ("[A]rt 4(1) of the ICCPR, in requiring that a measure introduced in

though the British scheme had more procedural safeguards than those employed decades earlier by the Irish government in *Lawless*,[203] the Law Lords adjudged it to be both disproportionate and discriminatory, and hence incompatible with the ECHR.[204] Accordingly, as it was authorized to do by the Human Rights Act, the Court so advised the government.[205]

Whether indefinite security detention under derogation from the right to liberty could secure judicial approval in Europe today, as opposed to 1961 when *Lawless* was decided, is thus open to some doubt. Of the nine Law Lords who heard *A. v. Secretary of State*, only one voted to uphold the detention. Even he, however, seemed to imply that he might not sustain a system of security detention if it were applied to British citizens:

derogation from Covenant obligations must not discriminate, does not include nationality, national origin or "other status" among the forbidden grounds of discrimination . . . However, by art. 2 of the ICCPR the states parties undertake to respect and ensure to all individuals within the territory the rights in the Covenant "without distinction of any kind, such as race . . . national or social origin . . . or other status". Similarly, art. 26 guarantees equal protection against discrimination "on any ground such as race, . . . national or social origin . . . or other status". This language is broad enough to embrace nationality and immigration status. It is open to states to derogate from arts. 2 and 26 but the United Kingdom has not done so. If, therefore, as I have concluded, art. 23 discriminates against the Appellants on grounds of their nationality or immigration status, there is a breach of arts. 2 and 26 of the ICCPR and so a breach of the UK's "other obligations under international law" within the meaning of art. 15 of the European Convention.").

ICCPR, *supra* note 28, art. 4.1 provides:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

[203] As Lord Walker, dissenting in *A. v. Sec'y of State*, explained:

> [T]he 2001 Act contains several important safeguards against oppression. The exercise of the Secretary of State's powers is subject to judicial review by SIAC, an independent and impartial court, which under . . . the 2001 Act has a wide jurisdiction to hear appeals, and must also review every certificate granted . . . [for security detention] at regular intervals. Moreover the legislation is temporary in nature. Any decision to prolong it is anxiously considered by the legislature. While it is in force there is detailed scrutiny of the operation of . . . [security detentions] by the individual (at present Lord Carlisle QC) appointed [as ombudsman] . . . . There is also a wider review by the Committee of Privy Councillors . . . . All these safeguards seem to me to show a genuine determination that the 2001 Act, and especially Pt 4 [on security detentions], should not be used to encroach on human rights any more than is strictly necessary.

A., [2004] UKHL 56, ¶ 215.

[204] *Id.* ¶¶ 43 (proportionality), 67 (discriminatory), 72 (declaration of incompatibility with ECHR on both grounds).

[205] *Id.* ¶ 72.

> [I]nterning British citizens without trial, and with no option of going abroad if they chose to do so, would be far more oppressive, and a graver affront to their human rights, than a power to detain in "a prison with three walls" a suspected terrorist who has no right of abode in the United Kingdom, and whom the government could and would deport but for the risk of torture if he were returned to his own country.[206]

The core flaw in the British system was discrimination. Foreign citizens suspected of international terrorism could be detained indefinitely, whereas British citizens could not. This disparity served also to highlight that the detention was disproportionate: if security did not require indefinite detention of British citizens suspected of terrorism, then why did it require indefinite detention of foreign citizens?

Not only heightened judicial sensitivity to the right to liberty, but also changing technology, may cast doubt on the continued validity of *Lawless*. The Law Lords in *A. v. Secretary of State* were intrigued by the attraction of electronic restraints as an alternative to imprisonment. They noted that when one security prisoner was released on bail, it was on condition:

> [T]hat he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communications device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company.[207]

The Court hinted strongly that such a system of restraints would more likely survive its scrutiny: "The Appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so."[208]

When the legislation was subsequently revised, it incorporated conditions of this kind. But after several detainees thus placed under house arrest managed to abscond, some British police continue to call for extending the maximum period of detention prior to charging terrorism suspects, currently twenty-eight days, to allow for indefinite security detention.[209] As of this writing, however, even a far more modest proposal

[206] *Id.* ¶ 213 (Lord Walker of Gestingthorp).

[207] *Id.* ¶ 35.

[208] *Id.* *See also* BP Americas, *supra* note 46, princ. II.4 ("American States shall establish by law a series of alternative or substitute measures for deprivation of liberty.").

[209] *E.g.*, Mark Townsend & Jamie Doward, *Lock Terror Suspects Up Indefinitely Say Police*, OBSERVER, July 15, 2007, at 1. By late 2007, Prime Minister Gordon Brown was considering introducing legislation to extend the twenty-eight-day period to fifty-six days.

by Prime Minister Gordon Brown, to extend the twenty-eight day period to forty-two days in individual cases subject to parliamentary review, has yet to overcome opposition from his own party as well as the opposition in Parliament.[210]

In sum, the ECHR does not permit security detention in ordinary times. Even in national emergencies, when States derogate from the right to liberty, the evolving jurisprudence of the European Court of Human Rights and the British House of Lords casts doubt on whether indefinite or prolonged security detention is ever a proportional response to terrorism.

VI. PROCEDURES FOR SECURITY DETENTION

Where security detention is allowed at all, the procedures for its use must be previously established by law.[211] They must also include the following procedural safeguards:

A. REGISTRATION

The detention must be registered.[212] There must be no "prisoners without a name in cells without a number."[213] Indeed, under IHL, "[t]he

Sarah Lyall, *British Intelligence Chief Sharpens Intelligence Warning*, N.Y. TIMES, Nov. 6, 2007, at A3.

[210] A. Travis, *Terrorism: Lords Say 42-Day Law Will Put Fair Trials at Risk*, THE GUARDIAN (London), Aug. 5, 2008, at 4; James Kirkup, *MP Promises Rebellion on 42-Day Detention*, DAILY TELEGRAPH, April 2, 2008, at 14.

[211] ICCPR, *supra* note 28, art. 9.1 ("No one shall be deprived of his liberty except . . . in accordance with such procedures as are established by law."); ACHR, *supra* note 41, art. 7.2 ("No one shall be deprived of his liberty except . . . under the conditions established beforehand by the Constitution . . . or by a law . . . ."); ACHPR, *supra* note 47, art. 6 ("No one shall be deprived of his freedom except for . . . conditions previously laid down by law."); ADHR, *supra* note 43, art. XXV ("No person may be deprived of his liberty except . . . according to the procedures established by pre-existing law."); BP, *supra* note 37, art. 2 ("[D]etention . . . shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose."). The ICRC treats this procedural requirement as the procedural aspect of the more generally applicable "principle of legality." ICRC Guidelines, *supra* note 30, at 383.

Although as noted in the preceding text the ECHR does not allow security detention except, perhaps, by derogation. ECHR, *supra* note 39, art. 5.1 states generally, "No one shall be deprived of his liberty save . . . in accordance with a procedure prescribed by law." In view of the emphasis in *Lawless* on the procedural "safeguards" for the Irish security detention under derogation from Article 5, one might expect the European Court, if it were to allow a security detention under derogation today, to require that it be done pursuant to a procedure prescribed by law. *See* Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A, no. 3), ¶ 15 (1961).

[212] "The prohibitions against . . . unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their

entire system of detention . . . is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to the ICRC."[214]

B. COMMUNICATIONS

The detention must not be *incommunicado* for more than a few days.[215] The prisoner should be entitled to communicate with family and counsel.[216]

status as norms of general international law." HRC GC 29, *supra* note 80, ¶ 13(b). BP, *supra* note 37, art. 12 provides:

> 1. There shall be duly recorded: (a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; (c) The identity of the law enforcement officials concerned; (d) Precise information concerning the place of custody. 2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

See also BP Americas, *supra* note 46, princs. III.1 ("The law shall prohibit, in all circumstances, . . . secret deprivation of liberty since [it] . . . constitute[s] cruel and inhuman treatment."), IX.1 (admission), IX.2 (registration).

[213] *See* JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (Toby Talbot trans., Knopf 1981).

[214] ICRC Guidelines, *supra* note 30, at 385. Asserting the generally applicable procedural safeguard of the "[r]ight to be registered and held in a recognized place of internment/administrative detention," the ICRC explains that this reflects numerous IHL requirements of registration, notification to family and national authorities, and visits to places of detention. *Id.* at 384-85 (citing Geneva IV, *supra* note 49, arts. 106, 107, 136, 137, 138 & 143).

[215] BP Americas, *supra* note 46, princ. III.1 ("The law shall prohibit, in all circumstances, incommunicado detention of persons since . . . [it] constitute[s] cruel and inhuman treatment."); BP, *supra* note 37, art. 15 ("Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days."). The exceptions referenced provide as follows: BP, *supra* note 37, art. 16.4 requires that "Any notification referred to in the present principle [such as to consular authorities] shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require." BP Americas, *supra* note 46, art. 18.3 establishes that:

> The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

Moreover:

> [T]he mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee . . . to treatment respectful of his dignity.

Velasquez Rodriguez v. Honduras, Judgement, Inter-Am. Ct. H.R., (Ser. C) No. 4, ¶ 187 (July 29, 1988).

C. NOTICE OF REASONS AND CONSULAR RIGHTS

The detaining authorities must inform the detainee of the reasons for her detention[217] and, if she is foreign, of her right to communicate with her consulate for assistance.[218]

[216] BP Americas, *supra* note 46, princs. V (counsel), XVIII (family and legal representatives), art. 19 ("A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."). The ICRC asserts that "[a]n internee/administrative detainee must be allowed to have contacts with—to correspond with and be visited by—members of his or her family." ICRC Guidelines, *supra* note 30, at 389-90 (citing Geneva IV, *supra* note 49, arts. 106, 107, & 116 and Geneva Protocol II, *supra* note 54, art. 5(2)(b)). The ICRC acknowledges that IHL assures this right "in all but very exceptional circumstances," citing Geneva IV, art. 5, which provides:

> [w]here in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

Id. While this may foreclose the expansive "rights of communication" under GC IV—which include family visits—it does not by terms or by logic foreclose the more limited IHRL rights of communication in State Parties to IHRL treaties, which do not necessarily include family visits, but which do forbid prolonged incommunicado detention.

[217] ICCPR, *supra* note 28, art. 9.2 ("Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest . . . ."). This part of Article 9.2 is applicable to all deprivations of liberty. *See* HRC GC 8, *supra* note 111, ¶ 1. Similar provisions are in ACHR, *supra* note 41, art. 7.4 ("Anyone who is detained shall be informed promptly of the reasons for his detention . . . ."); BP, *supra* note 37, art. 10 ("Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest . . . ."); and BP Americas, *supra* note 46, princ. V (citing Geneva Protocol I, *supra* note 51, art. 75.3). The ICRC asserts a generally applicable procedural safeguard of a "[r]ight to information about the reasons for internment/administrative detention." ICRC Guidelines, *supra* note 30, at 384.

[218] BP, *supra* note 37, art. 16.2:

> If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

See BP Americas, *supra* note 46, princ. V; *see also* La Grand (Germany v. U.S.), 2001 I.C.J. 466 (June 27); The Right to Information on Consular Assistance, Advisory Opinion OC-16/99, 1999 Inter-Am. Ct. H.R. (Ser. A) No. 16 (Oct. 1 1999); ICRC Guidelines, *supra* note 30, at 385.

D. JUDICIAL CONTROL

The detention must be subject to prompt and effective judicial control,[219] at least where requested by the detainee. The detainee must be entitled to bring proceedings before a court to decide without delay on the lawfulness of her detention.[220] This right is non-derogable.[221] There is

[219] ACHR, *supra* note 41, art. 7.5 ("Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released . . . ."); BP, *supra* note 37, arts. 4 ("Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority."), 11.1 ("A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority"), 11.3 ("A judicial or other authority shall be empowered to review as appropriate the continuance of detention."); BP Americas, *supra* note 46, princ. V ("Every person deprived of liberty shall, at all times and in all circumstances, have the right to the protection of and regular access to competent, independent, and impartial judges and tribunals, previously established by law.").

[220] ICCPR, *supra* note 28, art. 9.4 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."). This provision, "i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention." HRC GC 8, *supra* note 111, ¶ 1. Provisions similar to ICCPR art. 9.4 include ACHR, *supra* note 41, art. 7.6; ADHR, *supra* note 43, art. XXV; ECHR, *supra* note 39, art. 5.4 ("Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided."); BP, *supra* note 37, arts. 11.1 ("A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority."), 32.1 ("A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful."). The ACPHR, *supra* note 47, is less explicit but does provide generally in Article 7.1(a) that every individual has the "right to an appeal to competent national organs against acts of violating his fundamental rights . . . ."

[221] HRC GC 29, *supra* note 80, ¶ 16 ("In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."). ACHR, *supra* note 41, art. 27.2 lists, in addition to other non-derogable rights such as the right to life and to humane treatment, "the judicial guarantees essential for the protection of such rights." The Inter-American Court of Human Rights identifies habeas corpus as one of those "non-derogable judicial guarantees." Adv Op. OC-9/87, Habeas Corpus in Emergency Situations, Advisory Opinion OC-9/87, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9 (Oct. 6, 1987).

The ICRC derives from IHL the procedural safeguards that, "[a] person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention," and "[r]eview of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body." ICRC Guidelines, *supra* note 30, at 385-86. In State Parties to IHRL treaties that make judicial review of detention non-derogable, these IHL rules allowing review by an independent and impartial administrative body should yield to the "more favourable" IHRL

arguably a gap in protection by means of judicial control, insofar as IHRL treaties do not expressly mandate periodic judicial review of detention. However, they may reasonably be interpreted to require periodic judicial review.[222]

E. FAIR JUDICIAL HEARING ON DETENTION

The hearing in which a detainee contests the lawfulness of his detention must be fair and public, before an independent and impartial tribunal established by law.[223] A fair hearing affording due process of law must, at minimum, give a security detainee "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[224] Arguably it must also ensure the right to counsel for the detainee.[225]

requirement of judicial review. Geneva Protocol I, *supra* note 51, art. 75.8. This also reflects the fact that the IHL option of a "court or administrative board," Geneva IV, *supra* note 49, art. 43, adopted in 1949, was meant to allow "sufficient flexibility to take into account the usage in different States." ICRC COMMENTARY, *supra* note 75, *Commentary on Geneva IV*, ¶ 260. Once States subsequently became parties to the ICCPR (entered into force in 1976), ECHR (entered into force in 1953), and ACHR (entered into force in 1978), their "usage" incorporated the more demanding IHRL requirement of judicial review. There remains the exception of *force majeure*: where by reason of armed conflict, courts are not open and functioning, administrative review necessarily takes the place of judicial review, until the courts reopen. *See Ex parte* Milligan, 71 U.S. 2 (1866).

[222] *See* BP, *supra* note 37, art. 11.3 ("A judicial or other authority shall be empowered to review as appropriate the continuance of detention."); BP Americas, *supra* note 46, princ. VI (periodic judicial control); *Report on Terrorism and Human Rights*, *supra* note 149, ¶ 124 ("Detention in such circumstances must also be subject to supervisory judicial control without delay and, in instances when the state has justified continuing detention, at reasonable intervals."). Pejic asserts the procedural safeguard, "[a]n internee/administrative detainee has the right to periodical review of the lawfulness of continued detention." Pejic, *supra* note 30, at 388 (citing Geneva IV, *supra* note 49, arts. 43, 78).

[223] ICCPR, *supra* note 28, art. 14.1; ECHR, *supra* note 39, art. 6.1; ACHR, *supra* note 41, art. 8.1; ACHPR, *supra* note 47, art. 7.1; BP Americas, *supra* note 46, princ. V. Pejic would add the procedural safeguard that "[a]n internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person." Pejic, *supra* note 30, at 389. However, she acknowledges that "neither humanitarian nor human rights treaty law expressly mention" this right. *Id.* The present writer therefore does not include it in the IHRL consensus of instruments, even as amplified by IHL.

[224] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004). Although this requirement was stated as a matter of due process of law under the U.S. Constitution, the IHRL ban on "arbitrary" detentions, as noted in Part V.b, supra, has a procedural dimension and incorporates the concept of due process of law. Accord BP Americas, supra note 46, princ. V. *See also* Al-Marri v. Pucciarelli, 534 F.3d 213, 216 (per curiam), and 253, 262-76 (Traxler, J., concurring) (4th Cir. 2008) (en banc) (remanding habeas petition brought by alleged enemy combatant for further proceedings in which government must present best available evidence and allow detainee to confront and question witnesses against him, unless government can show that such additional process would be impractical, unduly burdensome or would harm

Beyond the foregoing procedural requirements, the U.N. Body of Principles envisions an additional safeguard: "In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment."[226]

In international armed conflict, the International Committee of the Red Cross (ICRC) is entitled to visit all places where protected persons are interned or detained, and to interview them. Such visits may not be prohibited "except for reasons of imperative military necessity, and then only as an exceptional and temporary measure."[227] Protected persons entitled to such visits include all who "find themselves, in case of a conflict or occupation, in the hands of a Party . . . of which they are not nationals."[228] Thus, if a State detains its own nationals on security grounds, the detainees are not entitled to Red Cross visits. Nor are nationals of neutral or co-belligerent States entitled to Red Cross visits, so long as their countries maintain "normal diplomatic relations" with the detaining State.[229]

national security, and requiring government on remand to bear burden of proof), *petition for cert. filed*, Sept. 19, 2008.

[225] BP Americas, *supra* note 46, princ.. V; BP, *supra* note 37, art. 17 ("1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. 2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.").

The Inter-American Court of Human Rights has advised that the circumstances of a case "—its significance, its legal character, and its context in a particular legal system—are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing." Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion OC-11/990, 1990 Inter-Am. Ct. H.R. (ser. A) No. 11, ¶ 28 (Aug. 10, 1990). Few circumstances could be more significant for a detainee than a hearing on whether he may lawfully be detained indefinitely. Thus, the right to counsel is arguably an essential element of a fair hearing. *See Hamdi*, 542 U.S. at 539 (plurality opinion); *id.* at 540, 553 (Souter and Ginsburg, JJ., concurring in part and dissenting in part).

The ICRC asserts the procedural safeguard, "An internee/administrative detainee should be allowed to have legal assistance." ICRC Guidelines, *supra* note 30, at 388.

[226] BP, *supra* note 37, art. 29.1; *accord* BP Americas, *supra* note 46, princ. XXIV (requiring regular institutional inspections).

[227] Geneva IV, *supra* note 49, art. 143.

[228] *Id.* art. 4.

[229] *Id.*

Although IHL provides no similar right in non-international armed conflict, nonetheless the ICRC's "right of access in these situations is widely recognized."[230]

VII. Humane Treatment of Security Detainees and Compensation for Unlawful Detention

The treatment of the detainee must be humane and must not subject her to torture or to cruel, inhuman or degrading treatment or punishment.[231] Humane treatment includes regular access to medical care.[232] Detainees unlawfully detained have a right to be compensated.[233]

VIII. Conclusion

Because of the difficulties in relying exclusively on criminal prosecution to confront the threat of terrorism, the United States, United Kingdom and other States have grappled with developing systems of preventive detention of suspected terrorists for security purposes. These systems have not distinguished themselves as exemplars of the rule of law. If prolonged or indefinite security detention is to be permitted, far greater attention must be paid to the substantive and procedural safeguards of international human rights and humanitarian law.

Except in the member states of the Council of Europe, where security detention is allowed, if at all, only by derogation from the right to liberty, IHRL allows security detention, provided it is not arbitrary or discriminatory, is based on grounds and procedures previously established by law that meet minimum procedural requirements, does not entail inhuman treatment of detainees, and is no more restrictive of liberty or long-lasting than required to meet the exigencies of security. In addition, unlawfully detained persons have a right to be compensated. Security

[230] ICRC Guidelines, *supra* note 30, at 391.

[231] CAT, *supra* note 29, arts. 2.1, 2.2, 16.1; ICCPR, *supra* note 28, arts. 7, 10.1; ECHR, *supra* note, 39, art. 3; ACHR, *supra* note 41, art. 5; ADHR, *supra* note 43, arts. I, XXV; ACHPR, *supra* note 47, art. 5; BP, *supra* note 37, arts. 1, 6; BP Americas, *supra* note 46, princ. I; Geneva IV, *supra* note 49, Common Article 3.1 (a), (c), art. 27.

[232] BP, *supra* note 37, art. 24; BP Americas, *supra* note 46, princs. IX.3, X. The ICRC asserts, "An internee/administrative detainee has the right to the medical care and attention required by his or her condition." ICRC Guidelines, *supra* note 30, at 390 (citing Geneva IV, *supra* note 49, art. 81 (medical attention as required by the detainees' state of health); and Geneva Protocol II, *supra* note 54, art. 5.1(b) (internees must be afforded "safeguards" as regards health "to the same extent as the local civilian population")).

[233] ICCPR, *supra* note 28, art. 9.5; ECHR, *supra* note 39, art. 5.5; *see also* BP, *supra* note 37, art. 35.1 ("Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.").

detention must also comply with other provisions of international law where applicable, in particular IHL, which imposes similar requirements, with the important addition that IHL generally prohibits detention of foreign nationals in international armed conflict unless "absolutely necessary" or "necessary, for imperative reasons of security."

IHRL would do well to follow the European model, which permits security detention, if at all, only by derogation.[234] That approach makes clear that security detention is an extraordinary device to be used (if at all) only in exceptional circumstances. The formalities of having to declare and defend states of emergency[235] in order to derogate also ensure that conscious, visible attention by government officials, lawmakers and judges will focus on whether there is truly a need for security detention in a given situation and, later, on whether the exigencies truly continue.

Under a derogation framework, this visible attention may be focused at three distinct stages: when the legislature authorizes and designs a system of preventive detention; when the executive formally invokes it in an emergency; and when the independent judiciary considers, on a case-by-case basis, whether preventive detention of a particular suspected terrorist is warranted.

Whether security detention is done under the European model, allowing it only by derogation if at all, or is authorized without derogation as currently allowed by IHRL outside Europe, two central questions merit further consideration. First, what is the evidentiary basis required to justify security detention? Given the fundamental liberty interests at stake in a prolonged detention, the standard for preventive detention should be no less than a preponderance of the evidence.

Second, should security detention outside the context of armed conflict be allowed at all? Even taking into account that criminal justice systems

[234] *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, at 540, 564, 568, 573, 577 (2004) (Scalia and Stevens, JJ., dissenting) (arguing that indefinite wartime executive detention of citizens accused of being enemy combatants is not permitted unless the writ of habeas corpus is suspended; in order to detain a citizen, the government must either pursue criminal prosecution or suspend the writ). In contrast, the Court has held that foreign citizens who fought against the U.S. in Afghanistan may be detained for the duration of that particular conflict, but has not to date addressed whether the President has constitutional authority to detain foreign citizens captured elsewhere as enemy combatants. Boumediene v. Bush, 128 S. Ct. 2229, 2240-41 (2008).

[235] *E.g.*, ICCPR, *supra* note 28, art. 4.3:

> Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

encounter extreme difficulties in coping with terrorism, is preventive detention always, or ever, necessary? Might not a system of alternative restraints suffice, including house arrest, electronic ankle bracelets and the other devices used in recent years in Britain? Acknowledging that some suspects have managed to escape those restraints, can the devices be fine-tuned to be more efficient?

If security detention is to be allowed, it must be only with the greatest caution and restraint. Granting executive or military officials authority, on the basis of secret and often flawed intelligence information and subject only to limited judicial review, to deprive persons of their liberty based on grounds of security alone, is dangerous to liberty and to the rule of law. In many countries political dissidents may be deemed security threats. Even in democracies under the rule of law, zealous officials may be too quick to conclude that someone is a security threat on the basis of shaky intelligence information. If security detention is not prohibited altogether, its use must be kept to an absolute minimum, and subjected to rigorous and redundant procedural safeguards.

As a plurality of the United States Supreme Court recently warned:

> [A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.[236]

[236] *Hamdi*, 542 U.S. at 530.

[3]

Privacy as Struggle

ANDREW E. TASLITZ*

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I. INTRODUCTION

The topic of this forum is "underappreciated criminal procedure cases." Given that topic, I have made an odd choice: *Hoffa v. United States.*[1] *Hoffa* is an odd choice because it receives ample attention from courts, scholars, and students, having a prominent place in criminal procedure casebooks.[2] Further, it is highlighted as a pivotal case in the historical development of Fourth Amendment doctrine in the recent well-known collection of essays on leading criminal procedure cases entitled *Criminal Procedure Stories*.[3] *Hoffa* is an even odder choice because my fascination with it stems from one of the two reasons it is so famous—its seedling role in the growth of the "assumption of the risk" doctrine as the primary basis for drastically limiting the scope of Fourth

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1. 385 U.S. 293 (1966).

2. *See, e.g.*, CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL, AND COMPARATIVE MATERIALS 205 (3d ed. 2002).

3. Tracey Maclin, Hoffa v. United States*: Secret Agents in Private Spaces*, *in* CRIMINAL PROCEDURE STORIES 181, 181–222 (Carol S. Steiker ed., 2006).

Amendment protections[4] (the second reason for *Hoffa*'s fame is its more specific focus on the problem of undercover agents and informants[5]). Yet, I still consider *Hoffa* "underappreciated" because its core concept of assumption of the risk has not only migrated well beyond the area of informants, but has also overtly or covertly mutated into a highly individualistic notion of privacy as the lone individual's successful struggle against all other human beings, social relationships, and the state. This vision of privacy as being deserved only by those willing to fight for it to the point of severing all human connections renders the Fourth Amendment a weak guardian of liberty. More importantly, it ignores the collective, political functions of the Fourth Amendment; it encourages an atomistic view of human nature inconsistent with the sort of defiant willingness to engage in collective political action required by virtuous citizens in republican governments; and it permits ready infiltration of dissenting groups by agents of the state.[6] These are large claims that cannot be fully justified in so brief an essay. Yet I hope to paint, albeit in broad brush strokes, a sufficiently vivid picture of the Court's conception of privacy to unsettle the reader, convince her that my portrait is at least plausibly representative of reality, and whet her appetite for a more detailed argument to follow at a later date.

Hoffa itself seems on its face a fairly innocuous and narrow decision. The case arose in the context of the "Test Fleet Trial," in which James Hoffa (who was then President of the Teamsters Union) was being tried for violations of the Taft-Hartley Act.[7] During the trial, a local Teamsters Union official, Edward Partin, met repeatedly with Hoffa in his hotel suite. In Partin's presence, Hoffa discussed bribing Test Fleet jury members. Partin reported these conversations to a federal agent, and Hoffa was arrested, charged, and convicted for endeavoring to bribe the Test Fleet jurors. Hoffa appealed that conviction to the Supreme Court, arguing that his conversations with Partin should have been suppressed because Partin was a government informer. Although Partin's entry into Hoffa's

4. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 109–10 (3d ed. 2002).

5. *See* Maclin, *supra* note 3, at 214–20.

6. *See infra* Part II; *cf.* ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 (2006) [hereinafter TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT] (historical background to these claims); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007) (infiltration); Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in* Ferguson v. City of Charleston, 9 DUKE J. GENDER L. & POL'Y 1 (2002) (atomism); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221 (2003) [hereinafter Taslitz, *Racial Auditors*] (political function).

7. Hoffa v. United States, 385 U.S. 293, 294, 296 (1966).

room was consensual, Hoffa contended that Partin's failure to disclose his role as a government informer vitiated Hoffa's consent and turned the interactions into an illegal search for verbal evidence. The Supreme Court disagreed:

> In the present case, however, it is evident that no interest legitimately protected by the Fourth Amendment is involved. It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin or in Partin's presence. Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. . . .
>
> Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.[8]

The Court's conclusion, upholding the undercover agent's actions, seems intuitively right, for without undercover activity much serious crime would go undetected or unprevented.[9] But the Court did much more than hold that on the facts the search was reasonable—the Fourth Amendment demanding such reasonableness for all searches and seizures.[10] Rather, the Court held that there was no search in the first place, thus there was no search for the Fourth Amendment to protect. Although *Hoffa* briefly preceded the Court's adoption of the *Katz v. United States* test, defining searches as invasions of "reasonable expectations of privacy,"[11] *Hoffa*'s logic survived and has been incorporated into the

8. *Id.* at 302 (footnote omitted).

9. *See, e.g.*, Lewis v. United States, 385 U.S. 206 (1966). There, the Court rejected the argument that an undercover drug purchase in the defendant's home violated his Fourth Amendment rights. *Id.* at 211. Where the home was converted into a "commercial center" in which outsiders were invited in for illegal business, it had no greater sanctity than a store, garage, or street. *Id.* The Court emphasized the practical implications of its holding:

> Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*. Such a rule would, for example, *severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest*. A prime example is provided by the narcotics traffic.

Id. at 210 (footnote omitted) (emphasis added).

10. *See* U.S. CONST. amend. IV ("The right of the people to be secure . . . against *unreasonable* searches and seizures, shall not be violated . . . .") (emphasis added).

11. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

modern understanding of the *Katz* test for what conduct constitutes a "search." Thus, using "Katzian" terminology, *Hoffa* must today be understood as holding, or at least as laying the foundation for the currently dominant idea, that there is no reasonable privacy expectation against another's turning on the discloser of information.[12]

This Hoffian idea of "misplaced confidence" in confiding in others has come to be called by commentators and the Court itself "assumption of the risk."[13] Yet the Court does not give this term the meaning it ordinarily receives in tort and criminal law: proceeding in the face of a risk of which you are consciously aware.[14] There was no evidence in *Hoffa* that he had any awareness of the risk that Partin worked for the government or would turn on Hoffa. Moreover, the Court has unquestionably applied the assumption of risk idea in post-*Hoffa* cases to situations where conscious awareness of a risk of lost privacy was not only lacking, *but where most Americans would agree it was lacking.*[15] While "assumption of risk" under the Fourth Amendment thus occurs when the Court believes someone *should have been aware* of such a risk, empirical evidence suggests the Court's notion of what risks we must fairly assume is sometimes wildly out of line with ordinary citizens' views on that subject.[16]

The migration of the assumption of risk idea from the undercover agent context to most other Fourth Amendment contexts logically should—and indeed does—have radical implications.[17] When we leave the home, we "risk" being seen or heard by observers, as we do when we confide in friends or lovers, engage in financial transactions, make telephone calls, use the internet, drive, shop, eat out, visit museums, or accept social invitations—in short, when we engage in all of life's ordinary occupations.[18] With a few limited exceptions, as I and others

12. *See* ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 107–43 (2d ed. 2003) (analyzing the "reasonable expectation of privacy" test).

13. *Id.* at 116–20.

14. *Id.* at 117.

15. *Id.*; *see also* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993) (empirically comparing Court's assessments of reasonable privacy expectations with those held by most Americans, often finding a significant divergence between the two).

16. TASLITZ & PARIS, *supra* note 12, at 117; Slobogin & Schumacher, *supra* note 15, at 737–42.

17. *See, e.g.*, Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125 (2002) (exploring these implications).

18. *See* TASLITZ & PARIS, *supra* note 12, at 107–43 (showing how the Court has limited citizens' expectations of privacy in a variety of life's normal occurrences); *infra* text accompanying notes 21–30.

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have demonstrated elsewhere, these logical implications of *Hoffa*'s reasoning uncabined have been realized.[19] Further growth spurts may also lie in *Hoffa*'s doctrinal future.

The title of this short essay is "Privacy as Struggle," a title meant in part to capture the Court's requirement of superhuman individual efforts to attain secrecy, that is, totally veiling one's activities from the state's prying eyes as an essential prerequisite to the existence of privacy, all too often at the expense of human relationships, interpersonal trust, and political voice. I want, therefore, to paint an apocalyptic vision of the Court's Fourth Amendment privacy jurisprudence, as the reader will no doubt have noticed I have already done in connection with my reading of *Hoffa*. I want to do so not because I truly believe that the end of civil liberties is coming, but rather because I believe that the apocalyptic attitude can sharpen our understanding of the consequences of the Court's conception of privacy. Merely screaming, "The sky is falling! The sky is falling!" is sometimes part of what helps to keep it up in heaven, to stop a small shift away from sound civil liberties ideals from snowballing into a more rapid descent down the slippery slope into civil liberties Armageddon.[20]

II. V FOR VENDETTA

The best place to turn for apocalyptic imagery is, of course, science fiction films. The most recent such film relevant to my essay is *V for Vendetta*.[21] *Vendetta* takes place in a near-future England in which fear of terrorism has led to the election of an oppressive government that puts a premium on surveilling its citizenry. The governmental departments charged with coordinating surveillance are named by their function as body parts: the "Eye" to watch citizens through both visible cameras on

19. *See* Taslitz, *supra* note 17, at 133–50.

20. *See generally* Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195 (2005) (exploring how fear for the future can lead to dangerous civil liberties slippery slopes in the Fourth Amendment area and recommending an energized, albeit perhaps paranoiac, dissent as an important counterweight); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (examining the causes of slippery slopes and the means for countering them).

21. My recounting of the *Vendetta* story is based on my repeated viewing of the *V for Vendetta* two-disk DVD of a film by the same name starring Natalie Portman and Hugo Weaving. V FOR VENDETTA (Warner Bros. 2006). That film is in turn based on the Vertigo/DC Comics novel. ALAN MOORE ET AL., V FOR VENDETTA (2005).

public streets and hidden ones in private residences; the "Ear" to listen to telephone and other electronic voice communications; and the "Finger Men" to reach out and grab the seditious and the different whose presence the Eye and Ear have detected.

V is a superhuman figure, an escaped concentration camp survivor transformed by his captors' brutal scientific experiments. Masked with the face of Guy Fawkes, the failed bomber of Parliament in an earlier century who sought to bring down what he saw as an overweening government, V wages an initially one-man campaign to bring down the modern totalitarian regime.[22] To do so, V must, of course, somehow avoid the surveillance of the Eye and Ear and the brutality of the Finger Men. He therefore constructs a well-shielded Shadow Gallery as his home—an underground lair built in the forgotten core of the city's long-abandoned subway system, the "tube" to you Anglophiles out there. His few and rare guests—a woman named "Evey" being the only one of which the audience is ever aware—must be blindfolded and rendered unconscious to protect his location. Even then, he is reluctant to release Evey, for he fears that even a description of the color of the stone in his lair will be sufficient for the Finger Men to identify him. Yet, at the same time, his isolation—V is cut off from all human contact other than Evey—allows him to explain his seditious ideas to Evey without fear, and to bring her to see the importance of liberation.

One of V's primary tools of rebellion is his eventual blinding of the Eye and deafening of the Ear by sabotage. The state's blindness and deafness cannot last long, but V does not need much time, for the people, once freed from surveillance, arise in their own struggle of a different sort from that of V: the struggle of a group to regain political autonomy for itself and for its individual members.

To be sure, none of us has to build hidden underground lairs to achieve privacy. Yet the Court's dominant notion of privacy centers on the idea of "assumption of risk," meaning that if you want to protect yourself against state surveillance, you must make every effort to protect yourself against private surveillance, and every person you trust to know a part of your life creates a risk of revelation that you must accept.[23] If your friend turns out to be an undercover agent, you pay for your trust in him when he turns state's evidence against you.[24] If you deposit your

22. *See generally* ANTONIA FRASER, FAITH AND TREASON: THE STORY OF THE GUNPOWDER PLOT (1996) (providing background on Guy Fawkes's role in British history and memory); JAMES SHARPE, REMEMBER, REMEMBER: A CULTURAL HISTORY OF GUY FAWKES DAY (2005) (same).

23. *See* Taslitz, *supra* note 17, at 134–41.

24. *See, e.g.*, Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting) ("The risk of being overheard by an eavesdropper or betrayed by an informer

funds in a bank, "assuming the risk," it too may turn on you, and you lose any constitutional ground for barring the state from learning whatever it wishes to know about your finances.[25] If you walk on the street, where other people can see and hear you, you can and increasingly are subject to camera surveillance by the state. Much like *Vendetta*, you took a chance with your privacy just by leaving home.[26]

Indeed, it is the home that seems to be the one place where the Court claims to be, and often is, granting privacy without requiring extraordinary efforts to see that what is said and done in the home stays in the home.[27] Still, you had better keep your blinds completely shuttered, or peeping Toms and peeping police may come to snoop.[28] And if the police want to use thermal imaging or other modern technologies to monitor what you do in your home, you do have privacy protection there, but *only if* the technologies are not yet in widespread use.[29] Should there be rapid

or deceived as to the identity of one with whom one deals is probably inherent in the condition of human society. It is the kind of risk we necessarily assume whenever we speak.") (approvingly quoted by the majority in Hoffa v. United States, 385 U.S. 293, 303 (1966)).

25. *See* United States v. Miller, 425 U.S. 435, 442–43 (1976) (holding that there is no legitimate "expectation of privacy" in the contents of checks and deposit slips since they are negotiable instruments and not confidential communications, nor in financial statements because they, like the checks and deposit slips, "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.").

26. *See, e.g.*, United States v. Knotts, 460 U.S. 276, 281–82 (1983) (holding that an electronic device used to track a moving motor vehicle, where the public generally could observe that vehicle, did not invade any reasonable expectation of privacy); Martin Marcus & Christopher Slobogin, *ABA Sets Standards for Electronic and Physical Surveillance*, CRIM. JUST., Fall 2003, at 5 (analyzing implications of Court's electronic surveillance jurisprudence); Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213 (2002) (examining specifically this jurisprudence's implications for video surveillance on public streets).

27. *See* Taslitz, *supra* note 17, at 144–45; D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) (exploring legal privileging of the home, including in the Fourth Amendment context).

28. *See* Minnesota v. Carter, 525 U.S. 83, 91 (1998) (holding that a visitor to a home engaged in a drug transaction observed by an officer peeping through window blinds had no reasonable expectation of privacy against such observation).

29. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that officers using a thermal imaging device to detect marijuana growing heat lamps in a home engaged in a Fourth Amendment search but only because the technology involved was "not in general public use").

social diffusion of technology, your home may no longer be your castle, however much that old adage may continue to be used.[30]

In the recent case of *Georgia v. Randolph*,[31] the Court likewise held that police do not have consent to enter a home when one resident, a wife, says yes, but the other resident, her husband, says no, a holding seemingly giving strong privacy protection to the home. Still, Justice Alito took no part in this decision, three other Justices dissented, and the author of one of the dissenting opinions, Chief Justice Roberts, probably more accurately read the Court's prior precedents when he described them as having "clearly mapped out" this rule: "If an individual shares information, papers, *or places* with another, he assumes the risk that the other person will in turn share access to that information or those papers *or places* with the government."[32] Indeed, Roberts wrote: "Even in our most private relationships, our observable actions and possessions are private at the discretion of those around us."[33] Thus, Roberts had this advice for the unwary spouse:

> To the extent a person wants to ensure that his possessions will be subject to a consent search only due to his *own* consent, he is free to place these items in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed.[34]

So much for trust in the marital relationship. Not once did Roberts address the consequences of his decision as being the complete absence of prior judicial review or authorization for the state's entry into the home because, in his vision, the wife's consent effectively constituted a waiver of the *husband's* privacy rights, leaving him with no Fourth Amendment protection at all.[35] Likewise, Roberts likely misread the majority's rule, which permits warrantless entry where there is still some individualized suspicion—reasonable suspicion—such as when interspousal domestic violence is suspected.[36] Again, Roberts's rule does away with even this traditional limitation on police power, a limitation that does not handicap the police in doing their jobs.[37]

The individualistic emphasis of the Court's concept of privacy also means that group privacy—which can have social functions somewhat

30. *See* Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through* Kyllo*'s Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393 (2002) (exploring *Kyllo*'s implications).
31. 126 S. Ct. 1515 (2006).
32. *Id.* at 1531 (Roberts, C.J., dissenting).
33. *Id.* at 1534.
34. *Id.* at 1535.
35. *See id.* at 1531–37.
36. *See id.* at 1525–26 (majority opinion) (addressing the crime victim scenario).
37. *Id.* (noting majority's rule will not interfere with the police's protection of abused spouses).

different from the privacy accorded to individuals[38]—is for all practical purposes outside the Fourth Amendment's protection.[39] Groups require a shielding from the judging eyes of the broader society or the intimidating stare of the state for their coherence and for their effectiveness in serving their particular social function.[40] Group privacy encourages the free exchange of ideas among group members, a process that can stiffen their resolve to stand fast in favor of their dissenting views against the enormous majority pressures toward social conformity.[41] This function of group privacy has obvious First Amendment implications,[42] and courts often do address certain matters that could be viewed as group privacy issues as, instead, simple free speech issues.[43] But ignoring the

38. *See* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 6, at 190 (summarizing the social functions of group privacy).
39. *See id.* at 260. An individualistic approach to privacy ignores the experience that informed search and seizure understandings in 1868, when the Fourteenth Amendment, which incorporated the Fourth Amendment against the states, was ratified:
> A purely individualistic conception of privacy that fails to honor separately the privacy of families and of community, of social and political groups[, as the Court's does], forgets the experience of slaves living under a system in which they struggled to preserve or achieve these things in the face of overwhelming onslaught.

Id.
40. *See id.* at 190.
41. *Id.* Further:
> [T]he opportunity for groups to gather in homes, civic centers, schools, and churches—all the time substantially insulated from outsiders' eyes—may be necessary to promote the free exchange of ideas that define a democracy. Such an exchange can also encourage group solidarity, enhancing part of each individual's sense of self while emboldening group members eventually to express their views in a broader public forum.

Id.
42. *See, e.g.*, Taslitz, *supra* note 17, at 158–65 (cxplaining how privacy for gays to congregate is essential to developing personal relationships and group identification, which is central to many gay individuals' identity and important for fostering a democratic society); Solove, *supra* note 6, at 138–51 (collecting cases that address various First Amendment rights in the group context).
43. *See, e.g.*, Menotti v. Seattle, 409 F.3d 1113 (9th Cir. 2005) (viewing police implementation of city emergency order prohibiting protestors' access to portions of downtown during an international trade conference as primarily a First Amendment free speech question, though analyzing a specific instance of police taking a protestor's sign as a Fourth Amendment seizure question); Handschu v. Special Servs. Div., 475 F. Supp. 2d 331 (S.D.N.Y. 2007) (analyzing constitutional claims of inappropriate NYPD surveillance and intelligence-gathering activities directed at protestors, including videotaping public gatherings and preserving the tapes, as First Amendment free speech questions), *vacated*, No. 71 Civ. 2203(CSH), 2007 WL 1711775 (S.D.N.Y. June 13, 2007) (vacating portions of the earlier order but still analyzing the constitutional issues under the First Amendment).

close connection between Fourth Amendment privacy and First Amendment free speech issues undervalues both constitutional protections.[44] It was, for example, the willingness of New York courts under that state's constitution to recognize broad privacy rights in even public restrooms and gay bars that significantly contributed to the rise of the gay rights movement in New York and nationally, for gay men and women could come out of the closet to voice their views without risking targeted police investigations and arrests for alleged consensual sex crimes.[45] Similarly, the United States Supreme Court readily rejected the argument that the Fourth Amendment presumptively requires using a subpoena rather than a search warrant to obtain newspaper records of journalistic investigations.[46] A subpoena would allow media outlets to select the relevant documents themselves rather than permitting police rummaging through relevant and irrelevant items.[47] A subpoena also gives a newspaper time to file a motion to quash it, perhaps on First Amendment grounds, perhaps preventing a constitutional violation in the first place rather than seeking an after-the-fact remedy for damage done.[48] The Supreme Court was unmoved by such considerations,[49] and it took the Privacy Protection Act of 1980 to correct this mistake.[50] More recently, the New York Police Department has been accused of using mass arrest and surveillance tactics at the Republican National Convention, thereby limiting the size, scope, and movements of the public protests, chilling free speech, and "raising troubling questions about whether the Department was targeting protesters for arrest."[51]

44. *See* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 6, at 12 (making a similar point and summarizing some of the historical support).

45. Taslitz, *supra* note 17, at 160–61.

46. Zurcher v. Stanford Daily, 436 U.S. 547, 559 (1978).

47. *See* Brief for Respondents at 20 n.8, Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (Nos. 76-1484, 76-1600), 1977 WL 189744.

48. *See id.* at 8.

49. *Zurcher*, 436 U.S. at 554–68. For background on the legal requirements for, and tactical advantages and disadvantages of, subpoenas, see MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES (2d ed. 2003) and TASLITZ & PARIS, *supra* note 12, at 142, 741, 749.

50. *See* 42 U.S.C. § 2000aa (2000) (limiting seizure of media work product during the course of an investigation).

51. *See* CHRISTOPHER DUNN ET AL., N.Y. CIVIL LIBERTIES UNION, RIGHTS AND WRONGS AT THE RNC: A SPECIAL REPORT ABOUT POLICE AND PROTEST AT THE REPUBLICAN NATIONAL CONVENTION 14–36, 43–45 (2005), *available at* http://www.nyclu.org/pdfs/rnc_report_083005.pdf. *See generally* AM. CIVIL LIBERTIES UNION, FREEDOM UNDER FIRE: DISSENT IN POST-9/11 AMERICA (2003), *available at* http://aclu.org FilesPDFs/dissent_report.pdf (commenting on police efforts to suppress dissent in cities throughout America). The *New York Times* editorial page recently made these trenchant comments about the NYPD's tactics:

> Police Commissioner Ray Kelly seemed to cast an awfully wide and indiscriminate net in seeking out potential troublemakers. For more than a year before the convention, members of a police spy unit headed by a former official of the Central Intelligence Agency infiltrated a wide range of groups. As Jim Dwyer has reported in The Times, many of the targets—including environmental and church groups and even a satirical troupe called Billionaires for Bush—posed no danger or credible threat. . . .
>
> . . . .
>
> Along with Mayor Michael Bloomberg's denial of permits for protests on Central Park's Great Lawn, the police action helped to all but eliminate dissent from New York City during the Republican delegates' visit. If that was the goal, then mission accomplished. And civil rights denied.

Editorial, *Secrets of the Police*, N.Y. TIMES, Aug. 8, 2007, at A18.

Groups can also matter less for overtly political reasons than for reasons of human flourishing.[52] Constitutional scholar Doriane Lambelet Coleman has particularly emphasized the impact on family privacy of unjustified child abuse investigations. As Coleman notes, in most jurisdictions, upon a report of suspicion of child abuse—reports generally inadequate to establish even particularized *reasonable suspicion* as defined in the *Terry v. Ohio* line of cases:[53]

> [T]he state typically seeks to enter into and examine the family home and to seize and separate the children from their parents or from the school setting in which their parents have placed them so that they can be interviewed and examined, either by CPS, the police, or medical personnel designated by these officials. Generally, state officials are authorized to exercise extraordinarily unfettered discretion when they engage in these intrusions. [Yet approximately] 70 percent of the time no abuse or neglect is found by the conclusion of the investigations.[54]

52. *See* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 6, at 277 (explaining the importance of family relationships, and how social services employees are allowed to search homes and seize children with nothing more than a hunch of child abuse).

53. For an explanation of the *Terry v. Ohio* standard, see *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000):

> In *Terry*, we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.

Id. (citations omitted).

54. Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 441 (2005); *see* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987) (defending a broad notion of Fourth Amendment privacy that protects interpersonal relationships).

Coleman goes on to document a significant number of cases in which previously happy and healthy families became dysfunctional *because of these unjustified searches.*[55] It was not simply the individual harm done to the psyches of children or parents[56] but the resulting harm to family dynamics that amplified the harm to all.[57] Yet few, if any, courts recognize these matters as implicating the Fourth Amendment.[58] Coleman argues that variants of the traditional individualized suspicion and warrant requirements can better balance the need to ferret out child abuse than does the current approach of almost unfettered state discretion.[59]

The Supreme Court's focus on an individual privacy of personal struggle also makes it easy for privacy incursions to be balanced away by countervailing state needs. After all, if the harm the state inflicts is to but one person while the gains the state makes are portrayed as to all of society, it would intuitively seem to be the rare case where the state should lose.[60] Indeed, state interests prevail far more than individual ones in a host of situations: from weak protections against automobile searches; to expansion of the requirement of mere "reasonable suspicion" as an alternative to, and lesser justification for, searches than is probable cause; to a wide array of suspicionless, warrantless purportedly administrative searches.[61] This approach thoroughly ignores the collective political functions of the Fourth Amendment in preventing group and individual humiliation by the state and in regulating state violence.[62] Such collective political functions are found in a close examination of the riots, protests, and philosophical defenses of the concepts underlying what became the Amendment during the long colonial struggle with England.[63] But they are also found in the history of search and seizure practices during slavery and Reconstruction—a history leading up to the eventual

55. Coleman, *supra* note 54, at 447–58.
56. *Id.* at 514–19.
57. *See id.* at 441–58.
58. *See id.* at 415–16.
59. *Id.* at 522–40.
60. *See* Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 91–92 (2003) (supporting a similar point that the Court frequently finds state concerns to be weighty while citizenry concerns slight).
61. *See* TASLITZ & PARIS, *supra* note 12, at 332–412 (summarizing case law); Margaret Paris & Andrew E. Taslitz, *Catering to the Constable: The Court's Latest Fourth Amendment Cases Give the Nod to the Police*, CRIM. JUST., Fall 2004, at 5, 7 (analyzing the trend of recent cases).
62. *See* Taslitz, *Racial Auditors*, *supra* note 6, at 264–98 (examining the Fourth Amendment's connection to the "political emotions" that promote civil liberties change and to "political honor" as a component of the character of a vigilant and virtuous republican people); Taslitz, *supra* note 60 (examining the roles of group and individual humiliation and respect in the Fourth Amendment's regulation of political violence).
63. *See generally* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 6, at 17–67 (providing a historical and philosophical analysis of this issue).

incorporation of the Fourth Amendment against the states via the Fourteenth Amendment of 1868.[64] Yet the Court's individualistic emphasis leads it to read the relevant history with a selective eye, downplaying the collective political aspects of the history of the original Fourth Amendment of 1791, and entirely ignoring the nineteenth-century history of search and seizure abuses that logically should inform the meaning of the modern Fourth Amendment.[65]

Correspondingly, a fuller examination of the relevant history reveals that the Fourth Amendment was rooted in a social contract philosophy in which one function of the state was to maintain social order among the People by the use of violence, while the People were to regulate the state's violence to prevent it from becoming but a larger replacement for private oppression.[66] Restated, the Amendment assumes that public safety and vigorous privacy protections are both feasible and desirable. The tradeoff between security and liberty is thus seen as false; both can be achieved.[67] But that is an approach that seems consistent with a least restrictive alternatives strict scrutiny analysis—one requiring state creativity to craft the least intrusive means for protecting public safety.[68] Yet, with precious little explanation, the Court has expressly rejected such an analysis despite routinely subjecting other fundamental rights to the rigors of strict scrutiny.[69]

Finally, and perhaps ironically, though the Court articulates a weak concept of privacy, it articulates virtually no theories of property and free movement—the two other sorts of interests protected by the Fourth Amendment but relegated to secondary status.[70] As to the latter of these two interests—locomotion—Professor Tracey Maclin wrote about its secondary status for the first time over a decade ago.[71] Yet, sadly the

64. *See generally id.* at 95–257 (recounting the relevant antebellum and Reconstruction history).
65. *Id.* at 11–14.
66. *Id.* at 3–4.
67. *See id.* at 261–62.
68. *See id.* at 82–83, 261–62.
69. *See* MILTON R. KONVITZ, FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE 70, 84 (2001).
70. *See* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 6, at 259–60.
71. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1259 (1990) (arguing that the Court has "placed [the right to move freely] at risk by undermining its central constitutional underpinnings through restrictive interpretation of the [F]ourth [A]mendment").

situation has only gotten worse since. As one brief example, *Terry* stops are permitted not merely on a lower quantity but also a lower *quality* of evidence.[72] Moreover, as Professor David Harris has ably documented, despite the Court's asserted commitment to individualized suspicion, lower courts have increasingly allowed reliance on generalizations and stereotypes to justify stops.[73] The Supreme Court and the lower courts often wax rhapsodic about privacy, but rarely, if ever, do they explicate the social value of locomotion.[74] Here too, they could learn some lessons from history—a history we do not here have the time to review.[75]

III. CONCLUSION

For me, the lessons that the courts have drawn from *Hoffa* have had importance well beyond electronic surveillance, as I have attempted to explain. Yet, the implications of this broadly important concept of privacy as personal struggle in the context of technological surveillance are equally troubling. If privacy inheres in individuals alone, apart from human interrelationships or the social reality of groups; if privacy further thus serves only narrow, parochial interests rather than broader collective and individual ones; and, if privacy invasions therefore need not be routinely monitored by agencies other than the Executive Branch, such as by the judiciary or more directly by the People, then privacy interests must certainly readily give way in the face of seemingly grave and potentially imminent threats to public safety like those posed by terrorism.[76] Similarly, if privacy is accorded a relatively low ranking in the hierarchy of fundamental rights, then government need not be creative and energetic in seeking ways to achieve both privacy and security. The easiest, most blunt, most direct assaults on privacy thus become acceptable means to achieve public safety.[77] The logic of such an approach leads to programs like the warrantless, suspicionless, secret electronic NSA surveillance program of international phone calls that recently made its way into the

72. Alabama v. White, 496 U.S. 325, 330 (1990); TASLITZ & PARIS, *supra* note 12, at 309–16.

73. David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 987–88 (1998); David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 434–35 (2003).

74. Maclin, *supra* note 71, at 1260.

75. *See generally* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 6, at 106–86 (providing a history of mobility during the mid-1800s).

76. *See* Taslitz, *supra* note 20, at 232–43; *supra* text accompanying notes 1–19.

77. *See* Taslitz, *supra* note 20, at 232–34, 239–42.

newspapers.[78] Indeed, Attorney General Alberto Gonzales, during an appearance just last year before the House Judiciary Committee, suggested that the extension of the NSA surveillance program to domestic phone conversations could not be ruled out.[79] Gonzales would not even confirm or deny the existence of a current, ongoing NSA domestic telephone surveillance program, one that largely trusts the Executive to police itself. This is something that surely would have surprised the Framers, and that Representative Adam Schiff of California described as a "very disturbing" prospect, "represent[ing] a wholly unprecedented assertion of executive power."[80]

Likewise, if privacy is so narrowly defined by the Court, as it currently is, that it renders who is doing the watching, how, and for what purposes irrelevant, and that it declares privacy in public to be incoherent, then much technological surveillance can seemingly legitimately go thoroughly unregulated, encouraging its expansion.[81] The rapid spread of closed-circuit television (CCTV) on many street corners in many US cities—a technology not proven to be particularly effective in reducing either crime or terrorism—is a perfect example.[82] The ABA, under Chris Slobogin's leadership, has recommended continuing citizen oversight of CCTV and aggressive policies to limit when and how photos are taken,

78. James Riesen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. *See generally* Brief for Amici Curiae Center for National Security Studies & The Constitution Project at 3–5, Am. Civil Liberties Union v. Nat'l Sec. Agency, 467 F.3d 590 (6th Cir. 2006) (Nos. 06-2095, 06-2140) (providing background on the NSA program); AM. BAR ASS'N, RESOLUTION 302, at 2–16 (2006), http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf (providing an in-depth analysis of the Foreign Intelligence Surveillance Act and the NSA program's constitutionality); THE CONSTITUTION PROJECT, STATEMENT OF THE CONSTITUTION PROJECT'S LIBERTY AND SECURITY INITIATIVE (2006), http://www.constitutionproject.org/pdf/Members_NSA_Surveillance_Statement.pdf (expressing opposition to the NSA program).

79. Eric Lichtblau, *Gonzales Suggests Legal Basis for Domestic Eavesdropping*, N.Y. TIMES, Apr. 7, 2006, at A23.

80. *Id.* Given the bad publicity about the NSA warrantless surveillance program, it has, according to the Administration, recently been dropped, and replaced by a special FISA Court program whose details, as of the date of this writing, remain secret. *Id.* Yet, just as this essay went to press, Congress passed a statute authorizing a variant of the original warrantless surveillance program, albeit an authority that lapses after 180 days if the statute is not reenacted. *See* James Risen, *Bush Signs Law to Widen Reach for Wiretapping*, N.Y. TIMES, Aug. 6, 2007, at A1.

81. *See* Taslitz, *supra* note 17, at 141–46.

82. *Id.* at 125–27, 126 n.10.

how long they are preserved, and for what purposes they are used.[83] These recommendations are but one example of how security and liberty can both be served by envisioning privacy as addressing collective, political problems requiring collective, political solutions. But if these proposals are adopted legislatively or by executive action, it will not be because of, but rather in spite of, the Court's cramped notion of Fourth Amendment privacy.

We do not live in *V for Vendetta*'s totalitarian world of the all-knowing Eye and Ear. But current constitutional privacy concepts nod enough in that direction to make that movie metaphor resonate and make me more than just a wee bit nervous.

83. *See generally id.* at 182–87 (discussing the ABA standard, its implications, and shortcomings).

[4]

WHY MUST TRIALS BE FAIR?

*Stefan Trechsel**

I. *Introduction*

A. *Why Must Trials be Fair?*

Why should fairness be a dominant interest of criminal proceedings? Such questions are shocking, and asking them arouses perplexity. Fairness is quite an obvious value, unquestioned in law, criminal proceedings, in human rights and in everyday life.

It is certainly not the purpose of this paper to cast any doubt upon the basic assumption that trials must be fair. However, there is a certain attractiveness in looking for an answer to a question when the answer appears to be obvious. There is also a chance that an analysis of the background of a norm will strengthen that norm and the motivation to respect it. Such a study may even add colour and contour to the norm and assist in its interpretation.

B. *The Positivistic Reason*

It is particularly easy to give a reason for the necessity of fairness in criminal proceedings if one adopts a positivist standpoint. This view can already be found expressed in the Magna Carta of 1215. Since the "Déclaration des droits de l'homme et du citoyen" of 1789 and the early American Constitution, it has become universal to include procedural safeguards in constitutions[1] and laws of criminal procedure.

In addition to these sources of domestic law, a growing body of international instruments, each with its own legal character, degree of binding force and effectiveness of implementation have dealt with the

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1 Cherif A. Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions", (1993) 3 Duke Journal of Comp. and Int'l L. 235ss.

issue. Without in any way aiming at completeness, let me cite some examples: the Universal Declaration of Human Rights; the UN Covenant on Civil and Political Rights; the Conference on Security and Cooperation in Europe (so-called third basket); the American and European Conventions on Human Rights; and the African Charter of Human and Peoples Rights. One source sometimes overlooked in this context is Article 3 common to the Fourth Geneva Convention of 12 August 1949, the most universally ratified international treaty. Para. 1(d) of Article 3 prohibits convictions and executions without previous judgment of a duly composed tribunal offering the guarantees recognised as indispensable by civilised people. What is required even in armed conflict, when other fundamental rights can be derogated, must apply *a fortiori* in peace time.

C. *What are the Contents of the Right to a Fair Trial?*

To find an answer to this question, we may again turn to international law. True, international law is not entirely uniform. The Geneva Conventions rather than detail any specifications, rely on other sources. Even the most comprehensive treatment of the issue, found in Article 14 of the International Covenant on Civil and Political Rights, does not lend itself to any textual comparison that might lead to any reliable result — its reference to "fairness" must be read as a general clause. Thus, the European Court of Human Rights saw no obstacle, in the absence of an express guarantee in the European Convention, to declaring the right against self-incrimination to be an inherent element of "fair trial".[2] In general, the universally recognised elements of fair trial or due process in criminal proceedings include: the guarantee of an independent and impartial tribunal; publicity; reasonable speediness; the presumption of innocence including the protection against self-incrimination; the right to be assisted by counsel; the right to present evidence for the defence and to challenge evidence for the prosecution; the right to be informed; the right to be able effectively to present one's arguments; and, the access to some form of appeal.[3]

2 Eur. Court H.R., *Funke* v. *France*, Judgment of 25 February 1993, Series A nr. 256-A.

3 Richard B. Saphire, "Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection", (1978/79) 127 U. of Penn. L.R. 111ss.

To these procedural guarantees, *stricto sensu*, one must add the "*status negativus*" — guarantees which protect fundamental values such as life, physical integrity, personal liberty, privacy (including home and correspondence), and property. While these rights — with the exception of life and with special emphasis on personal liberty — are typically interfered with in the context of criminal proceedings, they are of a general character and I do not propose to include them in the concept of "fairness" for the purposes of this paper.

Even so, the catalogue of procedural rights recognised in international and national instruments as elements of a fair trial is quite impressive. "Human Rights in criminal proceedings" has — not surprisingly — been the subject of a wealth of publications, seminars, colloquia and conferences. These aim, as a rule, at defining the scope and limits of those rights. It can be assumed that this will remain a never ending exercise, not only because of the vastness of the problem but also due to its dynamics.

The extent of those rights ought to be imagined not as forming a line, clearly and permanently drawn, though difficult to find, but rather as a shoreline subject to constant change. It has often been said that the state of criminal procedure constitutes a barometer of the health and character of a State. Here again, the imagery suggests flux and reaction to external influences, in particular to the frequency and danger of perceived criminality in the society concerned. In view of the current universal threats of terrorism and organised crime, we may metaphorically characterize our situation as living during an "incoming tide", when the rights of the defence are on the defensive.

D. *Looking for the Real Reason*

This paper will try to look for the reasons behind the textual sources. *Why* do they all insist on fairness? This question has not been invented for the purposes of the present conference; the literature in the field is very rich both in quantity and in quality. However, some of this literature is limited in scope due to the methodology of the authors.

It might be interesting to compare some of the different approaches not usually treated together. This paper will briefly discuss the historical, philosophical, sociological and psychological approaches, in that order.

I shall address general arguments relating to "rights of the individual", "fair trial" or "due process". However, we should be aware that, besides the general argument, there exist specific reasons and justifications for each individual right included in the category. The strengths and merits of each specific justification will not be addressed in this paper. Similarly, this article will not discuss whether any individual right should be allowed to be waived. (e.g., I would void waiver of the right to counsel, but allow waiver of the presumption of innocence, and only point out that even at the outset, one's right to appeal is already quite a limited one).

II. *Historical Considerations*

A. *Pre-Enlightenment Times*

In our present day context we are tempted to say that fairness is one of the essential element in criminal procedure and evidence. In fact, we would define criminal procedure as the organisational framework set up to allow for fairly dealing with persons suspected of having committed an offence. Of course, this was not always the case. In earlier stages of the development of our western society, the procedure of a "criminal trial" more resembled ritual, drama, or exorcism.

For example, Uwe Wesel[4] paints a colourful picture of how a "primitive society" deals with murder: The defendant — known to be the culprit, it must be presumed — finds refuge in the sanctuary of the witch-doctor's hut. The rest of the village gather outside and conduct a "palaver" ceremony, an African negotiation method for reaching a unanimous community decision. In this specific case, the "palaver" is a lengthy discussion of all the virtues and weaknesses of the victim and the defendant, and ends in agreement on the compensation to be paid. The dominant right of the accused in these "criminal proceedings", if they can be so named, is his immunity, as long as he stays in the sanctuary. The early Germanic tribes dealt with crimes such as theft or murder in a similarly commercial way, in the open assembly called "Thing", where compensation was negotiated between the parties.

4 Uwe Wesel, *Frühformen des Rechts in vorstaatlichen Gesellschaften* (Frankfurt-on-Main, 1985).

Already at that time the development of "fairness" may have been particularly exemplary in England — it is hardly an accident that this word has been taken over in other languages, such as German.[5] However, should the English "enlightenment" be described in modern terms, the result is rather surprising. As Bodenhamer[6] puts it with regard to England for the pre-1066 period: "In Anglo-Saxon England criminal proceedings were oral, personal, accusatory ...".

Medieval rules of evidence were characterized by completely irrational methods, such as compurgation (oath-taking), ordeal and battle. However, by the mid-fifteenth century, England had developed a system of criminal procedure almost perfect by present-day standards — the most salient *lacuna* being the absence of counsel.

Although the brilliant image of late medieval criminal procedure in England was not unclouded, it stood in remarkable contrast to the law on the Continent where the leading influence came from the Roman Catholic church, whose inquisitorial system began to spread during the 12th century and eventually became predominant. The inquisitorial method institutionalized torture as a method for extracting from the accused the "truth" the inquisitor wanted to hear.

A similar trend towards inquisitorial procedure occurred during the 17th century in the Puritan colonies of America where a major concern was to discover sin, punish it and reclaim the sinner.[7]

B. *An Intermediate Finding*

These snapshots draw attention to the fact that long before the philosophical cornerstone upon which our edifice of human rights and, more particularly, rights in criminal procedure were built, the picture was not at all uniformly gloomy. They also apparently indicate a tendency towards reducing rights when prosecution pursues religious goals. This is not really surprising and draws our attention to the connection between the general goal of penal law and the rights of the defendant in criminal proceedings.

5 Dieter Dörr, *Faires Verfahren*, Schriftenreihe des Institutes für Europäisches Recht der Universität des Saarlandes, vol. 19, (Kehl/Strassburg/Arlington, 1984).

6 David J.Bodenhamer, *Fair Trial: Rights of the Accused in American History* (New York/Oxford, 1992) 11.

7 Bodenhamer, at 23.

As long as criminal law is meant to serve aims such as deterrence, retribution (just desert), restoring peace or rehabilitation, it will be linked in some way to an idea of justice. It is only consistent, then, that the proceedings will equally be organised with (procedural) justice in mind, and, therefore, that there will be rights for the accused. It would be blatantly contradictory to claim justice for the outcome of unjust proceedings.

This changes as soon as criminal law is meant to serve a goal dictated by a supreme ideology (*überwertige Idee*), in particular, religion, or when defendants are not regarded as basically responsible fellow-creatures but as an object in need of therapy or restructuring. Wolfgang Schild[8] advances an interesting theory to explain the cruelty of medieval criminal justice: As life was mainly oriented along religious lines, the paramount goal in life was to avoid perpetual damnation in hell and to reduce the time to be spent in purgatory. Confession was the first step to redemption, and suffering in the execution of capital punishment promised relief in eternity. This, according to Schild, made torture and other forms of martyrdom acceptable even to the victims. It is understandable that in such a perspective the issue of worldly rights was of little relevance and there was also hardly any room for consideration of the issue of fairness in the proceedings.

C. *The Enlightenment*

The cradle of human rights, including those of the accused in criminal proceedings, lies to a large, if not decisive, extent in the philosophy of Enlightenment which discovered, to get immediately to the core of the issue, the inherent and unrelinquishable dignity of the individual human being. Beccaria, Grotius, Kant, Montesquieu, Pufendorf and Rousseau are some of the names to be recalled with deep admiration and gratitude in this context. The basic values they advocated and made popular have provided guidelines which are still valid today. Let it be recalled that, to give but one example, Rousseau's idea of the "contrat social" is to be found again in the theory of justice of Rawls.

Basically, after the difficult process of putting the ideas of the Enlightenment into legislation — e.g., the Code d'Instruction Criminelle of

8 Wolfgang Schild, *Alte Gerichstbarkeit: vom Gottesurteil bis zum Beginn der modernen Gesetzgebung* (Munich, 1980).

1808 or the reformed German Code of Criminal Procedure of 1877[9] — we still labour in the garden laid out by the Enlightenment and we can but hope that what history has achieved by this development will not be lost any more.

III. *Some Highlights from Legal Philosophy*

A. *The Ethical Aspect*

1. *The defendant as a human subject*

Generally, the aims of criminal procedure may be expressed thusly: The prosecution of offenders (crime control) is an important task of the community; criminal procedure must be organised so as to guarantee effectiveness; and citizens are safe when those who do not obey the law can successfully be prosecuted and punished.

However, the State is not free to pursue these aims by any means. As a matter of fact, it is one of the basic features of the State based on the rule of law (*Rechtsstaat*) that even legitimate goals may not be pursued by any means. The individual as a human being with his or her inherent dignity must be respected. This means not only that there can, of course, be no room for torture or other ill-treatment, but that prosecuting authorities must also respect a number of formal and substantive limits on the use of measures of coercion such as detention on remand, search and seizure and eavesdropping.

Furthermore, a defendant must be regarded as a subject rather than as an object of criminal proceedings. This means that she or he must be treated as a responsible being capable of answering any charges brought against her or him. It follows that one of the most fundamental guarantees in criminal proceedings is the right to be heard, including the right to effectively present one's evidence and put to the test the evidence of the prosecution.

I would regard these arguments as being of a typically ethical nature.

9 Winfried Hassemer, "Menschenrechte im Strafprozess", (1988) 4 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 336, at 338.

2. *The basic antagonism*

Effectiveness of prosecution and rights for the defence are often regarded as antagonistic interests. In everyday courtroom practice they doubtlessly are. The defence will call witnesses and experts who, by the end of the day, will not have contributed in any meaningful way to the outcome, and certainly not to the establishment of the truth. Certain defence counsel regard it as their duty to frustrate every effort of the prosecution to find out and prove what actually happened. Sometimes, in the day-to-day practice of an organ called upon to implement a human rights' instrument, one even wonders whether certain lawyers regard it as a fundamental human right that even those rightly suspected are acquitted. On the other hand, the prosecuting authorities may now and then be tempted to hinder the defence, to hide the weaknesses of their own case. This temptation may be particularly strong in cases which have aroused a strong public interest or in systems where re-election of members of the prosecuting authorities depends on success, and success is assessed as a function of the number of convictions and years of imprisonment for which a prosecutor takes credit.

3. *The possibility of convergence*

However, as soon as we look behind the appearances, elements of convergence become visible, in particular if we limit ourselves to *legitimate* interests.

For one, the State cannot in earnest be interested in obtaining convictions as the result of proceedings which are not fair. Such a policy could not be reconciled with the basic idea of social contract — be it in the sense of Rousseau or Rawls. Being committed to values, the State cannot want to ignore the rights of even its suspect or criminal citizens. Fairness lies also in its own interest.

On the other hand, it is difficult to conceive of any legitimate interest of the perpetrator of a crime in not being convicted and sentenced. Suspects may, of course, regard impunity *de facto* as their paramount interest; however, their attitude is, then, unethical by standards such as Kant's categorical imperative.[10]

10 Roland Hoffmann, *Verfahrensgerechtigkeit*, Studien zu einer Theorie prozeduraler Gerechtigkeit (Paderborn/Munich/Vienna/Zurich, 1992) 196ss.

Hassemer has taken the opposite view. He rejects any harmonistic blur, in particular, any of the attempts developed by the Second Senate of the German Federal Constitutional Court to integrate the goals of justice and truth into the theory of effectiveness. He fears that "*Funktionstüchtigkeit der Strafrechtspflege*", i.e., the ability of the administration of criminal justice to function properly, would lead to the disappearance of the fruitful and necessary contrast between effectiveness and due process ("*Rechtsschutz*").[11]

Between the two positions (convergence and harmonophobia) there is, however, no real contrast. Conflict exists, and is bound not only to exist but also to be brought fully to light and discussed in all its facets, in any specific proceeding. Harmony exists in the sense that both the State and the individual have no *legitimate* interest other than that the solution of the conflict be fair, and that the proceedings leading to the solution follow rules which give no unjustified advantage to either of the parties.

B. *Justice*

1. *Outcome-justice and procedural justice*

Let us now approach a deeper layer of legal philosophy, the ethical value called justice. Presuming that the administration of criminal justice ought to produce justice, what are the conditions which would permit us to say that justice has been done?

In approaching this question I would like to distinguish between two aspects of justice: "outcome-justice", which evaluates the final result of criminal proceedings; and, "procedural justice", which examines the proceedings as a result of which the final outcome was reached.

2. *The flaws in outcome-justice*

The answer, from the perspective of outcome-justice will be that justice has been done if the judgment is just, i.e., if it is based upon the true facts and if the law has been applied correctly. This perspective examines the outcome of the proceedings in order to evaluate the whole

11 Hassemer, *supra* n. 9, at 342.

operation. Such a concept of justice is absolutely dominant in countries of continental Europe, such as Switzerland.

Of course, we would like to assume that justice is done in every trial. However, *can* justice be done in all criminal proceedings, and *is* justice done in all criminal proceedings? The honest answer is *no*. For idealists this may be a rather shocking statement which calls for further elaboration.

a) *The uncertainty in interpreting and applying the law*

I shall start by examining the second criterion of the just judgment, the correct application of the law. I limit myself on this question to the European theory of interpretation of the methodology of jurisprudence. Though similar considerations should apply to legal systems prevalent in other parts of the world, especially with regard to international treaties, I will deal specifically with the German and Swiss systems.

The following propositions are, as far as I am aware, not seriously contested: In order to find the true meaning of a statute and to decide whether a particular case warrants its application, the judge has at his or her disposal a set of argumentative instruments, sometimes themselves referred to as methods of interpretation. These will usually include: 1) a textual, semantic and grammatical approach; 2) perhaps also a historical one; 3) a systematic one; and 4) a teleological one. The correct application of these techniques will usually bring the judge to the correct solution.

How can a critic ascertain whether the judge reached the correct result? He or she cannot do so by simply analysing the result itself but rather must follow the line of reasoning of the judge. Did she or he apply the rules correctly without any departure from logic, in a full chain of arguments with no link missing?

While this will normally not be a particularly difficult task, there are always a number of cases to which the law cannot easily be applied. In these cases, the chain of arguments the judge can build leads to a point close to the final result but there will always remain a gap over which she must jump. The judgment in such difficult cases is the result of following a chain of logically linked steps, up to a certain point, at which a value judgment must be made. This implies a manifestation of the judge's personality as a citizen and as a human being.

If we accept this state of facts, and I cannot see how we could avoid accepting it, the notion of the "correct application of the law" which may

have looked like a rather straightforward issue, loses some of its varnish. Can a judgment, if it bears to some extent the imprint of an individual judge's personality, objectively ensure the production of justice?

b) *The uncertainty in establishing the true facts*

With regard to the establishment of the facts, the situation is even more critical. I propose, at the outset, to distinguish between, on the one hand, the objective, material facts — the "what happened" —, and, on the other hand, the subjective, psychological facts — the *mens rea* — including the finding of guilt.

i. *With regard to the objective facts:*

Not surprisingly, objective facts are less difficult to establish than subjective ones, although there are numerous problematic issues, such as the credibility of witnesses. Even expert opinions on such matters as causation are often far from convincing in a strictly logical sense.

What's more — in certain areas it is quite accepted that positive evidence, in a scientific sense, is impossible to attain. I shall give but two examples, with my apologies for taking them again from the legal order with which I am somewhat familiar. The first concerns offences committed by omission — what in German is called "*unechtes Unterlassungsdelikt*", and in Latin "*delictum commissionis per omissionem*". The standard example is that of a mother who lets her child die by omitting to feed it or to consult a medical doctor.[12] In everyday, common-sense logic one could easily accept that she "killed" her baby, but it could never be proven with logical stringency that the child would not have died from some other reason.

The other similar example relates to negligence. A driver exceeds the speed limit by 10 km/h and causes lethal injuries to an elderly pedestrian. If the only imprudence with which he is blamed with is speeding, then he can only be held responsible for causing the death of the pedestrian if the injuries would not have occurred or would not have been deadly had the driver respected the speed-limit.

12 *Cf.*, the *Erismann*-case, BGE (Decisions of the [Swiss] Federal Tribunal) 73 IV 165 (1947).

The common feature of these examples is that the judge is asked to pass a hypothetical judgment. His finding will, therefore, to use an established terminology, be ascriptive rather than descriptive and cannot, in a strict sense, be proven to be right or wrong.

Let it be clear that I am in no way criticising this state of affairs; it cannot be helped. All I wish to point out is that the operation of the criminal justice system cannot be expected in all cases to reliably reveal objective, verifiable, uncontestable truth.

ii. *With regard to the psychological facts:*

The ground is even unsafer when we examine subjective facts. Here, three elements are of primary relevance: What did the defendant know? What did the defendant want? And, is the defendant responsible for what he did or caused to happen by performing or omitting to perform a specific action? In some instance it may also be important to know the motive for the defendant's behaviour.

The first question is the least problematic. At least in principle, it is possible to find out what somebody knew. For example, there may be witnesses who convincingly affirm: "We told her", or perhaps even: "He told us himself".

It is much more difficult to find out what someone intended to do or to achieve. Though there will usually be a link between motive and intent, what do we mean by "motive"? It is not uncommon to hear defendants say quite honestly: "I do not know why I did it". Actually, Reiwald[13] ventured that often no one in the court-room, least of all the accused, knows why the offence was committed. This opinion is shared by Alexander and Staub,[14] Plack,[15] Reik[16] and others.

This scepticism is particularly typical of the psychoanalytical approach. In fact, according to psychoanalytical theory, the true motive is more likely to be sub-conscious than not. Some rather far-fetched exam-

13 Paul Reiwald, *Die Gesellschaft und ihre Verbrecher, 1948*, new edition with articles of Herbert Jäger and Tilmann Moser (Frankfurt-on-Main, 1973).

14 Franz Alexander/Hugo Staub, "Der Verbrecher und seine Richter, 1928", in *Psychoanalyse und Justiz* (Frankfurt-on-Main, 1971) 205ss.

15 Arno Plack, *Plädoyer für die Abschaffung des Strafrechts* (Munich, 1974).

16 Theodor Reik, "Geständniszwang und Strafbedürfnis, 1925", in *Psychoanalyse und Justiz* (Frankfurt-on-Main, 1971) 138ss.

ples are to be found in earlier literature.[17] For the classical analytical school, the road to the discovery of the real motive is psychoanalysis, a process which may take three or more sessions per week over several years. The sheer cost of this is prohibitive. Not only would it be quite unpracticable to apply this method on a regular basis — the result would hardly be workable for a criminal judgment.[18] We are thus faced with a situation in which we have to accept, from the outset and as a principle, that the full truth cannot be brought to light in criminal proceedings. One may regret this situation, and it has been severely criticised by Menninger,[19] Plack,[20] Ostermeyer[21] and others. However, such criticism is worthy of Don Quixote: it lacks any realistic purpose.

iii. *With regard to guilt:*

Finally, the most precarious finding is that of guilt. The German Federal Supreme Court (*Bundesgerichtshof*) has defined guilt in a very concise and convincing way: We find that someone has acted guiltily if that person decided to do wrong while he could have decided otherwise.[22]

How do we determine whether the defendant could have acted otherwise? Do we ever know whether we could have acted other than the way we did? Could I, for instance, have submitted the text of this essay on time rather than belatedly? Quite frankly, I do not know for sure, although I do not adhere to determinism. Again, such a judgment is hypothetical. It is not possible to know and to prove the answer with scientific certainty.

We have to admit that at this point we cannot even claim that courts always establish the truth. Courts are compelled to decide on the basis of reasonable assumptions, everyday experience or tacit conventions of social life. Again, our findings regarding the defendant's *mens rea* is not description but ascription. This can be illustrated by the "man-at-the-

17 See e.g. the case Lefebvre; *cf.*, with detailed discussion, Ernst Hafter, "Psychoanalyse und Strafrecht", (1930) 44 *Schweizerische Zeitschrift für Strafrecht* 1ss., 11, with further references.

18 Stefan Trechsel, "Das unbewusste Motiv im Strafrecht", (1981) 93 *Zeitschrift für die gesamte Strafrechtswissenschaft* 397ss.

19 Karl Menninger, *The Crime of Punishment* (New York, 1968).

20 Arno Plack, *supra* n. 15.

21 Helmut Ostermeyer, *Strafrecht und Psychoanalyse* (Munich, 1972).

22 BGHSt 2. 200 (1952).

elbow-test", according to which criminal responsibility is to be assumed when a person standing next to the author would have concluded that he was the master of his deed when he committed the offence.

Again, these observations are not meant to be critical. While this area is full of controversial problems, it seems unavoidable that such ascriptive judgments be made, although they cannot, strictly speaking, be proven to be true.

c) *Conclusions*

The application of criminal law aims at an outcome which is based on the true facts and which constitutes a correct application of the law. However, as in all human activities there are many opportunities for error — to some extent it is even *a priori* impossible to ascertain whether the outcome is indeed consistent with the aim of truth. Therefore, whether justice has been done cannot be decided by mere reference to the outcome.

3. *Looking for more solid ground: procedural justice*

How, then, can criminal procedure live up to the standard of "doing justice"? One obvious way is by adhering to values in the procedure leading to the outcome. This is in accordance with the Confucian wisdom that it is not the attaining of a goal which is decisive, but the road taken. Castañeda's (imaginary?) Don Juan called this road the "path with a heart". The deficiency we found in the area of outcome-justice must be compensated by procedural justice.

There is nothing new about the concept of procedural justice — it turns up, to mention but one of the most prominent sources, in Rawls' "justice as fairness".[23] I do not deem it necessary here to dwell upon Rawls' distinction between pure, perfect and imperfect procedural justice — let me just recall that criminal procedure, in his terminology, is an example of imperfect procedural justice because the full respect of the rules of fairness cannot guarantee that the outcome will be just.[24]

23 John Rawls, *A Theory of Justice* (Cambridge, Mass., 2nd ed., 1972) 3ss.
24 Rawls, at 85ss.

In the following considerations I shall distinguish between an instrumental/utilitarian aspect of procedural justice, and procedural justice as a value in itself.

a) *The instrumental / utilitarian aspect of procedural justice*

The point of departure of this discussion is Rawls who, like other scholars, attributes to procedural justice a purely instrumental value.

i. *The "usefulness" of procedural justice:*

It is certainly not wrong to regard procedural justice as a method which can contribute to the production of substantive justice. It stands to reason, for instance, that dialogue — one of the most fundamental principles of democracy — will be of great value in exposing the factual truth, as well as the true meaning of the law. Respect of the right to be heard, what in French is so aptly called *le contradictoire*, no doubt improves the quality of the outcome of criminal proceedings as it increases the probability that all relevant arguments will be brought into the open and taken into account. The same applies for "equality of arms". This guarantee aims at avoiding one-sidedness and helps reduce the dangers of distorted perception. Equality of arms calls for the possibility of assistance by counsel in order to counter-balance the professional skill of the prosecuting authority. These elements of fairness can be seen as serving one of the most central values in proceedings: the impartiality of the deciding court.

ii. *Procedural justice as a nuisance:*

This is not the case for the rules of evidence which might be expected to be particularly instrumental in the service of truth. While the instrumental/utilitarian character of the ban on hearsay is quite apparent, it cannot be said that torture will *never* lead to the truth. Length of detention on remand, in particular of *incommunicado garde à vue*, may be a strong incentive for a defendant to make self-incriminating statements. Illegal wiretapping will bring results quite as reliable as legal eavesdropping. It will often appear more expeditious not to follow the complicated formalities required in order to obtain extradition or to get evidence by means other than letters rogatory.

There is no need to dwell further on this point. It cannot be contested that respect for the rules of fair trial may create obstacles to an effective establishment of the facts. Thus, individual rights and rules of evidence

cannot be explained and justified merely by reference to their instrumentality to the outcome.

iii. *The instrumental approach to procedural justice cannot compensate for the imperfections of outcome-justice:*

We first saw that "outcome-justice" cannot be regarded as the cornerstone of the administration of justice. We then formulated the hypothesis that procedural justice might compensate for the flaws of outcome-justice. However, reflecting upon procedural rights from a utilitarian aspect, we found ourselves led right back to the outcome. The instrumental perspective views rights in criminal proceedings as serving the purpose of improving the outcome or reducing its shortcomings; therefore it cannot constitute a counter-weight to the latter.

Let me formulate my question in a crude way: Can there be justice if the outcome of criminal proceedings is faulty in substance, be it that the facts have not been established in accordance with reality, or that the law has been wrongly interpreted? If the answer were negative, this would mean that judgments, with some luck, are now and then rather just and regularly more or less unjust. How could conscientious judges, prosecutors and others continue to devote their energy and idealism to such a task? This would not, perforce, lead us to advocate the end of criminal justice, because it is still better to have an imperfect decision that to have no decision at all. Yet, it may also be better to have no decision at all than to have a decision so bad that it undermines the citizens' confidence in the administration of justice.

There is one example regarding which one will find rather widespread agreement that the substantially wrong judgment is still a just one: application of the principle *in dubio pro reo*, the presumption of innocence, to acquit a person, who is in fact guilty, due to insufficient evidence. This rule is a certain corrective to some of the weaknesses of criminal justice. As it is not always possible to establish the facts fully and completely and to eliminate all doubts, it is the State which must bear the consequences. Its punitive power shall not hit the individual unless the guilt of the latter has been lawfully established beyond reasonable doubt.

This, however, is far from compensating for the fundamental flaws I have pointed out. Idealists claim that it is better to acquit n guilty than to convict one innocent. The question is, how large should n be? If n=1, the sentence loses all meaning. With n=10, I could agree. If it were

n=1,000,000, I would strongly disagree, because this would be the end of criminal justice; even the most remote and improbable doubt would have to lead to an acquittal. The argument of *in dubio pro reo*, therefore, can hardly be regarded as an instrument of justice at all.

But there is also a stronger and more theoretical argument against the idea that acquitting in case of doubt could compensate for the flaws in the production of material justice: It is still linked to the outcome and therefore necessarily contaminated by the imperfections of outcome-justice.

In fact, if we want to save the administration of criminal justice as an activity generating justice, we must give procedural justice an independent weight, a value fully detached from the outcome.

I can see two approaches to the solution. The first one, relatively modest, consists of accepting that *some elements of justice* are added to the overall value of prosecution and judgment in criminal matters by the fairness of the proceedings. This, however, is not the production of justice we are looking for. Let us focus on a second approach.

b) *Procedural justice as a value in itself*

The alternative, ambitious solution, consists of saying: In so far as crime control can generate justice, it is in the area of procedural fairness. This, of course, is not tantamount to accepting that for practical purposes the outcome is never or only seldom just. I believe and hope that, as a matter of everyday court activity, the vast majority of criminal judgments do, to a large extent, satisfy the criteria of justice.

One particularly dubious field of criminal procedure is that of sentencing. In terms of absolute quantity I would venture to propose that never, and by no rational criteria can it ever be proven, that one specific sentence is just. It may be easier to claim: "If sentence A is assumed to be a just sentence for offence alpha, then sentence A plus is a just sentence for offence alpha plus". But as soon as one gets down to the amount of a fine or the number of days to be spent in prison, it turns out that there is no logical link between the "plus" in alpha and the "plus" in A.

On balance, there may be fully just judgments in criminal cases but if there are so, it is the result of happy coincidence rather than of the correct application of reliable methods. Outcome-justice is possible but not feasible.

i. *Procedural justice is feasible:*

Procedural justice, on the other hand, *is* feasible. Contrary to the outcome, procedure is controllable — in a twofold sense.

First, it is possible to set out, in legislation, how the procedure is to be organised and which are the rights to be given to the defence (and, by the way, to victims as well as witnesses, experts and other involuntary participants). Of course, it remains difficult to decide where the dividing lines between such rights and the competence of the police and other authorities should be drawn and what guarantees are necessary to respect the dignity of suspects as autonomous human beings and to protect them against any abuse of power. But these are problems of implementation, not of principle. There may also be, in certain cases, secondary difficulties of fact-finding, e.g., whether a summons has actually reached the defendant. Of course, we cannot discuss the subject of justice and disregard the fact that what humans do will never be perfect. Let it suffice to say that there are no flaws comparable to those we identified in analysing the dangers connected with the production of the judgment.

ii. *In proceedings, justice can and must be seen to be done:*

Second, procedural justice is notoriously controllable in quite a different way. One of the fundamental guarantees of a fair hearing is that it be public, i.e., exposed to control by the interested citizen. We are well aware of the fact that this guarantee is highly problematic in more than one respect — Heike Jung[25] is among the many authors who have given careful consideration to this issue. But I shall not enter into a discussion of those controversies because they are not germane to the subject under discussion here. Apart from the public, the parties themselves are also given possibilities of control over the procedure, e.g., via rights to information, the right to be heard, equality of arms and legal remedies such as the right to appeal or to file a complaint.

This is the moment to recall a saying which has often been quoted in the Anglo-Saxon discussion from where it found its way into the case-law of the European Court and Commission of Human Rights. It is a quotation taken from Lord Hewat in *R.* v. *Sussex Justices, ex parte Mc-*

25 Heike Jung, "Öffentlichkeit — Niedergang eines Verfahrensgrundsatzes", in *Gedächtnisschrift für Hilde Kaufmann* (Berlin/New York, 1986) 891ss.

Carthy:[26] "It is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". Demonstrating that justice is done can, to a certain limited degree, be achieved, with regard to the outcome, by publishing the reasons for the judgment. The demonstrative effect of fair proceedings in open court will, however, be much more immediate and convincing.

A hearing, particularly in a criminal case, has most of the features of drama — in many ways, it *is* a drama. The various persons on the stage, or rather their roles, invite identification on the part of the audience. This process of identification leads to the public not only observing but, to some extent, actually living the production of justice in fairness or experience profound feeling of resentment in the face of unfairness.

IV. *A Sociological Viewpoint*

The importance of the production of justice to be seen to be done has yet another aspect to it, a sociological one described particularly well by Niklas Luhmann.[27] It is not possible here to present in any detail the impressive theoretical edifice erected by this eminent author. However, I want to briefly refer to it because it enhances, from yet another angle, the importance of fairness in (*inter alia* criminal) proceedings and places it in a wider context.

Luhmann asks why people can be expected to accept judgments in spite of the uncertainty as to whether they are truly and fully just. He stresses that it is the process of the production of justice, as demonstrated in fair and transparently visible proceedings, which creates authority by convincing the addressee and other observers of their legitimacy. He refers to symbolism in the sense of Durkheim, Mead and Freud and concludes that the drama of criminal procedure is also designed to convince the nonparticipants that everything is done as it should be done and that those responsible for the administration of

26 *R.* v. *Sussex Justices, ex parte McCarthy* [1924] I K.B. 256, at 259, here quoted from Gerry Maher, "Natural Justice as Fairness", in *The Legal Mind, Essays for Tony Honoré* (Oxford, 1986) 103ss., at 105.

27 Niklas Luhmann, *Legitimation durch Verfahren, Soziologische Texte Band* (Darmstadt, 2nd ed., 1975) 66.

justice (not, of course, the defendant) are honestly and seriously engaged in trying to find the truth.

The visible fairness is therefore not only of essential importance for the respective proceedings but also for maintaining the authority of the administration of the law in general.

V. *Procedural Justice in the Light of Social Psychology*

A. *Some Results of Empirical Research*

So far, we have remained theoretical — even Luhmann does not support his sociological approach by any empirical research. Quite a number of studies have, however, been carried out by social psychologists on the perception of criminal proceedings by involuntary participants, in particular defendants, and other persons. The most recent survey I came across is that discussed in detail by Tom R. Tyler, *Why People Obey the Law*, of 1990.[28] Similar studies were published by, Heinz,[29] Casper,[30] Thibaut/Walker[31] and others.

In these research projects, people — people at large, people who had had contacts with law enforcement agencies and prison inmates who were serving sentences — were confronted with questions in order to ascertain their assessment of the enforcement of criminal law ("litigant-satisfaction").

The result was that people tend to obey the law because they believe it is the right thing to do. In evaluating justice and injustice they attach importance also to matters which are not outcome-related, but that are of merely procedural character.

In an article by Casper, Tyler and Fisher[32] it is reported that the most important factor in generating litigant satisfaction was procedural jus-

28 Tom R. Tyler, *Why People Obey the Law* (New Haven/London, 1990).

29 Anne M. Heinz, "Procedure versus Consequences: Experimental Evidence of Preferences for Procedural and Distributive Justice", in Talarico Suzette (ed.), *Courts and Criminal Justice* (Beverly Hills, 1985) 13ss.

30 Jonathan D. Casper, "Having their Day in Court: Defendant Evaluation of the Fairness of their Treatment", (1978) 12 Law and Society Review 237ss.

31 John Thibaut/Laurens Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, N.J., 1975); "A Theory of Procedure", (1978) 66 Calif. L.R. 541ff.

32 Jonathan D. Casper/Tom Tyler/Bonnie Fisher, "Procedural Justice in Felony Cases", (1988) 22 Law and Society Review 483ss.

tice, seen to consist mainly of the opportunity to fully state one's case and the fact that "the decision maker is perceived as having listened to and considered their side's arguments".[33] In their study, based on data gathered in an earlier study of defendants charged with felonies, they found that litigant satisfaction did not depend only upon the favourability of their sentences but also on whether they had conceived of the proceedings as fair. Similar results have been obtained by Landis and Goodstein.[34] In their sample of 619 prison inmates, "procedural issues are more important than outcome issues in shaping ... perceptions of outcome fairness. Perceptions of how one is treated by the participants involved in the criminal justice processing experience are by far the most important predictors of perceptions of outcome fairness".[35]

B. *Limited Cross-Cultural Validity?*

While these findings impressively confirm our theoretical hypothesis of the importance of procedural fairness, it should be recalled that these data were collected in North America. It cannot be excluded that persons who have grown up and lived within the common-law system have a different conception of and relationship with justice than persons used to the more authoritarian continental European system. There is a popular saying about English criminal justice: "give them a fair trial and hang them".[36]

I have already referred to the relationship between the various theories of the goals of criminal law and the particulars of criminal

33 Casper/Tyler/Fisher, at 486.

34 Jean M. Landis/Lynne Goodstein, "When is Justice Fair? An Integrated Approach to the Outcome versus Procedure Debate", (1986) American Bar Foundation Research Journal 675ss.

35 Landis/Goodstein, at 701.

36 I cannot resist the temptation of illustrating this point with an anecdote of my own biography: When, at the age of seventeen, far from even considering the possibility of ever studying law, I went to improve my English in Donegal, I was greatly surprised to be told in a very condescending tone — by people without legal training and repeatedly — that in their system a person was presumed innocent until proven guilty, whereas with us the accused had to prove his innocence. A question of this kind would never have been the topic of casual conversation in Switzerland. I was not even sufficiently aware of our legal system to protest adequately against such absurd accusations.

procedure. In a broader perspective, there is also an obvious link between the political system and the system of criminal procedure. The US system reflects extreme liberalism, while the European continental systems are closer to socialist ideologies in the sense that the State will interfere more easily with economic and other activities of individuals and corporations. In the US, the parties are left to fight each other; they must respect the rules of the game, but the stronger party, that with the better hand and, in particular, that with the better lawyer, shall win. In continental Europe, the presiding judge will do most of the questioning and thereby protect the accused, witnesses and others against aggressive lawyers and prosecutors.

I cannot exclude, therefore, that continental European samples would give different answers to the questions put in the North American studies here referred to. It would be interesting to extend such research to other geographical areas. As long as this has not been done, some doubt remains as to whether the results obtained can be read as bearing witness universally to the importance of fairness as an element of litigant satisfaction.

VI. *Concluding Remarks*

A. *Recapitulation*

First, we recalled the existence of a wealth of norms of different character which denote an *opinio communis* that everyone has a fundamental right to fair trial.[37] The precise scope of the right to fairness is and will remain open to dispute.[38]

37 What is open to controversy is the field of application of that guarantee, e.g., with regard to disciplinary proceedings. This issue cannot be discussed in the present context.

38 However, the prohibition of torture and inhuman or degrading treatment is so universally accepted that it can be regarded as *ius cogens*. To illustrate this point: A State which, by extradition or expulsion, exposes a person to such treatment contrary to Article 3 of the European Convention on Human Rights in the receiving State commits itself a violation of that Article, whereas the same does not apply with regard to the right to fair trial. If the proceedings in the requesting State do not live up to the standards of Article 6 of the Convention, this does not automatically constitute a violation of Article 6 on the part of the requested State: see e.g., European Court of Human Rights, *Soering* judgment of 17 July 1989, Series A no. 161.

Next, we looked for the deeper reason for this postulate. The problem was approached under several headings, historical, philosophical, sociological and socio-psychological. However, we noted that these approaches are not strictly separated — there is, for instance, a very close link between the historical and philosophical approaches.

Our very brief excursion into history showed that setting aside earlier developments in medieval England, rights of the defence in criminal proceedings have their origins in the age of enlightenment, and that they flow directly from the recognition of basic human dignity common to everyone including persons suspected of having committed a crime.

Our philosophical discourse centred around the problem of justice and led to the result that the outcome of criminal procedures is affected by so many imponderable flaws that it cannot be regarded as the pillar upon which the postulate of doing justice could solidly rest. We arrived at this conclusion without even mentioning what is perhaps the weakest spot of the whole exercise: the justification of criminal law itself. Of course, it can be rather convincingly argued that murder, rape, theft and other forms of intolerable behaviour should lead to some kind of sanction while homosexual intercourse between consenting adults should not. But in other areas, hotly debated issues arise — abortion is not the only example; and we are certainly at a loss if we are asked to explain why the punishment for a particular crime must be, as a matter of justice, that which is set out in the statute or something different, let alone that for a specific offence committed a specific sanction is the one and only just one.[39]

As the product of the criminal justice machinery is not a suitable witness to justice, we have turned to the process of manufacturing the product and have found that it can quite reliably be so conceived as to satisfy criteria of (procedural) justice. To a large extent it can be kept under control by the manufacturers, and it can, and even must, be visible to those who want to see. The criminal process has the function, *inter alia*, of demonstrating that justice is done, and how it is done.

39 It is contested, in German doctrine, whether there is only one just sentence — the majority opinion is that within a certain frame several different sentences are just; however, there is still no practical system for fixing the limits of that frame; *cf.* Hans-Heinrich Jescheck/Thomas Weigend, *Lehrbuch des Strafrechts*, Allgemeiner Teil (Berlin, 5th ed., 1996) 880ss.; Eduard Dreher/Herbert Tröndle, *Strafgesetzbuch und Nebengesetze* (Munich, 46th ed., 1993) §46, No. 9ss.

A sociological approach focuses on the effect of this phenomenon on society and leads to the conclusion that visible procedural justice (not limited to the field of crime control) generates authority and legitimation which in turn lead to acceptance and provides motivation for obeying the law. In this respect, the proceedings themselves might have a reforming effect on the author of the offence.

Last (and perhaps also least), we discussed empirical evidence, the result of studies undertaken in North America, showing that persons who had taken part in or observed trials, including convicted prison inmates, were strongly impressed by the experience of procedural (in)justice, independently of the outcome.

B. *Final Questions*

I would like to conclude by formulating three final questions inspired by the preceding pages.

1. *Be seen to be done vs. seem to be done*

First, it has become obvious that an essential feature of the production of judgments is that justice is seen to be done. Would it be permitted to go one step further and say that appearance is, in the final analysis, the only matter of importance — that there is no room, no use, no need for hidden justice, nor is there any reason to fear hidden injustice? The proposition is perhaps less cynical than might appear at first sight.[40]

It is tempting to go even one step further and to ask whether there is, in fact, any difference between justice seen to be done and justice which seems to be done. Is there any independent, invisible justice? In a moral sense, most certainly. However, if we look at the administration

40 Again I cannot resist inserting an anecdote of my personal experience: On the very day when I drafted this passage, I was faced with a problem of incompatibility in Strasbourg. I was acting as Rapporteur in a case brought before the European Commission of Human Rights against Switzerland. One of the parties in the proceedings underlying the application was a former assistant of mine. I therefore declined acting as Rapporteur. The member of the Secretariat then suggested that I might well be the Rapporteur as long as I would not take part in the vote — my name would then not appear on the decision. Despite the philosophical opinion reflected in the question here formulated, I insisted on someone else acting as Rapporteur.

of criminal justice as a means of dealing with social conflict, it is only the appearance which counts, although, of course, this includes the outcome. In other words, the judgment itself must also appear to be just.

2. *Cui bono?*

Second, looking back on this text, as a practitioner I cannot but ask: *cui bono*? I would accept that the reasons found for the need to respect fairness in criminal proceedings is of little use when legislators ask what these rights should be, or judges wish to know, how they ought to be applied.

However, it may be possible to detect some usefulness of these considerations if we look in a different direction. What we have discussed is the value of fair proceedings in themselves. This might be an incentive for judges and other persons engaged in the administration of criminal law to focus on the fairness of the proceedings more than they had before. Of course, this is an argument which does not have the same weight in every legal system. I will confess to the sin of nationalist narrow-mindedness as I am thinking in particular of Switzerland where, in my view, the evaluation of procedural justice needs some enhancing — not only with regard to those engaged in the administration of justice but also with regard to the entire population. I would not feel competent to formulate any hypothesis on this issue with regard to other societies.

A slight modification of perspective might also, to some extent, relieve the stress under which judges operate and which consists of, on the one hand, the committed search for the truth and for full material justice, and on the other hand, the critical awareness of the inherent limitations to which they are subject, the fact that it is not possible to completely establish the truth or to justify in detail the decision for one sentence rather than for a harsher or a more lenient one. Procedural justice requires excellent knowledge of procedural law, patience, even human warmth. But, in principle, and contrary to outcome-justice, it *can* be achieved.

3. *Back to ethics*

Finally, and this is, in my eyes, the most important aspect: The observation of fairness in criminal proceedings ought not primarily to

be looked at as a technicality. Criminal proceedings are a drama, no doubt, but the players of the different roles do not perceive themselves as actors — least of all the defendant. They are first of all human beings. And in the relations with others they are, as a rule, quite aware of a constant duality — they face and address each other partly as the role, partly as the human being behind it. The degree to which the human being, the individual, becomes apparent, and, in particular, the degree to which the defendant gets the feeling that he is being respected as a fellow human being, might well be the most important element in humane criminal proceedings.

[5]

RE-CONCEPTUALIZING THE RIGHT OF SILENCE AS AN EFFECTIVE FAIR TRIAL STANDARD

JOHN JACKSON*

Abstract As the European Court of Human Rights has come to qualify the privilege against self-incrimination and the right of silence in recent decisions, this article argues that the Court has failed to provide a convincing rationale for these rights. It is claimed that within the criminal process the right of silence should be distinguished from the privilege against self-incrimination and given enhanced effect in order to uphold the protective and participatory rights of the defence which come into play when a suspect is called upon to answer criminal allegations.

I. INTRODUCTION

When the European Court of Human Rights in *Funke v France*[1] gave expression to the right of anyone charged with a criminal offence to remain silent and not to contribute to incriminating himself. This was an important symbolic statement of the importance of the right across European jurisdictions straddling both common law and civil law traditions. The right had, of course, been entrenched in a number of international instruments such as the Universal Declaration of Human Rights (UNDHR), the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR) and although there is no explicit reference to the privilege in article 6 of the ECHR, the Committee of Experts which reported to the Committee of Ministers of the Council of Europe on the differences between the ICCPR and ECHR in 1970 had considered that prohibition of self-indictment was of the 'very essence' of a fair trial.[2] The European Court of Justice had also recognized the right in an important judgment in 1989.[3] But the *Funke* decision was the first occasion when the Strasbourg court affirmed the significance of the right.

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[1] *Funke v France* (1993) 16 EHRR 297.

[2] *Report of the Committee of Experts on Human Rights to the Committee of Ministers* (Strasbourg, Council of Europe, 1970) para 141 (vi).

[3] Case 374/87 [1989] *Orkem v European Commission*, ECR 3283.

More recently, however, the Strasbourg court would seem to have diminished its importance by indicating in cases such as *Jalloh v Germany*[4] and *O'Halloran and Francis v United Kingdom*[5] that the right is not absolute and that a range of factors can be taken into account in determining whether the privilege against self-incrimination will apply in a particular case. More worryingly, the Court in *Jalloh* suggested that competing public interests such as the urgent need to obtain evidence may even be taken into account in determining whether certain treatment amounted to inhuman and degrading treatment. At a time when the Court appears more ready to countenance public interest arguments to dilute the force of the individual rights in the Convention, it would seem to be more important than ever to have a clear view of what the rights are for.

Yet the rationale for the privilege against self-incrimination has always been difficult to justify precisely. In the United States an increasing number of commentators have expressed a declining faith in the rationale for the self-incrimination clause of the Fifth Amendment. It has been described variously as 'an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights'[6] and a doctrine which cannot be 'squared with any rational theory',[7] relying for its justification on 'stirring rhetoric that may move the heart but leaves the intellect unconvinced', the fundamental values said to underpin it being striking in their 'vacuity and circularity'.[8] In this article it will be argued that the rationales used by the European Court are equally unconvincing. Part of the difficulty it will be argued is that there has been a failure to differentiate clearly enough between the substantive and procedural dimensions of the right. The case law of the Court has focused more on those aspects of the right to do with upholding the dignity and will of the individual accused than on the more procedural aspects of the right which link it to defence rights when a suspect or accused is called upon to answer criminal allegations.[9] While the substantive dimensions may be subject to proportionate curtailment, the procedural dimensions have at their root a need to enable the accused to mount an effective defence which cannot be balanced away against other considerations. It will be claimed that within the criminal process

[4] (2007) 44 EHRR 32.

[5] Application nos. 15809/02 and 25624/02, 29 June 2007.

[6] AR Amar and RB Lettow, 'Fifth Amendment, First Principles: The Self-Incrimination Clause' (1995) 93 Michigan Law Review 857, quoted in R J Allen and M K Mace, 'The Self-Incrimination Clause Explained and its Future Predicted' (2004) 94 Journal of Criminal Law & Criminology 243, 245.

[7] W J Stuntz, 'Self-Incrimination or Excuse' (1988) 88 Columbia Law Review 1227, 1228, quoted in Allen and Mace, ibid. See also D Dolinko, 'Is There a Rationale for the Privilege Against Self-Incrimination?' (1986) 33 UCLA Law Review 1063.

[8] Allen and Mace (n 6) 244.

[9] See also S J Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart, Oxford, 2007) 161–2 (arguing that the focus in the Court's case law on the autonomy of the accused neglects the importance of the defence role in the institutional understanding of fairness).

the right of silence in particular is entitled to be given an enhanced effect not specifically for reasons to do with upholding substantive rights such as the dignity and respect of the individual but in order to uphold the procedural rights of the defence which come into play when a suspect is called upon to answer criminal allegations.

The article is in three parts. First, it will trace the recent jurisprudence of the Court to show how the right has been diluted in recent decisions. Second, it will examine the rationales put forward by the Court. Third, it will identify the need to focus upon the procedural dimensions of the right.

II. THE APPROACH OF THE COURT TOWARDS THE PRIVILEGE AGAINST SELF-INCRIMINATION

Although *Funke v France* did much to signal the importance of the right, it was not until the later case of *Saunders v United Kingdom*[10] that the Court gave greater clarity to its precise scope. The Court emphasized, first of all, that the privilege against self-incrimination and the right of silence were generally recognized international standards which lay at the heart of the notion of a fair trial procedure. But it was a right that was confined for the purposes of Article 6 of the ECHR to persons charged with criminal proceedings which, of course, is given an autonomous meaning within the ECHR system. It was also primarily concerned with respecting the will of an accused person to remain silent and did not extend to the use in criminal proceedings of material obtained from the accused through the use of compulsory powers, but which has an existence independent of the will of the suspect, such as documents pursuant to a warrant, breath, blood and urine samples and bodily tissues for the purpose of DNA testing. At the same time the privilege extended not just directly to protect suspects from incriminating themselves but also indirectly to the use of self-incriminating information against them at their trial.

The Court did not find it necessary in *Saunders* to decide whether the right was absolute or whether infringements may be justified in particular circumstances. In the earlier case of *John Murray v United Kingdom*[11] it had made it clear that warning suspects that adverse inferences may be drawn against them at their trial amounted to an indirect form of compulsion which did not necessarily destroy the very essence of the privilege. But in *Saunders* the Court did not accept the government's argument that the privilege could be balanced away on some pressing ground of public interest such as the need to investigate and punish fraud. The fairness requirement of Article 6 meant that the privilege applied to all types of criminal proceedings without distinction from the most simple to the most complex. In *Heaney and McGuinness v Ireland*[12] the Court took the view that compelling persons to account for their

[10] (1997) 23 EHRR 313.

[11] (1996) 22 EHRR 29.

[12] (2001) 33 EHRR 12.

movements in the interests of averting terrorism under the Offences Against the State Act did destroy the very essence of the privilege and the security and public order concerns of the government could not justify a provision which extinguished this essence.

This approach suggests that when an infringement goes to the 'essence of the privilege' it can never be justified whatever the countervailing public interest considerations. But in *Jalloh* the Court cast doubt on this by suggesting that in determining whether the proceedings as a whole have been fair, the Court *will* weigh the public interest in the investigation and punishment of the offence against the individual interest that the evidence has been gathered lawfully.[13] In this case emetics was forcibly administered to the applicant after he was seen to swallow a tiny plastic bag or bubble thought to contain drugs when he was approached by police officers. The applicant was a street dealer who was offering drugs for sale on a comparably small scale and was finally given a six-month suspended prison sentence and probation. As a result the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity. But in applying this balancing test, the Court left open the possibility that the privilege could be infringed in the public interest, something that seemed to be precluded in *Saunders* and *Heaney and McGuinness*, thus adding some uncertainty to the scope of the privilege.

Apart from the question of the weight of the public interest in the investigation and punishment of the offence, the Court in *Jalloh* mentioned a number of other factors to be taken into account in determining whether the right not to incriminate oneself has been violated: the nature and degree of the compulsion, the existence of relevant safeguards in the procedure and the use to which any material so obtained is put.[14] In *John Murray* the Court had already made a distinction between direct and indirect compulsion and indicated that a certain amount of indirect compulsion was acceptable. In *Jalloh* there is also the suggestion that if there are relevant safeguards in the procedure, these may be enough to offset a finding that there has been a violation of the privilege. The Court observed that section 81a of the German Code of Criminal Procedure provided that bodily intrusions had to be carried out *lege artis* by a doctor in a hospital and only if there was no risk of damage to the defendant's health. In this case, however, the applicant refused to submit to a prior medical examination. He could only communicate in broken English which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it. This, however, raises the question whether the Court might have been prepared to consider that there was no violation of the privilege if he had been subjected to a proper medical examination. It is hard to see how safeguards to protect the applicant's *physical* health could affect

[13] (2007) 44 EHRR 32. para 117.
[14] ibid, para 44.

the essence of the privilege which the Court has said it is primarily concerned with respecting the will of the accused. The suggestion that there may be compensating safeguards which may be enough to offset the privilege also raises questions about how significant the privilege is in the first place.

Finally, the Court's reference to the use to which any material obtained is put as a factor in determining whether the right against self-incrimination has been violated suggests that there may be circumstances when the Court may consider that incriminating material may be used against the accused at trial. This would seem to contrast with Judge Morenilla's view in *Saunders* that the very fact that the applicant's compelled statements had been admitted in evidence against him undermined the very essence of his right not to incriminate himself.[15] In *Jalloh* the Court stated that the drugs obtained following the administration of the emetics were the decisive evidence in the applicant's conviction for drugs-trafficking, thereby suggesting an analogy with the way in which the Court approaches the testimony of witnesses whom the accused has had no opportunity of examining.[16] It is to be noted that the question here is not a legal question requiring some judgment to be made about the importance of the privilege against other principles or public interests. It is more a factual question whether in the light of other evidence in the trial, the self-incriminating aspect could not be considered significant and therefore to have affected the overall fairness of the trial. Other questions that are raised by this approach are whether the use of derivative evidence obtained as a result of the information provided under compulsion can be used against the accused or whether the use of the incriminating material to impeach the accused's evidence or another witness might be acceptable as an alternative to using the evidence directly against the accused.[17]

Instead of re-affirming an approach that would justify certain infringements of the privilege only where they do not go to the 'essence of the privilege', *Jalloh* seemed to embark on a 'wholly new approach' whereby a wide range of factors may be considered in deciding whether a particular instance of self-incrimination constitutes a violation.[18] This approach was re-affirmed by the Grand Chamber in *O'Halloran and Francis*[19] which held it could not accept that any direct compulsion requiring an accused person to make incriminatory statements *automatically* violated the privilege against self-incrimination. The central issue in each of two applications brought in this case was whether the privilege was violated when the registered keeper of a car was required

[15] (1997) 23 EHRR 313, concurring opinion.
[16] cf *Kostovski v Netherlands* (1991) 12 EHRR 434, para 44.
[17] See M Boyle, 'Freedom from Self-Incrimination and the Right of Silence: A Pandora's Box?' in Mahoney et al (eds), *Protecting Human Rights: the European Perspective* (Carl Heymanns Verlag, Cologne, 2000) 1021, 1029–30.
[18] This was the view of the dissenting judge, Judge Pavlovschi, in *O'Halloran and Francis v. UK* (2008) 46 EHRR 21 (Application no 15809/02). See also A Ashworth, Commentary [2007] Crim LR 897.
[19] ibid.

under United Kingdom road traffic law to furnish the name and address of the driver of the car when it was caught speeding on camera. The first applicant, O'Halloran, admitted he was the driver on the occasion in question and he had argued unsuccessfully at his trial that his confession should be excluded because his privilege against self-incrimination had been violated. The second applicant, Francis, on the other hand, was convicted for refusing to supply the information required. Although the Court did not go so far as *Jalloh* and indeed earlier UK authority[20] which suggested that the privilege could be balanced away on broad public interest grounds, it followed *Jalloh* by referring to the other factors mentioned in that case which could be taken into account in order to determine whether the privilege was infringed such as the nature and degree of the compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure and the use to which any material so obtained was put. The Court concluded that having regard to these factors, the essence of the applicants' right to remain silent and their privilege against self-incrimination had not been destroyed.

As regards the nature and degree of the compulsion used to obtain the evidence, the Court referred to Lord Bingham's opinion in the Privy Council case of *Brown v Stott*[21] that all who own or drive motor cars know that they are subject to a regulatory regime which requires them to disclose certain information in the interest of public safety. A further aspect of the compulsion applied in the present case was that the information required was limited only as to the identity of the driver. As regards the relevant safeguards, the compulsion was subject to the safeguard that no offence was committed if the owner could show that he did not know and could not with reasonable diligence have known who the driver of the vehicle was. As to the use to which the statements were put, the identity of the driver was only one element in the offence of speeding and conviction for such an offence did not arise solely from the information obtained and in the case of Francis who refused to give the information in the first place, this constituted the offence itself.

The difficulty with all these factors is that they do not appear to be particularly cogent as a means of distinguishing the facts from other cases where the Court has held that there was a violation of the privilege. Although it may be relevant to distinguish cases where persons voluntarily engage in certain activities such as driving and it may be justified to place certain obligations on them such as the need to obtain and carry a licence, it can hardly be said, as one of the dissenting judges put it, that all those who own or drive cars are automatically presumed to have given up unambiguously and unequivocally the right to remain silent.[22] Even if this could be said, it would seem equally

[20] See *Brown v Stott* [2001] 2 WLR 817 (holding that the power to require owners to name drivers was not a disproportionate response to the general public interest in maintaining public safety).

[21] [2001] 2 WLR 817.

[22] See dissenting opinion of Judge Myjer in *O'Halloran and Francis*.

to follow that those like Saunders who voluntarily engage in corporate activity must also be presumed to have given up their right to silence in relation to the investigation and prosecution of matters associated with these activities-but this is not what the majority of the Court presumed in *Saunders*. The point that all that was being asked of car owners in this case was to provide one simple fact may be answered on the ground that the disclosure of one simple fact may be devastating in terms of one's incrimination in an offence. The fact that owners were exonerated when they could not with reasonable diligence have known who the driver of their car was goes more to the principle of *nullum crimen sine culpa* than to the principle of self-incrimination. Finally, the fact that the use made of the incriminating statement was not enough in itself to convict one of the offence does not make the statement any the less incriminating and the fact that one can be prosecuted and sentenced to a considerable fine for reliance on the privilege appeared to the Court in *Heaney and McGuinness* to destroy the very essence of the privilege.

III. RATIONALE OF THE PRIVILEGE AND THE RIGHT OF SILENCE

The degree to which limitations may be put upon the exercise of the privilege would seem to depend on how significant the privilege is considered to be. We have seen that the Court has linked the privilege and the right of silence very closely to the aims of a fair trial, putting them at the heart of a fair procedure. This would seem to suggest that the right is primarily a procedural right attached to the right to a fair trial rather than a substantive right expressing the principle that individuals generally should not have to account to the State for their actions or activities. In an earlier case pre-dating *Funke*, the European Commission had recognized a general right of silence as the negative counterpart of the right to freedom of expression enshrined in article 10 of the ECHR.[23] Applying the broader balancing test required under article 10 the Commission considered that while there were situations when a person could be compelled to speak when there is a basis in law, a legitimate aim and a pressing social need for compulsion such as when witnesses are required to testify, when persons are required to incriminate themselves out of their own mouth this involves a particular intrusion on individuals which is entitled to a particular weighting. This broader right of silence is not one that was pursued in the jurisprudence and the right has been linked instead to the fair trial right under article 6.

At first sight it seems strange to say that the privilege and the right of silence lie at the heart of a fair procedure as they prescribe negatively what constitutes an unfair procedure without positively setting out what is a fair procedure.[24]

[23] *K v Austria* Series A no 255-B, 2 June 1993.

[24] S Trechsel, *Human Rights and Criminal Proceedings* (Oxford University Press, Oxford, 2005) 347–8.

The reasons why the Court considers the rights to be so important are to be found in a passage in *Saunders* which has been restated in a number of subsequent judgments:[25]

> Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 ... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6.2 of the Convention.
>
> The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.

Although the Court links the rights to a fair procedure suggesting the rights are fundamentally about procedural fairness, in fact there are two kinds of rationales mentioned here which are mixed together somewhat: what has been described as an intrinsic substantive rationale that it is in principle unfair to require accused persons to do anything that might incriminate themselves and a non-substantive rationale which claims that the requirement offends other basic rights and principles associated with a fair trial such as the presumption of innocence and the need to avoid miscarriages of justice.[26]

The intrinsic substantive rationale which would seem to be the primary concern links the rights to the idea of respect for the will of the accused. This would seem to be an expression of the principle that any positive participation by the accused in the criminal process must be on a voluntary basis. One of the difficulties here, however, is in determining when participation is voluntary and when it is not. Arguably, persons facing criminal allegations are placed in a position where their freedom to choose whether to speak or not is extremely limited, all the more so when they are being questioned by the police in custody. More fundamentally, however, a number of commentators[27] have found it difficult to justify why there should be a special right to protect accused persons from being required to incriminate themselves. Accused persons are already protected under the ICCPR, the ACHR and the ECHR in

[25] (1997) 23 EHRR 313, paras 68–69; *Serves v France* (1999) 28 EHRR 265, para 46; *Quinn v Ireland* (2001) 33 EHRR 264, para 40; *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12, para 40; *Allan v United Kingdom* (2003) 36 EHRR 12; *JB v Switzerland* Appl 31827/96 (2001), para 64; *Jalloh v Germany* (2007) 44 EHRR 32, para 100.

[26] This useful distinction has been made by D McGrath, *Evidence* (Thomson Round Hall, Dublin, 2005) 623. See also I Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (1995) 54 CLJ 342, 348 (making a distinction between theories concerned with 'accusatorial process norms' and theories concerned with upholding substantive values).

[27] See eg RJ Allen, 'The Simpson Affair, Reform of the Criminal Justice Process and Magic Bullets' (1996) 67 University of Colorado Law Review 988, 1021 and Dolinko (n 7).

an absolute way from being forced to confess by the requirement that they are not be subjected to torture, cruel, inhuman or degrading treatment. In addition persons are protected in the criminal process, although not in an absolute way, by a right to privacy and as we have seen arguably under Article 10 by a general right of silence. So what is it that justifies the additional protection from being required to incriminate oneself within the criminal process?

According to critics, we have to fall back here on the 'old woman's reason' given by Bentham that it is harsh to subject accused persons to the burden of self-incrimination or, as the US Supreme Court has put it, to the 'cruel trilemma of self-accusation, perjury or contempt'.[28] Of course, in the reality of modern criminal justice systems, this trilemma is not so painful as is suggested here. As a general rule defendants are not prosecuted for refusing to answer questions before trial and at trial are never prosecuted for contempt for failing to testify. The modern debate in many jurisdictions is instead directed to whether adverse evidential consequences should attach to silence.[29] In telling lies there is the risk that one might be caught out but this takes us to the nub of the point made by many critics that the trilemma, if it is a trilemma, is only faced by guilty persons.[30] Martens J made this point forcibly in his dissenting opinion in *Saunders*[31] when he said that this rationale cannot justify the immunities under discussion since they presuppose that the suspect is guilty, 'for an innocent person would not be subjected to such choices nor bring about his own ruin by answering questions truthfully'. Consequently, innocent suspects are not treated 'cruelly or unethically, whilst guilty suspects should not complain that society does not allow them to escape conviction by refusing to answer questions or otherwise hiding evidence'.

Mike Redmayne has suggested that we should not be too quick to accept these counter-arguments.[32] He argues that the privilege against self-incrimination is grounded in the idea that in a liberal democracy citizens are entitled to distance themselves from prosecutions as this is when the State is at its most powerful. Distinctions based on the guilty and the innocent imply that there is *no* value in protecting a guilty person from self-incrimination. Yet we should recognize the particular harm which is done to personal integrity when the State requires us to incriminate ourselves in the course

[28] *Murphy v Waterfront Commission* (1964) 378 US 52, 55, per Goldberg J. For a clear analysis of Bentham's arguments, see W Twining, *Theories of Judicial Evidence: Bentham and Wigmore* (Weidenfeld & Nicolson, London, 1983) 84.

[29] P Roberts and A Zuckerman, *Criminal Evidence* (Oxford University Press, Oxford, 2005) 395.

[30] R J Allen, 'The Simpson Affair, Reform of the Criminal Justice Process and Magic Bullets' (1996) 67 University of Colorado Law Review 989, 1021.

[31] (1996) 23 EHRR 313, para 9, n 74.

[32] M Redmayne, 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 Oxford Journal of Legal Studies 209, 221.

of a prosecution.[33] Conversely, the argument that the innocent are never subjected to cruel choices is also over-stated. As Redmayne has pointed out, imposing a duty to cooperate may sometimes confront innocent persons with difficult choices as where one may compelled to incriminate others who are close to us.[34] He gives the example of the owner of a car asked to identify the person driving his car. If he was not driving then it was another person, presumably a friend. As Redmayne recognizes, however, the same dilemma confronts witnesses who are compelled to testify against an intimate person. We ought not lightly to impose requirements on a person to testify against such a person but ultimately we consider that such arguments are counterbalanced by the need for the criminal justice system to have access to incriminating information. In a similar manner we should place *some* weight on the privilege against self-incrimination but it is hard to see why it should be given the special status of a fair trial right entitling suspects and defendants to a special immunity from being compelled to provide self-incriminating information which may be used against them.

Another problem with a rationale based on respecting the will of the accused is that it is difficult to find a clear and coherent dividing line between what State conduct may be said to respect the will and what does not. In his dissenting opinion in *Saunders*, Judge Martens questioned the distinction between the use of material obtained by legal compulsion such as blood and urine samples and the use of material obtained in defiance of the will.[35] In both cases the will of the suspect is not respected in that he is forced to bring about his own conviction. The best interpretation of the distinction made by the Court is to be found by equating the privilege with an immunity from *wilfully* participating in one's own incrimination. This would include the handing over of documents but would not include submitting to blood tests, although certain decisions such as *Jalloh* do not seem to square with this. There is still a problem, however, in finding a rationale which views handing over documents as coming within the privilege but submitting to a blood test as outside the privilege. In each case there is compulsion in terms of restricting personal autonomy, in the one case by requiring the accused to act against his will and in the other by requiring that he submit to interference with his body. Thus the Supreme Court of Canada has recognized that the principle against self-incrimination applies to 'products of the mind and products of the body'.[36]

Some jurisdictions have tried to limit the compulsion to condemn oneself to testimonial rather than real evidence. This may seem an easier line to draw although it can still lead to fine distinctions such as what to do about lie

[33] See also R K Greenawalt, 'Silence as a Moral and Constitutional Right' (1981) 23 William and Mary Law Review 15, 39.
[34] Redmayne (n 31) 222.
[35] (1996) 23 EHRR 313, para 12.
[36] *R v B (SA)* [2003] 2 SCR 678, para 34.

detection tests.[37] But the difficulty remains that one can incriminate oneself in other ways than condemning oneself out of one's own mouth, and if the rationale for the principle is to be found in respecting the will of the suspect, why should these other forms of self-incrimination be excluded? One reason that has been given is that there is something inherently worse about the State invading the 'sanctum of the mind' for the purpose of incriminating an individual.[38] Another point of difference is that real evidence is frequently more 'objective' and reliable with the result that it can be of considerable assistance in a criminal investigation.[39] But these would seem to be arguments better made in the context of considering whether the privilege should be given more or less force to specific situations rather than for making hard and fast distinctions based on what should be included or excluded within the privilege. Thus although the Supreme Court of Canada has considered that body samples may come within the privilege, the key question is whether in each case the search for truth outweighs self-incrimination concerns about the abuse of state power. In *R v B (SA)*,[40] for example, the Court was asked to make DNA warrant legislation unconstitutional on the ground that a DNA sample was so intimately tied to one's person that the legislation effectively required one to incriminate oneself. The Court considered that DNA evidence was reliable and important evidence, unlike in the case of compelled statements which may well be untrue. On the other side, there was to be weighed the extent of compulsion being exercised, the degree to which the State and the suspect were in an adversarial position at the time the evidence was gathered, and any circumstances that might increase the risk of abuse of power including the degree of invasion required. Although the Court held that the degree of compulsion was great and the adversarial position high during a criminal investigation, the safeguards attached to a warrant and the relatively unobtrusive way DNA can be obtained lessened the risk of abuse of power to the point where the balance favoured discovering the truth over the self-incrimination concern of the accused. This principled approach towards self-incrimination is reminiscent of the kind of balancing exercise required in respect of a number of qualified rights under the Convention such as the right of privacy under article 8 and the freedom of expression under Article 10 and in recent decisions in relation to the privilege against self-incrimination, the European Court would seem to be following this route. But the question again arises as to whether a special right against self-incrimination has any

[37] See Allen and Mace (n 6) above.
[38] *R v S (R)* (1995) 121 DLR (4th) 589, 702-3, per L'Heureux-Dube J. See also P Arenella, '*Schmerber* and the Privilege Against Self-Incrimination: A Reappraisal' (1982) 20 American Criminal Law Review 31.
[39] *Ferreira v Levin* 1996 (1) BCLR 1, 123, para 259, per Sachs J.
[40] [2003] 2 SCR 678.

particular rationale that could not be served by the rights to privacy and silence that we have seen already exist or may be deduced under the Convention.[41]

It would seem to be difficult to justify the privilege against self-incrimination in terms of a self-standing right that should exist independently of the absolute right not to be subjected to cruel, inhuman and degrading treatment and the qualified rights to privacy and the general right of silence. If it is difficult to make out a convincing case for such a substantive right on its own ground, it is equally difficult to make a convincing case for the need for such a privilege in order to safeguard other principles. In the statement quoted above the Court links the privilege with the presumption of innocence. This presumption carries with it an evidentiary obligation on the state to prove the ingredients of the offence charged against the accused but it has also been used to express more diffusely the idea that individuals in the criminal process should be treated as innocent and that intrusive actions should not be taken against them unless there are good reasons to do so. This can include such actions as searching and seizing property, stop and search, arrest and questioning. But it is difficult to link the privilege conceptually with these principles.[42] Clearly requiring a person to incriminate himself can constitute evidence for the prosecution's case but it does nothing to diminish the high standard of proof required for guilt. Clearly also we should limit the State's ability to take action against us in the criminal process without good reason but the privilege extends beyond these situations entitling individuals to refuse to cooperate with an investigation even where there is reasonable suspicion against them. We might try to link the privilege more closely to the presumption by saying that it expresses the idea that an accused should not have to contribute in any way to the prosecution case at least until there is a prima facie case against him.[43] In a case brought under article 6(2) of the ECHR, the European Court held that drawing inferences against an accused before there was a convincing prima facie case against him was not permissible, for the effect was then to shift the burden of proof to the defendant.[44] But the problem again here is that the privilege purports to extend to protecting persons from direct compulsion to incriminate themselves even when there *is* prima facie or strong evidence against them.

Another argument that the Court makes which is closely tied to the presumption of innocence is that the privilege can help avoid miscarriages of justice. An obvious first problem with this claim is that there is not an exact fit between protection from self-incrimination and protection from wrongful conviction. Much argument has been generated over claims about whether innocent suspects or defendants need the right. Bentham claimed that the right

[41] For arguments basing the privilege against self-incrimination on the protection of privacy, see D J Galligan, 'The Right to Silence Reconsidered' (1988) CLP 69.
[42] Roberts and Zuckerman (n 28) 414–6.
[43] cf RK Greenawalt (n 32).
[44] *Telfner v Austria* (2002) 34 EHRR 207.

can never be useful to the innocent.[45] Bentham was primarily concerned about bars to questioning witnesses in court rather than with the private interrogation of suspects in custody which had not been developed in his day and even he may have conceded that there is a danger of vulnerable innocent suspects making incriminating statements in the coercive atmosphere of the police station.[46] But according to the European Court, the privilege extends beyond giving immunity to making incriminatory statements to the handing over of documents that were in existence before any criminal charge. Clearly these may be of considerable assistance to the court in determining guilt without any risk of them being used to convict the innocent.

When the argument is confined to the making of incriminating statements in the criminal process, another problem is that as an instrumentalist rationale it risks, more than arguments based on intrinsic merit, counter-arguments being made that far from providing a protection to the innocent, the right jeopardises the conviction of the guilty. In the absence of empirical data either way, the arguments and counter-arguments tend to consist of grossly inflated claims about the effect of the right of silence on the guilty and the innocent without enough attention being given to the procedural context in which the right operates. Taking their cue from Bentham, many critics for example, point to the debilitating effect on the prosecution of allowing the guilty to remain silent when they erect a 'wall of silence' upon being called to account for their actions. Even when it appears that suspects are hiding behind a 'wall of silence', however, there is little evidence to suggest that removal of the right of silence will make much difference to the prosecution's prospects of success. When legislation was introduced in Northern Ireland to permit the courts to draw adverse inferences from silence in certain circumstances, there is some evidence to suggest that this encouraged more to speak to the police and testify but no evidence that this did anything to improve the conviction rates.[47] Conversely, however, when advocates of the right of silence point to the role that it plays in protecting the innocent, it is almost impossible to provide data on the numbers of innocent persons who might be convicted in the absence of the privilege.[48]

A sophisticated version of an argument which concedes that the right encourages the guilty to be silent but claims that abolition would risk the conviction of the innocent has been put forward by Seidmann and Stein.[49]

[45] Even in his own day, these claims were hotly contested, see eg Lord Denman's arguments in the *Edinburgh Review* in 1824, recounted by Twining (n 27) 105.
[46] ibid, 209 n 83. For discussion of how Bentham's views have been mis-used by modern advocates of the abrogation of the right of silence in the police station, see W Twining, 'The Way of the Baffled Medic' (1973) 12 JSPTL (NS) 348.
[47] See J Jackson, M Wolfe and K Quinn, *Legislating Against Silence: The Northern Ireland Experience* (Northern Ireland Office, Belfast, 2000).
[48] Greenawalt (n 32) 44.
[49] D J Seidmann and A Stein, 'The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege' (2000) 114 Harvard Law Review 431.

Briefly, the argument is that abolition would encourage the guilty as well as the innocent to speak with the net result that fact finders would find it harder to distinguish the guilty who would tell lies from the innocent who would speak the truth. Consequently, the guilty would pool with the innocent resulting in the fact-finder discounting the exculpatory statements of the guilty and the innocent. Although ingenious, this argument also risks making assumptions that may not be empirically justified. In common with other arguments it tends to make an indiscriminate distinction between two categories of persons—the innocent and the guilty—whereas in fact a number of persons innocent of serious charges may be guilty of other offences or have good reason for hiding things from the police.[50] A fundamental problem with the argument, however, as with all the claims that tend to be made about the right of silence protecting the innocent is that it tends to exaggerate its significance in affecting behaviour. It is true that Seidmann and Stein were able to point to the fact that in the context of the changes permitting inferences to be drawn from silence in England and Wales, these had encouraged more suspects to make statements to the police but again in order to show that this has had a detrimental effect on innocent suspects, there would also need to be evidence to show that this has affected the way fact-finders regard exculpatory statements.[51] The reality in most jurisdictions as we have seen is that most suspects and defendants do speak to the police or testify, irrespective of whether there is a right of silence or not. Within the context of custodial interrogation, the pressure to speak notwithstanding the right is immense because silence can be seen as an act of non-cooperation with the authorities which can do the suspect little good in terms of decisions that affect his or her liberty or that affect the level of the charge brought. Certainly where policing is organized around interrogation and confession, the failure to speak can be interpreted as a challenge to authority.[52] As regards silence at trial, there is the risk that whatever comments are made exhorting juries to disregard the accused's failure to testify, juries may penalize defendants for not testifying. If the right of silence does not affect behaviour that much, then it is hard to see it as a great buttress for the innocent. Whatever form the argument for the right of silence takes as a safeguard for the innocent, then, either that it encourages innocent persons to be silent (and thereby saves them from falsely incriminating themselves) or

[50] For other objections to the theory based on the fact that it makes assumptions about the way suspects and defendants and fact-finders would act that may not be empirically justified: see G Van Kessel, 'Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right of Silence' (2002) 35 Indiana Law Review 924, 956–960 and R Park and MJ Saks, 'Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn' (2006) 47 Boston College Law Review 1, 72.

[51] See T Bucke, R Street and D Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994* (Home Office, London, 2000) Home Office Research Study no 199.

[52] See D Dixon, 'Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act 1984' (1991) 20 Anglo-American Law Review 27, 38.

that it encourages the guilty to be silent (and thereby marks them out from being pooled with the innocent), in reality it appears to affect very few people in their decision whether to speak or not.

Another problem with basing arguments for the privilege against self-incrimination and the right of silence upon the protection of the innocent is that again as an instrumentalist rationale they are vulnerable to counter-arguments that offer compensating mechanisms in exchange for these immunities.[53] The European Court in *Murray* endorsed such arguments by permitting adverse inferences to be drawn from silence in certain circumstances. Although the Court conceded that warning suspects about inferences may amount to indirect compulsion, it was prepared to justify this degree of compulsion provided safeguards are built into the system such as providing access to legal advice and at court ensuring that any inferences that are drawn can be justified. These were exactly the arguments that were used to justify the extension of the Northern Ireland legislation permitting inferences to be drawn from silence to England and Wales in 1994. A Royal Commission on Criminal Justice established to address concerns that had been raised by a number of miscarriages of justice concluded by a majority that little would be gained and much might be lost if the right were to go as 'the possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent.'[54] The difficulty with this approach was that it lent itself open for others to conclude, as the minority argued, that if enough other safeguards were put in place in the police station to protect the innocent suspect, then there would be little need for the right. As the government had already concluded that the balance in the police station had swung too far in favour of the suspect principally as a result of a statutory right of access to legal advice introduced in earlier legislation,[55] it was able to reject the Commission's majority view and adopt the minority view and press ahead with the changes already enacted in Northern Ireland.

IV. THE RIGHT OF SILENCE AS A NECESSARY CONDITION FOR EFFECTIVE DEFENCE PARTICIPATION

We have reached the point where it would seem difficult to argue for a distinctive privilege against self-incrimination linked to the right to a fair trial over and above the other protections provided for by human rights instruments. It is hard to see why we should give specific priority to respecting the voluntariness of an accused's decision to hand over or reveal incriminating

[53] See S Greer, 'The Right to Silence: A Review of the Current Debate' (1990) 53 MLR 58.

[54] Royal Commission on Criminal Justice, *Report* (1993) Cm 2263, 54.

[55] As far back as 1987 it had established a working group to consider *how*, not whether, the law should be changed. See *Report of the Working Group on the Right of Silence* (Home Office, London, 1989).

information over and above respecting an individual's general personal autonomy and freedom of action. Other rationales linked conceptually or instrumentally to principles and objectives associated with a fair trial fail to mark out a close enough connection to these principles and objectives.

This is not to say that there should not be a general right of silence deduced from the right to freedom of expression or linked with other rights such as the right of privacy by the need to prevent undue government restrictions on our personal autonomy. We may also want to give special protection against interferences which compel us to incriminate ourselves and others in the course of a criminal prosecution. But these rights need to be weighed against other interests, in particular the need for citizens to account for their actions in certain circumstances. It has been argued, for example, that it is perfectly legitimate to require people who engage in regulatory activities to account for themselves either to public officials or to opponents in litigation.[56] Within the criminal justice process there may also be a legitimate aim in requiring persons to account for themselves in order to reach a conclusion as to whether a criminal offence has been committed. Applying a strict proportionality test we should only require persons to account for themselves when certain proportionality conditions are fulfilled such as rationality and necessity.[57] Just as the right of silence can be grossly exaggerated as a mechanism for protecting the innocent, we have seen that it can also be grossly exaggerated as an obstacle for convicting the guilty. Irrespective of whether there is a right of silence or not, there are good prudential reasons why suspects and defendants would want to provide an account of themselves. Of the few who would be affected by an abrogation of the right and change their behaviour by providing an account, it is unclear how advantageous their speaking is to the police or the prosecution.

Hence in general terms we should not require suspects to account for themselves. Exceptions might be made in cases where it is might otherwise be difficult to find the necessary evidence such as in road traffic cases of the kind that arose in *O'Halloran and Francis* where the owner of a car was required to name who had been driving his car at a particular time when it was seen to be exceeding the speed limit.[58] But it is not enough in these

[56] S Sedley, 'Wringing out the Fault: Self-Incrimination in the 21st Century' (2002) 52 Northern Ireland Legal Quarterly 107.

[57] See eg R Alexy, 'The Structure of Constitutional Rights Norms' in *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002) arguing that constitutional rights are optimization requirements that ought to be realized until competing considerations can justify their limitation according to strict proportionality conditions.

[58] Redmayne (n 31) 230. cf *Brown v Stott* [2001] 2 WLR 817 where the Privy Council held that an admission compulsorily obtained under road traffic legislation by the defendant that she had been driving her car did not violate her right to a fair trial. The Privy Council held that limited qualification of the right against self-incrimination was acceptable if it was reasonably directed towards a clear and proper objective and represented no greater qualification than was called for by the situation.

situations, arguably, just to claim that the right of silence can be 'balanced away' by a general public interest such as the need to subject more vehicles and their owners to a strict regulatory regime.[59] There would in addition have to be specific reason to show why requiring motor owners to name drivers was necessary in order to achieve this aim. On this reasoning, *pace* the ruling in the *Saunders* case, there may also be circumstances where enforced answers made outside the criminal context should be allowed to be presented as part of the prosecution case. But again these would need to be strictly justified on the bases of rationality and necessity, taking account of all reasonable alternatives.[60]

Short of compelling a person to give evidence or answer questions in the criminal process, however, once there is a basis in evidence for suspecting that a person has been engaged in criminal conduct, it would seem reasonable to call for an answer not out of necessity in order for the prosecution to make out its case (the need for the prosecution to obtain answers from a suspect can as we have seen be greatly exaggerated) but rather to advance the general interests of truth finding within what may be called the 'adversarial' rationalist tradition.[61] Although traditionally this mode of fact-finding has been reserved for the trial, states are increasingly 'front-loading' the forensic enterprise into the pre-trial phase in order to expedite proceedings and there is no reason why this should not be done provided suitable safeguards are put in place. Safeguards are necessary to ensure that suspects are not put under improper physical or psychological pressure and that they are able to put forward any defence as effectively as they can. At the point when there is a basis in evidence for putting allegations against a suspect, he or she ought arguably to be given the same or equivalent defence rights as are available at trial which include, most importantly, access to legal advice, disclosure of the evidence against him and an authenticated record of any interview either by audio or video tape. But such safeguards cannot be effective unless they are accompanied by a *Miranda*-style rule prohibiting any questioning until they are put in place and because as we have seen suspects are inevitably put under pressure when faced with criminal allegations, especially when they are in custodial interrogation, suspects in custody should not be able to waive these rights, at least not until they have had an opportunity to speak to a lawyer. Once there is sufficient evidence of a person's involvement in a criminal offence, the right of silence should arguably be given greater salience than in

[59] A Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell, London, 2002) 65, criticizing the *Brown* decision for putting the privilege against self-incrimination second to the general public interest.

[60] cf *Ferreira v Levin* 1996 (1) BCLR, 1, para 265, per Sachs J (doubting whether these conditions were met where examinees' compelled answers to questions in an inquiry into a company's affairs could be used against them in subsequent criminal proceedings).

[61] For the claim that most Anglo-American evidence scholarship has been dominated by a rationalist tradition which gives overriding effect to rectitude of decision making, see W Twining, *Rethinking Evidence* (2nd edn, Cambridge University Press, Cambridge, 2006) chapter 3.

other encounters between the State and the citizen by preventing any questioning until safeguards are put in place to enable the accused to mount an effective defence. When these are in place, the right of silence would still be respected in the sense that suspects would not be compelled to answer police questions but as at trial they would be given the opportunity to respond to the allegations against them. It is doubtful also whether at this stage there is any need to apply the 'indirect compulsion' of warning suspects that adverse inferences may be drawn against them. Suspects would be made aware, however, that they have an opportunity to respond to certain allegations that have arisen against them and that a record will be made of any answers for the purposes of trial. In recognition of the growth in non-judicial and non-court disposals across a number of jurisdictions,[62] they would also be made aware through access to a lawyer of any informal disposals or decisions that may be made if they are prepared to make an admission to the allegations.

On this analysis the right of silence would be maintained throughout the stage of police investigation because it is not generally necessary for the investigation for suspects to be compelled to give evidence. At a point when there are allegations based on evidence that call for an answer, suspects should, however, be given an opportunity to respond under conditions that allow for informed and fair participation. These conditions which would still caution suspects that they have a right not to respond are required not out of any sentimental desire to see 'fair play' or to give suspects a 'sporting chance' to avoid conviction but out of a need to enable suspects to participate effectively in the proceedings that have in effect been mounted against them. Of course, under legal advice suspects may decide as at trial not to answer questions. But this decision would be an informed one after they have been told, for example, that there may be costs attached to such a strategy in terms of delayed disposal of the case.[63] It would also be a decision made with the

[62] See S Thaman, 'Plea-Bargaining, Negotiated Confession and Consensual Resolution of Criminal Cases' in K Boele-Woelki and S van Erp (eds), *General Reports of the XVII Congress of the International Academy of Comparative Law* (2007). For the effect of recent non-court disposals on suspects in custody such as the use of conditional cautions in England and Wales whereby defendants who admit their guilt are offered the chance to agree to complying with certain conditions as an alternative to appearing in court, see J Jackson, 'Police and Prosecutors after PACE: The Road from Case Construction to Case Disposal' in E Cape and R Young (eds), *Regulating Policing The Police and Criminal Evidence Act Past, Resent and Future* (Hart, Oxford, 2008) 255.

[63] Although there are limits to the incentives that should be offered to suspects to cooperate, arguably it is unrealistic for any legal system which with limited resources must try to expedite proceedings as much as possible not to offer certain incentives to suspects to cooperate with an investigation. The ICTY Chamber has held that the lack of cooperation of an accused should not as a rule be taken into consideration as a factor that might justify denial of an application for provisional release. See *Prosecutor v Jokic* IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, 20 February 2002. But cooperation with the prosecution can be cited as a mitigating factor at the sentencing stage: see W Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge 2006) 532–533.

full participation of an active defence. The decision not to answer questions would be a negative one but again as at trial it would be made as part of an active defence strategy on the basis of equality of arms.

We have reached the point then where it would seem justified to give the right of silence a special weighting for suspects in the criminal process and for this to be considered part of the right to a fair trial. It is not helpful, however, to link such a right with the privilege against self-incrimination in so far as this suggests that just because they are suspects they should be given some special or absolute immunity from disclosing information that may indicate their guilt. A better ground for justifying a 'weighted' right of silence for suspects is that there needs to be a recognition, especially where suspects are in custodial interrogation, of the vulnerable position that they are in and of the need therefore to avoid the risk of false confession.[64] When persons such as the applicant in the *Saunders* case are required to provide information to non-criminal investigators, they are often given advanced notice in writing of what is required of them and positively advised to have a legal adviser present. A police interview with a person in custody may take a very different form.[65] It is certainly arguable that in this situation the potential for systemic abuse of law enforcement powers is at its greatest.

Our argument for an enhanced right of silence at this stage, however, goes beyond simply an instrumentalist need to avoid persons falsely incriminating themselves. As well as providing a protection for the innocent it may be argued that the right is justified as a necessary procedural part of the general rights of the defence to enable the suspect to mount an effective defence. Commentators are increasingly making a distinction between protective and participative defence rights.[66] The right of silence has tended to be classified as a protective right, although on our argument unless it is transformed in the custodial context into a right not to be questioned akin to the accused's right not to be questioned at trial, it is unable to perform an effective protective function. On our view, however, it ought also to be viewed more positively as part of the framework for the exercise of effective defence rights. Once under criminal suspicion, accused persons are entitled to be given the opportunity to defend themselves but in order to do this effectively, the rights of the defence need to be put into place *before* they are asked to provide a defence. Just as at trial, so in the pre-trial phase, suspects should be given an opportunity to

[64] See A Ashworth and M Redmayne, *The Criminal Process* (3rd edn, Oxford University Press, Oxford, 2005) 94, P J Schwikkard, 'The Muddle of Silence' (2009) 6 International Commentary on Evidence issue 2.

[65] See J Jackson, 'The Right of Silence: Judicial Responses to Parliamentary Encroachment' (1993) 57 MLR 270, 274, Dennis (n 26) 370.

[66] See, eg A Roberts, 'Pre-Trial Defence Rights and the Fair Use of Eyewitness Identification Procedures' (2008) 71 MLR 331, J Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68 MLR 737. See also Summers (n 9) who makes a distinction between the rights of the accused and the institutional position of the defence.

mount their most effective defence and this requires that there should be no questioning of suspects until such time as the conditions for this are put in place, principally by giving access to legal advice which is necessary so that decisions as to how to mount the defence are, just as at trial, taken on an informed basis. Various options as at trial are available at this stage. One may simply admit to the allegations that are being put. One may answer police questions or, depending on the procedure submit to judicial inquiry. Another, option may be to offer a detailed written explanation of one's conduct or to suggest certain lines of exculpatory inquiry.

V. INCORPORATING FAIR TRIAL STANDARDS FROM THE POINT OF BEING CALLED TO ACCOUNT

Since on our argument then proceedings have effectively begun against suspects as soon as they are to be called to account for evidence against them, then they should be entitled at that point to all the fair trial safeguards that are provided under the ECHR and other international standards. This is the point indeed at which the international criminal tribunals recognise that defence rights come into play. Article 14 of the ICCPR which includes a right not to be compelled to give evidence was expressly incorporated into the Statutes of the ad hoc international tribunals at The Hague and Arusha.[67] In addition the Statutes require that if questioned by the prosecutor, the suspect has a right to the assistance of legal counsel provided for free if he does not have the means to pay and the right to any necessary translation.[68] The rules go further by requiring that suspects are informed of these rights before being questioned and in addition are informed of the right to remain silent, and to be cautioned that any statement that is made shall be recorded and may be used in evidence.[69] Somewhat akin to the *Miranda* rules,[70] the rules further require that questioning of a suspect should not proceed without the presence of counsel

[67] ICTY Statute Art 21, ICTR Statute art 20.

[68] See ICTY Statute art 18(3), ICTR Statute art 17 (3). The inclusion of this latter right was added to the rules in 1995 out of recognition of its importance: see J R W D Jones and S Powles, *International Criminal Practice* (3rd edn, Oxford University Press, Oxford, 2003) 502.

[69] ICTY, ICTR RPE 42A.

[70] Note though the difference in that the *Miranda* rights only extend to a right to the presence of an attorney *prior* to questioning whereas the international criminal tribunals extend this right to the presence of counsel *during* questioning. This marks an important difference of perception in the way the right to counsel is exercised. Once a suspect exercises his *Miranda* rights, it would seem American defence lawyers virtually always advise suspects not to talk to the police, an attitude immortalized in Justice Jackson's comment that '[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statements to the police under any circumstances': *Watts v Indiana* 338 US 49, 59 (1949). See G Van Kessel, 'European Perspectives on the Accused As a Source of Testimonial Evidence' (1998) 100 West Virginia Law Review 837. The way the right is expressed in the international criminal tribunals' statutes and rules, however, suggests that defence lawyers have at this stage a more positive role to play in participating in the defence.

unless the suspect has voluntarily waived his right to counsel.[71] In addition all interviews must be recorded by audio or video-tape.[72] The ICTY Trial Chamber has also recognized the principle that where statements have been obtained by national authorities in breach of these safeguards, they may not be able to be admitted.[73] The ICC Statute goes further by granting certain basic safeguards to any persons who are subject to questioning at any time during an investigation under the Statute including the privilege against self-incrimination, the right not to be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment and rights to translation.[74] Then where there are grounds to believe that a person has committed a crime within the jurisdiction of the court and that person is about to be questioned either by the Prosecutor or by national authorities conducting an investigation under the Statute, he shall be informed of his defence rights which in addition to the rights under the ad hoc tribunals require that he be informed prior to being questioned of which crimes he is suspected of.[75] Although these rights do not go quite as far as the optimal rights granted to accused persons at trial, they establish an important basis for an equality of arms in the pre-trial phase of proceedings at the stage when accusations are made against suspects.

The European Court has been somewhat unclear as to when defendants are 'charged' for the purposes of Article 6 of the ECHR so as to enable their defence rights to come into play. It has considered that defendants are engaged within the meaning of article 6 when they have been officially notified of an allegation or 'substantially affected' by the steps taken against them.[76] It has been argued elsewhere that the mere exercise of investigatory powers against a suspect should not in itself trigger the initiation of proceedings but that proceedings do commence when defendants are held to account for allegations.[77] If this is the point at which a defendant is charged, his defence

[71] ICTY, ICTR RPE 42B.

[72] ibid 43.

[73] *Prosecutor v Delalić et al*, Decision on Mucić's Motion for the Exclusion of Evidence, 2 Sept 1997 (excluding statements obtained by Austrian police in circumstances where the accused was not offered counsel or informed adequately of his rights). See R May and M Wierda, *International Criminal Evidence* (Transnational Publishers, New York, 2002) 277–278.

[74] Rome Statute of the ICC, Art 55(1).

[75] ibid Art 55(2).

[76] *Deweer v Belgium* (1980) 2 EHRR 439 at [46]; *Eckle v Federal Republic of Germany* (1983) 5 EHRR 1. The UK courts have been similarly unclear on this point. In *Attorney General's Reference (No 2 of 2001)* the House of Lords held that the point in time at which proceedings should commence should ordinarily be when the accused is formally charged or served with a summons. But in *R (on the application of R) v Durham Constabulary and Another* [2003] 3 All ER 419, [2005] UKHL 21 the Divisional Court accepted that Art 6 was engaged when a person had been formally notified that allegations against him were being *investigated*. In the House of Lords Lord Bingham expressed reservations as to whether this was correct but was prepared to assume with some reluctance that there was a criminal charge against the young person at the beginning of the process by which he appeared to mean at the point of arrest.

[77] J Jackson, 'The Reasonable Time Requirement: an Independent and Meaningful Right?' [2005] CLR 3, 19. See *Howarth v United Kingdom* (2000) 31 EHRR 861, *Quinn v Ireland* (2001) 33 EHRR 264.

rights under article 6 are then triggered and he should be entitled to the full panoply of equality of arms including the presence of a legal adviser when being questioned and, something that is not presently provided as of right, disclosure of the case against the defendant as well.[78]

If the European Court has been less than clear as to when exactly a person is charged for the purposes triggering Article 6 rights, it has also been less than unequivocal about the importance of defence rights in the pre-trial phase of proceedings. In *Imbrioscia v Switzerland*[79] the Court accepted the principle that a defendant should have a right to assistance by counsel during police interrogations, although in the instant case it held that there had been no breach of article 6 because the applicant's lawyer had not asked to be present. This makes it clear that it is up to the defence to activate the right to be present at the examination of the accused.[80] Moreover the principle is somewhat weakened by the fact that the Court considered that there is no breach of article 6 unless the fairness of the trial is seriously prejudiced by an initial failure to comply with its provisions. In its own words, 'the manner in which article 6 (3)(c) was applied during the preliminary investigation depended on the special features of the proceedings involved and on the circumstances of the case.'[81] These observations were repeated in *John Murray* where the Court recognized the importance of legal advice being made available to suspects when warned about the possibility of adverse inferences being drawn against them. According to the Court in this case:[82]

> National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.

This is a less than ringing endorsement of the right to legal assistance in the pre-trial phase of criminal proceedings. Three qualifications appear to be made. First of all, the Court appeared to link the need for legal advice instrumentally with the consequences that may later attach to suspects at their trial from decisions made at the pre-trial phase. In *John Murray* the consequences of the decision not to answer questions were the possibility of adverse inferences being drawn from this at trial. In the later case of *Magee v United Kingdom*[83] the applicant was detained and his access to legal advice

[78] See eg R J Toney, 'Disclosure of Evidence and Legal Assistance at Custodial Interrogation: What does the European Convention on Human Rights Require?' (2001) 5 International Journal of Evidence & Proof 39.
[79] (1994) 17 EHRR 441.
[80] Trechsel (n 24) 267.
[81] (1994) 17 EHRR 441, para 38.
[82] (1996) 22 EHRR 29, para 63.
[83] (2001) 31 EHRR 35.

was also delayed for 48 hours. He was cautioned under the same legislation that was used to draw adverse inferences against the applicant in the *John Murray* case but unlike Murray, the applicant in this case broke his silence in his sixth police interview. The prosecution case against him was then based on the admissions that he made in interview. Having reiterated the principles set out in *Imbrioscia* and *John Murray* the Court considered the conditions in which the applicant was held in custody and took the view that as a matter of procedural fairness, he should have been given access to a solicitor at the initial stages of the interrogations 'as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators'.[84] The caution delivered to him under the legislation was an element which heightened his vulnerability. The Court concluded that 'to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced was—whatever the justification for such denial—incompatible with the rights of the accused under article 6.'[85] While the domestic court found on the facts that the applicant had not been ill-treated and that the incriminating statements he had made were voluntary, those that he had made by the end of the first 24 hours of his detention became the central platform of the prosecution's case and subsequently the basis for the applicant's conviction.

There is little doubt that the consequences of the applicant's decision to confess in this case were no less decisive for the outcome of the case than the consequences of the applicant's decision to remain silent in the *John Murray* case. The need for the applicant to have access to legal advice before making such a significant decision was therefore very strong. But it has been suggested that the behaviour of the suspect immediately after arrest will *always* have consequences.[86] If the accused makes a statement then even if this cannot be later used in evidence, it will be recorded in the continental system and joined to the file. In the course of the proceedings it may then be quoted in order to clarify contradictions between that and later statements. Even under the US *Miranda* system statements made in the absence of a lawyer may be used later to impeach testimony. If the suspect decides to be silent, then it will be hard especially in the continental system for this to be kept later from the triers of fact. Under common law systems it may be easier to keep such evidence from the jury but many systems have permitted the prosecution to lead evidence of how a defendant has reacted to questions and to allow comment along the lines that a particular defence was first put forward at trial.[87] More

[84] ibid para 43.
[85] ibid.
[86] Trechsel (n 24) 283.
[87] See *R v Gilbert* (1977) 66 Cr App R 237. In a study conducted for the Royal Commission on Criminal Justice in 1993 it was found that the jury heard about the defendant's silence under questioning in 80 per cent of Crown Court trials. See M Zander and P Henderson, *Crown Court Study* (London, HMSO 1993), RCCJ research study no 19. In Canada it seems that efforts are made to shield the jury from an accused's pre-trial silence except where it has special relevance, see DM Paccioco and L Stuesser, *The Law of Evidence* (4th edn, Irwin, Toronto, 2005) 288–289.

broadly, it may be argued that whatever use is made of the suspect's responses or lack of them at a later trial, the suspect's reaction may have a considerable effect on the way the case is investigated and whether it is prosecuted or disposed of by other means.

The second qualification is that even in circumstances when decisions are made at the pre-trial stage which have consequences at trial, it would seem that restrictions may be placed on access to legal advice 'for good cause'. Under the Northern Ireland legislation access could be denied to terrorist suspects for 48 hours if there was a risk of alerting persons suspected of involvement in the offence who were not yet arrested. In *Magee* it was considered that whatever the justification, the restriction in this case could not be compatible with article 6 given the fact that the rights of the defence were so irretrievably prejudiced. But the Court left it open in other cases to consider that there may be just cause to restrict access, perhaps where the coercive atmosphere of the interrogation was less pronounced or where the defendant was not facing such serious charges.[88] The final qualification made in the above statement is the familiar resort that we have seen the Court takes to looking at the proceedings as a whole before deciding whether there has been a breach of article 6. This has been used in certain cases to uphold the fairness of trials even where there has a systemic denial of access to a lawyer at the pre-trial phases. In one case where the applicant had been in custody for 20 days without seeing a lawyer, the Court took note of the fact that at trial he had the benefit of legal assistance and that he had enjoyed, 'overall', a fair trial.[89]

In its latest decisions the European Court would seem to have given stronger expression to the need for suspects to avail of legal advice before being questioned, although it has repeated the qualifications made by it in *John Murray*. In *Salduz v Turkey*[90] the applicant had been interrogated in the absence of a lawyer after signing a form reminding him of the charges against him and of his right to silent. He made various admissions to the police of being involved in an unlawful organization and hanging an illegal banner from a bridge. He later retracted his statement to the police alleging that it had been extracted under duress. His statement was used for the purpose of his conviction and in concluding that there had been a breach of article 6 the Court held that he had been undoubtedly affected by the restrictions on his access to a lawyer. The Court expressly linked the right of access not only to the need to protect the accused against abusive conduct on the part of the authorities and

[88] cf *Brennan v United Kingdom* (2002) 34 EHRR 18 where the Court considered deferral was in good faith and on reasonable grounds but in any event the admission was made after the deferral of access and could not be linked to it.

[89] *Sarikaya v Turkey*, Application no 36115/97, 22 April 2004. See also *Mamaç v Turkey*, Application nos 29486/95, 29487/95, 29853/96, 20 April 2004. Cf *Ocalan v Turkey* (2003) 37 EHRR 10.

[90] Application no 36391/02, 27 November 2008.

the prevention of miscarriages of justice but also to fulfilment of the aims of article 6, notably 'equality of arms between the investigating or prosecuting authorities and the accused'.[91] The Court underlined the importance of the investigation stage for the preparation of the criminal proceedings as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. At the same time, the Court continued, 'an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the gathering and use of evidence'.[92] As a result in most cases this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help ensure respect of the right of an accused not to incriminate himself which presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. Against this background and against the repeated statements of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment that the right of a detainee to have access to legal advice is a fundamental safeguard against ill treatment, the Court found that in order for the right to a fair trial to remain sufficiently 'practical and effective' Article 6 (1) required that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated that in the light of the particular circumstances of each case there are compelling reasons to restrict this right.[93] Even then the rights of the defence must not be unduly prejudiced and the Court went on to say more unequivocally than it did in *Magee* that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogations without access to a lawyer are used for a conviction.

This judgment is to be welcomed for putting the right of access of a lawyer on a firmer footing emphasising not only the protective role that the lawyer can play in ensuring that detained persons are not coerced into making a confession in breach of the privilege against self-incrimination but also the positive participative role that is required in advising on the complexities of gathering and using evidence.[94] This is emphasised particularly in the concurring opinions of Judge Zagrebelsky with Judges Casadevall and Turmen and of Judge Bratza who would have preferred the Court to have emphasized that detained persons should be entitled to access to legal assistance not just from the point of interrogation but as soon as they are imprisoned so that from that stage they can give their lawyer instructions in order to prepare their defence. The Court emphasizes the important impact which the investigation stage

[91] ibid para 53.

[92] ibid para 54.

[93] ibid para 55.

[94] *Salduz* has applied in a number of recent cases see Panovits v Cyprus, Appln. no

may have for the trial but the reality is that increasing numbers of cases in many jurisdictions do not reach trial at all. This makes it all the more important, however, that accused persons are given access to a lawyer before the first stages of interrogation as in many cases it is this first encounter with the police that may determine whether the case is advanced to trial or is otherwise diverted out of the court process. Another useful aspect of the judgment is that it emphasises that if defence rights are to be waived, any waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.[95] Thus in the present case no reliance could be placed on the assertion in the form that the applicant had been reminded of his right to silent. It may be argued indeed that to be effective any waiver must be witnessed by a lawyer or a judicial figure rather than simply be made in the presence of the police.

VI. CONCLUSION

In this article we have argued that although human rights standards and jurisprudence have linked the privilege against self-incrimination with the right of silence as an essential ingredient of a fair trial, it would be better in the context of fair trial rights to make a distinction between the two. While in general terms these rights may be viewed as part of the need for states to respect the individual dignity and autonomy of the individual, it is indisputable that there are circumstances when they may have to give way to other considerations when states need access to information. We have argued, however, that within the criminal process the right of silence is entitled to be given a special weighting not specifically for reasons to do with upholding substantive rights such as the dignity and respect of the individual but in order to uphold the procedural rights of the defence which it has been argued come into play not just at the trial phase of criminal proceedings but also at the stage of pre-trial proceedings when a suspect is called upon to answer allegations against him.

Human rights jurisprudence has developed special participatory rights for the defence such as the equality of arms and the right to adversarial procedure at the trial phase of proceedings. It would seem only logical that these principles are also applied at the pre-trial phase when the defendant is equally affected by the proceedings by being asked to participate in them. If it is important for a defendant to be given full access to the rights of the defence at the stage when he or she is asked to account for allegations in order to mount the most effective defence, then it is important that these rights are in place at this stage and that a defendant is not called to account for actions *until* they are in place. The right of silence should be transformed at this stage of the criminal process from a right which is linked to the exercise of an individual's

[95] See also Panovits v Turkey, Appln. no 4268/04, 11 December 2008.

will but is extraordinarily difficult to assert in the coercive atmosphere of a police station and should become instead a procedural right inextricably linked to the participatory rights of the defence by requiring that there can be no participation by the accused until the conditions for fair and informed participation are put in place. In order to further highlight the distinction between these two aspects of the right of silence, one predicated upon the exercise of will and the other linked institutionally with the rights of the defence, it can be argued that accused persons should not, at least in the most serious cases, be able to able to waive their defence rights without at least having consulted with a solicitor. Defence rights exist arguably not just out of respect for the dignity of the individual but to safeguard institutional values that are held dear in the criminal process such as the need for accurate findings of fact and the protection of the innocent. Once the rights of the defence are put in place, however, the right of silence reverts to an exercise of will or choice on the part of the individual accused, but a choice that is made on an informed basis as part of a defence strategy which is taken in full recognition of the costs and benefits of its exercise.

[6]

Confrontation: The Search for Basic Principles

RICHARD D. FRIEDMAN*

INTRODUCTION

The Sixth Amendment to the Constitution guarantees the accused in a criminal prosecution the right "to be confronted with the Witnesses against him."[1] The Confrontation Clause clearly applies to those witnesses who testify against the accused at trial. Moreover, it is clear enough that confrontation ordinarily includes the accused's right to have those witnesses brought "face-to-face," in the time-honored phrase, when they testify.[2] But confrontation is much more than this "face-to-face" right. It also comprehends the right to have witnesses give their testimony under oath and to subject them to cross-examination.[3] Indeed, the Supreme Court has treated the accused's right to be brought "face-to-face" with the witness as secondary to his right of cross-examination.[4]

Interpreting the Confrontation Clause as it relates to witnesses at trial presents some difficulties. For example, to what extent does the Confrontation Clause prevent the trial court from limiting the subject matter of cross-examination?[5] To what extent does the witness's failure to testify to the substance of a prior statement mean that the defendant has had an inadequate opportunity to confront the witness if the prior statement is admitted against him?[6] For the most

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1. U.S. CONST. amend. VI.

2. *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.").

3. *See, e.g.*, 5 JOHN HENRY WIGMORE, EVIDENCE § 1395, at 150 (Chadbourn rev. 1974) (stating the defendant demands confrontation "not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination"), *quoted in* Davis v. Alaska, 415 U.S. 308, 316 (1974), *and in Coy*, 487 U.S. at 1029 (Blackmun, J., dissenting).

4. In fact, with respect to some child witnesses, the Court has held that the former right may give way, so long as the latter is preserved. *See* Maryland v. Craig, 497 U.S. 836, 860 (1990) (holding that state interest in preventing trauma to child witness testifying in child sexual abuse case may be sufficiently great to justify invoking special procedure in which the child testifies in room with only prosecutor and defense counsel present, while defendant, judge, and jury watch over one-way closed circuit television). *But see* Brady v. Indiana, 575 N.E. 2d 981 (Ind. 1991) (declining, under state constitutional provision guaranteeing the defendant the right to be brought "face to face" with the witnesses against him, to follow *Craig*).

5. *See Davis*, 415 U.S. at 320 (holding that preventing defendant from cross-examining accusing witness about prior adjudication of the witness as juvenile delinquent, when that adjudication suggested motive for the witness to fabricate accusation, was violation of defendant's confrontation right).

6. I have analyzed this problem, and criticized a line of Supreme Court cases beginning with *California v. Green*, 399 U.S. 149 (1970), in Richard D. Friedman, *Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket*, 1995 SUP. CT. REV. 277, 292-94.

part, however, the boundaries of the confrontation right as applied to trial witnesses are tolerably clear.

The more pervasive perplexity arises with respect to another aspect of the Confrontation Clause. Suppose that the prosecutor offers evidence of a statement to prove the truthfulness of a proposition that the statement asserts, but the declarant herself—the person who made the statement—does not testify at trial. The accused may contend that admissibility of this statement violates his confrontation right. If the declarant were to testify live but not subject to cross-examination, he might argue, the violation would be clear, and the prosecution should not be permitted to gain an advantage by substituting hearsay evidence of the declarant's statement for her live testimony.

Sometimes this argument will appear persuasive, and sometimes it will not. Suppose the statement accuses the defendant of a crime and the only reason the prosecution presents hearsay evidence of the statement rather than the declarant's live testimony is that it anticipates that the declarant would be a poor witness under cross-examination. In that case, the confrontation argument seems quite strong. If, however, the statement at issue is a record of a stock exchange, recording the price of a sale and made contemporaneously with that sale, but not made in contemplation of a prosecution, the confrontation argument seems quite weak.

The issue then is this: as to what types of hearsay does the Confrontation Clause require exclusion? Vastly different theories as to this hearsay aspect of the Clause have been expressed both in judicial opinions[7] and in academic commentary.[8] In this essay, I will not endeavor to survey the entire field. I will,

7. For example, in *Green*, 399 U.S. at 172-89, Justice Harlan, concurring, took the view that the Confrontation Clause "reaches no farther than to require the prosecution to produce an[y] available witness whose declarations it seeks to use in a criminal trial." *Id.* at 174. Six months later, in *Dutton v. Evans*, 400 U.S. 74 (1970), Justice Harlan expressed a radically different view, endorsing the following statement by Wigmore:

> "The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—i.e. a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially."

Id. at 94-96 (1970) (Harlan, J., concurring in the judgment) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1397, at 131 (3d ed. 1940) (footnote omitted)). In *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), the Supreme Court offered an overall approach, analyzed in detail in this article, to the question of when the Confrontation Clause demands the exclusion of a hearsay statement made by an out-of-court declarant. *See infra* notes 16-18 and accompanying text.

8. For Wigmore's view, endorsed by Justice Harlan in *Dutton*, see *supra* note 7. My colleague Peter Westen has taken a view similar to that espoused by Justice Harlan in *Green*. *See* Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1187-98 (1979) (endorsing the view that a "witness against" the accused is a person who is available to give live testimony in open court, under oath, and subject to cross-examination). Other works expressing varied views of the nature of the Clause include Michael H. Graham, *The Confrontation Clause, The Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 600 (1988) (arguing that the Confrontation Clause could be interpreted as meaning that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be present and to cross-examine his accusers if they are available"); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 622 (1988) (contending that "[t]he confrontation clause gives the accused the right to exclude all out-of-court statements when the declarant is not produced except when the prosecutor establishes the lack of a reasonable probability that the accused's cross-examination of the declarant would have led the jury to weigh the evidence more favorably to the accused"); Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 173 (1995) (proposing "an interpretation of the Confrontation Clause that will limit the use of hearsay evidence to situations in which (1) the judge has made an independent foundational finding that the hearsay is competent and (2) the hearsay is independently corroborated"); Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 626-27 & n.14 (1992) (contending that the Confrontation Clause should be interpreted in light of three dimensions: an evidentiary dimension that "addresses the concern that the reliability of a statement offered as evidence be tested by cross-examination," a procedural dimension that "addresses the concern that a hearsay statement may be the product of misconduct by the prosecution or its agents," and a societal dimension that "embodies communal values by granting criminal defendants the affirmative right to face their accusers").

however, criticize the current doctrine, such as it is, and propose an approach that I believe would be far more satisfactory. In many respects—but not in all—my approach is similar to those advanced by Justice Clarence Thomas,[9] by the United States as *amicus curiae* in *White v. Illinois*,[10] and by Professor Akhil Amar in his recent book, *The Constitution and Criminal Procedure*.[11]

Part I of this essay reviews the current doctrine, showing how it has been unstable and tends to conform the Confrontation Clause to the ordinary law of hearsay—particularly to the version of hearsay law expressed in the Federal Rules of Evidence. Part II introduces an alternative approach, detached from hearsay law and based instead on the idea that the Confrontation Clause gives the defendant a right to confront adverse witnesses—those who make testimonial statements—whether the testimony is given at trial or beforehand. Under this view, the confrontation right applies to a far narrower set of out-of-court statements than does hearsay doctrine, but it is not ringed with exceptions, nor is it overridden by the determination that the standard at issue is particularly reliable. One might say that the confrontation right is far less extensive, but far more intensive, than the rule against hearsay.

With this structure in mind, Part III takes a more critical look at several issues raised by current doctrine. It argues that reliability and truth-determination are poor criteria to govern application of the Confrontation Clause; that a narrow but absolute understanding of the confrontation right best comports with the language and theory of the Clause; and that, with narrow qualifications, unavail-

9. White v. Illinois, 502 U.S. 346, 364-65 (1992) (Thomas, J., concurring).

10. Brief for the United States as Amicus Curiae Supporting Respondent, White v. Illinois, 502 U.S. 346 (1992) (No. 90-6113), *microformed on* U.S. Supreme Court Records and Briefs 1991/92 FO, Card 4 of 7 (CIS) [hereinafter Brief for the United States].

11. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 89-144 (1997). The chapter of Professor Amar's book addressing these issues is taken with few changes from an earlier article published in *The Georgetown Law Journal*. *See* Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996).

My approach bears a somewhat more distant relationship to that presented by Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 559 (1992). *See id.* at 561 ("Hearsay statements procured by agents of the prosecution or police should . . . stand on a different footing than hearsay created without governmental intrusion"). Berger's theory is discussed further *infra* note 122.

ability of the declarant should not affect application of the Clause. Part IV discusses how a witness-oriented approach to confrontation should apply to statements that were not made directly to the authorities. This is one context in which I differ sharply from Justice Thomas and Professor Amar. If the confrontation right did not apply in this context, a gaping loophole would be open for an accuser to offer testimony without facing the accused.

I. THE CURRENT DOCTRINE

As I have already suggested, the Confrontation Clause expresses a fundamental right, and is very distinct in nature and consequences from ordinary hearsay doctrine. Until 1965, however, the presence of hearsay doctrine meant that it was not particularly pressing for the Supreme Court to develop a doctrine of the Confrontation Clause with respect to out-of-court statements. The Clause did not bind the states, and in federal prosecutions any out-of-court statement that might have been excluded from evidence in common law litigation via the Confrontation Clause could also be excluded by bringing it within the rule against hearsay.[12] When the Court held the Clause applicable to the states in *Pointer v. Texas*,[13] however, the Clause took on greater independent significance. Now some out-of-court statements became inadmissible as a matter of federal constitutional law against defendants in state prosecutions. It therefore became important for the Court to develop a theory of the Confrontation Clause. Unfortunately, however, the approach taken by the Court has tended to meld the Clause and ordinary hearsay doctrine. Indeed, whereas shortly after *Pointer* the Court tended to emphasize the extent to which the Confrontation Clause and hearsay doctrine are distinct,[14] it has more recently emphasized the extent to which they are similar.[15] In *Ohio v. Roberts*,[16] the Court attempted to state "a

12. The Federal Rules of Evidence did not become effective until 1975. The common law of hearsay for the first three-quarters of this century is best reflected in—and was profoundly influenced by—Wigmore's monumental treatise on evidence. Wigmore published three editions of this treatise between 1904 and 1940. The portions dealing principally with hearsay were revised by James Chadbourn in the 1970s and are contained in volumes four through six of the revised edition.

13. 380 U.S. 400, 407-08 (1965) (holding use in state prosecution of statement from preliminary hearing at which defendant was unrepresented by counsel violates Confrontation Clause).

14. *See* United States v. Inadi, 475 U.S. 387, 393 n.5 (1986) (noting that the Confrontation Clause and hearsay doctrine do not overlap completely); Dutton v. Evans, 400 U.S. 74, 80-81 (1970) ("[Although the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots[,] . . . this Court has never equated the two, and we decline to do so now." (footnotes omitted)); California v. Green, 399 U.S. 149, 155-56 (1970) ("While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.")

15. *See* Bourjaily v. United States, 483 U.S. 171, 182-83 (1987); White v. Illinois, 502 U.S. 346, 353 (1992) (discussing how " 'hearsay rules and the Confrontation Clause are generally designed to protect similar values' " and how they " 'stem from the same roots' " (quoting *Green*, 399 U.S. at 155-56, and *Dutton*, 400 U.S. at 80-81)); Ohio v. Roberts, 448 U.S. 56, 65-66 (1980) (same); *see also infra* text accompanying notes 56-61 (discussing dependence of confrontation doctrine on hearsay theory in *Idaho v. Wright*, 497 U.S. 805 (1990)).

16. 448 U.S. 56 (1980).

general approach" to the law of the Confrontation Clause as it applies to hearsay statements made by out-of-court declarants.[17] After a brief analytical section, the Court stated the doctrine as follows:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[18]

In three respects that I will now discuss in turn, the Supreme Court's subsequent treatment of this framework has tended to make confrontation doctrine resemble ordinary hearsay law.[19] First is the scope of the term "witnesses" under the Confrontation Clause. The Court has insisted upon giving this term a broad meaning. Second and third, respectively, are the unavailability and reliability requirements. Both of these requirements have posed serious problems and the Court has retreated from them, especially when they are not in accord with prevailing hearsay law.[20]

A. THE SCOPE OF THE CLAUSE: HEARSAY DECLARANTS AS "WITNESSES"

Ohio v. Roberts makes its test generally applicable to "a hearsay declarant [who] is not present for cross-examination at trial."[21] The Court seems to have assumed out of hand—though the point had already been contested[22]—that hearsay declarants are per se "witnesses" within the meaning of the Confrontation Clause. Indeed, in *White v. Illinois*,[23] the Court brushed aside a challenge to this broad sense of the term "witnesses," saying it was "too late in the day" to embark on a different path.[24]

17. *Id.* at 65. A prior statement made by a witness who testifies in court can be hearsay and can raise Confrontation problems as well. *See supra* note 6 and accompanying text. The presence of the declarant as a witness at trial substantially alters the situation, however. The focus of *Roberts*, and my principal concern in this essay, is the declarant who does *not* testify at trial.

18. *Id.* at 66.

19. The argument in this Part is broadly in agreement with that made by Jonakeit, *supra* note 8, that the Supreme Court has treated the confrontation right as "essentially a minor adjunct to evidence law," *id.* at 558, in which "the accused must look to hearsay doctrine to see if he has a confrontation right," *id.* at 572.

20. Jonakeit, *id.* at 571-72 & n.50, discusses another respect in which the Court has conformed confrontation law to ordinary hearsay doctrine: If an out-of-court statement is not offered to prove the truth of what it asserts and so is not hearsay under the most common definition, as expressed in Fed. R. Evid. 801(c), then the Court concludes that it does not raise Confrontation Clause concerns. *See* Tennessee v. Street, 471 U.S. 409, 413, 414 (1985).

21. *Roberts*, 448 U.S. at 57.

22. *See supra* note 7 (discussing the changing views of Justice Harlan on this point, his later view adopting that of Wigmore).

23. 502 U.S. 346 (1992).

24. *Id.* at 353.

I will question the wisdom of that choice later in this essay, arguing instead for a narrower reading of the term "witnesses" that includes only declarants who make statements with testimonial intent.[25] I will argue that the failure to adopt a limited sense of the term "witnesses" has tended to make the confrontation right broader than it should be, and that, at least partially as a consequence, the right is too dilute—that is, too weak—in situations in which it should apply.

B. THE UNAVAILABILITY REQUIREMENT

The idea behind *Roberts*'s unavailability requirement was that, if the declarant is available to testify as a witness at trial, the prosecution should produce her rather than relying on her out-of-court statement. If the declarant is unavailable, the possibility of producing the witness does not exist, and so the benefits of admitting the prior statement are more apparent. The general unavailability rule articulated by *Roberts* was too stringent, however, and soon broke down. Consider the hypothetical mentioned above of a prosecution's attempt to prove the price of a stock at a given time by contemporaneous records of the stock exchange. It would be silly to require the prosecution, as a precondition to admitting the records, to demonstrate the unavailability of their maker. Indeed, even if the maker in this scenario appeared to be available, it would probably be wasteful to require the prosecution to produce her.

Not surprisingly, the Court has cut back drastically on the unequivocal application of the unavailability requirement. In *United States v. Inadi*,[26] the Court considered a Confrontation Clause challenge to the admissibility of out-of-court statements of a nontestifying coconspirator, absent a showing by the prosecution that the declarant was unavailable to testify.[27] Reversing the court of appeals, the Court countenanced the trial court's admission of the testimony.[28] It refused to impose an unavailability requirement in this context, instead holding that "*Roberts* simply reaffirmed a longstanding rule . . . that applies unavailability analysis to prior testimony."[29] Any thoughts that *Inadi*'s rejection of an unavailability requirement might be confined to the type of declaration there at issue, the statement of a coconspirator, were dispelled by

25. *See infra* Part II. Professor Amar also questions the Court's choice. *See* AMAR, *supra* note 11, at 94 (suggesting that the Court "heed the word *witness* and its ordinary, everyday meaning"). The *White* Court's unwillingness to consider such a limitation was based on its view that "[s]uch a narrow reading of the Confrontation Clause . . . would virtually eliminate its role in restricting the admission of hearsay testimony." *White*, 502 U.S. at 352. That is definitely not so of the variant of the limitation that I propose here. In fact, under my theory the Confrontation Clause would require exclusion of hearsay in some situations in which Chief Justice Rehnquist, author of the *White* majority opinion, favors admissibility. Note the discussion below of *Lee v. Illinois*, 476 U.S. 530, 543 (1986), in which Justice Rehnquist voted against application of the Confrontation Clause. *See infra* text accompanying notes 39-46.

26. 475 U.S. 387 (1986).

27. *Id.* at 388.

28. *Id.* at 400.

29. *Id.* at 394.

White v. Illinois.[30] In *White*, the statements at issue were a four-year-old girl's accusations that the defendant sexually abused her.[31] The Court repeated much of the analysis of *Inadi* in refusing to impose an unavailability requirement on the girl's statements, which purportedly fit within the hearsay exceptions for excited utterances and statements made for purposes of medical diagnosis or treatment.[32]

Thus, the Supreme Court's decision to impose an unavailability requirement in the confrontation context has closely paralleled the imposition of an unavailability requirement by the hearsay rules of the Federal Rules of Evidence. *Roberts*, while purporting to announce a general unavailability requirement, applied it in the case of prior testimony—a setting in which the Federal Rules of Evidence also require unavailability for admissibility of the prior statement.[33] *Inadi* and *White* proclaimed that the unavailability requirement is limited to prior testimony and refused to apply the requirement to statements of a coconspirator, to excited utterances, or to statements made for purposes of medical diagnosis or treatment—statements that, under the Federal Rules, fit within exemptions to the rule against hearsay without any need for showing unavailability.[34] The emerging pattern is not hard to spot: follow the Federal Rules. Notwithstanding *Inadi* and *White*, it would not be surprising were the Court to hold—if a proper case arose—that the Confrontation Clause's unavailability requirement is not strictly limited to prior testimony. It likely applies to statements offered under any of the other hearsay exceptions—most prominently declarations against interest[35]—for which the Federal Rules of Evidence require unavailability.[36]

C. THE RELIABILITY REQUIREMENT

Roberts declares that a statement can satisfy the reliability requirement in either of two ways. First, the statement may fall within a "firmly rooted"

30. 502 U.S. 346 (1992).

31. *Id.* at 349-50.

32. *Id.* at 353-57. Note that in *Idaho v. Wright*, 497 U.S. 805, 815-16 (1990), the Court reserved the question of whether the unavailability requirement applied to the declarations there at issue. As in *White*, those statements were accusations of sexual abuse made by a child. *Id.* at 809.

33. *See* FED. R. EVID. 804(b)(1).

34. *See id.* 801(d)(2)(E); *id.* 803(2); *id.* 803(4).

35. *Id.* 804(b)(3).

36. The Court might achieve this result by purporting to apply *Roberts*'s reliability requirement rather than by openly re-expanding the unavailability requirement. That is, the Court might hold that, given the prevailing doctrine governing such an exception, and particularly the requirements of the exception as stated in the Federal Rules of Evidence, if the variant of the exception invoked by a state prosecutor did not require unavailability it would not be "firmly rooted." Even if a state court purported to require the declarant's unavailability as a precondition to admissibility of the statement, the Supreme Court and, in a habeas case, the lower federal courts as well could impose their own view of unavailability. Suppose, for example, that the state court, while purporting to require unavailability, rules that a declarant is unavailable because the prosecution has been unable to find her. The Supreme Court might nevertheless rule that as a matter of constitutional law the declarant is not unavailable because the prosecution had made inadequate attempts to locate her.

hearsay exception.[37] Second, the statement may be supported by "a showing of particularized guarantees of trustworthiness."[38] Like the unavailability requirement, the reliability requirement yields problematic results if applied according to its terms. In one case, the Court responded to this tension by evading the apparent dictates of *Roberts*; more recently, its response has been to conform the reliability test to hearsay doctrine and to adhere to the test in that form.

1. "Firmly Rooted" Exceptions

The first aspect of the reliability requirement provides that "reliability can be inferred without more" if the statement "falls within a firmly rooted hearsay exception." This per se aspect of the reliability requirement, providing that qualification under a "firmly rooted" hearsay exception automatically satisfies the requirement, was bound to create problems; some statements that fit within such exceptions are nevertheless of the type that the Confrontation Clause should exclude.

Lee v. Illinois[39] presented this dilemma. There, one Thomas confessed to having committed murder with Lee.[40] At trial, Thomas was at least arguably unavailable to be a witness, because he was a codefendant and was relying on his right not to testify.[41] And, given the nature of the confession—under which Thomas accepted a full share of blame for a particularly gruesome and senseless pair of murders—it at least arguably fell within the firmly rooted hearsay exception for declarations against interest.[42] The per se aspect of the *Roberts* reliability requirement therefore should have at least called for consideration of whether the statement did fit within that exception. But a bare majority of the Court, per Justice Brennan, refused to approach the case in that way, saying in a footnote:

> We reject respondent's categorization of the hearsay involved in this case as a simple "declaration against penal interest." That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant.[43]

37. Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).

38. *Id.* Though *Roberts* was tentative about this second means, the Court was more definite about it in *Lee v. Illinois*, 476 U.S. 530, 543 (1986) ("even if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness' "); *accord* Idaho v. Wright, 497 U.S. 805, 816-17 (1990).

39. 476 U.S. 530 (1986).

40. *Id.* at 533-36.

41. *Id.* at 536. The four dissenters concluded that Thomas was unavailable for confrontation purposes. *Id.* at 549-50 (Blackmun, J., dissenting). This conclusion is not obviously correct. As the dissenters recognized, if the prosecution had been eager to have Thomas's testimony, it had some plausible options, such as trying him first. *Id.* at 550.

42. *See* FED. R. EVID. 804 (b)(3).

43. *Lee*, 476 U.S. at 544 n.5.

Failing to find sufficient "particularized guarantees of trustworthiness"—a point hotly contested by the four dissenters[44]—the majority held that the Confrontation Clause rendered the statement inadmissible.[45]

Lee is particularly interesting because it reflects unwillingness on the part of the majority to accept the full implications of the per se aspects of the *Roberts* reliability requirement, as well as implicit recognition that, even if a statement by an unavailable declarant fits within a firmly rooted hearsay exception, its admission may violate the confrontation right.[46]

Lee represents one response to the tension created by the per se aspect of *Roberts*'s reliability standard. If the case were decided today, however, I believe the contemporary Court would be more likely to act in accordance with the far different attitude reflected in Justice O'Connor's opinion for the Court, unanimous on this issue, in *White v. Illinois*.[47] There, the Court noted that the exception for excited utterances has a long history and broad acceptance.[48] As to the exception for statements made for medical diagnosis or treatment, however, the Court could say only that it "is similarly recognized in Federal Rule of Evidence 803(4), and is equally widely accepted among the States."[49] Indeed, the latter exception is of much more recent vintage, and to a large extent it was created by—rather than merely recognized in—Rule 803(4).[50] Only by

44. *Id.* at 551-57 (Blackmun, J., dissenting).

45. *Id.* at 543-46.

46. *Lee* is also interesting, in my view, because the majority utterly failed to recognize the grounds that made its result so compelling. *See* text following note 91 or Part IIIA *infra*.Taken on its own terms, *Lee* reflects recognition that a statement fitting within a firmly rooted hearsay exception may not be reliable. That point is valid, though I do not believe that Thomas's statement, which strikes me as quite reliable, illustrates it. More broadly, I am arguing in this essay that reliability is an inappropriate criterion under the confrontation right.

47. Justice Thomas, joined by Justice Scalia, joined in the Court's opinion except for its discussion of the meaning of the phrase "witnesses against." *White v. Illinois*, 502 U.S. 346, 358-366 (1996). All other Justices concurred fully in the Court's opinion. This unanimity with respect to the per se aspect is one reason I believe *White* is a better guide to the contemporary Court's attitude than is *Lee*. Other considerations are that *White* is more recent and that Justice O'Connor, along with Justice Stevens, is one of the two members of the *Lee* majority still on the Court. Perhaps the most significant consideration, though, is that, as I argue throughout this Part, the conformance of the per se aspect to the Federal Rules of Evidence is part of a broader tendency toward such conformance in applying all aspects of the *Roberts* framework. Indeed, this tendency makes it an interesting question whether *Lee* itself would be decided the same way today.

48. *Id.* at 355 n.8.

49. *Id.*

50. It is instructive to examine the first edition of McCormick's handbook, which appears to have been the principal source relied on by the drafters of Rule 803(4). CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE (1st ed. 1954). Before the Federal Rules were promulgated, "[s]tatements of a *presently* existing condition made by a patient to a doctor consulted for *treatment*" were "universally admitted as evidence of the facts stated." *Id.* § 266, at 563 (emphasis added). According to McCormick, "some courts" had extended the scope of the exception to include statements of the patient as to past symptoms "when made to a doctor for treatment." *Id.* McCormick further argued for admissibility of statements made "by the patient to the doctor for treatment which describe the general character of the cause or external source of the condition to be treated, so far as this description is pertinent to the purpose of treatment," but he acknowledged that "[t]he greater number of courts" had declined to adopt this principle. *Id.* § 266, at 564. Further, it appears that the majority of courts—with McCor-

virtue of the expansive language of that Rule, language that Illinois had adopted,[51] could the crucial statements be brought within that "firmly rooted" exception, thereby satisfying *Roberts*'s reliability requirement.[52] A near synonym for "firmly rooted," it seems, is "in the Federal Rules of Evidence."

Of course, the presence of a provision in the Federal Rules as they were originally promulgated does in itself indicate widespread acceptance, even if not a long pedigree; the Rules have been more or less closely adopted in about forty states. But we might well pause at a doctrine that in effect conforms a constitutional right, a part of the Bill of Rights, to the contours designed—in a process not bearing the remotest resemblance to the amendment procedure established by Article V of the Constitution—by a committee of drafters of evidentiary rules for the federal courts.[53]

2. "Particularized Guarantees of Trustworthiness"

Even if a statement does not fall within a "firmly rooted" exception, it may yet satisfy the reliability test of *Roberts* if it is supported by "particularized guarantees of trustworthiness."[54] Once again we see the Confrontation Clause being conformed to ordinary hearsay doctrine. The language is strikingly similar to the key phrase of the residual hearsay exception as expressed in

mick's support—held the hearsay exception inapplicable to descriptions even of present symptoms made to a doctor employed only for purposes of testimony (though most courts allowed the doctor to include the statement in describing the basis of his medical conclusions). *Id.* § 267, at 565-66. In at least three crucial respects, then, Rule 803(4) expanded on the prior law. First, it applies to past as well as present descriptions. FED. R. EVID. 803(4). Second, it applies to statements made for purposes of diagnosis—including litigation-demanded diagnosis—as well as those made for treatment. *Id.* Third, in language closely tracking McCormick's, it applies to descriptions not only of symptoms but also of "the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *Id.*

51. 725 ILL. COMP. STAT. 5/115-13 (West 1993) (quoted in People v. White, 555 N.E.2d 1241, 1250 (Ill. App. Ct. 1990)).

52. The statements described acts of sexual molestation and identified the accused as the perpetrator. *White*, 502 U.S. at 349-50. Thus, they went beyond a description of symptoms, to a description of the causes. Indeed, the identification of the accused seems to go beyond a description of the "inception or general character of the cause or external source" of the injury. Some courts have allowed statements of this sort on the theory that identification of the perpetrator is necessary for treatment for sexually transmitted diseases—a controversial theory when the declarant is a young child who cannot be expected to understand the medical significance of the perpetrator's identity. *See* Tome v. United States, 61 F.3d 1446, 1450 (10th Cir. 1995) (holding over dissent that trial court did not err in permitting doctor to testify as to victim's statement to her identifying perpetrator of sexual abuse), *on remand from* 513 U.S. 150 (1995).

53. In *Idaho v. Wright*, 497 U.S. 805, 817-18 (1990), the Court refused to treat a state's residual exception, identical to former Federal Rule of Evidence 803(24) (now new Rule 807), as "firmly rooted." But as the Court noted, the residual exception is a beast of a different nature from other hearsay exceptions. It is meant to accommodate ad hoc instances of statements that appear to warrant admissibility, and so "almost by definition" does not address recurrent situations with a long tradition supporting admissibility. *See id.* at 817.

54. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

Federal Rule 807—"equivalent circumstantial guarantees of trustworthiness."[55] And that residual exception, like this aspect of the *Roberts* reliability test, was created to ensure that hearsay warranting admissibility would not be excluded merely because it failed to fit one of the "firmly rooted" hearsay exemptions enumerated in the Rules.

In *Idaho v. Wright*,[56] the Supreme Court held that this aspect of the *Roberts* reliability test could be satisfied only by "circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief," and not by corroborating evidence.[57] Justice O'Connor declared that "[t]his conclusion derives from the rationale for permitting exceptions to the general rule against hearsay . . . ."[58] The mode of analysis is remarkable. Why, we might wonder, should the shape of doctrine under the Confrontation Clause be determined by the rationales of hearsay doctrine, unless the Clause is seen as essentially nothing more than a constitutionalization of prevailing hearsay doctrine?[59]

Wright's refusal to allow corroborating evidence into the inquiry does serve a purpose, however. Under the contrary rule, the Confrontation Clause issue would largely come down to the question of whether the court believes, on the basis of all the evidence, that the statement is very probably true. And often this would translate into: "does the court believe the defendant is guilty?" There is no logical inconsistency in requiring the court to decide as a threshold matter for admissibility purposes a question identical to one the factfinder must determine on the merits of the case.[60] But an argument that the court has examined all the evidence and determined that the defendant is guilty, and therefore he has no confrontation right, is at the least extremely unattractive. Moreover, the inquiry would be intensely dependent on the facts of particular cases, which would mean that the Clause would provide very little protection unless appellate courts were willing and able to delve deeply into the facts of each case.

Nevertheless, Justice Kennedy was surely correct in saying for himself and three other *Wright* dissenters: "[i]t is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence."[61] The problem, I believe, is

55. FED. R. EVID. 807.

56. 497 U.S. 805 (1990).

57. *Id.* at 819, 823.

58. *Id.* at 819.

59. *But see* California v. Green, 399 U.S. 149, 155 (1970) (refusing to view the Confrontation Clause as "nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law").

60. *See* Bourjaily v. United States, 483 U.S. 171, 181 (1987) (making admissibility of coconspirator statements, even in a prosecution for conspiracy, dependent on the judge's threshold determination that the declarant and the accused were coconspirators).

61. *Wright*, 497 U.S. at 828 (Kennedy, J., dissenting).

the Court's articulation of the confrontation right in terms of the reliability of the statement, a matter to which I will return in Part III. The reliability determination threatens to become a shadow of the trial on the merits—a battle over the ultimate factual issues at stake in the prosecution, based on all the evidence presented at trial. To prevent this from happening, the court must crop the inquiry. One way is to exclude from it information that might substantially help prove the accuracy of the particular statement not because it tells us anything about the making of the statement but only because it points in the same direction as the statement.

I have argued that in three respects—the scope it accords to the term "witnesses"; the significance it accords to the unavailability of the declarant; and the importance it places on, and the way in which it purports to assess, the reliability of the declarant—the Supreme Court has tended to conform the Confrontation Clause to prevailing hearsay doctrine. This approach devalues the Confrontation Clause, treating it as a constitutionalization of an amorphous and mystifying evidentiary doctrine, the continuing value of which is widely questioned. We may well wonder whether the *Roberts* framework, as initially presented by the Court and as subsequently developed by it, fails to capture some enduring value reflected by the Clause. I believe the answer is affirmative and, in Part II, I will show why—developing a basic structure for the confrontation right that is far different from the one that prevails under current law.

II. "THE WITNESSES AGAINST HIM"

The Confrontation Clause does not speak of the rule against hearsay or of its exceptions, or of unavailability, reliability, or truth-determination. It says simply that the accused shall have a right "to be confronted with the Witnesses against him."[62]

The origins of the Clause are famously obscure.[63] If we look back far enough, however, a reasonably clear picture emerges, one in which the Clause's applications to testimony at trial and to out-of-court statements appear not as separate rules but as parts of an integral whole. I am currently engaged in a project with Michael Macnair, an English legal historian, in which we are attempting to trace the origins of hearsay law and of the confrontation right. I will glean briefly from that project in the following pages.

We are used to the idea that witnesses testify under oath in an open proceeding in the presence of the accused, "face-to-face." This was the practice of the

62. U.S. CONST. amend. VI.

63. *See* California v. Green, 399 U.S. 149, 174-75 (1970) (Harlan, J. concurring) (stating that there is "scant" evidence of the Framers' understanding of the Confrontation Clause); Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384-400 (recounting history of the Confrontation Clause from various sources including the Bible, Roman law and English law).

ancient Hebrews[64] and Romans,[65] and for centuries it has been the English way. It was described in especially vivid terms by Thomas Smith in the sixteenth century as an "altercation."[66] But this is not the only way in which testimony might be given in a judicial proceeding. Smith presented his account of English law as contrasting with the system that then prevailed in Continental Europe. There, testimony was taken under oath but out of the presence of the parties.[67] Often it was taken in front of a notary rather than at the tribunal itself, and was later presented to the tribunal in written form.[68]

Over the course of centuries, English writers praised the openness of the English system.[69] That is not to say, however, that the norm of having the

64. Under scriptural law, multiple witnesses were necessary for a criminal conviction. *Deuteronomy* 17:6, 19:15-18 (King James). The Essenses, the people of the Dead Sea Scrolls, allowed a capital conviction on proof by three witnesses to separate episodes of the same crime. To ensure against witness unavailability, the testimony of witnesses would be taken after each episode, in the offender's presence; on the third episode the verdict would be complete. *See* Lawrence H. Schiffman, *The Law of Testimony*, *in* SECTARIAN LAW IN THE DEAD SEA SCROLLS: COURTS, TESTIMONY, AND THE PENAL CODE 73 (1983). This may be the first known instance of a deposition taken to preserve testimony.

65. *See, e.g.*, *Acts* 25:16 (King James), which quotes the Roman governor Festus as declaring: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988), quotes this passage.

66. THOMAS SMITH, DE REPUBLICA ANGLORUM 114 (Mary Dewar ed., Cambridge Univ. Press 1982) (1565).

67. Walter Ullmann, *Medieval Principles of Evidence*, 62 L.Q. REV. 77, 84-85 (1946).

68. R.C. van Caenegem, *History of European Civil Procedure*, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 15, 44, 53 (Mauro Cappalletti ed., 1972). In later Athenian procedure as well, testimony was usually taken out of the presence of the tribunal and then presented to it in writing. The witness usually confirmed the written testimony in person at the trial, but the testimony was essentially fixed. ROBERT J. BONNER, EVIDENCE IN ATHENIAN COURTS 47-48 (1905); A.R.W. HARRISON, THE LAW OF ATHENS: PROCEDURE 139 (1971); STEPHEN C. TODD, THE SHAPE OF ATHENIAN LAW 128-29 (1993); Stephen C. Todd, *The Purpose of Evidence in Athenian Courts*, *in* NOMOS: ESSAYS IN ATHENIAN LAW, POLITICS AND SOCIETY 19, 29 n.15 (Paul Cartledge et al. eds., 1990).

69. For example, in the Case of the Union of the Realms, 72 Eng. Rep. 908, 913 (K.B. 1604), Lord Chief Justice Popham, arguing the superiority of English over Scots law, particularly emphasized the preferability of live testimony over previously taken depositions:

> For the Testimonies, being viva voce before the Judges in open face of the world, he said was much to be preferred before written depositions by private examiners or Commissioners. First, for that the Judge and Jurors discern often by the countenance of a Witness whether he come prepared, and by his readiness and slackness, whether he be ill affected or well affected, and by short questions may draw out circumstances to approve or discredit his testimony, and one witness may contest with another where they are viva voce. All which are taken away by written depositions in a corner.

More than a century later, Sollon Emlyn wrote:

> The excellency . . . of our laws I take chiefly to consist in that part of them, which regards criminal prosecutions. . . . In other countries . . . the witnesses are examined in private, and in the prisoner's absence; with us they are produced face to face and deliver their evidence in open court, the prisoner himself being present, and at liberty to cross-examine them.

Sollon Emlyn, *Preface* to A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS, at iii-iv (2d ed. 1730). Professor Amar cites a later passage, from Blackstone, along the same lines. AMAR, *supra* note 11, at 130 (citing 3 WILLIAM

witness testify before the accused at trial was always maintained in England. Some courts in England, such as the Court of the Star Chamber, adhered to the procedures of the Continent rather than to those of the common law. But precisely for this reason, these courts were politically controversial, and most of them were abolished in the seventeenth century; the equity courts survived, but without criminal jurisdiction. Moreover, the common law courts were not above using equity procedures when it turned out that a witness was unavailable to testify at trial. Before the middle of the seventeenth century, the common law courts developed a sophisticated body of doctrine governing when it was acceptable to use at trial equity depositions taken of witnesses no longer available.[70] And, perhaps most importantly for our purposes, in politically charged trials in the Tudor and early Stuart eras, especially trials for the crime of treason, the authorities did not always bring the accusing witnesses to the trial.[71] But, beginning even before the middle of the sixteenth century, we find repeated demands by treason defendants that their accusers be brought "face-to-face,"[72] and also repeated statutory support for this position.[73] By the middle of the seventeenth century, this position, and the accused's right to examine the witnesses, had prevailed.[74]

BLACKSTONE, COMMENTARIES 373 (1765)). Other important statements describing, and praising, the openness and confrontational nature of the English system in contrast to Continental systems include MATTHEW HALE, HISTORY OF THE COMMON LAW 163-64 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1739); SMITH, *supra* note 66, at 99, 114-15.

70. *E.g.*, Anon., 78 Eng. Rep. 192 (K.B. 1623) (misdated in 5 WIGMORE, *supra* note 3, § 1364, at 23 n.47) (allowing deposition to be read to jury when taken in connection with a case between same parties and witness cannot be found); The King and the Lord Hunsdon v. Countess Dowager of Arundel & The Lord William Howard, 80 Eng. Rep. 258, 261 (K.B. 1616) (allowing reading of witness depositions by court only if court in which depositions were taken is held competent); *see also* Michael Richard Trench Macnair, The Law of Proof in Early Modern Equity 192-95 (1991) (unpublished D.Phil. dissertation, Oxford University) (Bodleian Law Library, Oxford) (describing Elizabethan and later practices allowing for introduction of depositions when witnesses have died or otherwise become unavailable).

71. The most notorious example is that of Walter Raleigh. *See, e.g.*, Kenneth W. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4 (1972) (noting that the oft-repeated contention "that the evils of the Raleigh trial led in some way to the Sixth Amendment" may not be "anything other than a convenient but highly romantic myth," and "adher[ing] to it for this reason").

72. *See, e.g.*, Seymour's Case, 1 How. St. Tr. 483, 492 (1549) (defendant demanded that he receive open trial and that his "accusers be brought face to face"); Duke of Somerset's Trial, 1 How. St. Tr. 515, 517, 520 (1551) (defendant had accusations against him "openly declared" and asked that witness be brought "face to face" with him); R. v. Rice ap Griffith, Lloyd and Hughes (K.B. 1531), *in* 93 PUBLICATIONS OF THE SELDEN SOCIETY, 1 THE REPORTS OF SIR JOHN SPELMAN 47, 48 (J.H. Baker ed., 1976) (the witness James ap Powel (an accomplice) "allowa toutz lour actz facie ad faciem" (admitted all their acts face to face)).

73. Treason statutes requiring that accusers or accusing witnesses be brought "face to face" with the defendant included 1 Eliz. ch. 1, § 21 (1558) (requiring that witnesses be brought face to face with defendant before defendant is arraigned or indicted); 1 Eliz., ch. 5, § 10 (1558) (requiring that witnesses be face to face with defendant, unless defendant confesses the crime); 13 Eliz., ch. 1, § 9 (1571) (same); and 13 Car. 2, ch. 1, § 5 (1661) (same).

74. By the time of John Lilburne's trial in 1649, there seemed to be no doubt that the witnesses would testify live in front of Lilburne; "hear what the witnesses say first," said the presiding judge in

This history, I believe, reveals the essential idea of the Confrontation Clause: *If the prosecution wishes to present the testimony of a witness, the testimony must be taken before the accused, subject to oath and the accused's right to cross-examination.* And testimony, it must be emphasized, is not limited to statements made by witnesses at trial. Just what out-of-court statements should be deemed to be "testimony"—or, put another way, just what declarants of out-of-court statements should be deemed to be "witnesses"—for purposes of the Confrontation Clause is a difficult issue, to which I will return in Part IV. But in light of what I have said thus far, testimony must include not only testimony given under oath at trial, but also (at the very least) the type of statements Justice Thomas identified in his concurring opinion in *White v. Illinois*—"formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[75] Such statements are made to the authorities who will use them in investigating and prosecuting a crime, and they are usually made with the full understanding that they will be so used. And if the practice of the adjudicative system is that such statements are admissible at trial, then to that extent the system has provided a mechanism by which witnesses, without actually appearing at trial, can create testimony for use there. In that circumstance, such statements, although made out-of-court, are testimonial in every

postponing one of Lilburne's arguments. 4 How. St. Tr. at 1329. When the witnesses did testify, Lilburne was allowed to pose questions for them, but only through the court: "[Y]ou must make your question to us, and require us to ask him the question: and then if your question be fair, it shall not be denied you." *Id.* at 1335; *see also id.* at 1334. Lilburne purported to accept this restriction, though sometimes, perhaps impulsively, he failed to comply with it. *Id.* at 1335; *see also id.* at 1334. And, though the court was quite restrictive, he did get answers to some of his questions. *Id.* at 1333, 1340. For general background of the *Lilburne* case, see Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213 (1952).

By the time of John Mordant's trial just nine years later, there does not seem to have been any doubt that the defendant could question the witnesses, which Mordant did. Mordant's Trial, 5 How. St. Tr. 907, 919-21 (1658). Indeed, at one point the presiding judge solicitously inquired whether Mordant wished to ask a witness any questions, a practice that apparently soon became routine. *Id.* at 922; *see, e.g.*, Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1326-37 *passim* (1678) (allowing defendant on trial for murder to ask which doctors examined victim's body); Colledge's Trial, 8 How. St. Tr. 549, 599, 603, 606 (1681) (allowing defendant on trial for treason to ask witness about incriminating conversation witness had had with defendant regarding meetings with conspirators, and about other evidence introduced at trial); Grahme's Trial, 12 How. St. Tr. 645, 779 (1691) (allowing defendant on trial for treason to ask witness how incriminating papers arrived in witness's possession); *cf.* Lord Delamere's Case, 11 How. St. Tr. 509, 548-55, 566-67 (1686) (allowing defendant to question some witnesses directly, but requiring that he propound questions through the court for lead witness, and for character witnesses as to the lead witness).

John Fenwick was convicted in 1696 by Parliament on a bill of attainder in part on the basis of an examination taken under oath but out of his presence by a justice of the peace. Not only was that case hotly contested, it was argued on the basis that attainder was different from ordinary legal processes; even the prosecution conceded that in an ordinary court an out-of-court examination could not be presented so long as the witness could be produced. Sir John Fenwick's Trial, 13 How. St. Tr. at 593.

75. White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment). Similarly, Professor Amar speaks of "videotapes, transcripts, depositions, and affidavits when prepared for court use and introduced as testimony." AMAR, *supra* note 11, at 129. There may be a slight difference in nuance between the standard used by Justice Thomas and that used by Professor Amar, *see infra* note 121, but they are essentially the same.

meaningful sense of the word; indeed they lie at the core of the concern underlying the Confrontation Clause. Such a statement can be offered against the accused only if he has had an adequate opportunity to examine the witness under oath.[76]

This view of the Confrontation Clause integrates the Clause's applications both to testimony given in court and to statements made beforehand. The Clause provides that testimony against the accused, whether given before or during trial, is not admissible unless it is given subject to oath and the accused's ability to examine the witness, face-to-face. The key question with respect to a pretrial statement, under this view, is whether it is testimonial. If it is, the confrontation right applies; if it is not, the right does not apply (although other evidentiary or constitutional rules might nevertheless call for the statement's exclusion). Thus, under this theory the confrontation right applies only to a subset of hearsay declarants, those who are deemed to have made testimonial statements and so have acted as witnesses. And note that nothing in this theory requires a court, in determining whether the right applies, to decide whether the statement is reliable, or whether it fits within a recognized hearsay exception, or (subject to limited qualifications that I will soon explain) whether the witness is unavailable. In Part III, I will elaborate on these points, and compare in these respects the theory I am advocating with the prevailing doctrine.

III. COMPARING APPROACHES

In Part I, I discussed three respects in which current Confrontation Clause doctrine, as applied to hearsay statements by out-of-court declarants, tends to conform to prevailing hearsay doctrine: the broad scope accorded to the term "witnesses," the qualified unavailability requirement, and the reliability requirement, including the per se satisfaction of that requirement by statements falling within a firmly rooted hearsay exception. In this Part, I will address the same aspects of confrontation theory, although in altered order, and compare the view of the confrontation right that I have outlined in Part II to the doctrine as implemented by the Supreme Court and, to a lesser extent, to some other views. Part IIIA argues that the Court has engaged in the wrong inquiry by making reliability the basic criterion for deciding whether the confrontation right ap-

76. Often, the accused's opportunity to examine the witness occurs some time after the statement was made, typically at trial. I have discussed the important issue of the circumstances in which such a delayed opportunity should be considered adequate in *Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket*. *See* Friedman, *supra* note 6, at 297.

If the testimonial statement is made before trial, subject to an adequate opportunity to confront the witness (typically at a deposition), and the witness is unavailable to testify at trial, then the Confrontation Clause is not violated by introduction at trial of the prior statement. If the witness is available to testify at trial, then our system prefers to have her live testimony taken in front of the factfinder and perhaps supplemented by the prior testimony, rather than relying on the prior testimony alone, even though the prior testimony was subject to confrontation. I express no opinion on the questions whether this preference should be established as a matter of constitutional law, and if it should whether it should be as a matter of the Confrontation Clause or as a more flexible matter of due process.

plies. Part IIIB contends that the scope of the right should extend only to testimonial statements, but that as to such statements it should be absolute, not riddled by exceptions, subject only to the qualification that the right can be forfeited by the accused's misconduct. Part IIIC argues that, subject to the same qualification and perhaps two others that, while not rejecting outright, I do not endorse, the availability or unavailability of the witness should be irrelevant in deciding whether the confrontation right applies.

A. RELIABILITY AND TRUTH-DETERMINATION

The Supreme Court has said that "the 'Confrontation Clause's very mission' . . . is to 'advance the accuracy of the truth-determining process in criminal trials.' "[77] In *Lee v. Illinois*,[78] the Court acknowledged that the Clause advances "symbolic goals" by "contribut[ing] . . . to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails."[79] But even in *Lee*, the Court said that confrontation is "primarily a functional right that promotes reliability in criminal trials."[80]

Thus, as Part IC has shown, the Court has consistently made reliability the keynote of its jurisprudence dealing with the application of the Confrontation Clause to hearsay. When the Court has excluded statements under the Clause, it has purported to do so on the grounds that they are unreliable.[81] Correspondingly, assuming that no unavailability requirement applies to the out-of-court statement at issue, or that the requirement has been satisfied, a Confrontation Clause challenge to admissibility may be overcome by demonstrating that the statement at issue is sufficiently reliable.[82]

Elsewhere, I have argued that reliability of hearsay evidence is a poor criterion to determine whether admissibility of the evidence will advance the truth-determination process.[83] Reliability is notoriously difficult to determine. It puts the cart before the horse, essentially asking whether the assertion made by

77. United States v. Inadi, 475 U.S. 387, 396 (1986) (quoting in part Tennessee v. Street, 471 U.S. 409, 415 (1985) (citation omitted)).

78. 476 U.S. 530 (1986).

79. *Id.* at 540.

80. *Id.*

81. Idaho v. Wright, 497 U.S. 805, 825-27 (1990); *Lee*, 467 U.S. at 544-46.

82. Justice Thomas appears to agree. As noted above, Justice Thomas joined in most of the Court's opinion in *White*—including its holding that the statements there at issue fit within firmly rooted hearsay exceptions and therefore satisfied the reliability requirement. White v. Illinois, 502 U.S. 346, 366 (1992) (Thomas, J., concurring). Professor Amar does not address this issue explicitly. But he criticizes the Court, and particularly *Roberts*, for treating the Clause as a "balance" in which some hearsay is permitted on grounds of practicality, rather than as a "bright-line rule." *See* AMAR, *supra* note 11, at 126. Accordingly, there does not appear to be any room in Professor Amar's scheme for admitting, on grounds of reliability, evidence that would otherwise be precluded by the Confrontation Clause.

83. Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS LAW JOURNAL (forthcoming 1998).

the statement is true as a precondition to admissibility.[84] Perhaps most important, evidence that is not particularly reliable can be very helpful to the truth-determination process.[85] Indeed, the paradigm of acceptable evidence—live testimony given under oath and subject to cross-examination—is not particularly reliable; if it were, conflicting testimony would not be such a common aspect of trials.

These are all arguments suggesting that reliability of a hearsay statement is a poor criterion to determine whether admissibility of a hearsay statement will assist the truth determination process. Plainly, these arguments apply just as forcefully if the confrontation right, as well as ordinary hearsay law, is at stake. In applying the confrontation right, moreover, I believe an additional, broader consideration comes into play: Truth-determination is itself a poor criterion for determining applicability of the confrontation right. That is, whether or not admissibility of the challenged statement would assist truth-determination should not be determinative of whether admissibility violates the confrontation right.

If a witness delivers live testimony at trial, the court does not excuse the witness from cross-examination on the ground that the evidence is so reliable that cross-examination is unnecessary to assist the determination of truth.[86] The result should be no different when the testimonial statement is made out-of-court. Though the Confrontation Clause may be, as both Professor Amar and the Court contend, closely related to our desire that litigated facts be determined accurately, that does not mean that the Clause should be applied on a case-by-case basis with an eye to what will assist accurate factfinding in the particular case. The Clause expresses a right that has a life of its own: Giving the accused the right to confront the witnesses against him is a fundamental part of the way we do judicial business.[87] As Part II's brief historical overview has shown, this right has deep roots. We should adhere to it even if in the particular case it does not help accurate factfinding—just as we adhere to the rights of counsel and trial by jury without having to ask whether to do so in the particular case will do more good than harm.

If, apart from reliability considerations, a given statement would fit within the

84. *Id.*

85. *Id.*

86. The situation in which the witness becomes unavailable, as by death, through no fault of either party after giving direct testimony but before cross has been substantially completed, is discussed below. *See infra* notes 112-13 and accompanying text.

87. Such a view might be justified under a sophisticated form of utilitarianism, a "two-level" or "indirect" utilitarianism, recognizing that social utility may be best advanced in some circumstances "by setting up principles about rights, and inculcating habits of absolute respect for them," even though doing so forces us to give up some opportunities for actions that, the cost of denigrating the principle aside, would achieve further utility. JEREMY WALDRON, THE LAW 102 (1990). Or it may also be justified under a conception that views rights as those interests of special importance that must be kept on a different "level[] of moral calculation" from interests that are part of the "ordinary social calculus." *Id.* at 105.

Confrontation Clause, I think it is most unsatisfactory to say to the accused, in effect:

> Yes, we understand that you have not had an opportunity to cross-examine this person who has made a testimonial statement against you. Do not trouble yourself. The law in its wisdom deems the statement to be so reliable that cross-examination would have done you little good.[88]

If such a reliability test were applied rigorously—admitting a statement only if the courts were extremely confident that it was so clearly reliable that cross-examination would have done no good—very little evidence would satisfy it. But some courts, at least, are more inclined to treat the test as a generous doorway for prosecution evidence.[89] And, because any serious attempt to determine the reliability of a statement must take into account many circumstances of the particular statement and its context, a reliability test is immune to effective appellate monitoring.

Note that the argument I am making—that reliability is not the proper criterion for judging whether admissibility of a statement would violate the Confrontation Clause—is a double-edged sword. On the one hand, if the statement is not testimonial, so that the declarant should not be deemed to have been acting as a witness in making it, the Clause should not bar its admissibility, even if the statement does not seem reliable.[90] On the other hand, if the statement is testimonial, so that the declarant *was* acting as a witness in making it, then the Clause should bar its admission unless it was made or reaffirmed in the manner appropriate for testimony, subject to oath and cross-examination.[91]

This analysis helps justify the result in *Lee*. The problem with Thomas's statement was not the one the majority identified, that the statement was unreliable; given its highly self-inculpatory content, the statement actually seems quite reliable. Rather, the problem was that, given that circumstances in which it was made, the statement amounted to testimony against Lee, offered without oath or cross-examination.

88. *See Wright*, 497 U.S. at 820-21 (declaring that cross-examination would be of "marginal use" with respect to statements falling within firmly rooted hearsay exceptions).

89. *See, e.g.*, Taylor v. Commonwealth, 821 S.W.2d 72, 74-76 (Ky. 1990), *cert. denied*, 502 U.S. 1121 (1992); State v. Earnest, 744 P.2d 539, 539-40 (N.M. 1987), *cert. denied*, 484 U.S. 924 (1987). In both of these cases, notwithstanding *Lee*, the court upheld on grounds of reliability the admission of confessions of murder coconspirators who at defendants' trials asserted the privilege against self-incrimination.

90. If the statement seems so unlikely to be true as to have little probative value, perhaps it should be excluded on those grounds. *See* FED. R. EVID. 403. And perhaps in extreme cases an accused should have a due process right to the exclusion of such evidence offered against him, on the grounds that, given its slight probative value, if it has any impact on factfinding that impact is likely to be deleterious. But such a doctrine should not often come into play.

91. I address the situation in which the witness reaffirms at trial a prior statement in *Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket*. *See* Friedman, *supra* note 6, at 309.

B. SCOPE AND EXCEPTIONS

Closely related to the matter of reliability is the architecture of the Confrontation Clause. Under the prevailing doctrine, the scope of the Clause is very broad, as broad as the rule against hearsay. That is, the declarant of any out-of-court statement offered to prove the truth of what it asserts is treated as a "witness" for purposes of confrontation. But the confrontation right is riddled with exceptions, purportedly based on the attempt to sift out reliable evidence from the presumptive exclusionary bar. Given the vast scope that the Court attributes to the Clause, limitations of this sort are inevitable. Otherwise, the Clause would have intolerably restrictive consequences, barring all prosecution hearsay.

Justice Thomas takes a narrower view of the scope of the Clause. Like Professor Amar and myself, he does not equate the word "witnesses" in the Clause with all hearsay declarants, but rather limits it to those who make statements that might in some sense be deemed testimonial.[92] Justice Thomas does not correspond for this narrow reach, however, by enhancing the intensity of the right—that is, by giving it stronger consequences when it does apply. Like the Court, it appears, he would reject confrontation-based challenges when the statement at issue falls within a "firmly rooted" hearsay exception or is otherwise shown to be reliable.[93]

By contrast, although I take a relatively narrow view of the Clause's scope, I would treat the right that it creates as absolute, just as we treat as absolute the rights to counsel and jury trial and, for that matter, the right to cross-examine witnesses testifying at trial. I therefore do not believe that the vitality of the confrontation right should be in any way dependent upon whether a statement falls within a "firmly rooted" hearsay exception. Absolute rights may not be much in fashion in this "age of balancing."[94] But I agree with Professor Amar that the Confrontation Clause should be viewed as creating a bright-line rule, not merely a presumptive rule subject to defeasance by proof that the importance of the evidence to the factfinding process outweighs the value of the confrontation right.[95]

92. White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment).

93. The Government, in its amicus brief in *White*, also argued for this narrower view of the scope of the Confrontation Clause. The Government first argued the position adopted by the Court, that the statements at issue fit within firmly rooted hearsay exceptions. Brief for the United States, *supra* note 10, at 10-15. Justice Thomas "join[ed] the Court's opinion except for its discussion of the narrow reading of [the phrase 'witnesses against'] proposed by the United States." *White*, 502 U.S. at 366. Perhaps both the Government and Justice Thomas can be understood to have been arguing in the alternative—that is, they would prefer a reinterpretation of the Clause, with a narrow scope and no exceptions, and failing to gain adoption of the principle they regarded the statements at issue as falling within "firmly rooted" hearsay exceptions. But they gave no indication that this was their view, and the structure of the Government's brief, at least, suggests otherwise.

94. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

95. AMAR, *supra* note 11, at 126 (noting text of Confrontation Clause does not contain a balancing test).

The language of the Clause, as well as its theory, suggests a strong, absolute right—not simply some interest that should be weighed against others. Balancing tests are not very good protectors of rights, because a judge disposed to rule against the right will generally have an easy enough time finding ample weight on the other side of the balance. And balancing tests are highly case-specific in application, making it difficult to yield consistent results, and demanding great expenditure of appellate resources if power is not to be effectively ceded to trial judges.

Admittedly, a bright-line rule will not avoid arbitrary and manipulative application unless it reflects a principle that seems sound and commands respect. But I believe that the principle that an accused has a right to confront those who make testimonial statements against him is such a principle.[96]

Having said all this, I must also state one qualification (which I do not regard as an exception): If the accused's own wrongful conduct is responsible for his inability to confront the witness, then he should be deemed to have forfeited the confrontation right with respect to her statements. He might do this by obstructing the trial, or whatever other forum is provided for the confrontation, to such an extent as to warrant his physical exclusion from that forum.[97] He might also do it by preventing the witness from testifying at any such forum, as by intimidating or killing her. This forfeiture principle, which I have elaborated upon elsewhere,[98] has long had substantial recognition in case law,[99] and has also been recognized in the new Federal Rule of Evidence 804(b)(6).[100]

In short, the scope of the confrontation right should be limited to those who act as witnesses by making testimonial statements, but within that scope it should be treated as a precious right, one of the basic cornerstones of our system. It is subject to forfeiture by the accused's misconduct, but in other respects it should be treated as absolute.

96. Interestingly, this principle has gained a strong foothold in Continental Europe, in decisions of the European Court of Human Rights under Article 6 of the European Convention on Human Rights. *See, e.g.*, Saïdi v. France, 261 Eur. Ct. H.R. (ser. A) at 44 (1993) (defendant deprived of fair trial when not permitted at any stage to confront declarants of out-of-court statements upon which conviction was based); Kostovski v. Netherlands, 166 Eur. Ct. H.R. (ser. A) at 44-45 (1989) (same).

97. *See* Illinois v. Allen, 397 U.S. 337, 342 (1970) (holding Sixth Amendment right to be present at own trial forfeited by defendant who persisted in disruptive conduct in courtroom).

98. *See* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997).

99. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982) (allowing witness's grand jury testimony to be admitted at trial where defendant had knowledge of plot to kill witness and failed to give warning), *cert. denied*, 467 U.S. 1204 (1984); Reynolds v. United States, 98 U.S. 145, 159 (1878) (allowing testimony given at previous trial to be admitted after defendant's conduct resulted in declarant's unavailability); Harrison's Trial, 12 How. St. Tr. 833, 851-52 (1692) (admitting previous statement of witness whom defendant allegedly caused to be unavailable at trial).

100. The new Rule, which became effective on December 1, 1997, states an exception to the rule against hearsay for a statement that was made out of court by a declarant deemed unavailable to testify at trial and that is "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." FED. R. EVID. 804(b)(6).

C. UNAVAILABILITY

Unavailability is a complex factor in the jurisprudence of the Confrontation Clause. On the one hand, if the declarant is unavailable, the prosecution can argue that excluding the out-of-court statement will not lead to the production of live testimony. On the other hand, if the declarant is available, the prosecution might argue that if the defendant insists on examining her, he can call her as a witness. Under the approach I have presented here, however, unavailability should generally have no impact on the application of the Confrontation Clause. With narrow qualifications, which I will discuss in this section, I believe the governing principles should be quite simple. If the statement is not a testimonial one, then the declarant should not be deemed to have been acting as a witness in making it, and so the Clause should not apply—whether the declarant is available or not. Other doctrines might exclude the statement,[101] but the Confrontation Clause should not. If, by contrast, the statement is testimonial, so that the declarant was acting as a witness in making it, then the Clause should apply, and exclude the statement, unless the accused had an adequate opportunity to examine the witness—whether the declarant is available at trial or not.

In subsection c1, I will address the question of whether, for the prosecution to introduce a hearsay statement by an out-of-court declarant consistently with the Confrontation Clause, the unavailability of the declarant should generally be *necessary*, as *Roberts* seemed to provide. This analysis will, I believe, shed some light on the Supreme Court's recent treatment of unavailability. In subsection c2, I will discuss the question of whether the witness's unavailability should be *sufficient* to remove the proscription of the Clause. And in subsection c3, I will consider the significance of the accused's ability to produce the declarant as a witness.

1. Unavailability as *Necessary* to Satisfy the Confrontation Clause?

Under the theory of the Confrontation Clause that I have presented here, the Clause does not apply to all hearsay statements by out-of-court declarants that are offered by the prosecution, but only to the narrow subset of such statements that qualify as testimonial. Hence, the Clause cannot impose a general requirement of unavailability of the declarant as a precondition to admissibility of such hearsay.

Now consider testimonial statements, the type of statements that should fall within the ambit of the Clause. Under the theory presented here, the Clause should preclude admission of such a statement unless the accused has had an adequate opportunity to examine the witness under oath.[102] It may be that the

101. The statement might, for example, be excluded by ordinary hearsay law, or on the grounds that it is more prejudicial than probative.

102. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 407 (1965) (holding Confrontation Clause violated by admission of testimonial statement that was not taken subject to adequate opportunity for cross-examination).

accused did have such an opportunity before the trial—if, for example, the statement was testimony given at a deposition or at a prior trial.[103] If the accused did in fact have such an opportunity, and the witness is unavailable at trial, it seems clear that the Clause should not, and does not, pose any obstacle to admission of the prior statement.[104]

But now suppose that the accused had an adequate opportunity to examine the witness before the trial, and the witness is available to testify at trial. Our system has a general preference that the witness testify live.[105] Whether that preference should be imposed constitutionally, and if so, whether that preference should be imposed under the Confrontation Clause rather than under the more flexible standards of due process, are difficult and complex questions on which I wish to offer no opinion.[106] I believe, however, that a plausible argument supports the proposition that the prior opportunity to examine the witness satisfies the Clause: The accused has had the opportunity to "be confronted with" the witness when the witness gave the testimony, and it is not clear that the Clause requires that the confrontation be repeated at trial if that is possible.

This analysis casts an interesting light on the current doctrine. As discussed in Part I, *White* indicates that the Confrontation Clause does not impose an unavailability requirement on hearsay statements that are not prior testimony. Under the theory I have advanced, this result makes sense, almost fortuitously, because under this theory, if the prior statement is not testimonial—however that term may be defined—then the Confrontation Clause should not apply at all. At the same time, there is some irony in imposing an unavailability requirement on prior testimony alone. The principal way by which prior testimony is likely to satisfy the current doctrine's reliability requirement—and so

103. I do not mean to suggest that all prior opportunities should be deemed adequate; it may be, for example, that the earlier opportunity was inadequate because it occurred before the issues were sufficiently gelled, or in a proceeding at which counsel was insufficiently prepared, or at which tactical considerations weighed against conducting a rigorous examination. *Cf.* California v. Green, 399 U.S. 149, 164-66 (1970) (holding sufficient an opportunity to examine the declarant at a preliminary hearing).

104. *E.g.*, *id.* at 165-66 (upholding admission of prior testimony where witness was deemed to be unavailable and defendant was deemed to have had an adequate opportunity for cross-examination). In *Barber v. Page*, 390 U.S. 719, 722 (1968), the Supreme Court noted that "traditionally there has been an exception to the confrontation requirement when a witness is unavailable and has given testimony at previously judicial proceedings against the same defendant which was subject to cross-examination by that defendant." Rather than speaking about an exception to the confrontation requirement, the Court might have said that in these circumstances, the requirement is satisfied.

105. Live testimony is not incompatible with introduction of the prior statement; in some circumstances, indeed, the optimal result is live testimony supplemented by the prior statement.

106. *Cf.* Barber v. Page, 390 U.S. at 725 ("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."); FED. R. EVID. 804(b)(1) advisory committee's note (recognizing argument that "former testimony is the strongest hearsay" and so should be admissible even if the witness is available, but concluding that "opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. . . . In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available.").

make it important whether the unavailability requirement is met—is to satisfy the criteria of the very firmly rooted hearsay exception designed especially for admitting some prior testimony.[107] Unlike any of the other exceptions governing hearsay by out-of-court declarants, this exception requires that the accused must have had an earlier opportunity to examine the declarant under oath. Indeed, that earlier opportunity is the basis for this exception,[108] and arguably it should be sufficient in itself to satisfy the Confrontation Clause, even if the declarant is available at trial.

2. Unavailability as *Sufficient* to Satisfy the Confrontation Clause?

Roberts seemed to imply a general rule that, to use the hearsay of an out-of-court declarant, the prosecution must show the unavailability of the declarant as well as the reliability of the statement. At least two notable scholars have advocated a position once taken by the second Justice Harlan—that unavailability is sufficient in itself to satisfy the Confrontation Clause. In other words, they would hold the confrontation right applicable only if the declarant is available to testify.[109] I disagree. If the prior statement is testimonial, then the confrontation right applies, whether the declarant is available or not.

Nothing in the text of the Confrontation Clause suggests that it is applicable only to available witnesses; the Clause speaks of "the witnesses," not "the

107. *See* FED. R. EVID. 804(b)(1).

108. *See* FED. R. EVID. 401 advisory committee's note ("Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact.").

109. As discussed above, this was the view of Justice Harlan in June 1970, expressed in his concurrence in *Green*, 399 U.S. at 172-89; *see supra* note 7. It is also the view of Peter Westen and Michael Graham. *See supra* note 8.

I do not believe Professor Amar means to advocate an unavailability requirement, but in his 1996 article he suggested that the prosecution ought to be able to "can" a witness's affidavit for use at trial if the witness is then unavailable. Amar, *supra* note 11, at 695. I believe this was a slip, because an affidavit is not taken subject to cross-examination. Thus, in his recent book, Amar speaks instead of the government's ability, before trial, to subpoena a dying witness to "can" the witness's deposition "with the defendant looking on, and able to cross-examine." AMAR, *supra* note 11, at 130. The change is important, because a deposition stands on a different footing from an affidavit. The accused presumably had an adequate opportunity to confront the witness at the deposition. If the accused had such an opportunity, then the only reason, or at least the principal reason, to exclude the deposition at trial is a preference for the live testimony, a factor that drops out of the analysis if the witness is no longer available.

Professor Amar still says the defendant should be able to "oblige witnesses to [make] . . . pretrial depositions and affidavits, 'canning' testimony to be later introduced in court in situations where the witness might not be available at the time of trial." *Id.* Just how a defendant is to oblige a witness to sign an affidavit is unclear to me. It is one thing to compel a witness to answer a question, even in writing; but an affidavit is not a response to questions. Putting that aside, if Amar means to suggest that the defendant, but not the prosecution, ought to be able to compel a person to make an out-of-court sworn statement, without examination by the other party, and later introduce that statement at trial if the declarant is unable to testify, then I wonder whether this is consistent with his view that the Compulsory Process Clause merely gives the defendant subpoena parity with the prosecution. *Id.* at 133-34. Perhaps Amar means to suggest that parties have equal power to compel pretrial testimony from a witness but only the defendant has a right to require exclusion of the testimony if it was not taken subject to cross-examination. Or perhaps Amar's residual reference to affidavits is merely a slip, as I believe the other one was, and in this context he meant only to refer to depositions.

available witnesses." And I do not believe any reasons of constitutional policy call for such a limitation, either.

At the outset, it is important to bear in mind the qualification to the confrontation right that I have stated: If the accused's own wrongful conduct is responsible for the witness's unavailability to testify subject to confrontation, then he should be deemed to have forfeited the confrontation right with respect to her testimonial statements.[110] At the other extreme, if the unavailability of the declarant is attributable to the prosecution, then it seems obvious that the confrontation right should survive.[111]

Now consider the cases in the middle, in which the unavailability of the declarant cannot be attributed to the fault of either party. Why should the accused, rather than the prosecution, bear the burden of the witness's unavailability? The witness has, by hypothesis, made a testimonial statement, and has become unavailable through no fault of the accused before the accused has had an opportunity to exercise his right of confrontation. If the witness testified at trial on direct examination but died before cross-examination, without fault of the accused, the court presumably would not allow the testimony to support a verdict.[112] I do not believe any different result is appropriate when the witness makes the testimonial statement out-of-court instead of at trial.

My conclusion is fortified by the fact that in most cases, the prosecution can protect itself quite easily against the later unavailability of the witness. Recall that, under the theory I am proposing, the Confrontation Clause's reach is limited to testimonial statements, and such statements are rarely made long before investigation and prosecution have begun.[113] Thus, the prosecutor can

110. *See supra* text accompanying notes 97-100.

111. See Federal Rules of Evidence 804(a), which provides that if a declarant's unavailability to testify as a witness at trial is "due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying," then the declarant is not deemed unavailable for purposes of Rule 804, and therefore the declarant's statement will not be admitted under Rule 804's exceptions to the hearsay rule.

112. It seems to be rather clear that, when a witness who has testified against an accused refuses altogether to answer the accused's questions on cross-examination, the confrontation right demands exclusion of the testimony, at least if the testimony was significant. *See* Commonwealth v. Kirouac, 542 N.E.2d 270, 273 & n.5 (Mass. 1989) (holding defendant unjustly denied meaningful cross-examination when six year-old accuser declined to answer all relevant questions); 1 MCCORMICK ON EVIDENCE § 19, at 79 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK].

The same result should be required, without reference to the reliability of the testimony, if the witness, after testifying for the prosecution but before the accused has had an adequate opportunity for cross, dies or becomes permanently disabled through no fault of the accused. *See Kirouac*, 542 N.E.2d at 273 n.5 (collecting authorities); MCCORMICK, *supra*, § 19, at 80 (contending in general that direct testimony of witness who dies before cross should stand "except for the testimony of the state's witnesses in criminal cases" with respect to whom "exclusion may well be required"); *cf.* WIGMORE, *supra* note 3, § 1390(1), at 134-36 ("[p]rinciple requires in strictness nothing less" than exclusion, but discretion should be exercised where absence of cross-examination is shown not to be "a material loss"; no distinction drawn between prosecution witnesses and other witnesses).

113. Indeed, under the views of Justice Thomas and Professor Amar, a testimonial statement is by definition made in the presence of the authorities, so they would have to be aware of it when it is made. In Part IV, I will advocate a somewhat broader definition of testimonial statements.

usually arrange for the witness to be deposed while she is still available, giving due notice to the accused.[114] If the witness later becomes unavailable, there should usually be no constitutional obstacle to use of the deposition transcript, because the accused had an adequate opportunity to confront the witness. If the accused did not avail himself of that opportunity, that is his problem. Arguably, though less clearly, it should suffice for the prosecution to give the accused notice, while the witness is still available, that it intends to use the out-of-court statement if the witness becomes unavailable and that the accused may take her deposition now, should he wish to be sure of an opportunity to confront her.

3. An "Available to the Accused" Exemption?

Ironically, as the last paragraph suggests, a plausible argument could be made that those who have argued for an unavailability exemption from the Confrontation Clause have gotten it almost precisely backwards, and that there ought to be instead an "available to the accused" exemption. That is, if the accused, aided by his Compulsory Process right, can force the declarant to testify subject to cross-examination, then presentation of the declarant's hearsay statement as part of the prosecution's case, without the declarant becoming a witness at that time, does not mean that the accused will not have had the opportunity to examine her. This argument finds some support in decisions of the Supreme Court; the Court has placed great weight on this opportunity of compulsion in rejecting defendants' confrontation claims.[115] Though the argument may have some force,[116] it presents several difficulties.

First, the text of the Confrontation Clause is in the passive voice. The accused has a right "to be confronted with the witnesses against him." Arguably, this suggests that to secure confrontation, the accused need do no more than demand it.[117] If so, a requirement that to achieve confrontation the accused must act

114. Even if the witness appears to be dying, a deposition is possible. For cases in which the confrontation requirement was taken very seriously in the context of the deposition of a dying witness, see *Rex v. Charles Smith*, 171 Eng. Rep. 357, 357-60 (1817) (entire deposition of deceased admitted, despite defendant's late arrival when taken, only because text read back and affirmed by declarant upon defendant's arrival and defendant given opportunity to cross-examine); *Rex v. Forbes*, 171 Eng. Rep. 354, 354 (1814) (portion of deceased's deposition made prior to arrival of defendant inadmissible because defendant unable to observe manner and demeanor of declarant during testimony).

115. White v. Illinois, 502 U.S. 346, 355 (1992) (reasoning declarant can be subpoenaed by prosecution or defense regardless of whether, given availability of declarant, Confrontation Clause requires production of declarant); United States v. Inadi, 475 U.S. 387, 397-98 & n.7 (1986) (reasoning co-conspirators whose out-of-court statements were admissible regardless of availability to testify in-court could nevertheless be subpoenaed by the defense). At least in a limited context, Professor Amar appears to agree. AMAR, *supra* note 11, at 131. *See infra* note 127.

116. I have contended, outside the confrontation context and subject to proper procedures, that if the party opponent is not substantially less able than the proponent to call as a witness the declarant of a hearsay statement, this factor weighs heavily in favor of admitting the hearsay. *See* Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 753-63 (1992).

117. I would think Professor Amar might regard this problem as quite serious indeed, because in various contexts he has emphasized the importance of taking the constitutional text—including single words—seriously. *See* AMAR, *supra* note 11, at 127.

affirmatively, by invoking compulsory process to "obtain" the presence of the witness, imposes an improper burden on him.

Second, this argument would render the Confrontation Clause virtually superfluous, because that Clause would only be, in effect, the flip side of the Compulsory Process Clause. It would tell criminal defendants, "if the prosecution chooses to use the prior statement of a witness rather than presenting her at trial, but you want to confront her, you may use your compulsory process right to do so."

Third, even when compulsory process will secure the attendance of the witness, so that the accused could put her on the stand, this is far less satisfactory for the accused than the opportunity to cross-examine. When a witness finishes testifying for the prosecution, defense counsel usually finds it worthwhile to rise and ask at least a few questions, exploring the possibility of impeaching the witness and, if the witness seems nearly invulnerable, sitting down promptly in order to play down her testimony. But if an out-of-court statement is introduced as part of the prosecution's case, it is far riskier and costlier for defense counsel, in the middle of his own case, to put the declarant on the stand, invite her to repeat the damaging account, this time live in front of the jury, then try to shake her—and if he comes up empty-handed, try to explain to the jury why he bothered with the whole exercise.[118] Small wonder defense counsel hardly ever tries.[119]

Finally, the full implications of the argument are rather startling. The prosecution could present as part of its case-in-chief an affidavit or videotaped statement that it had taken from a witness, and perhaps even drafted for her, and in response to the Confrontation Clause objection it could point out, "If the accused wants to examine her, he may call her as part of his case." Such a procedure is not unthinkable. It is perhaps most easily envisioned in the case of child witnesses, where we may suspect that cross-examination is so likely to be fruitless that the invocation of the confrontation right is little more than an

A related textual concern is that the Compulsory Process Clause gives the accused the right "to have compulsory process for obtaining witnesses *in his favor*." U.S. CONST. amend. VI (emphasis added). Only in a somewhat strained, albeit plausible, sense is a declarant whom the accused compels to testify for the purpose of confronting her on the subject matter of her prior statement a witness in favor of the accused.

118. Another potential difficulty is that ordinarily a party is not allowed to ask leading questions of his own witness. As Amar points out, however, this should not be a problem, because the witness would presumably be deemed hostile. *See* AMAR, *supra* note 11, at 131 n.192. This rule may have constitutional force. *Id.*

119. I have proposed a procedural change that would minimize this difficulty, but as of yet (one can always hope) it is not the law. Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*, 13 CARDOZO L. REV. 883, 892-904 (1991). Under this procedure, if the proponent of sufficiently probative hearsay gave sufficient notice, the hearsay would generally be admissible unless the opponent produced the declarant, ready and able to testify, by a given time. If the opponent did that, the proponent would have to present the declarant as a live witness as part of its case or forgo use of the hearsay. More recently, I have questioned whether this procedure should be applied universally. But if the Confrontation Clause were interpreted to allow the prosecutor to escape a challenge under the Clause by saying, "If the accused wants to examine the declarant, let him produce her," then I think this procedure definitely ought to be followed.

attempt to intimidate the child into not testifying. This procedure would be such a dramatic change from the way we conduct criminal trials that the prospect ought to give us pause.

In short, we must treat with great care any suggestion that the accused's compulsory process right relieves the confrontation problem when the prosecution offers a testimonial statement made by a witness whom the accused has not had an opportunity to confront.

In this Part, I have argued that the unavailability of the witness should generally be irrelevant in determining whether the Confrontation Clause demands the exclusion of an out-of-court statement. The only qualification of this rule that I would draw with certainty is that if the unavailability of the witness was procured through wrongdoing of the accused, then the accused should be deemed to have forfeited the confrontation right. Two other qualifications are possible. First, if the prior statement is testimonial and the accused had an adequate opportunity before the trial to examine the witness under oath, then arguably unavailability should be decisive, the Confrontation Clause allowing the prior statement if the witness is unavailable at trial but not otherwise. This qualification comports with current doctrine. The second possible qualification arises if the court believes, given an extremely unlikely prospect of cross-examination being fruitful, that the accused's invocation of the confrontation right is probably based on the anticipation that the witness would be too intimidated to testify at trial to the full detail of an earlier testimonial statement. Arguably, in such a case, if the witness is available to testify at trial the court should call the accused's bluff, admitting the prior statement and leaving it to the accused to call the witness to the stand, if he really hopes that confrontation will be helpful. Such a procedure strikes me as plausible, at least when the witness is a child, though I have grave qualms about it.

IV. TESTIMONIAL STATEMENTS NOT MADE TO THE AUTHORITIES

So far, my arguments have been consistent with Justice Thomas's view that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[120] Professor Amar appears to agree with this sense of what it means to act as a witness for purposes of the Confrontation Clause, although he may differ slightly with Justice Thomas over the meaning of the term "formalized."[121] I would take the definition of "witnesses" only slightly further—but the extension is a crucial one.

120. White v. Illinois, 502 U.S. 346, 365 (Thomas, J., concurring in part and concurring in the judgment).

121. Professor Amar believes that Justice Thomas and Justice Scalia (who joined Justice Thomas's opinion) "have properly drawn" the distinction "between general out-of-court declarations . . . and governmentally prepared depositions." AMAR, *supra* note 11, at 131 & n.194. Justice Thomas, unlike Professor Amar, puts emphasis on formalization of the statement; Professor Amar, unlike Justice Thomas, puts emphasis on governmental preparation. But they may mean much the same thing—open

The question of whether a statement made by a person out-of-court should be considered testimonial—or put another way, whether the person should be considered a witness in making the statement—is not exogenous to the legal system's procedural rules. Rather, the question depends crucially on those rules because to a large extent it depends on the use that the system makes of the statement. If the declarant correctly understands at the time she makes the statement that it will play no role in any litigation, then the statement cannot readily be considered testimonial. If, by contrast, the declarant correctly understands that her statement will be presented at trial, than the statement does appear testimonial. Thus, as suggested above, the definition of "witnesses" must extend to persons who make out-of-court statements under the formalities prescribed by the system for the making of statements later to be presented to the factfinder.

Now suppose a system in which statements made out-of-court—including out-of-court statements not made under prescribed formalities—may be freely presented to the factfinder and the factfinder is placed under no greater restrictions in considering such statements than it would be in considering testimony given by the declarant as a live witness in court. Suppose further that a declarant, either unwilling or unable to testify at trial, makes a statement—perhaps orally, perhaps in writing, perhaps to legal authorities, perhaps to someone else entrusted to relay the statement—with the anticipation that, in all likelihood, the statement will be presented to the factfinder at trial. It seems to me that such a person is a witness as fully as an out-of-court deponent in the ancient Athenian or the medieval Continental—or indeed the modern American—system. True, the state as *prosecutor* may not have participated in the preparation or recording of the particular statement. But the *adjudicative system* has given broad leeway to the declarant to testify in an informal manner.[122]

governmental involvement in the preparation or taking of the statement. Both Justice Thomas and Professor Amar, it seems, would treat as falling within the Confrontation Clause a detailed accusatory statement made by a declarant to the police in the police station, even if the declarant did not swear to the statement or even sign it and even if the initiative was all on the part of the declarant. Professor Amar's term "governmentally prepared depositions" has a mildly archaic ring to it. In most modern jurisdictions, a deposition is not the same thing as an affidavit. Rather, a deposition is an examination of a witness before trial. Thus, while an affidavit, a sworn statement, may be prepared by the government, nobody really prepares a deposition—for the questioner presumably has not drafted the witness's answers. Professor Amar, in expressing agreement with Justice Thomas, says that Thomas "accept[ed] the views propounded by the United States" as amicus curiae in *White v. Illinois*. *Id.* That is true in substantial measure. Indeed, Justice Thomas said that the test he adopted was "along the lines suggested by the United States," *White*, 502 U.S. at 365. But Justice Thomas also explicitly criticized the Government's articulation of its test, and his articulation, emphasizing "formalized" statements and not extending to all statements made "in contemplation of legal proceedings," seems significantly more restrictive. *See infra* note 125.

122. Note that Berger, *supra* note 11, makes prosecutorial involvement the touchstone of her Confrontation Clause analysis. This essay, by contrast, makes the touchstone the question of whether the statement was testimonial. There is a close, but not perfect, fit between the two concepts. As discussed in this Part, some statements are testimonial even though governmental agents had no involvement in their presentation. Also, some statements procured by governmental agents are not

The adjudicative system should, of course, establish rules of procedure and evidence that do not result in violations of the confrontation right. If, however, these rules permitted a person to make a given type of out-of-court statement in the correct anticipation that this statement would be used at trial, the system would be inviting such violations of that right.[123] Thus, I think the following may be the proper way, theoretically, to determine whether the confrontation right would be violated by admissibility of a statement with respect to which the accused has not had an opportunity for cross-examination. First, assume hypothetically that the statement could be admitted at trial even absent an opportunity for confrontation. Then, ask whether in those circumstances a person in the declarant's position should be deemed to have made the statement with the anticipation that it would be presented at trial.[124] If the answer is in the affirmative, then the declarant should be deemed to be a witness for Confrontation Clause purposes—because otherwise, she could effectively act as a witness yet escape confrontation.[125]

The answer may be affirmative with respect to some statements even though they were not sworn or made to the authorities. Consider this scenario, not at all

testimonial; a statement procured by an undercover agent from a conspirator during the course of the conspiracy is an example. Within the ambit of the Clause as she would define it, Berger would require exclusion of the statement unless the declarant is produced or "special procedures" are followed, such as videotaping statements by child declarants, *id.* at 562, 612. In some context, Berger's approach, like the one presented here, would provide and absolute right of exclusion absent an opportunity for cross-examination. *See id.* at 609 (statements elicited through planned custodial interviews).

123. I am speaking in terms of anticipation, but I could as well speak of intention, which in its broadest sense is synonymous. One intends the anticipated consequences of her actions, and I believe a person acts testimonially, whether at trial or beforehand and whatever her desire may be, if she anticipates that her statement will be presented at trial by the prosecution. For purposes of this essay, however, I do not believe much would change if we used a narrower sense of intent, such as (a) desire, (b) desire of sufficient importance to be decisive in the decision to make the statement, or (c) principal desire. Perhaps, though, bifurcating the standard would be appropriate, statements made to the authorities being considered testimonial if a person in the declarant's position would ordinarily anticipate trial use of the statement, whether the declarant desired such use or not, and statements not made to the authorities being considered testimonial only if the declarant desired such use. *See infra* text accompanying note 128.

124. This is essentially the technique that Professor Amar applies to sworn statements made to the authorities. AMAR, *supra* note 11, at 129. However, I am proposing that it be applied more broadly than under Amar's conception, to out-of-court statements in general.

125. My approach is quite similar in some respects to that which the United States, as *amicus curiae*, proposed in *White*. Brief for the United States, *supra* note 10, at 18-19. The Government contended that "[f]or purposes of the Confrontation Clause, the term 'witness against' . . . describes those individuals who actually provide in-court testimony *or the functional equivalent—i.e.*, affidavits, depositions, prior testimony, or other statements (such as confessions) that are *made with a view to legal proceedings*." *Id.* (emphasis added); *see also White*, 502 U.S. at 364 (Thomas, J., concurring in part and concurring in the judgment) (paraphrasing Government's statement of its position). It is not clear, however, to what extent the United States would have treated an informal statement made in contemplation of its use in prosecution but not made to governmental authorities as being a "functional equivalent" of testimony. *See White*, 502 U.S. at 352 (characterizing the Government's argument as being that the Clause applies only "where the circumstances surrounding the out-of-court statement's utterance suggest that the statement has been made for the *principal* purpose of accusing or incriminating the defendant" (emphasis added)).

far-fetched under the somewhat narrower conception urged by Justice Thomas and Professor Amar. A woman tells a counselor at a private shelter that she has been raped. The counselor says:

> Please make a statement for us. We will videotape it and send the tape to the prosecutor. I anticipate that the prosecutor's office will use it at trial as the cornerstone of its case against your assailant. The prosecutor won't have to call you as a witness, because that's just not necessary any more (ever since the Supreme Court adopted the Thomas-Amar view of the Confrontation Clause).[126] The accused might call you—but only if he dares, and only if you're then available.[127] Which, so far as the law is concerned, you needn't be.
>
> Oh, and by the way, since you're not speaking under oath, don't worry about the prosecutor going after you for perjury.[128]

It seems clear that in this setting, if the complainant makes the statement and it is indeed presented at trial, she is acting as a witness—notwithstanding that the statement is not made to the authorities, or even at their instigation, or under oath. She is providing testimony in a manner to which the legal system is receptive; the counselor is essentially acting as a conduit, an agent for the declarant. At least in such a case, in which the declarant not only anticipated but desired that her statement be used testimonially, and she used her listener as an intermediary between her and the authorities, I believe the statement should clearly be deemed testimonial.

That the statement is not under oath does not make it less testimonial, nor

126. Of course, the jurisdiction's hearsay law might cause exclusion of the videotape. But this is an insufficient response to the constitutional concern. It is more than plausible that the jurisdiction will *not* choose to be more protective of the accused's rights than is constitutionally necessary. This is the situation that constitutional doctrine must address.

127. It is in this context that Professor Amar makes the following argument: "If witness *A* testifies about what out-of-court friend *B* said, and the defendant wants to challenge *B*'s memory or truthfulness directly, face-to-face, the defendant can always use his own compulsory process right to subpoena *B* and interrogate him on the stand, for all to see." AMAR, *supra* note 11, at 131.

I have already discussed some difficulties with the idea that the accused's compulsory process right should make up for a prior absence of confrontation. *See supra* notes 117-19 and accompanying text. In this context, notice two additional points. First, the compulsory process right is of little comfort if the witness has become unavailable by the time of trial. Second, the argument proves too much, for it could be used even in response to a governmentally prepared affidavit. Though that is a startling possibility, it is not, as I have said, an unthinkable one—but Professor Amar's full discussion of the confrontation right suggests that it is not one he is willing to accept. AMAR, *supra* note 11, at 129-30.

128. Such a scenario is also perfectly realistic—with one key qualification—under Professor Aviva Orenstein's proposal for a new hearsay exception for statements concerning sexual assaults made by victims of such assaults. Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 213, 217 (1997) (proposing hearsay exception and noting that hearsay statement could be offered at trial through testimony of rape counselors or friends of victim-declarant). The one qualification is that if the declarant is available to be called as a witness, Orenstein's exception would require that she be so called. *Id.* at 213-14. Nevertheless, Orenstein leaves open the possibility that "emotional incapacity to face the perpetrator should constitute unavailability." *Id.* at 214.

should it diminish the protection to which the accused is entitled. The oath is one of the protections accorded the defendant, providing some assurance that witnesses will not offer testimony without putting themselves at risk for false statement. Assuming the statement was made with testimonial intent, the absence of an oath is part of the problem; it should not be an excuse for admitting an accusatory statement that suffers from yet another critical problem—the lack of opportunity for adversarial examination.

Thus, it seems clear that if the prosecution is allowed to present the videotape without calling the complainant as a witness under oath and subject to cross-examination, the Confrontation Clause will be seriously undercut. Indeed, if the Confrontation Clause is construed so that the complainant in a case like this is beyond the Clause's scope, we may anticipate that a good deal of testimony will be given pretty much as described in this hypothetical.

Even some statements made less formally than the one in this hypothetical should be deemed to be testimonial for purposes of the Confrontation Clause. Continue to suppose that the Thomas-Amar conception of the Clause were adopted, so that no statement made to a private party would be within the Clause. Then, even without the advice of professional counselors, many declarants would realize that they could provide a statement to a private party, with the anticipation that it would be passed on to the prosecution and used at trial, and without the need for confronting the accused, or even testifying under oath.

I realize that this extension of the term "witnesses" beyond the bounds advocated by Justice Thomas and Professor Amar calls for some difficult factual determinations.[129] That is not especially troubling; many sound rules of law do. And in most cases, the question of testimonial intent would be quite clear. Perhaps, though, it might be worthwhile to use a similar approach that is somewhat streamlined by eliminating the hypothetical premise (that the statement could be admitted at trial absent confrontation) and replacing it with a somewhat broader question as to the declarant's expectation. Under this approach, a declarant should be deemed to be acting as a witness when she makes a statement if she anticipates that the statement will be used in the *prosecution or investigation* of a crime. This approach, while perhaps less analytically precise than the one laid out above, would be very close to it in practice but significantly simpler to apply.

I can also offer a few rules of thumb. A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A

129. In *White*, Justice Thomas refused for this reason to accept the approach suggested by the Government, which depended on whether the statement was made in contemplation of legal proceedings. *See* White v. Illinois, 502 U.S. 346, 364 (Thomas, J., concurring in part and concurring in the judgment) ("Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights."). Nevertheless, the approach he adopted was "along the lines suggested by the United States." *See id.* at 365; *see also supra* note 121.

statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.

In sum, I believe that the term "witnesses" should not be limited to formalized statements, or to statements made directly to the authorities. A modestly broader definition is necessary to ensure that the adjudicative system does not effectively invite witnesses to testify in informal ways that avoid confrontation. Such a definition would occasionally present difficult factual issues—but that is a familiar, and tolerable, problem in protecting a fundamental right.

CONCLUSION

In this essay, I have presented a structure in which the Confrontation Clause would apply to in-court testimony and sworn testimonial statements provided to the authorities, as well as to other statements made with testimonial intent. But it would not apply to the general run of hearsay declarations.

Under this structure, if a statement fell within the Clause, the protection would, in a meaningful sense, be absolute. The statement could not be admitted against an accused unless he had an adequate opportunity to confront the witness. The unavailability of the witness would not remove the statement from the requirements of the Clause, nor would the statement's presumed reliability.

Apart from the relatively narrow scope that I would attribute to the term "witnesses," two doctrines, each already rather well established though perhaps not fully exploited, would relieve the apparent rigor of this rule. First, the opportunity for confrontation could be satisfied before trial, at least if the witness later turned out to be unavailable to testify at trial. Second, the accused could not invoke the Clause if his own wrongful conduct caused his inability to confront the witness.

This structure, I contend, would lead to a robust confrontation right. It reflects a fundamental premise of our judicial system—that the prosecution cannot present as evidence against a criminal defendant a statement made with the intention that it be so used unless the accused has had an opportunity to examine the witness. It sets up a bright-line rule, but one that, when sensitively applied, leads to sensible results. Moreover, it confines the confrontation right to its proper realm, those who make testimonial statements and so act as witnesses. Thus, it is clearly distinct from the vast morass of hearsay law.

[7]

THE PROTECTION OF HUMAN DIGNITY IN INTERROGATIONS: MAY INTERROGATIVE TORTURE EVER BE TOLERATED? REFLECTIONS IN LIGHT OF RECENT GERMAN AND ISRAELI EXPERIENCES

Miriam Gur-Arye and Florian Jessberger***

[T]he prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3 [of the European Convention of Human Rights], which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.

European Court of Human Rights (2010)[1]

Granting GSS investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the latter's dignity and liberty, raises basic questions of law and society, of ethics and policy, and of the rule of law and security. These questions and the corresponding answers must be determined by the legislative branch. ...

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[1] Gäfgen v. Germany, App. No. 22978/05, Grand Chamber judgment of June 1, 2010, § 107, *available at* HUDOC (http://www.echr.coe.int) [hereinafter *Gäfgen* case (GC)].

[A]ccording to the existing state of the law, neither the government nor the heads of the security services have the authority to establish directives regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general rules which can be inferred from the very concept of an interrogation itself.

An investigator who employs these methods exceeds his authority. His responsibility shall be fixed according to law. His potential criminal liability shall be examined in the context of the "necessity defense." Provided the conditions of the defense are met by the circumstances of the case, the investigator may find refuge under its wings.

Israeli High Court of Justice (1999)[2]

Respect for human dignity is the basis of this state .... The framers of the Constitution have deliberately put such notion at the outset of the Constitution. ... The motivation behind that lies in the history of this state. ... The human being was not to be treated for the second time as somebody having information that the state would wring out of him, even if for the purpose of serving justice. This is the reason why Article 1 paragraph 1(1) of the Grundgesetz is unalterable. ... The strict prohibition even to threaten the use of force against a suspect, is already the result of a balancing of all relevant interests at stake. Such balancing was undertaken when the Grundgesetz was drafted. ... This Chamber must not take part in the abstract discussion of constitutional principles, as this is not necessary for adjudicating the instant case. The law is clear. The exceptional cases that have been discussed are theoretical borderline cases; in appraising them one may come up against a legal grey zone and arrive at the frontier of jurisprudence. The present case, however, does not constitute one of such extreme exceptional situations.

Landgericht Frankfurt a.M. (2004)[3]

[2] HCJ 5100/94 Public Committee against Torture in Israel and Others v. The State of Israel 53(4) PD 817, § 38 [1999] [hereinafter *Torture* case]. For an official English translation, see http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.htm.

[3] Landgericht Frankfurt am Main [LG Frankfurt a.M.] [Frankfurt Regional Court], Dec. 20, 2004, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 692, 2005 [hereinafter *Daschner* case]. For an English translation, see Antonio Cassese, *Respect for Human Dignity in Today's Germany: Regional Court (Landgericht) of Frankfurt am Main, Decision of 20 December 2004, Daschner Wolfgang and E. Case*, 4 J. INT'L CRIM. JUST. 862 (2006).

The issue of whether interrogative torture may ever be tolerated has been discussed explicitly by both the Israeli High Court of Justice and the Frankfurt Regional Court in Germany. The Israeli court ruling related to the use of interrogative torture in the war on terror; the case brought before the German court was one of routine police work. This paper analyzes the two rulings in depth and offers a comparative reading of the rulings. The comparative analysis reveals that, despite some fundamental differences, the Israeli and German rulings should both be seen as an attempt to uphold the ban on torture, on the one hand, and yet to grant fair treatment to an individual interrogator who used, or threatened to use, force in order to save innocent lives, on the other. While determining the lessons to be learned from the German and Israeli experiences, this paper raises doubts as to whether it is possible to keep the ban on torture intact while either excusing the individual interrogator (Israel) or significantly mitigating his punishment (Germany). The paper further suggests that, in order to provide a real barrier against the practice of interrogative torture, the evidence resulting from such interrogations should be inadmissible in any criminal proceedings.

I. INTRODUCTION

Since the events of September 11, 2001, a relatively old debate has gained renewed currency: whether, and under what conditions, the use of force amounting to torture in the interrogation of suspected terrorists is compatible with the rule of law.[4] In fact, there is growing evidence that torture is already an element of the global "war on terror."[5] Perhaps even more alarming are the attempts to justify torture legally. The categorical ban on torture appears to have lost its status as an indefeasible baseline of liberal democracy. The unthinkable is not only being thought, but openly discussed. This is plainest in the US, where several official government reports under the Bush administration have taken the view that physical and psychological violence may legally be used in the interrogation of terrorist suspects,[6] and where even liberal scholars have raised their voices in favor of torture as an option in the "war on terror."[7] Yet, experiences in Israel and Germany, some of which are presented in

[4] *See, e.g.*, S. LEVINSON, TORTURE: A COLLECTION (2004); B. BRECHER, TORTURE AND THE TICKING BOMB (2007); P. Gaeta, *May Necessity Be Available as a Defense for Torture in the Interrogation of Suspected Terrorists*, 2 J. INT'L CRIM. JUST. 785 (2004); O. Gross, *Are Torture Warrants Warranted*, 88 MINN. L. REV. 1481 (2004) ; J.T. Parry & W.S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743 (2002); Philip B. Heyman, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 453 (2002).

[5] *See, e.g.*, HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB (2004).

[6] For a compilation of official documents, see K.J. GREENBERG & J.L. DRATEL, THE TORTURE PAPERS (2005).

[7] *See* A.M. Dershowitz, *Is There a Torturous Road to Justice?*, LOS ANGELES TIMES, Nov. 8, 2001, at B19; A.M. DERSHOWITZ, WHY TERRORISM WORKS—UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002). However, the US stance has shifted with the election of President Barack Obama, who, in an Executive Order of 22 January 2009, made clear that proscrip-

this paper, show that these debates are by no means restricted to the US. Furthermore, as demonstrated by the German abduction case, which is explored in detail further below, the discussion of the "pros" and "cons" of using, or threatening to use, force in interrogations by now extends beyond counterterrorism scenarios in the strict sense to encompass routine law enforcement practice.

This paper ties in with these observations. It focuses on the Israeli and German experiences, offers a comparative reading of the rulings of the Israeli and German courts with regard to the use—or threat to use—force in interrogations, and assesses the lessons to be learned from these rulings. The following section sets the broader framework of the question to be dealt with by briefly exploring the relationship between torture and human dignity, by presenting mechanisms of protection of human dignity, and by identifying the elements of the relevant legal framework (Part II). Subsequently, the ongoing debates on "interrogative torture" in Israel and Germany are presented. Parts III and IV focus on whether interrogative torture can be tolerated. The rulings of the Israeli and German courts are presented in Part III, and the legal issues involved are analyzed from a comparative perspective in Part IV. A comparative account of additional issues relating to the admissibility within the criminal process of statements obtained under torture is presented in Part V. Part VI, which identifies some lessons to be learned from the German and Israeli experiences, assesses the solution offered by both the Israeli and the German rulings to the dilemma involved in interrogative torture aimed at saving lives.

After this paper was completed, the Grand Chamber of the European Court of Human Rights (ECtHR) published its decision in *Gäfgen v. Germany* in June 2010.[8] A discussion of this decision has been added to this paper where it analyzes the German experience with regard to the *Gäfgen* case (Part V) and identifies the lessons to be learned from both the Israeli and the German experiences (Part VI).

II. Human Dignity, Torture, Interrogations, and the Relevant Legal Framework: Some Preliminary Remarks

In Israel and Germany, the debate with regard to torture focuses on "interrogative torture," that is, the intentional infliction of severe pain or suffering, whether mental

tions from common article 3 form the baseline of interrogations and revoked interpretation guidelines issued between September 11, 2001 and January 20, 2009. *See* Exec. Order No. 13,491, Jan. 22, 2009, section 3(c). Still, President Obama also announced in April 2009 that CIA executives who used torture in the past would not be prosecuted. *See Statement of President Barack Obama on Release of OLC Memos*, Apr. 16, 2009: "[I]t is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution. … This is a time for reflection, not retribution."

[8] *Gäfgen* case (GC), *supra* note 1.

or physical, on a person in order to extract information.[9] Before the relevant developments in Israel and Germany are presented, it is worth making a few preliminary remarks with regard to "interrogative torture" and its relation to human dignity. The first one focuses on the notion of interrogation, while the second and third remarks serve to define the relationship between human dignity and torture, on the one hand, and human dignity and criminal law, on the other. A fourth introductory remark deals with the various sources of law—international, constitutional, and statutory—that may be relevant to the topic at hand.

First, with regard to the purpose of interrogations, we propose to distinguish between two different scenarios. The first one concerns interrogations carried out for preventive purposes (not necessarily, but frequently, with a view to the prevention of crime). An example is the questioning of a person in connection with a threat to plant a bomb in a supermarket. The second scenario concerns interrogations that are carried out in the context of a criminal investigation. In this case, the questioning serves to investigate a crime that has allegedly been committed and, ultimately, to produce evidence for trial. The issues we will explore in this paper relate first and foremost to the first scenario and therefore gravitate around the legitimacy of infringing human dignity in order to prevent harm. If the infringement of human dignity amounts to torture, we will speak of "preventive torture."

Second, the debates that we will refer to in this paper center to a large extent around the notion of torture, whereas we shall deal with human dignity and its violations. We suggest that torture should be regarded as an extreme form of violation of human dignity.[10] Human dignity is violated by purposely forcing the interrogee to reveal information against his will, which turns the interrogee into an instrument being used for preventive ends. In such cases, the interrogee is treated merely as an object: he is used as an instrument. A minimum level of severity is required to instrumentalize the interrogee. However, whenever the methods of interrogation to which the interrogee is subjected are sufficiently serious, human

[9] For this definition and additional forms of torture, see article 1 of the UN Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, which reads as follows:

> For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

International courts defining torture have also referred to this definition. *See, e.g.*, Prosecutor v. Delalic et al., Case No. IT-96-21, Trial Chamber Judgment, ¶ 452 et seq. (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Furundzija, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 147 et seq. (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[10] On the notion of human dignity, see the relevant contributions to this volume.

dignity is violated, regardless of whether the methods are classified as "torture" or "inhuman treatment." "[T]he real and immediate threats against [an interrogee] for the purpose of extracting information from him [may attain] the minimum level of severity" to violate his human dignity.[11]

Third, while there are various mechanisms designed to protect human dignity against violations, we suggest that there are basically two such mechanisms in relation to criminal law. Both these mechanisms operate ex post and both may be characterized as indirect mechanisms of protection. The first mechanism concerns the establishment of criminal responsibility of those who execute the act that violates human dignity, such as interrogative torture. The criminalization of violations of human dignity may deter possible offenders from committing the act in the first place. Why torture if there is a risk of being prosecuted? The second mechanism refers to the use of information obtained through an act that violates human dignity, such as interrogative torture. Here, the fact that a statement obtained through an act violating human dignity cannot be used in later proceedings may make the act itself less "attractive." Why torture if any statement resulting from the interrogation cannot be used? Raising the costs of torture for the perpetrator and lowering the benefits that may be reaped from it may thus have a preventive effect.

Finally, we wish to emphasize that legal provisions situated at different levels—international law, constitutional law, and sub-constitutional statutory law—may be relevant to our topic. At the level of international law, the key provision is the absolute ban on torture and inhuman or degrading treatment. This ban is not only laid down in human rights instruments, such as the UN Convention against Torture, Inhuman or Degrading Treatment or Punishment (1984), the UN Convention on Civil and Political Rights (1966), and the European Convention of Human Rights (1950), but is also part of customary international law. While the relevant international law deals with the notion of torture rather than (violations of) human dignity, at the level of constitutional law it is the other way round. As a matter of fact, torture is neither a constitutional concept nor a notion that is referred to in statutory law in Germany or Israel.[12] Yet, the concept of human dignity is firmly anchored in German and Israeli constitutional law. In Germany, article 1(1) of the Grundgesetz (Basic Law) provides

[11] *Gäfgen* case (GC), *supra* note 1, § 108. In this case, the Grand Chamber arrived at the conclusion that "the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture." *Id.*

[12] In Germany, however, there are two notable exceptions to this observation. Since 2002, the Code of Crimes Against International Law (*Völkerstrafgesetzbuch*—VStGB) defines crimes against humanity and war crimes, which both include acts of torture if committed under the special circumstances described in the definitions. Furthermore, section 60(2) of the German Residence Act (*Aufenthaltsgesetz*—AufenthG) prohibits the expulsion of asylum seekers to a state where they would be in danger of being tortured.

that human dignity is inviolable (*unantastbar*), and article 104(1) provides that "[d]etained persons may be subjected neither to mental nor to physical ill-treatment." In Israel, section 2 of the Basic Law: Human Dignity and Liberty (1992) prohibits the violation of life, bodily integrity, and human dignity, and section 4 of the Basic Law grants protection of life, bodily integrity, and human dignity to all persons.[13] It should be noted that, unlike the absolute protection of human dignity under the German Constitution, the constitutional status of human dignity under the Israeli Basic Law is the same as other human rights. All those rights are subject to a limitation clause[14] that is based on proportionality tests. However, the fact that both legal systems enshrine the concept of human dignity at the level of constitutional law separates them from other countries. The third level relates to sub-constitutional, statutory law. While several statutory provisions, in particular in the penal code, the code of criminal procedure, and laws relating to the police, are relevant in the present context, it should be noted that neither the concept of human dignity nor the concept of torture are expressly part of German or Israeli statutory law.[15]

III. Can "Interrogative Torture" Be Tolerated?—The Judicial Rulings in Israel and Germany

A. The Ruling of the Israeli High Court of Justice—Is Preventive Torture Permissible in the War on Terror?

The question whether the use of force in interrogation is permissible in the context of the war on terror was explicitly discussed in Israel in the *Torture* case.[16] To fully evaluate the ruling of the High Court of Justice (HCJ) in this case, an elaboration on the background leading to the ruling is needed.

1. Prologue: The Report of the Landau Commission

In 1987, after the public in Israel found out that the Israeli General Security Services (GSS) had used force while interrogating Palestinians suspected of "hostile terrorist activity," a commission of inquiry chaired by former Supreme Court President Moshe Landau (hereinafter "the Landau Commission") was established.[17] The Com-

[13] For an official translation of the Israeli Basic Law: Human Dignity and Liberty, see http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm. Before the enactment of the Basic Law: Human Dignity and Liberty in 1992, human dignity had been protected by the Israeli Supreme Court. *See, e.g.*, HCJ 355/79 Katalan v. The Prison Services 34(3) PD 294 [1980].

[14] Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1454 p. 90, § 8.

[15] An exception can be found in sections 7 & 8 of the German Code of Crimes Against International Law, where acts of torture are explicitly included as crimes against humanity and war crimes.

[16] *Torture* case, *supra* note 2.

[17] *See Excerpts of the Report of The Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 Isr. L. Rev. 146, 149-54 (1989).

mission held that the use of moderate force by the GSS when interrogating terrorist suspects was permissible by virtue of the criminal law defense of necessity.[18] The conclusion was based on two key assumptions.

According to the first assumption, the use of force when interrogating suspected terrorists is the "last resort" for collecting "information about terrorists and their modes of organization and thwarting and preventing preparation of terrorist acts whilst they are still in a state of incubation."[19] There is no other way to collect such information because of the "obdurate will not to disclose information and ... the fear of the person under interrogation that harm will befall on him from his own organization, if he does reveal information."[20] It should be noted that although the Commission related in its report to the notion of a "ticking bomb," it did not restrict this situation to instances in which a bomb has been set to explode imminently. According to the Commission's report "the decisive factor is not the element of time,"[21] but rather the fact that there are no other ways to overcome the suspects' reluctance to disclose information needed to "prevent preparation of terrorist acts whilst they are still in a state of incubation."[22]

The second assumption rests on the balance of interests. In balancing the interests involved, the human dignity of the suspect under interrogation was ignored. The alternatives were defined in the Commission's report as follows:

> are we to accept the offense of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.[23]

In the classified section of its report, the Landau Commission "formulated a code of guidelines for GSS interrogators," which it recommended be brought "annually for reappraisal before a small Ministerial Committee."[24] In the years that followed, the GSS employed coercive methods of interrogation established by the special Ministerial Committee. The main methods were described in the HCJ's 1999 ruling as follows: shaking of the suspect's upper torso; waiting in the "Shabach" position, in which the suspect is seated on a small and low chair, the seat of which is tilted forward, his hands are tied, his head is covered by an opaque sack, and powerfully

[18] *Id.* at 167-76.
[19] *Id.* at 157.
[20] *Id.* at 184.
[21] *Id.* at 174.
[22] *Id.* at 157.
[23] *Id.*
[24] *Id.* at 185.

loud music is played in the room; the "Frog Crouch" on the tips of one's toes; excessive tightening of hand or leg cuffs; and sleep deprivation.[25]

2. Criticism of the Landau Commission's Report

Scholars of law and philosophy both inside and outside Israel criticized the Landau Commission's report.[26] It was argued that the Commission should have focused on "general strategy in the fight against terrorism and the alternative means of ... information-gathering" rather than on "individual suspects and alternative means of extracting information from them."[27] In balancing the interests at stake, "one must take into account the special weight assigned to individual autonomy and human dignity,"[28] as well as the danger to the whole legal system that would result from "the precedent" of permitting the use of force in the course of interrogations.[29] To limit this latter danger, the Commission should have at least imposed a ban on using confessions obtained by coercive methods in criminal proceedings.[30] By waiving the need for immediacy from the necessity defense, the Landau Commission ignored the unique nature of the defense as an emergency measure aimed at preventing concrete and imminent danger.[31]

The main criticism of the Landau Commission focused on its conclusion. By its very nature, it was argued, necessity cannot serve as a source for governmental author-

[25] *Torture* case, *supra* note 2, §§ 9-13.
[26] The *Israel Law Review* devoted an entire issue to the Landau Commission's report: 23 Isr. L. Rev. (1989). *See also* Leon Shleleff, *On the Lesser Evil—On the Landau Committee Report*, 1 Plilim [Isr. J. Crim. Just.] 185 (1999) (in Hebrew); Daniel Statman, *The Question of Absolute Morality Regarding the Prohibition on* Torture, 4 Mishpat U-Mimshal [L. & Gov't Isr.] 161 (1997) (in Hebrew); Mordechai Kremnitzer & Re'em Segev, *Using Force During Investigations by the General Security Service—The Lesser Evil?*, 4 Mishpat U-Mimshal [L. & Gov't Isr.] 667 (1998) (in Hebrew); Malcolm Evans & Rod Morgan, Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 41-52 (1998); Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. Int'l L. & Foreign Aff. 89, 94-97 (2001); Yuval Ginbar, Why not Torture Terrorists? 171-82 (2008).
[27] Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 Isr. L. Rev. 216, 229 (1989).
[28] *Id.* at 248.
[29] Paul H. Robinson, *Letter to the Editor*, 23 Isr. L. Rev. 189 (1989); Kremnitzer, *supra* note 27, at 261.
[30] Adrian A.S. Zuckerman, *Coercion and the Judicial Ascertainment of Truth*, 23 Isr. L. Rev. 357, 363-69 (1989).
[31] A.M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists—and to Lie About It?*, 23 Isr. L. Rev. 192, 198 (1989); S.Z. Feller, *Not Actual "Necessity" but Possible "Justification"; Not "Moderate" Pressure, but either "Unlimited" or "None At All,"* 23 Isr. L. Rev. 201, 205 (1989); Kremnitzer, *supra* note 27, at 243-47.

ity. It is an ad hoc defense applying to an individual who is confronted with imminent danger,[32] not a basis "for weighing policy by state agency faced with long-term systemic problems."[33] In a democratic state, it is the legislature that should decide on the methods of conducting intelligence interrogations in the war on terror.[34]

Some went further and argued that, even if morally there are rare cases in which the use of force in interrogation might be justified as the lesser of two evils, legally there should be an absolute ban on using force in the course of interrogations in order to minimize the slippery slop syndrome.[35]

Following the publication of the Landau Commission's report, several petitions challenging the legality of these methods of interrogation were brought before the HCJ, which rejected them without taking an explicit stand on their legality. Finally, in 1999, the HCJ changed its attitude and took a stand on the merits, ruling that the coercive methods used by the GSS were illegal. The HCJ's ruling explicitly discussed some of the arguments against the findings of the Landau Commission and should be read in light of the criticism of the Commission's report.

3. THE HCJ'S DECISION

Three different premises underlie the HCJ's ruling that the coercive methods used by the GSS when interrogating suspected terrorists were illegal.[36]

The first premise relates to the GSS's general power to interrogate. According to the court, the power of the GSS to interrogate suspected terrorists is similar to that of the "ordinary police force."[37] The interrogation, which necessarily causes discomfort to the suspect, ought to be fair and reasonable. The methods used by the GSS were unfair and unreasonable, and were therefore not included within the general power to interrogate.[38] It should be noted that the court avoided classifying the methods used by the GSS explicitly as "torture" or as "cruel or inhuman treatment." Rather,

[32] *See* references *supra* at note 26.

[33] Dershowitz, *supra* note 31, at 198.

[34] Robinson, *supra* note 29, at 190; Kremnitzer, *supra* note 27, at 171.

[35] Sanford H. Kadish, *Torture the State and the Individual*, 23 ISRAEL L. REV. 345, 351-55 (1989); Statman, *supra* note 26, at 195.

[36] For a detailed analysis of the Judgment, see Mordechai Kremnitzer & Re'em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*, 34 ISR. L. REV. 509, 516-27 (2000); Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogation? Reflections in Light of the Israeli Experience*, *in* TORTURE: A COLLECTION 183 (S. Levinson ed., 2004); GINBAR, *supra* note 26, at 200-22. For alternative possible readings of the judgment, see Amnon Reichman & Tsvi Kahana, *Israel and the Recognition of Torture: Domestic and International Aspects*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 631 (C. Scott ed., 2001).

[37] *Torture* case, *supra* note 2, § 32.

[38] *Id.* § 31.

the court emphasized the infringement of the suspect's human dignity, which had been ignored by the Landau Commission.[39] According to the court, the various interrogation methods used by GSS

> ... do not fall within the sphere of a "fair" interrogation. They are not reasonable. They infringe the suspect's dignity, his bodily integrity and his basic rights in an excessive manner. They are not to be deemed as included within the general power to conduct interrogations.[40]

The second premise focuses on the need for an explicit legislative authorization to use force in interrogations. Following the arguments criticizing the Landau Commission for failing to assign special weight both to human dignity and to the rule of law in a democracy, the court held:

> Granting GSS investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the suspect's dignity and liberty, raises basic questions of law society, of ethics and policy, and of the rule of law and security. These questions and the corresponding answers must be determined by the legislative branch. This is required by the principle of the separation of powers and the rule of law, under our understanding of democracy.[41]

It should be noted that the second premise was crucial to the court's ruling. The coercive methods used by the GSS were declared illegal due to the lack of explicit authority. However, the court did not explicitly impose a general ban on using force during interrogations. Rather, the court was willing, at least rhetorically, to leave it for the legislature to decide whether or not the use of interrogational force could be legalized by stating:

> Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the people. We do not take any stand on this matter at this time.[42]

The third premise touches upon the criminal law defense of necessity in "ticking bomb" situations, which the court defined more narrowly than the definition offered

[39] *See supra* text between notes 22-23.

[40] *Torture* case, *supra* note 2, § 27 (emphasis added). Similarly, "if the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or 'breaking' him—it shall not fall within the scope of a fair and reasonable investigation. Such means harm the rights and *dignity* of the suspect." *Id.* § 31(emphasis added).

[41] *Id.* § 37.

[42] *Id.* § 39.

in the Landau Commission's report. In contrast to the Landau Commission, and in the light of the arguments criticizing the Commission's conclusions, the court held that "the 'necessity defense' does not constitute a source of authority, which would allow GSS investigators to make use [of] physical means during the course of interrogations."[43] Nonetheless, the court left room for the necessity defense within criminal proceedings against an individual interrogator who has used preventive force in a "ticking bomb" situation. According to the court, the criminal liability of the individual interrogator

> ... shall be examined in the context of the "necessity defence." Provided the conditions of the defense are met by the circumstances of the case, the investigator may find refuge under its wings. Just as the existence of the "necessity defense" does not bestow authority, the lack of authority does not negate the applicability of the necessity defense or of other defenses from criminal liability.[44]

The court did not clarify the conditions in which the necessity defense would apply, but rather left it to the Attorney-General to "instruct himself regarding circumstances in which investigators shall not stand trial, if they claim to have acted from a feeling of 'necessity.'"[45]

Reactions to the HCJ's judgment varied. Some praised it,[46] while others thought that it did not go far enough. It was argued that the court should have ruled out the necessity defense and imposed an absolute ban on using force in interrogation, in accordance with international law.[47] It was further argued that the court should not

[43] *Id.* § 36.

[44] *Id.* § 38.

[45] *Id.*

[46] Dan Izenberg & Ben Lynfield, *Human-Rights Groups Applaud GSS Ruling*, JERUSALEM POST, Sept. 7, 1999, at 2. *See also* Johan T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 74 (2002), stating:

> Recognizing its responsibility for past failure to stop torture, the Supreme Court of Israel used administrative law to stop GSS's pervasive violations of human rights. From this decision, U.S. Courts can draw a lesson in doctrine but also, and more importantly, a recognition of their inevitable responsibility for protecting individuals from illegal state violence. *Id.* at 148.

[47] *See* GINBAR, *supra* note 26, at 206-207, arguing that:

> one significant omission in the [HCJ] ruling is worth mentioning. The Court describes the international legal prohibition of torture and other ill treatment accurately and succinctly.
>
> > These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing. (para. 23)
>
> However, when discussing the TBS [Ticking Bomb Scenario], international law simply vanishes: the Court does not refer to it at all, and most significantly fails to address, let alone attempt to reconcile, the apparent contradiction between the absolute prohibition and its own facilitation of violent interrogation.

See also references in the note below.

have left room for the legislature to decide whether to legalize the use of force in interrogations.[48]

B. THE RULING OF THE FRANKFURT REGIONAL COURT—CAN PREVENTIVE TORTURE BE JUSTIFIED OR EXCUSED?

In Germany, a case decided by the Frankfurt Regional Court[49] in 2003 and 2004 unleashed a stormy debate in public as well as among scholars as to the legitimacy of methods and means of interrogation that may well amount to torture.

On 27 September 2002, law student Magnus Gäfgen kidnapped 11-year-old Jakob von Metzler, the son of a senior bank executive, killed him in his apartment, and hid the dead body close to a lake near Frankfurt. In accordance with his plan, he forwarded a letter to the boy's family in which he demanded €1 million in return for the release of the child. Three days after the boy's disappearance, Gäfgen was arrested after being observed picking up the ransom. During his interrogation, the suspect gave evasive or misleading answers concerning his involvement in the abduction and provided no information about the location or health status of the boy. Finally, the day after the arrest, Frankfurt Police Deputy Chief Wolfgang Daschner, who was responsible for the investigation, instructed a police officer that pain be inflicted on the suspect, without causing injuries, under medical supervision, and subject to prior warning, in order to extract information needed to save the life of the boy. Accordingly, a subordinate police officer told Gäfgen, who was still in police custody, that the police were prepared to inflict pain on him that "he would never forget," if he continued to withhold information concerning the whereabouts of the boy. Under the influence of this threat, Gäfgen gave full particulars of the whereabouts of the boy. The actual infliction of pain, which in fact had been arranged by summoning a specially trained police officer, was not necessary. Shortly thereafter, police officers found the dead body of the boy.[50] In 2003 and 2004, two trials—one against Gäfgen and one against Daschner and a subordinate police officer—took place before the Frankfurt Regional Court.

In the course of the trials against Gäfgen and Daschner, two main issues were discussed. First, it was necessary to determine whether the statement made by

[48] Kremnitzer & Segev, *supra* note 26, at 528-58; Reichman & Kahana, *supra* note 36, at 638-43; Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 ISR. L. REV. 259 n. 168; Barak Cohen, *Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories*, 12 IND. INT'L & COMP. L. REV. 75 (2001); GINBAR, *supra* note 26, at 207-22; B'TSELEM, LEGISLATION ALLOWING THE USE OF PHYSICAL FORCE AND MENTAL COERCION IN INTERROGATIONS BY THE GENERAL SECURITY SERVICE (2000). An English version can be found at http://www.btselem.org.

[49] *Daschner* case, *supra* note 3.

[50] The facts of the case presented in this paragraph are taken from the findings of the court. For an English summary, see Gäfgen v. Germany, App. No. 22978/05, Chamber judgment of June 30, 2008, § 8 et seq., *available at* HUDOC (http://www.echr.coe.int) [hereinafter *Gäfgen* case (Chamber)].

Gäfgen under the threat to use force was legitimately introduced into his trial. The second question, raised in the *Daschner* case, was whether a state agent who uses or threatens to use force, arguably amounting to torture, in order to prevent the death of one or more innocent persons commits a crime.[51] In other words, may "preventive torture"—or, to use the more euphemistic terms suggested by some authors, "rescue torture" or "necessity torture"—during police interrogations be justified or excused? We will elaborate on the second question first.

1. The Trial Against the Deputy Chief of Police: Guilty But Not to Be Punished

After Gäfgen was convicted and the conviction was upheld on appeal, Deputy Chief of Police Daschner and the subordinate who executed the order were indicted. On 20 December 2004, the Frankfurt Regional Court pronounced its judgment.[52] Both defendants were found guilty: the subordinate police officer of coercion (*Nötigung*), under section 240(1)[53] of the German Criminal Code, and Daschner of instructing the subordinate to commit coercion (*Verleitung eines Untergebenen zu einer Straftat*), under sections 375(1) and 240(1) of the German Criminal Code.

The court found that the police officers' acts could not be based on police law, which regulates the rights and duties of public officials in relation to averting threats to public order and security, since threatening to inflict pain in order to elicit information is explicitly prohibited under the applicable police law.[54] The judgment deals extensively with the question whether a criminal law justification or excuse was available. In the opinion of the court, the specific requirements of the justificatory defenses under criminal law were not met, in particular those of self-defense,[55]

[51] Consequently, the scope of this paper *excludes* situations where the infliction of mental or physical pain or suffering occurs for non-preventive ends (such as the production of a confession or punishment) or is caused by a person acting in a private capacity (such as the parents of a hostage). Also beyond the scope of this paper is the question whether criminal responsibility for the use of physical or mental violence in the interrogation of detainees can be excluded for *other* reasons than a perpetrator's life-saving motives, such as diminished capacity.

[52] *Daschner* case, *supra* note 3.

[53] Section 343 of the German Criminal Code (*Strafgesetzbuch*—StGB), which makes coercion to give evidence (*Aussageerpressung*) a crime punishable with imprisonment of one to ten years, was not to be applied, because in the opinion of the court the defendants were acting solely in order to save the life of the child and not to produce evidence against the suspect.

[54] *See* section 12(4) of the Hessian Security and Order Law (*Hessisches Gesetz über die öffentliche Sicherheit und Ordnung* – HSOG) in connection with section 136a of the German Code of Criminal Procedure (*Strafprozessordnung*—StPO).

[55] Under section 32 of the German Criminal Code, acts required by self-defense are not unlawful but justified. Subsection 2 defines self-defense as the defense necessary to avert an imminent and unlawful attack from oneself or another person. Proportionality is—unlike under many other domestic legislations—not required by the wording of the provision. However, according to case law, extreme cases of disproportionality are not covered by self-defense.

which includes the defense of another (*Nothilfe*), and justificatory necessity[56] (*rechtfertigender Notstand*).

The court gave two alternative reasons why the requirements of self-defense and justificatory necessity were not met.[57] First, the court found that the threat to use force was neither the only nor the least severe means at the disposal of the police. Rather—as the court determined—other measures were available, such as confronting the suspect with the siblings of the hostage. Therefore, the elements of self-defense—that the act be necessary (*erforderlich*)—and of necessity—that the danger could not be otherwise averted (*nicht anders abwendbar*)—were not fulfilled. Second, the court asserted that the threat to use force infringed human dignity as laid down in the German Constitution and international law. Apparently, the court shared the majority opinion in the literature[58] that infringements of human dignity cannot legitimately result from a balancing of interests. In the opinion of the court, a strict prohibition on inflicting or threatening to inflict pain on a suspect already results from a balancing of all interests involved. As a consequence, the court found that two additional elements of self-defense and necessity were not fulfilled. The act, being extremely disproportional, was neither required (*geboten*)[59] by self-defense, nor was it an appropriate means of averting the danger (*angemessenes Mittel, um die Gefahr abzuwenden*) under the provision on necessity.

The judgment then briefly discusses excuses, in particular necessity as an excuse under section 35 of the Criminal Code (*entschuldigender Notstand*) and mistake of law under section 17 of the Criminal Code (*Verbotsirrtum*), but concludes that neither of these grounds for excluding criminal responsibility was available in the present case. Section 35, which defines necessity as an excuse,[60] is only applicable

[56] Section 34 reads as follows:
Necessity as a justification
A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.
(Translation by Prof. Dr. Michael Bohlander for the German Federal Ministry of Justice, *available at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.)

[57] Since sections 32 and 34 require that all elements of the defense must be present *objectively* at the time of the commission of the crime. *Justification* by self-defense or necessity was clearly ruled out. At the time of the threat, the hostage was already dead. Yet, the police officers erroneously thought that the boy would still be alive. Therefore only "putative self-defense" (or "putative necessity") could have applied anyway. Controversially, this might have excluded the guilt, that given the act *would* have been justified *if* the perceptions of the perpetrator had proved correct.

[58] *See infra* note 67 et seq. and accompanying text.

[59] A literal translation would be "demanded by self-defense."

[60] Section 35 reads as follows:

where a person seeks to avert a danger from himself, a relative, or person close to him. Obviously, this was not the case for Daschner in relation to the abducted child. As to the mistake of law, the court found that Daschner in fact was aware that his conduct could (at least potentially) be prohibited by law, since as an experienced police officer he was familiar with section 136a of the German Code of Criminal Procedure, which explicitly forbids the use of force and coercion, including torture.

The court ultimately concluded that the act was not justified, that the defendants were not excused, and that both defendants were criminally responsible.

However, the court found "massive mitigating circumstances" in favor of both defendants. The judgment referred in particular to the defendants' aim of saving the life of the child, but also mentioned the provocative behavior of the suspect during the interrogations, the hectic atmosphere and the intense emotional pressure on the investigating officers, and the consequences of the crimes for the defendants, in particular the public attention devoted to the incident. In the opinion of the court, these mitigating circumstances had two effects. First, they allowed a departure from the sentencing range—six months to five years of imprisonment—for coercion to give evidence under aggravated circumstances pursuant to section 240(3) of the Criminal Code. As a rule, from which the court departed, coercion under aggravated circumstances applies if the coercion is committed by a public official abusing his or her authority and position. Instead, the court applied the lower sentencing range—one month to three years of imprisonment or a fine— for "ordinary" coercion under section 240(1) of the Criminal Code. On this basis, the court regarded as adequate fines of €10,800 for Daschner and €3,600 for the subordinate police officer. Second, the mitigating circumstances allowed the court to refrain from convicting and punishing the defendants altogether. The court applied section 59 of the Criminal Code,[61] a rarely used rule that, under strict conditions, allows the courts to reprimand while reserving punishment.

Necessity as an excuse

(1) A person who, faced with an imminent danger to life, limb or freedom which cannot otherwise be averted, commits an unlawful act to avert the danger from himself, a relative or person close to him, acts without guilt. This shall not apply if and to the extent that the offender could be expected under the circumstances to accept the danger, in particular, because he himself had caused the danger, or was under a special legal obligation to do so; the sentence may be mitigated pursuant to section 49 (1) unless the offender was required to accept the danger because of a special legal obligation to do so.

(2) If at the time of the commission of the act a person mistakenly assumes that circumstances exist which would excuse him under subsection (1) above, he will only be liable if the mistake was avoidable. The sentence shall be mitigated pursuant to section 49 (1).

(Translation by Prof. Dr. Michael Bohlander for the German Federal Ministry of Justice, *available at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.)

[61] Section 59(1) of the Criminal Code (*Voraussetzungen der Verwarnung mit Strafvorbehalt*) reads as follows:

The "guilty but not to be punished" verdict of the Frankfurt Regional Court deserves respect for its effort to balance the strict prohibition of torture under constitutional and international law, on the one hand, with the undeniable conflict confronting state officials in situations where the use of physical or psychological violence against a suspect is—at least subjectively—the last resort for saving innocent lives, on the other. If one tries to extract a message from the judgment, it would be that criminal responsibility for "preventive torture" cannot be avoided because of the fact that it is applied to save innocent lives. Notwithstanding his or her altruistic motivation, the torturer is guilty of a criminal offense. However, there may be situations involving "preventive torture" where considerable mitigation of the sentence is warranted or even—if legally permissible—where the court may refrain from conviction and punishment altogether.

Two further aspects of the court's decision that appear to militate against the transferability of its reasoning to the general debate on torture should be underscored.

First, the court avoided employing the term "torture." However, the judgment mentions article 3 of the European Convention on Human Rights (ECHR), which may be regarded as an implicit reference to torture. Since article 3 ECHR also encompasses the prohibition of inhuman treatment, it remains open whether in the opinion of the court the acts of Daschner and his subordinate actually constituted torture or "merely" inhuman treatment.[62] It should be noted that the Grand Chamber

If a person has incurred a fine not exceeding one hundred and eighty daily units, the court may warn him at the time of conviction, indicate the sentence and defer its imposition if

1. it can be expected that the offender will commit no further offences without the immediate imposition of the sentence;
2. a comprehensive evaluation of the offence and the personality of the offender warrant the existence of special circumstances which obviate the imposition of a sentence; and
3. reasons of general deterrence do not demand the imposition of a sentence.

(Translation by Prof. Dr. Michael Bohlander for the German Federal Ministry of Justice, *available at* http://www.gesetze-im-internet.de/englisch_stgb/index.html.)

[62] The distinction between torture and inhuman treatment derives principally from a difference in the intensity and severity of the suffering inflicted. *See* article 16 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('inhuman … treatment which [does] not amount to torture'); *Gäfgen* case (GC), *supra* note 1, § 167; J.A. FROWEIN & W. PEUKERT, *in* EUROPÄISCHE MENSCHENRECHTSKONVENTION: KOMMENTAR art. 3, marginal note 5 (2d ed. 1996). Personally, we would tend to classify the threat in the *Daschner* case ("pain you will never forget") not only as a *threat of torture* (which may be regarded as inhuman treatment) but also as actual *torture* by inflicting severe mental suffering. As regards the non-derogability of the prohibition of inhuman treatment (and its status as compared to torture), international law is not clear. While article 2 of the UN Torture Convention does not apply to inhuman treatment (see art. 16), under the ECHR and the American Convention on Human Rights (ACHR) the prohibition of inhuman treatment encompassed by the right to freedom from torture is—like the prohibition of torture itself—absolute and non-derogable. *See* art. 15(2) ECHR and art. 27(2) ACHR. *See also* N. JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW 300 et seq. (2002).

of the ECtHR expressly considered the threat to use violence in the present case as mere inhuman treatment.[63] If the threat to use force is classified merely as inhuman treatment, the German court ruling would apply a fortiori to acts of torture. Considering the academic discussion surrounding the *Daschner* case, the fact that the judgment refrains from explicitly characterizing the acts as torture (or inhuman treatment) may come as a surprise. However, since torture is not—with rare exceptions[64]—a technical term in German criminal law, this approach is understandable and ultimately does not militate against applying the reasoning of the judgment to the general debate on torture.

Second, the court explicitly did not decide whether and under what conditions criminal law defenses might be available in extreme circumstances, such as the "ticking bomb" scenario. In the opinion of the court, the case under consideration did not represent an extraordinary case of this nature, but rather a typical case of everyday police work. Still, the judgment presents and discusses several views put forward in the scholarly debate on the *Daschner* case, which also refer to the "ticking bomb" scenario.

2. Is Torture an Option for Switching Off a "Ticking Bomb"? The Debate Triggered by the *Daschner* Case

Since Daschner had attached to the official record a report in which he acknowledged his order to use force, the incident—even before it was subject to the court's decision—rapidly became public and unleashed a stormy debate in Germany about police interrogation techniques.[65] Media commentaries tended to emphasize either the absolute ban on torture or the power and duty of the police to use all means necessary to save the life of an innocent child. Not surprisingly, public opinion, including several politicians and representatives of the judicial system, sympathized with the methods applied by the police and was opposed to charging and punishing the two police officers. More surprisingly, perhaps, scholars were divided on the question whether the threat to inflict pain in the *Daschner* case constituted a criminal act or was instead justified or excused. Admittedly, two premises were shared by all commentators.

[63] *See Gäfgen* case (GC), §§ 79 & 108.

[64] *See supra* note 12.

[65] *See, e.g.*, J. Hooper, *Germans wrestle with rights and wrongs of torture*, The Guardian, Feb. 27, 2003, at 18; P. Finn *Police Torture Threat Sparks Painful Debate in Germany*, The Washington Post, Mar. 8 2003, at A19. For a comprehensive overview, see A.K. Weilert, Grundlagen und Grenzen des Folterverbotes in verschiedenen Rechtskreisen 112-231 (2009).

First, it was generally accepted that the state has no authority to legalize acts of torture, whatever the circumstances. Second, there was a consensus that "preventive torture" infringed human dignity as laid down in article 1(1) of the German Constitution (*Grundgesetz*) and as specified, for example, in article 104(1) of the German Constitution, article 3 ECHR, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[66] because torture aims to instrumentalize the victim for preventive ends. However, commentators disagreed about how to assess individual criminal responsibility in situations in which torture is applied against a terrorist—or, as in the *Daschner* case, a kidnapper—to gain information on the whereabouts of a bomb or a hostage in order to prevent the death of one or several innocent persons.

As regards criminal responsibility, a majority of scholars[67] argue that—as a matter of principle—"preventive torture" cannot be justified or excused by the fact that it is applied in order to prevent the death of innocent persons. This view is based on two main arguments. First, human dignity is inviolable under any circumstances, and torture is the most severe violation of human dignity. Human dignity not only ranks at the top of the basic human rights guaranteed by the German Constitution, including the right to life, but should also not be subject to any balancing tests. Its inviolability leaves no room for balancing opposing interests, such as the right to life of a hostage. As a consequence, a state is not permitted to resort, through its agents, to actions infringing human dignity on any grounds. The absolute prohibition of the infringement of human dignity provides the basis for the assessment of these situations under criminal law. Criminal responsibility for acts of torture cannot be excluded on the grounds that the use of physical or psychological violence is required to prevent harm to other interests or rights.

Second, any exception to this position raises the risk of abuse and opens the door to a dangerously slippery slope. Only a clear position that establishes criminal liability

[66] Article 1(1), sentence 1 of the German Constitution provides that the dignity of human beings is inviolable. Article 104(1) provides that persons in custody may not be subjected to mental or physical mistreatment. The ECHR entered into force for Germany on September 3, 1953; the UN Torture Convention entered into force for Germany on October 31, 1990.

[67] *See, e.g.*, W. Hecker, *Relativierung des Folterverbots in der BRD?*, 2003 Kritische Justiz 210-18; E. Hilgendorf, *Folter im Rechtsstaat*, 2004 Juristenzeitung 331-39.; F. Jessberger, *Wenn du nicht redest, füge ich dir große Schmerzen zu*, 2003 Juristische Ausbildung 711-15; J. Kinzig, *Not kennt kein Gebot? Die strafrechtlichen Konsequenzen von Folterhandlungen an Tatverdächtigen durch Polizeibeamte mit präventiver Zielsetzung*, 115 Zeitschrift für die gesamte Strafrechtswissenschaft 791-814 (2003); B. Kretschmer, *Folter in Deutschland: Rückkehr einer Ungeheuerlichkeit?*, 2003 Recht und Politik 103-18; R. Neuhaus, *Die Aussageerpressung zur Rettung des Entführten: strafbar!*, 2004 Goltdammer's Archiv für Strafrecht 521-39; W. Perron, *Foltern in Notwehr?*, *in* Festschrift für Ulrich Weber 143-54 (B. Heinrich et al. eds., 2004); C. Roxin, *Kann staatliche Folter in Ausnahmefällen zulässig oder wenigstens straflos sein?*, *in* Menschengerechtes Strafrecht: Festschrift für Albin Eser 461-71 (J. Arnold et al. eds., 2005); B. Beutler, Strafbarkeit der Folter zu Vernehmungszwecken 326 (2006).

for all acts of torture without exception can guarantee that torture is not routinely applied in difficult cases.[68]

According to the opposing view,[69] the application of "preventive torture" may be justified or excused if it is the last resort to prevent the death of innocents. This opinion is based mainly on the assumption that the omission of torture in situations like the *Daschner* case infringes the human dignity of the hostage or the victim of the terrorist attack.[70] According to this view, the conflict between the dignity of the kidnapper and the dignity of the hostage has to be resolved in favor of the latter: abducting and locking up the victim violates his dignity more gravely than torture infringes the attackers' dignity.[71] One may support this view by claiming that, while the abducted victim is completely defenseless, as there is nothing he can do to free himself, the kidnapper is not defenseless—he can reveal the information about the whereabouts of the victim and thereby avoid being tortured.

The *Daschner* case was not only a matter of controversy among criminal law scholars but also stimulated constitutional lawyers to review the traditional consensus that violations of human dignity as guaranteed by article 1(1) of the German Constitution cannot be justified under whatever circumstances. The wording of article 1(1) of the Constitution signifies in a declaratory manner that human dignity is the highest principle within the Constitution. This is further emphasized by the contextual argument, as dignity is located at the very beginning of the Constitution, thus preceding the other provisions. While some authors still adhere to the absolute protection of human dignity and the corresponding ban on any balancing test,[72] a

[68] In the same vein, C. HORLACHER, AUSKUNFTSERLANGUNG MITTELS FOLTER 213 et seq. (2007). *See also* WEILERT, *supra* note 65, at 229 (with reference to C. Roxin) (arguing that in the long run it is worse to sacrifice the rule of law than to tolerate limitations on state actions in the face of threats).

[69] *See, e.g.*, V. Erb, *Nothilfe durch Folter*, 2005 JURISTISCHE AUSBILDUNG 24-30 (2005); V. Erb, *Notwehr als Menschenrecht*, 2005 NEUE ZEITSCHRIFT FÜR STRAFRECHT 593-602; C. Fahl, *Angewandte Rechtsphilosophie—Darf der Staat foltern?*, 2004 JURISTISCHE RUNDSCHAU 182-91 (2004); G. Jerouschek & R. Kölbel, *Folter von Staats wegen?*, 2003 JURISTENZEITUNG 613-20. Some of the arguments were elaborated earlier by W. Brugger, *Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?*, 2000 JURISTENZEITUNG 165-73; *see also* W. Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 AM. J. COMP. L. 661 et seq. (2000).

[70] According to Erb, *Notwehr als Menschenrecht*, *supra* note 69, at 594, the state, if it imposes certain restrictions on self-defense, negates the attacked right in the same way as the original attacker because it removes obstacles that would otherwise have hindered the attack.

[71] *See* G. WAGENLÄNDER, ZUR STRAFRECHTLICHEN BEURTEILUNG DER RETTUNGSFOLTER 169, 200 (2006). See also the more delicate argument by B. Schünemann, *Kommentar zur Abhandlung von Luis Greco*, 2007 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 644, 647, who submits that a complete ban on excusing torture in any situation cannot be right in a categorical form.

[72] W. Höfling, *in* GRUNDGESETZ KOMMENTAR art. 1, marginal note 20 (M. Sachs ed., 4th ed. 2007).

growing number of scholars believe that the infringement of human dignity may be justified by the balance of interests in individual cases.[73]

IV. COMPARATIVE ASSESSMENT

There are some fundamental differences between the Israeli and German rulings. The Israeli Supreme Court gave its ruling on the petitions challenging the legality of the interrogative methods used by the GSS in its capacity as a High Court of Justice. The Frankfurt Regional Court gave its judgment in criminal proceedings against the individual interrogators who either ordered that pain be inflicted or threatened to inflict such a pain. More importantly, the Israeli HCJ ruling related to, and was based on, the use of extraordinary methods of interrogation in the war on terror, while the case brought before the German court concerned routine police work. The German court itself treated the case as a typical case of everyday police work and explicitly did not take a stand on whether criminal law defenses might be available in extreme circumstances, such as in "ticking bomb" scenarios. The methods of interrogation were also significantly different. The various methods used by the Israeli GSS, which were declared illegal, involved the use of physical force. In contrast, a mere threat to use force constituted a criminal act according to the German court. In this context, it is interesting to note that the Israeli and German courts both avoided using the term "torture" in describing the coercive methods of interrogation. Instead, both courts emphasized the violation of human dignity by the use—or threat—of force in interrogations.

Despite these fundamental differences, both rulings should be read as an attempt to solve the dilemma between upholding the ban on torture, on the one hand, and granting fair treatment to an individual interrogator who has used, or has threatened to use, force to save innocent lives, on the other.

Both the Israeli court and the German court ruled that interrogative torture was illegal: official interrogators have no authority to use—or threaten to use—force in interrogation. The Israeli court based its ruling on the lack of explicit authority,

[73] H. Dreier, *in* GRUNDGESETZ KOMMENTAR art. 1, marginal note 133 (M. Sachs ed., 2d ed. 2004). C. Starck, *in* GRUNDGESETZ KOMMENTAR: TEIL I art. 1 § 1, marginal note 79 (H. von Mangoldt & F. Klein eds., 2005) regards torture as "prohibited without exception" in the context of the criminal process but applies different standards to torture in a preventive context that is aimed at obtaining information in order to save a (potential) victim from harm. In the latter case, a balancing between the attacker's dignity and the victim's dignity is allowed. *See also* C. Herdegen, *in* GRUNDGESETZ KOMMENTAR art. 1, marginal note 43 (T. Maunz & G. Dürig eds., 44th ed. 2005). While Herdegen does not explicitly draw the conclusion that torture can be excused or justified, he questions the usual arguments for a ban on torture and points out that, in cases where high-ranking values are at stake, the sanctions of criminal law might be reduced or ruled out, *id.* at marginal notes 45 & 47. *See also* WAGENLÄNDER, *supra* note 71, at 199; Erb, *Notwehr als Menschenrecht*, *supra* note 69, at 599.

arguing that the Israeli legislature had not authorized the use of such methods. The ruling of the German court was based on the Police Law, which explicit prohibits the use of threats to inflict pain in order to elicit information. However, it should be noted that, due to political constraints, the Israeli court left room— at least rhetorically—for the legislature to decide in the future whether or not to legitimize the use of interrogational force.

Despite the conclusion that interrogative torture is illegal, both the Israeli court and the German court developed ways to take account of the individual situation of an interrogator who is motivated by the urge to save lives. The "fair" treatment offered to the individual interrogators by each ruling is different. According to the German ruling, criminal liability is to be imposed, but a possible sentence can be significantly mitigated. In the case at hand, the interrogators were found guilty but not punished. According to the Israeli court, in contrast, the criminal law defense of necessity may negate the criminal liability of the individual interrogator altogether.

In this context, it is interesting to note that the German court analyzed in depth the conditions required under the justifications of self-defense and justificatory necessity and under the excuses of ignorance of law or excusable necessity. The court concluded that these conditions were not met in the present case. The Israeli court, on the other hand, did not clarify the conditions under which the necessity defense may apply. Rather, it left it to the Attorney-General to "instruct himself regarding circumstances in which investigators shall not stand trial."[74] On the face of it, this difference derives from the different nature of the proceedings. In the criminal proceedings before the German court, an analysis of the various criminal law defenses that might be available to the defendants was necessary. Such an analysis was not required in the proceedings before the Israeli HCJ challenging the legality of the interrogative methods. However, considering that the Landau Commission's report analyzed the nature of the necessity defense and the conditions required for that defense in depth, we may assume that the Israeli HCJ, whose ruling should be read in the light of this report, purposely opted for vagueness regarding the question whether the necessity defense would be available to an individual interrogator. The aim of this vagueness was to strengthen the ban on torture and minimize the slippery slope syndrome.[75] The assumption might have been that interrogators who are not certain whether or not criminal liability will be imposed on them when they use force in interrogation will tend to avoid using such force in order to escape the risk of being indicted. In exceptional cases in which preventive torture is nonetheless

[74] *Torture* case, *supra* note 2, § 38.

[75] Sanford H. Kadish, *Torture the State and the Individual*, 23 ISR. L. REV. 345, 353 (1989) ("If ill-treatment were to become legal in combating terrorism, how long would it take for pressure to develop to extend its use to other contexts where it could also be thought that much was at stake?"). *See also* Kremnitzer, *supra* note 27, at 260-64.

used when interrogating suspected terrorists, fairness to the individual interrogator will be guaranteed by the Attorney-General, who will refrain from indicting the interrogator.[76]

What explanations can be offered for the difference between the German and Israeli rulings with regard to the "fair" treatment offered to individual interrogators (significant mitigation v. criminal law defense)?

One possible explanation derives from the different context. The German ruling related to the use of preventive torture within routine police work, while the Israeli ruling dealt with interrogative torture within the war on terror. Within routine police work, a stronger barrier to prevent the slippery slope syndrome may be required.

Another explanation stems from the different status of human dignity in the two legal systems. As pointed out while describing the debate in Germany, the German Constitution grants absolute protection to human dignity, which may not be subjected to any balancing tests. As emphasized above, torture is the most severe violation of human dignity and therefore cannot be justified by any of the criminal law justificatory defenses, which are based on a balance of interests. Under the Israeli Basic Law: Human Dignity and Liberty (1992), on the other hand, human dignity has the same constitutional status as liberty. Both rights are subject to the limitations clause, which is based on balancing tests.[77]

A further—connected—explanation has to do with the different classification of criminal law defenses. Under German law, the defenses are classified as either justifications or excuses. Granting a justification (either self-defense or justificatory necessity) to an interrogator who has used interrogative torture might undermine the attempt to uphold an absolute ban on torture. The meaning of the justification would be that interrogative torture is not wrong. By contrast, granting an excuse (excusable necessity) allows the absolute ban on torture to be maintained. The excuse means

[76] In fact, though without being aware of it, the Israeli court adopted in this context the technique of "acoustic separation" suggested by MEIR DAN-COHEN, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 37-93 (2002). According to Dan-Cohen, in an imaginary world, where conduct rules can be acoustically separated from decision rules, criminal law excuses should not be included among the conduct rules of the system. The message transmitted to the public will be that the law does not "relax its demands that the individual make the socially correct choices ... even when external pressures impel her toward crime," *id.* at 43. Excuses should be used as "a decision rule—an instruction to the judge that ... [it would be unfair to punish] a person for succumbing to pressure to which even his judge might have yield," *id.* In the real world, actual legal systems may in fact avail themselves of the benefits of acoustic separation by vagueness.

By refraining from clarifying the conditions under which necessity might apply in criminal proceedings against an individual interrogator who used force during an interrogation, the Israeli court in fact eliminated necessity from the conduct rules addressed to the interrogators. The court included necessity only in the decision rules addressed to the Attorney-General by inviting him to "instruct himself regarding circumstances in which investigators shall not stand trial, if they claim to have acted from a feeling of 'necessity.'" *See Torture* case, *supra* note 2, § 38.

[77] *See supra* text accompanying note 14.

that preventive torture is wrong, but it allows the system to refrain from blaming an interrogator who, under pressure to prevent a terrorist attack or to save lives, has used force while interrogating those who might have useful information. Under German law, however, the excuse of necessity could not be granted, because it is only available to an actor whose own life—or that of a close relative—is in danger.

Under Israeli law, on the other hand, criminal law defenses are not classified as either justifications or excuses. In fact, the necessity defense[78] is a mixture of both: it applies to severe danger to life, liberty, and property; it is available to both the actor whose interests are endangered and a third party; and it does not depend on a strict balancing test but rather on the reasonableness of the reaction. Granting necessity to third parties under Israeli law does not mean that the conduct is justified, but rather that criminal liability is negated. In fact, it seems that the Israeli HCJ treated necessity in "ticking bomb" situations more like an excuse. The court explicitly denied that necessity had any normative value;[79] rather, it emphasized the personal nature of necessity by referring to interrogators who "claim to have acted from a feeling of 'necessity.'"[80] Leaving it to the Attorney-General to instruct himself as to the conditions of necessity is also consistent with the notion of an excuse rather than a justification.[81]

The difference between the Israeli and German legal systems with regard to prosecutorial discretion can further explain the difference between the two rulings. The Israeli HCJ hinted that fairness towards an individual interrogator who has used force in a "ticking bomb" scenario would be guaranteed by the Attorney-General, who would refrain from indicting the interrogator. Such an option is not available under German law, which as a rule does not grant the prosecution discretion to refrain from indicting people accused of felonies.

[78] Defined as follows in section 34K of the Penal Law (Amendment No. 39), 5754-1994, SH No. 1481 p. 348: "A person shall not bear criminal liability for an act required to have been done immediately to save his or another's life, freedom, bodily integrity or property from an actual danger of serious injury stemming from the circumstances for which no alternative act was available." According to section 34P, section 34K shall not apply where, in the circumstances of the case, the act was not a reasonable means for preventing the danger.

[79] The court's statement in this regard was aimed at rejecting the state's argument that:

> an act committed under conditions of "necessity" does not constitute a crime. [It is an act] that society has an interest in encouraging, which should be seen as proper under the circumstances. In this, society is choosing the lesser evil. Not only is it legitimately permitted to engage in the fighting of terrorism, it is our moral duty to employ the necessary means for this purpose. This duty is particularly incumbent on the state authorities—and for our purpose, on the GSS investigators—who carry the burden of safeguarding the public peace.

Torture case, *supra* note 2, § 33.

[80] *Id.* § 38.

[81] *See supra* note 76 (showing that the Israeli Supreme Court adopted the technique of "acoustic separation" which applies to excuses).

V. Can Statements Obtained Through Violations of Human Dignity Be Admissible in Criminal Proceedings?

A. Germany: General Principles and the *Gäfgen* Case

In contrast to the issue of Daschner's criminal responsibility, the question whether and under what conditions Gäfgen's statement could be used in his trial received only little (public and scholarly) attention.

On 28 July 2003, long before the start of the above-mentioned criminal trial against the Deputy-Chief of the Frankfurt Police, Magnus Gäfgen, the man who had kidnapped and killed the boy, was convicted of murder and extortionate abduction and sentenced to life imprisonment. In the course of these proceedings, the Frankfurt Regional Court had held that the threat to inflict pain was unlawful and violated articles 1 and 104(1) of the German Constitution and article 3 ECHR, as well as section 136a(1) of the German Code of Criminal Procedure (*Strafprozessordnung*) (StPO). Section 136a(1) explicitly provides as follows:[82]

> The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.

Furthermore, section 136a(3) provides that "[s]tatements which were obtained in breach of this prohibition shall not be used, even if the accused consents to their use."

The Frankfurt Regional Court accordingly excluded all pre-trial statements made by Gäfgen on the grounds that statements made as the result of an unlawful threat were not admissible as evidence.

However, Gäfgen repeated the confession that he had initially given to the police while threatened with the use of force before the court after he had received a "qualified instruction." The so-called "qualified instruction" (*qualifizierte Belehrung*)[83] refers to the obligation to instruct the defendant that prior statements made under pressure cannot be used against him. This instruction is intended to restore the defendant's freedom from self-incrimination (*nemo tenetur se ipsum accusare*), as

[82] Translation by Brian Duffet and Monika Ebinger for the German Federal Ministry of Justice, *available at* http://www.gesetze-im-internet.de/englisch_stpo/index.html.

[83] For further references to case law about qualified instructions, see M. Gromes, Präventionsfolter 220 (2007).

he should not (falsely) fear that such prior statements might still be used against him. Since Gäfgen was eventually instructed in this way, the court was in a position to make use of his later confession before the court.

The court also had to address the question whether further items of evidence, such as the victim's corpse, which had been obtained as an indirect result of Gäfgen's coerced statement, could be used in the trial against him. According to the "fruits of the poisonous tree doctrine," which is well-known in Anglo-American law, this question (which in German doctrine is referred to as the "remote effect of evidence prohibitions") should arguably be answered in the negative. In Germany, however, a remote effect does not automatically lead to an exclusion of further evidence obtained through "tainted" evidence, unless the statutory norm that has been violated in the first place contains such an exclusion. This is not the case for section 136a StPO.[84] According to the Frankfurt Regional Court, in cases involving the violation of section 136a StPO, the question whether items of evidence resulting indirectly from a defendant's coerced statement should be admissible was subject to a balance between the severity of the interference with the defendant's rights and the seriousness of the offense of which he stood accused. The court concluded that, in the present case, the balance between the threat of physical violence and the offense of kidnapping and murdering a child required that the evidence resulting from Gäfgen's coerced statement be admissible.

Beyond the question whether or not such "tainted" statements, or further evidence obtained as the "fruit" of such statements, were admissible, another question arose. In cases involving exceptionally grave breaches of the above-mentioned statutory prohibition, is it only the statement itself that should be excluded or has the fairness of the trial as a whole been affected in such a way that the only remedy would be to terminate the proceedings? However, this drastic solution, which is theoretically well settled under German case law, is handled very restrictively by the judicial authorities. In the case against Gäfgen, the court accordingly found that the violation of the Constitution and the ECHR did not, contrary to what Gäfgen's defense council had argued, constitute a complete bar to criminal proceedings.[85]

[84] *See* 34 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] [DECISIONS OF THE FEDERAL COURT OF JUSTICE IN CRIMINAL MATTERS] 363 (364). For differing views on legal scholarship, see C. ROXIN, STRAFPROZESSRECHT 193, marginal note 47 (25th ed. 1998); J. Hanack, *in* STRAFPROZESSORDNUNG § 136a, marginal note 67 (E. Löwe & W. Rosenberg eds., 26th ed. 2007).

[85] *See* LG Frankfurt a.M., Apr. 9, 2003, STRAFVERTEIDIGER 325 (328), 2003, with case note by T. Weigend at 436. The decisions of the Regional Court have been upheld on appeal. *See* Bundesgerichtshof [BGH] [Federal Court of Justice], May 21, 2004, 2 StR 35/04; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 14, 2004, 2 BvR 1249/04, *available at* http://www.bundesverfassungsgericht.de/entscheidungen/frames/rk20041214_2bvr124904 (last visited Sept. 1, 2011).

On 30 June 2008, the ECtHR, to which Gäfgen had appealed, delivered its judgment.[86] It underlined that

> in view of the absolute prohibition of treatment contrary to Article 3 [ECHR] irrespective of the conduct of the person concerned and even in the event of a public emergency threatening the life of the nation—or *a fortiori*, of an individual—the prohibition of ill-treatment of a person in order to extract information from him applies irrespective of the reasons for which the authorities wish to extract a statement, be it to save a person's life or to further criminal investigations.[87]

The Court found that Gäfgen had been subjected to inhuman treatment prohibited by article 3 ECHR, as the German government had officially conceded during the proceedings. However, the Court pointed out that the German authorities had dealt adequately with this violation of the Convention and that Gäfgen could no longer claim to be the victim of a violation of article 3 ECHR.

While ruling on whether Gäfgen's right to a fair trial (granted by article 6 ECHR) had been violated, the Chamber held that

> there is a strong presumption that the use of items of evidence obtained as the fruit of a confession extracted by means contrary to Article 3 renders a trial as a whole unfair in the same way as the use of the extracted confession itself.[88]

However, in the particular circumstances of the case, it had been the applicant's new confession at the trial that had been the essential basis for his conviction. "Further items of evidence were used by that court only to test the veracity of this confession."[89]

Gäfgen successfully requested that the case be referred to the Grand Chamber, which held a hearing on 8 March 2009. On 1 June 2010, the Grand Chamber delivered its judgment. The Grand Chamber held (by 11 votes to 6) that article 6 ECHR had not been violated because:

> ... it was the applicant's second confession at the trial which—alone or corroborated by further untainted real evidence—formed the basis of his conviction for murder and kidnapping with extortion and his sentence. The impugned real evidence was not necessary, and was not

[86] *See Gäfgen* case (Chamber). On the judgment and its implications, see also T. Weigend, *Deutschland als Folterstaat? Zur Aktualität und Interpretation von Artikel 3 EMRK*, *in* OP HET RECHTE PAD—LIBER AMICORUM PETER J.P. TAK 328-30 & 332-35 (Y. Buruma et al. eds., 2008).

[87] *Gäfgen* case (Chamber), *supra* note 50, § 69.

[88] *Id.* § 105.

[89] *Id.* § 106.

> used to prove him guilty or to determine his sentence. It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction and sentence in respect of the impugned real evidence.[90]

However, unlike the Chamber, the Grand Chamber concluded (also by 11 votes to 6) that the German authorities

> did not afford the applicant sufficient redress for his treatment in breach of Article 3. It follows that the applicant may still claim to be the victim of a violation of Article 3 within the meaning of Article 34 of the Convention.[91]

We will elaborate on this conclusion in Part VI below.

B. ISRAEL: GENERAL PRINCIPLES, STATEMENTS OBTAINED BY A "NECESSITY INTERROGATION" AND THE *ISSACHAROV* CASE

Unlike Germany, in Israel there is no simple answer to the question whether a statement obtained under torture is admissible in criminal proceedings. The HCJ focused on the legality of the interrogative methods employed by the GSS and did not address the issue of the admissibility within criminal proceedings of statements obtained by such methods. According to the Landau Commission's report, the issue of admissibility of statements obtained by the use of force is to be determined according to the general law of evidence.[92]

Under section 12 of the Evidence Ordinance [New Version] of 1971,[93] confessions will be admissible in criminal proceedings if they have been given by "choice and free will." In addition, a doctrine relating to the admissibility of evidence obtained by illegal means has been developed in the case law. The case law doctrine has been applied both to confessions and to other evidence. Confessions obtained by illegal methods of interrogation are prima facie presumed to have been given without free will, violating section 12 of the Evidence Ordinance. However, such a presumption can be—and in many cases has been—refuted, and confessions have been admitted despite the illegal methods used in obtaining them. As to other evidence, the prevailing view has been that the use of illegal methods in obtaining evidence does not affect its admissibility but rather its credibility or weight.

The above case-law doctrine led to the admissibility of statements in two criminal cases in which statements were elicited under the procedures of "necessity

[90] *See Gäfgen* case (GC), *supra* note 1, § 180.
[91] *Id.* §§ 129-130.
[92] *Excerpts of the Report*, *supra* note 17, at 176-79.
[93] Evidence Ordinance [New Version], 5731-1971, 2 LSI 198 (1968-1972).

interrogations" involving extraordinary methods of interrogation. In the case of *State of Israel v. El Sayad*,[94] the defendant was indicted for being involved in various terrorist attacks. In court, the GSS explained that the defendant, who was proclaimed to be a "ticking bomb," had been interrogated under the procedures of "necessity interrogations," which involved extraordinary methods of interrogation. His conviction of various murders was based, inter alia, on the confession elicited from him in the course of this interrogation. The admissibility of the confession was based on the court's conclusion that, despite the use of the extraordinary methods of interrogation, the confession had been freely given and was credible. In the second case, *State of Israel v. El-Aziz*,[95] the court did not even deal with the question whether or not to admit the evidence included in the statement obtained during a "necessity interrogation." The only issue was one of credibility, and two of the three judges ruled that, despite the extraordinary methods of interrogation, the evidence was credible and the conviction could be based on it. We will return to these two cases in Part VI.

In the *Issacharov* case (2006),[96] an expanded bench of the Supreme Court (nine judges) ruled that the Basic Law: Human Dignity and Liberty (1992) ought to influence both the interpretation of section 12 of the Evidence Ordinance and the case law doctrine with regard to the admissibility of evidence obtained by illegal methods. The underlying assumption was that exclusionary rules with regard to evidence obtained by illegal methods are aimed not only at finding the truth but also at protecting interrogees' rights to bodily integrity, to human dignity, to autonomy of the will, and to due process. Infringement of the rights of interrogees by employing illegal methods of interrogation ought to be balanced against the interests of finding the truth, fighting crime, the rights of victims and public order. According to the balancing test, confessions will not be admissible if, at the time of interrogation, the illegal methods employed severely and excessively violated the basic rights of interrogees. In such cases, the confession ought to be considered not to have been freely given as required by section 12 of the Evidence Order. In the case law doctrine, the balancing test requires that the criminal court consider whether the admissibility of the evidence obtained by illegal methods significantly and excessively violates the right of defendants to due process.

The question whether confessions or other evidence obtained by torture are inadmissible within criminal proceedings was not explicitly discussed in the *Issa-*

[94] CrimC (Tel Aviv) 1147/02 The State of Israel v. El Sayad (Jan. 10, 2006) (not published). In the appeal, the Supreme Court decided to avoid the issue of the admissibility of the confession because it was of the opinion that there was enough evidence to convict the defendant without having to rely on the confession. *See* CrimApp 1776/06 El Sayad v. The State of Israel (Sept. 5, 2011) (not published).
[95] CrimC (Jer) 775/04 The State of Israel v. El-Aziz (Dec. 29, 2005) (not published).
[96] CrimA 5121/98 Issacharov v. Chief Military Prosecutor 60(1) PD 461 [2006], *available at* http://elyon1.court.gov.il/files_eng/98/210/051./n21/98051210.n21.pdf.

charov ruling (which focused on the violation of the defendant's right to consult a lawyer). There are some indications to support the conclusion that, in the court's view, confessions and other evidence obtained by torture are inadmissible. While discussing the category of illegal methods of interrogation that severely violate human dignity and autonomy of the will, and therefore produce inadmissible confessions and other evidence, the court referred to the HCJ ruling in the case brought by the Public Committee against Torture in Israel (PCATI). However, while elaborating on the considerations to be taken into account in the balancing test, the Supreme Court also attached weight to the severity of the offense as well as to security needs. Interrogative torture in the war on terror involves weighty considerations on both sides of the balance, and we shall have to wait and see which side will prevail.

C. A Comparative Remark

There is an obvious difference between the German and the Israeli approach with regard to the admissibility within criminal proceedings of statements obtained under torture. Under German law, such statements are explicitly inadmissible, whereas under recent Israeli case law (the *Issacharov* case) the admissibility of such statements is subject to the balancing test. A balancing test applies under German law only to real evidence obtained as an indirect result of the coerced statement ("fruits of the poisonous tree").

Despite this difference, it should be noted that, in the *Gäfgen* case, the inadmissibility of the statement elicited from the kidnapper under a threat to use force did not prevent his conviction for murder and extortionate abduction. It can be assumed that in cases where the statement obtained under torture is not essential for conviction, the balance test applicable under Israeli case law to the admissibility of the statement will also result in the inadmissibility of the statement obtained under torture. In such cases, there are no counter-considerations that might outweigh the infringement of human dignity involved in eliciting the statement. The real dilemma would arise in cases where the statement elicited under torture is essential for conviction and the exclusion of the statement would prevent conviction for a serious crime.

VI. Lessons to Be Learned

Irrespective of the differences between the contexts and the solutions offered—criminal law perspective vs. constitutional law perspective, police routine vs. war on terror, mitigation of punishment vs. necessity defense—we would submit that there are some lessons to be learned from the German and Israeli experiences for the current global debate with regard to preventive torture.

First, legislation that allows for the use of "interrogative torture" is not compatible with the concept of human dignity: an ex ante authorization ultimately implying

a "bureaucratization" of torture is not an option. This view is anchored in international treaties[97] and is (still) shared by a majority of scholars[98] and courts[99] worldwide. Most recently it has been explicitly endorsed by the ECtHR's Grand Chamber in the *Gäfgen* case, stating that

> the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. No derogation is allowed even in the event of a public emergency threatening the life of the nation. Article 3 [ECHR], which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult.[100]

It is true that the Israeli HCJ left room for the legislature to decide whether or not to legalize the use of force in interrogations.[101] It seems, however, that this option was no more than a lip service to political constrains. The Israeli court explicitly added that the constitutionality of any such legislation would have to be reviewed according to the limitation clause of the Basic Law: Human Dignity and Liberty (1992).

Second, both the German and the Israeli rulings attempt to keep the ban on torture intact while granting fair treatment to individual interrogators. The question is whether the various possible modes of fair treatment—excusing the interrogator (Israeli ruling) or mitigating his punishment (German ruling)—will indeed guarantee that the ban on torture will be maintained. The Israeli experience shows that, at least within the war on terror, granting an ex post defense of necessity to an individual interrogator may easily be turned into an ex ante authorization to use torture in a "ticking bomb" scenario.

According to reports of the PCATI and B'Tselem published in May 2007, the GSS continues to use at least some of the methods that were held to be illegal by the HCJ.[102] The information in the reports is based on complaints by Palestinians interrogees, and it is impossible to obtain an official statement in this regard. However, the two criminal cases discussed above[103] support the claim that the GSS has

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97 *See, e.g.*, ICCPR art. 7; UN Torture Convention art. 2(2); ECHR art. 3.

98 *See, e.g.*, A. Cassese, International Criminal Law 119 (2003); C. Greenwood, *International law and the "War Against Terrorism,"* 78(2) Int'l Aff. 301 (2002).

99 For US courts, see, for example, Kadic v. Karadzic 70 F.3d 232, 245 (2d Cir. 1995); Filártiga v. Peña-Irala, 630 F.2d 876, 882 (2d Cir. 1980).

100 *See Gäfgen* case (GC), *supra* note 1, § 107.

101 *See Torture* case, *supra* note 2, § 37.

102 For additional data supporting that claim, see Ginbar, *supra* note 26, at 207-19.

103 *See supra* text between notes 94-96.

adopted formal procedures called "necessity interrogations" under which interrogative methods similar to those declared illegal by the HCJ are employed. The practice of "necessity interrogation" adopted by the GSS takes us back to the holding of the Landau Commission and is inconsistent with the HCJ ruling.[104] According to the court's ruling, the criminal law defense of necessity is only available ex post within criminal proceedings against an individual interrogator. Necessity does not provide ex ante authority to use preventive torture even in "ticking bomb" situations and therefore cannot serve as a basis for formal guidelines for GSS "necessity interrogations."[105] Israeli experience, therefore, shows that the attempt to maintain the absolute ban on torture and yet grant a criminal law defense of necessity (which is to be treated more like an excuse) is doomed to fail.[106]

It remains to be seen whether the "fairness" offered by the German ruling by mitigating punishment on a case-by-case basis can effectively control the (to a certain extent understandable) desires of law enforcement agencies and provide an adequate barrier to the practice of torture. One may believe that granting mitigation on a case-by-case basis, taking into account all individual circumstances of the situation, can prevent interrogators from relying on mitigation without ignoring the undeniable conflict confronting state officials when torture seems to be the last resort for saving innocent lives. The majority (11 to 6 votes) of ECtHR's Grand Chamber did not share such a belief. The mitigated punishment,

> which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.[107]

Third, an additional barrier to the practice of torture can be achieved through an explicit ban on admissibility of statements obtained by means of "interrogative torture" in subsequent criminal proceedings. This conclusion is in line with the German ruling. According to Israeli case law, on the other hand, in cases where the

[104] In November 2008, the Public Committee against Torture in Israel (PCATI) and others filed a contempt of court motion with the High Court of Justice against the Israeli government and the GSS for their responsibility for the policy that grants a priori permits to use the torture in interrogations in violation of the HCJ's ruling of 1999. On July 2009, the HCJ rejected the contempt of court motion on the grounds that the contempt of court procedure was not the appropriate one for clarifying claims of violation of court decisions whose nature is "declarative." The ruling was delivered by a panel of justices, headed by Chief Justice Dorit Beinish.

[105] In a similar spirit, see GINBAR, *supra* note 26, at 207.

[106] Similarly, Ginbar argues that a "different 'slippery slope argument' could nevertheless be made—that once a state grants its torturing interrogators any exemption from liability in TBSs [Ticking Bomb Scenarios], it is likely to develop mechanisms and practices which would trigger these exemptions and defend the interrogators beyond the strict limits of such situations." *Id.* at 222.

[107] *Gäfgen* case (GC), *supra* note 1, § 124.

statement obtained under illegal methods, including "interrogative torture," is essential for conviction, the court will have to balance the violation of human dignity of the interrogee against the interests of fighting crime and protecting the legal order. "Interrogative torture" in the war on terror involves weighty considerations on both sides of the balance: the value of human dignity and autonomy of the will against the interest of fighting terror activity. Nonetheless, in view of the strong motivation of security services to fight terror, significant barriers are required to keep the ban on torture intact. One such barrier lies in the exclusion of statements obtained under torture even when the inadmissibility of the statement will prevent conviction.

A significant barrier for keeping the ban on torture intact might require extending the exclusionary rule to evidence that emerges indirectly from statements obtained under torture ("fruit of the poisonous tree"). Neither the Israeli nor the German case law went that far. Similarly, both the Chamber and the Grand Chamber of the ECtHR were not willing to go that far. It was only a minority of the Grand Chamber (6 votes to 11) who voted for the exclusion of any evidence obtained—directly or indirectly—as a result of violating article 3 ECHR:

> The Court could have answered that question categorically by asserting, in an unequivocal manner that irrespective of the conduct of an accused, fairness, for the purpose of Article 6, presupposes respect for the rule of law and requires, as a self-evident proposition, the exclusion of any evidence that has been obtained in violation of Article 3. A criminal trial which admits and relies, to any extent, upon evidence obtained as a result of breaching such an absolute provision of the Convention cannot a fortiori be a fair one. The Court's reluctance to cross that final frontier and to establish a clear or "bright-line" rule in this core area of fundamental human rights is regrettable.[108]

VII. CONCLUSIONS

Irrespective of the differences between the contexts—constitutional law perspective vs. criminal law perspective and war on terror vs. police routine—the Israeli and German rulings should both be seen as an attempt to leave the ban on torture intact while also developing ways to take into account the individual situation of an interrogator who was motivated by the urge to save the lives of innocent people. According to the Israeli ruling, the interrogator might be granted a criminal law defense of necessity; according to the German ruling, his punishment can be miti-

[108] *Id.* joint partly dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power, § 2.

gated. However, Israeli experience shows that any attempt to maintain the absolute ban on torture while also granting a criminal law defense of necessity is doomed to fail. An ex post defense of necessity to an individual interrogator may easily be turned into an ex ante authorization to use torture in a "ticking bomb" scenario. It remains to be seen whether the "fairness" offered by the German ruling by mitigating punishment on a case-by-case basis can effectively control the (to a certain extent understandable) desires of law enforcement agencies and provide an adequate barrier to the practice of torture. The ECtHR's Grand Chamber ruled that a mitigated punishment might not have enough deterrent effect to prevent interrogative torture required to save innocent lives.[109]

In view of the strong motivation of the security services and police officers to fight terror or serious crimes and save innocent lives, keeping the ban on interrogative torture intact may require the exclusion of all evidence resulting—directly or indirectly—from such interrogations. Neither the Israeli nor the German case law went that far. Only a minority of the ECtHR's Grand Chamber voted for the exclusion of any evidence obtained—directly or indirectly—as a result of the violation of article 3 ECHR.[110]

[109] *See supra* note 107.
[110] *See supra* note 108.

[8]

Rethinking Double Jeopardy: Justice and Finality in Criminal Process

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Summary: *A recent Law Commission Consultation Paper has reconsidered the double jeopardy rule. The Paper recommends,* inter alia, *the enactment of a new exception to the rule to allow for a retrial where significant new evidence of guilt emerges after acquittal. This article reviews the Commission's proposals and finds them justified, but argues that there is a need to rethink some of the details of the proposed exception.*

Introduction

Is there a case for rethinking the double jeopardy rule? In particular, should we create an exception to the general prohibition on prosecuting a person more than once for the same offence, to apply where new evidence is discovered after the person has been acquitted? What would be the limits of such an exception, and would it comply with the European Convention on Human Rights?

These questions are the focus of *Double Jeopardy*, a recent Consultation Paper from the Law Commission.[1] Double jeopardy was almost certainly not high on the Law Commission's list of priorities in criminal law reform. The rule was put in play by the Macpherson Report on the Stephen Lawrence Inquiry[2]; recommendation 38 of the Report was that consideration should be given to permit prosecution after acquittal where fresh and viable evidence is presented. The Home Secretary subsequently referred the law of double jeopardy to the Commission in July 1999, directing the Commission to take account of the Macpherson recommendation, the powers of the prosecution to reinstate criminal proceedings and the United Kingdom's international obligations. The Commission responded to the reference with considerable speed, producing a substantial 130-page Consultation Paper in just three months. This Paper was followed this year by a separate paper on

[1] Law Com. Consultation Paper No. 156 (London, The Stationery Office, 1999) (hereafter CP 156). CP 156 should be read together with *The Double Jeopardy Rule*, the Third Report of the Home Affairs Committee of the House of Commons for the Session 1999–2000 (The Stationery Office, 2000) (hereafter HAC Report). The classic monograph on the subject is M. L. Friedland, *Double Jeopardy* (1969). For more recent writing on double jeopardy in English law see A. L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993) esp. Chap. 2; R. Pattenden, *English Criminal Appeals 1844–1994* (1996) Chap. 8; G. Dingwall, "Prosecutorial Policy, Double Jeopardy and the Public Interest" (2000) 63 M.L.R. 268.
[2] Cm 4262–I (The Stationery Office, 1999).

prosecution appeals against judges' rulings,[3] discussed by Rosemary Pattenden in this issue of the Review. The Law Commission has postponed its final report on double jeopardy in order to produce a joint report on the two Consultation Papers.

CP 156 is a comprehensive review of double jeopardy after acquittal. The Commission was not asked to consider the law relating to further prosecution after a previous *conviction*, but the Paper points out that many of the issues arise equally in both cases.[4] Consequently the Commission has broadened the scope of its review, and most of its proposals apply whether a person was acquitted or convicted at the previous trial. The proposals are extensive. The Commission identifies more than 50 specific questions for consultation, and puts forward its own provisional views for reform in relation to the majority of them. Its key proposals begin with a recommendation for a statutory restatement of the general rule(s) against double jeopardy. The centrepiece of the proposals is the acceptance of the case for a "new evidence" exception to the rule against double jeopardy after acquittal. After debating at some length the justification for this exception and explaining the problems of setting its limits, the Paper sets out a series of carefully defined conditions for the operation of the exception. Finally the Paper discusses the "tainted acquittal" exception to double jeopardy, created by section 54 of the Criminal Procedure and Investigations Act 1996, and recommends that it should be enlarged.

The aim of this article is to reconsider the double jeopardy rule in the light of these key proposals.[5] An examination of the arguments of principle and of underlying theory suggests that the Commission's proposals are soundly based and deserve support. This includes the new evidence exception, but I argue that the Commission needs to think further about its parameters. In particular the question of the offences to which it should apply is tricky, and the Commission's answer is unsatisfactory. If a new evidence exception is to be created it will be essential to retain the discretion to stay proceedings for abuse of process so as to prevent retrials where there has been extensive prejudicial publicity about the overturning of a previous acquittal.

[3] Law Com. C.P. No. 158 (The Stationery Office, 2000).
[4] CP 156, para. 1.14.
[5] One further proposal was that the controversial rule in *Sambasivam v. Public Prosecutor, Federation of Malaya* [1950] A.C. 458 should be abolished (CP 156, para. 8.40). This rule prohibited the prosecution from challenging an acquittal by leading evidence in other proceedings against the same defendant tending to show that he was in fact guilty of the offence of which he had been acquitted. The rule, and the Law Commission's proposal, have now been overtaken by the decision of the House of Lords in *Z* [2000] 2 Cr.App.R., discussed in the article by Paul Roberts, *infra*.

The scope and limits of the rule against double jeopardy

The concept of "double jeopardy" essentially describes the idea of a person being put in peril of conviction more than once for the same offence.[6] A rule against double jeopardy is regarded by many as a fundamental principle of political morality in liberal states.[7] It is sometimes claimed that a citizen should have a constitutional right against state persecution in the form of repeated prosecution for the same offence.[8] The importance of a right against double jeopardy has received international recognition. Article 14(7) of the International Covenant on Civil and Political Rights states:

> "No one shall be liable to be tried or punished again for an offence of which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

A virtually identical provision is in Art. 4(1) of Protocol 7 to the European Convention on Human Rights.

> "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

The United Kingdom has not yet ratified Protocol 7, and it is not therefore included in the Human Rights Act 1998. The Government has indicated its intention to ratify and incorporate Protocol 7 into English law once some other unrelated provisions of national law have been amended.[9] The discussion in CP 156 sensibly proceeds on the basis that this intention will be realised and that the right in the ECHR will in due course be enforceable in the national courts under the provisions of the Human Rights Act.

In English law protection against double jeopardy is still provided at present by the common law. The protection does not take the form of a single self-contained rule similar to that contained in the human rights instruments. In essence it consists of a core rule of criminal jurisdiction, supplemented by a judicial discretion to stay criminal proceedings on the ground that they are an abuse of process. The core rule comprises the old pleas in bar of jurisdiction, namely *autrefois acquit* and *autrefois convict*. A person who has previously been acquitted or convicted of an offence

[6] This is Blackstone's proposition: see 4 Comm. 335–6. It is stated too narrowly for modern law which, as we shall see, extends protection against double jeopardy to include further prosecution for different offences founded on the same conduct. The rule against double jeopardy is one of the oldest rules of the common law. Friedland traced its origin to the dispute in the 12th century between Henry II and Archbishop Thomas Becket whether clerks convicted in the ecclesiastical courts were exempt from further punishment in the king's courts: *op. cit.* p. 5ff.
[7] See, *e.g., Green v. U.S.* (1957) 355 U.S. 184 at pp. 187–188 (Black J.).
[8] For example, the right appears in terms in the Fifth Amendment to the U.S. Constitution. There is an extensive jurisprudence on the scope of the American constitutional protection, surveyed recently by Akhil Reed Amar and Jonathan L. Marcus, "Double Jeopardy Law After Rodney King" (1995) 95 Col. L.R. 1; Akhil Reed Amar, "Double Jeopardy Law Made Simple" (1997) 106 Yale L.J. 1807.
[9] *Rights Brought Home: The Human Rights Bill*, Cm 3782 (1997), para. 4.15.

cannot be prosecuted a second time for the same offence.[10] The rule is narrow in the sense that it is restricted to an offence identical in law to the offence of which the person was previously acquitted or convicted.[11] Thus the plea of *autrefois convict* is not available where a defendant, convicted previously of offences under the Health and Safety at Work Act 1974 in respect of his failure to maintain a gas fire in a house he let out, is later charged with manslaughter of a tenant who died from carbon monoxide poisoning from the faulty fire.[12]

The scope of this core rule is further restricted by three situations in which a defendant may currently be retried for an offence of which he was acquitted or convicted at a criminal trial. The first two of these are where the prosecution is able successfully to appeal against an acquittal at summary trial,[13] and where the Court of Appeal orders a retrial following a defendant's successful appeal against conviction.[14] These are not true exceptions to the right against double jeopardy since both concern orders made on appeal in the original proceedings and in neither case therefore was there a "final" conviction or acquittal.[15] The third situation is a true exception and arises where a "tainted" acquittal is quashed by an order of the High Court.[16]

The *autrefois* rule, as we may call it, is supplemented by the principle, founded on the doctrine of abuse of process, laid down by the House of Lords in *Connelly v. D.P.P.*[17] This principle is that a prosecution should be stayed as an abuse of process where the charge is for a *different* offence from the one of which the defendant was previously acquitted or convicted, but the second charge is founded on the same facts as the first. According to the House in *Connelly* a second trial is only permissible in "special circumstances". What is covered by this phrase is not settled, but it includes acquiescence by the defendant in separate trials of two indictments,[18] cases where a further event occurs after the first trial (for example, the death of the

[10] CP 156, para. 2.3. The rule protects also against subsequent prosecution for an offence of which the person could have been convicted at the first trial by an alternative verdict.

[11] *Beedie* [1998] Q.B. 356, CA, confirming the view of Lord Devlin in *Connelly v. D.P.P.* [1964] A.C. 1254 at pp. 1339–40, and rejecting the wider view of Lord Morris of Borth-y-Gest that the rule extended to a case where the offences were substantially the same (*ibid.* at p. 1305).

[12] *Beedie* [1998] Q.B. 356.

[13] That is, on a point of law using the "case stated" procedure: Magistrates' Courts Act 1980 s.111(1); Supreme Court Act 1981 s.28(1). If the Divisional Court allows the Prosecution appeal it normally directs the Magistrates to continue the original hearing if the facts are in dispute. Occasionally, it may order a re-hearing before a different bench.

[14] Criminal Appeal Act 1968 s.7; since 1988 the Court of Appeal has had this power to order a retrial when it allows an appeal against conviction if the interests of justice so require.

[15] From the defendant's point of view this may be a distinction without a difference, since he or she is still undergoing a second experience of criminal trial for the same offence. The same point applies to the case where the defendant is retried following the failure of a jury at the first trial to agree a verdict at all. The latter case falls outside the scope of the rule against double jeopardy altogether. CP 156 draws attention to several other situations where there is no valid acquittal or conviction to trigger the *autrefois* rule; see paras. 2.7 and 2.8.

[16] Criminal Procedure and Investigations Act 1996 s.54.

[17] [1964] A.C. 1254.

[18] CP 156, para. 2.23, citing Lord Devlin in *Connelly v. D.P.P.* [1964] A.C. 1254 at p. 1360.

victim of an assault of which the defendant has been convicted),[19] and, it seems, cases where new evidence, showing guilt of a further offence, is discovered after the first trial.[20]

It is apparent from this summary that although there is substantial protection against double jeopardy in English law, the protection is by no means unqualified. There are several situations currently where a defendant may be validly tried a second time for an offence arising out of the same (or substantially the same) facts.

Having thus identified the scope and limits of the present law we need to return to the ECHR. How far is the present law compatible with the Convention? To what extent would the Convention permit further exceptions to the general rule against double jeopardy? The Law Commission devotes considerable attention to these questions and argues convincingly that current English law is not only compatible with the Convention but in one respect at least is more generous to the defendant than the Convention.

Article 4(1) of Protocol 7 states an absolute ban on fresh prosecutions for the same offence—giving effect to the principle of *non bis in idem*.[21] However, the ban applies only after the defendant has been "finally" acquitted or convicted, that is, when all rights of appeal have been exhausted. There is no prohibition in the Convention on prosecution rights of appeal. Accordingly retrials ordered by the Court of Appeal on the defendant's appeal and by the Divisional Court on the prosecution's appeal from summary trial appear to be Convention-compliant. The Strasbourg jurisprudence conflicts on whether the ambit of the ban on fresh prosecutions is identical with the narrow English *autrefois* rule, namely that it is restricted to prosecution for the same offence in law as the previous prosecution. *Oliveira v. Switzerland*[22] suggests that it is. In that case D's car had collided with two other cars on an icy road, resulting in serious injury to one of the drivers. D was convicted in successive prosecutions before different courts of offences of failing to control her vehicle and negligently causing physical injury. The European Court of Human Rights held that there was no violation of art. 4(1) of Protocol 7, since the Article does not preclude separate offences arising out of a single act by the defendant being tried by different courts. A wider view of Article 4(1) had previously been taken in *Gradinger v. Austria*.[23] There the defendant had been acquitted at a first trial of an aggravated offence of causing death by negligent driving, the aggravating feature being a blood-alcohol level above the permitted

[19] In such a case there is no bar to charging the defendant with murder or manslaughter: *De Salvi* (1857) 10 Cox C.C. 481; *Thomas* [1950] 1 K.B. 26. As the Law Commission notes (CP 156, para. 2.27), this is an exception to the principle that a person cannot be charged on the same facts with an aggravated form of an offence of which he or she has previously been acquitted or convicted: *Elrington* (1861) 1 B. & S. 688.

[20] CP 156, para. 2.24, citing an unreported decision of the Court of Appeal for Gibraltar: *Attorney-General for Gibraltar v. Leoni* (1999), where it was said that defendants convicted of an offence of jettisoning cargo from their boat would not be able to rely on the *Connelly* principle to resist a later prosecution for possessing and importing cannabis where the police subsequently recovered the cargo and found it to be cannabis. There is an obvious analogy between the discovery of new evidence of a separate offence and the happening of a further event giving rise to liability for a separate offence.

[21] The term frequently employed in civilian jurisdictions and in public international law to describe the rule against double jeopardy.

[22] (1998) 28 E.H.R.R. 289.

[23] (1995) A 328–C.

amount. On the basis of a new medical report administrative authorities subsequently fined D for an offence of driving with excess alcohol. The European Court of Human Rights found a violation of Article 4(1) on the basis that it prevented more than one prosecution in respect of the same incident used to identify the offences charged. An attempt was made in *Oliveira* to distinguish *Gradinger* on the ground that the latter concerned inconsistent findings by different courts on the same facts, but the strong dissenting judgment by Judge Repik in *Oliveira* demonstrated that the two decisions are inconsistent in principle. In one sense this conflict is relatively unimportant for English law because even if the wider view is correct, it largely corresponds with the principle laid down in *Connelly v. D.P.P.* which restrains second prosecutions for different offences founded on the same facts. However, the conflict has implications for the "special circumstances" exceptions to the *Connelly* principle, which are discussed below.

Although the ECHR prohibits fresh prosecutions for the same offence, it has express provision for cases to be reopened in certain circumstances. Article 4(2) of Protocol 7 provides:

> "The provisions of [Art. 4(1)] shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case".

It seems clear that the procedure under section 54 of the Criminal Procedure and Investigations Act 1996 is consistent with Article 4(2), on the basis that a "tainted acquittal" is an example of a fundamental defect in the previous proceedings. We will return to this point in due course. Where there is new evidence of a *different* offence arising out of the same facts, so as to bring the case within the "special circumstances" exception to the *Connelly* principle, the position is not totally straightforward. If the narrow view of Article 4(1) taken in *Oliveira v. Switzerland* is correct this case falls outside it altogether because it relates to different offences. If the wider view of Article 4(1) is correct, then according to the Law Commission this case falls within the new evidence exception in Article 4(2).[24] However, this can be so only if we can say that the previous proceedings against the defendant are being reopened. But if the different offence was not previously charged in what sense are the previous proceedings being reopened?[25] Surely it is a case of a fresh prosecution, not the reinstating of an old one. This point might well lead an English court to prefer the narrow view of Article 4(1), if it wishes to preserve the substance of the "special circumstances" exception to the *Connelly* principle. Moreover, the ECHR expressly recognises an exception to double jeopardy for new evidence of the *same* offence for which the defendant was previously acquitted. It would be very odd if the effect of Article 4 as a whole was to permit second trials where there is new evidence of the same offence, but not where there is new evidence of a different offence on the same facts.

[24] CP 156, paras. 3.42 and 3.46.

[25] Where another offence was charged but left to lie on the file (as happened in *Connelly v. D.P.P.* itself) then there is no difficulty in saying that the first prosecution is being reopened. But this seems unlikely since we are talking about new evidence of a different offence being discovered after the first trial.

The above analysis suggests that the English law on double jeopardy is very largely Convention-compatible. The only real doubt is the scope of the "special circumstances" exception to the *Connelly* principle. If this aspect of the common law does go beyond what Article 4 of Protocol 7 permits, presumably the duty of the English court to give effect to Convention rights will result in the court restating the common law more narrowly.[26] In one respect the current English law is more generous to the defendant than the Convention in not permitting an exception for new evidence of the same offence of which the defendant was acquitted. To evaluate the merits of this position, and to locate the case for reform in a proper framework of principle, we need to turn now to questions of underlying theory.

The justification for the rule against double jeopardy

The Law Commission identifies four rationales for the double jeopardy rule. These are the risk of wrongful conviction, the distress of the trial process, the need for finality, and the need to encourage efficient investigation.

(a) The risk of wrongful conviction

The argument here is that repeated trials for the same offence increase the risk of wrongful conviction.[27] The possibility of a miscarriage of justice where the defendant is convicted on weak or unreliable prosecution evidence is a constant danger in criminal proceedings, and the danger necessarily increases with repeated trials. Friedland reinforces the point by suggesting that in many cases an innocent person would not have the stamina or resources effectively to fight a second charge.[28] In addition, the prosecution will have the tactical advantage of knowing the defence strategy and may be able to adapt their case to meet it, thus increasing the likelihood of conviction whether the defendant is guilty or innocent.

This argument is superficially attractive, but ultimately it fails to persuade. It is certainly not persuasive against the kind of new exception proposed by the Law Commission. Firstly, the supposedly increased risk of wrongful conviction does not prevent retrials occurring under existing law, whether the jury has failed to agree, or the Court of Appeal has ordered a new trial, or for any other reason. Secondly, while it is true that second time round the prosecution have a better idea of the defence case, the converse is also true; the defence may equally be in a position to adapt their case to the prosecution strategy appropriately. Thirdly, if a new exception were to be introduced with a condition of *strong* new evidence of guilt any increased risk of wrongful conviction would be reduced. Fourthly, and more fundamentally, even if we concede that the risk must increase to some degree with repetition of trial, it does not follow that the risk necessarily outweighs the benefits of a new evidence exception in reducing the number of wrongful acquittals. There are two kinds of erroneous outcomes of criminal process. The burden and high standard of proof (and a number of other evidential rules) reflect our special concern to avoid one kind of error, namely wrongful conviction. These rules remain in place for retrials. It is not obvious that a *further* weighting is needed against wrongful conviction so as to prevent retrials altogether, even where there is good reason to believe that a retrial may correct the other kind of error, namely wrongful acquittal.

[26] CP 156, para. 3.44.

[27] CP 156, para. 4.5.

[28] *Op. cit.*, p. 4.

(b) The distress of the trial process

The Law Commission cites a number of views to the effect that it is an unacceptable hardship on the defendant to undergo the distress and anxiety of a second trial after he has been through the experience once already and secured an acquittal.[29] The rhetoric of inhumanity can reach a high level. Lord Loreburn L.C. once told Parliament, in the debates on the Bill which set up the Court of Criminal Appeal in 1907, that it "approaches the confines of torture to put a man on trial twice for the same offence".[30] The Commission attaches a good deal of weight to this argument, pointing out that distress extends to the defendant's family as well, and also to witnesses and victims. In the Commission's view the argument is capable of justifying a rule against double jeopardy which prevents second trials both for the same offence and for different offences on the same facts.[31]

This argument is grounded in what might be called the state's duty of humanity to its citizens, which is an aspect of the liberal imperative to treat all citizens with dignity and respect. As such the argument has some affinity with one of the rationales for the privilege against self-incrimination, namely the principle that the state should not impose cruel choices on citizens by obliging them to speak in circumstances where they may incriminate themselves.[32] However, like the self-incrimination rationale, the argument about the distress of the trial process presents some difficulties. Firstly, the argument does not prevent retrials under existing law. Every time the Court of Appeal orders a retrial, or there is a second trial following a hung jury, the defendant and all the other participants in the process have to repeat the distress and trauma associated with the trial. So, even if the argument might support a general rule against double jeopardy, it does not necessarily rule out retrials in exceptional cases. Secondly, if strong new evidence of guilt emerges after an acquittal, it is not obvious that witnesses and victims would always wish to avoid the distress associated with a second trial. In many cases surely, they would say that this is a price they were prepared to pay in order to see justice done. One can readily imagine that the parents of Stephen Lawrence would not object to a retrial if new evidence was discovered incriminating those who were acquitted in the earlier private prosecution. In such cases the distress to victims and their families from *not* permitting retrial might fairly be offset against the distress likely to be suffered by the defendants concerned.

(c) The importance of finality in litigation

Finality is an important value in civil litigation. Once a civil dispute has been finally adjudicated the matter becomes *res judicata*. A civil judgment can only be reopened subsequently if it can be shown that the judgment was procured by fraud.[33] One reason for the finality of civil judgments is usually said to be the importance attached to stable property rights and contractual relations where the interests of third parties are frequently involved.[34] Finality of adjudication also helps all parties to move on, to resume socio-economic activity, to create new legal relationships. This latter point is equally applicable in a broad general sense to

[29] CP 156, para. 4.6.
[30] H.L.Deb. (1907) Vol. 179, col. 1473.
[31] CP 156, para. 4.7. See further below.
[32] See I. H. Dennis, *The Law of Evidence* (Sweet & Maxwell, 1999), 136–7.
[33] Spencer Bower, Turner and Handley, *Res Judicata* (3rd ed. 1996), 203–208.
[34] CP 156, para. 4.8.

criminal cases,[35] but the issue of maintaining settled rights and obligations, and of not prejudicing third parties by destabilising final judgments, does not arise so plainly in criminal law. Moreover, a person's security and settled expectations always yield to a well-founded prosecution of him for a serious offence. There is no time limit for such prosecutions, whereas most civil causes of action are subject to statutory limitation periods.

Finality as a value in criminal litigation is relatively weak as far as *convictions* are concerned. A final conviction remains open to challenge—without limit of time—on the ground that it was mistaken and that a miscarriage of justice occurred. Such a challenge is not easy to mount, for a reason which I shall explore shortly. It requires, and rightly requires, some significant new material to support the claim that the guilty verdict was wrong.[36] However, where a well-founded challenge is made, the value attached to individual liberty and autonomy overrides the importance attached to the stability of criminal verdicts.

In relation to *acquittals* finality has traditionally assumed greater importance, for the same reason that it takes a lesser priority for convictions. Fairness to the defendant—again an aspect of the state's concern to treat all citizens with respect for their liberty and autonomy—results in a claim that a final judgment of acquittal should represent a line drawn under the past. The defendant should be able to get on with the rest of his life in a state of security from further prosecution. We might say that an acquitted person deserves a fresh start: that it would be unfair to deprive him of the right of self-determination free of the restraints imposed by knowledge of the possibility of further interference in his life through reopening of the acquittal. The Law Commission refers to the defendant's "need for repose" after an acquittal (and indeed a conviction and sentence), and notes that this aspect of finality begins to merge with the argument based on freedom from distress, discussed above.[37]

(d) The promotion of efficient investigation and prosecution

The double jeopardy rule is said to promote efficient investigation and prosecution of offenders because the police and the CPS know that they have only one chance of conviction. Therefore they have an incentive to investigate and prosecute the case as thoroughly as possible, and not to rely on the possibility of making good any deficiencies by bringing a second prosecution later.[38]

This argument plainly has force. The Law Commission is right to say that it supports both the narrow rule against double jeopardy (no fresh prosecutions for the same offence) and the wider rule (no fresh prosecutions for different offences arising on the same facts). As the Commission puts it, "in general the police should be expected to investigate all aspects of an incident which may have involved the

[35] *Ibid.*
[36] Under s.13 of the Criminal Appeal Act 1995 the Criminal Cases Review Commission may refer a conviction to the Court of Appeal under s.9 of the Act only if the Commission considers that, because of an argument or evidence not raised at trial or because of exceptional circumstances, there is a real possibility that the conviction would not be upheld. In *Criminal Cases Review Commission ex p. Pearson* [1999] 3 All E.R. 498 the Divisional Court held that the Commission was entitled, in a case likely to involve the willingness of the Court of Appeal to receive fresh evidence, to predict that the Court of Appeal might require the evidence to be "overwhelming or clear" (*Borthwick* [1998] Crim. L.R. 274) that a defence would have succeeded.
[37] CP 156, paras. 4.9 and 4.10.
[38] CP 156, para. 4.11.

commission of crime".[39] However, the force of the argument is limited to supporting the general rule. It does not necessarily rule out an exception for fresh evidence emerging after an acquittal, provided that the evidence could not have been discovered by due diligence in investigation before the first trial. As we shall see, such evidence might include a voluntary public admission by the defendant, or scientific evidence of identification produced by a new development in technology. Because the police and CPS will not know before the first trial whether such evidence might become available later the incentive to investigate and prosecute efficiently in the first place will not be lost.

Some might argue that allowing a second prosecution where new evidence emerges after an acquittal would provide an opportunity for the fabrication of evidence where police officers firmly believed an acquitted defendant to be guilty. This certainly looks like a possible danger. "Noble cause corruption", as it has been called, cannot be dismissed as simply speculative when we bear in mind some of the notorious police scandals of recent years.[40] However, this danger exists before the first trial. If police officers are prepared to go to the lengths of fabricating evidence at all against certain offenders, it seems unlikely that they will wait until after a first trial. What would be the point of waiting given the uncertainty of whether a retrial might be ordered at all? Furthermore the law of evidence provides procedures for challenging police evidence, and these procedures will be available at the retrial. At this stage we return to the points made above in connection with the argument about the increased risk of wrongful conviction. As before, it is doubtful whether any increased risk of fabrication of evidence is sufficient to outweigh the benefits of retrials. This is particularly so if an order for a retrial is only likely to be made in cases of the kinds of new evidence now to be considered.

The justification for a new evidence exception

What kind of case might justify an exception to the double jeopardy rule for new evidence? The Law Commission rightly adopts the technique of arguing from the "strongest possible" cases, but fails to make the best argument it could. One of its illustrative strong cases is new scientific evidence, which is discussed below. The other is the following scenario:

> "Two defendants are acquitted of conspiracy to murder. They are alleged to have hired X to kill another. The prosecution case, while to a degree compelling, is purely circumstantial. Shortly after the trial, as a consequence of a genuine religious conversion, X comes forward and volunteers to give evidence for the prosecution. The veracity of her evidence is supported by the revelation of certain details that would only be known to the murderer."[41]

This vision of the repentant hitperson, who has undergone a Damascene conversion, provides a vivid (and politically correct) example of unexpected new evidence. I am told by the Law Commission that the example is derived from an unreported case, but because CP 156 gives no supporting reference to the case, the example appears to be no more than a purely speculative possibility. Unfortunately that makes it an unconvincing way to propose major law reform. No sensible

[39] *Ibid.*
[40] The disbanded West Midlands Serious Crimes Squad is an obvious example.
[41] CP 156, para. 5.8(b).

legislator is likely to be persuaded to modify a long-standing rule of law by such an unsupported hypothetical. It is odd and unfortunate that the Commission should weaken its argument in this way because a much more compelling scenario is readily available. This is the case of the acquitted defendant who subsequently makes a voluntary admission of his guilt. There is at least one notorious recent example. In his autobiography *Respect*[42] Freddie Foreman, described on the cover as the "Managing Director of British Crime", told in detail how he took part in the killing of Frank "the Mad Axeman" Mitchell as a favour to the Kray brothers.[43] Twenty years earlier he had been tried for this murder and acquitted. It is not hard to envisage other acquitted defendants recounting similar exploits. Such situations pose a sharp policy question: should the state continue to be unable to reopen a case against a defendant, acquitted of very serious crimes, who voluntarily and publicly admits his guilt? The element of publicity in the admission is important because it increases the disrepute likely to attach to the criminal justice system if it appears unable to respond effectively.[44]

Returning to the subject of scientific evidence, the Law Commission suggests[45] the example of a new DNA test which enables a very small quantity of body fluid found on a rape victim to be identified as from the body of the defendant. If the defendant has previously been acquitted of the rape, having put up a defence of mistaken identity, should the prosecution be able to reopen the acquittal? This is undoubtedly a plausible scenario. In evidence to the Home Affairs Committee[46] the Association of Chief Police Officers (ACPO) drew attention to new techniques of DNA profiling developed by the Forensic Science Service. These include the "revolutionary LCN procedures that allow for an individual profile to be identified from a single cell".[47] According to ACPO a number of old cases involving undetected serious crimes have been reviewed with the aid of the new technology, and some striking successes obtained. Other scientific advances mentioned to the Home Affairs Committee[48] include corneal mapping, improved fingerprint technology and more sophisticated enhancement of CCTV pictures. ACPO told the Committee that the Forensic Science Service, together with the administrators of a national database for child murders, had estimated that there might be as many as ten serious offences where alleged offenders had been acquitted but significant new scientific evidence had become available to prove their culpability.

It seems clear therefore that the Law Commission's proposal for an exception to double jeopardy based on new evidence can be firmly grounded in the real world. New scientific evidence and voluntary detailed admissions are genuine possibilities. Their existence as possibilities for proving a person's guilt of the most serious offences in the criminal calendar raises an issue about the finality of previous

[42] Arrow, 1996.
[43] The story is told at pp. 207–217. In an earlier chapter Foreman described how he shot and killed Thomas "Ginger" Marks in a revenge attack. He was acquitted of this murder also.
[44] Other elements likely to increase disrepute might include profitmaking from the admission and an attitude of contempt for the law. Charges of other offences may or may not be possible in this type of case.
[45] CP 156, para. 5.8(a).
[46] HAC Report, App. 3.
[47] *Ibid.*
[48] See the evidence of David Calvert-Smith Q.C., the D.P.P. (HAC Report at para. 29(and the evidence of David Phillips, Chairman of ACPO (*ibid.* at para. 105).

acquittals which cannot be ignored. Unlike the tainted acquittal exception, which so far is of theoretical rather than practical importance, this exception is likely to be significant in practice. It forces us to reconsider the relationship between our concepts of justice and finality.

Justice and finality: some further considerations of theory

We can now return to the wider theoretical context. I have argued elsewhere[49] that the ultimate aim of the law of evidence is to secure legitimacy of verdicts and decisions in official adjudication. A legitimate verdict in criminal adjudication is one that is factually correct and morally authoritative. Moral authority derives in large measure from factual accuracy, but it may be significantly damaged if the criminal process culminating in the verdict has failed to respect the fundamental principles of criminal justice on which the criminal justice system is founded. These fundamental principles may be substantive or procedural; most of them appear in the European Convention on Human Rights.[50]

Legitimacy theory is capable of being applied to other areas of criminal law and procedure. In relation to double jeopardy it provides the following analysis. There is a presumption that a final verdict, whether of conviction or acquittal, reached after a fair trial and an appeal process, is factually correct and morally authoritative. This presumption has both empirical and normative foundations. We acknowledge that mistakes can be made in adjudication, but we believe that they occur in only a small minority of cases.[51] In addition we assume that the official procedures for determining guilt and innocence ought to deliver substantive and procedural justice; without this assumption the system could be no more than an unfair lottery and would have no credibility. It follows that we do not allow the presumption of the legitimacy of a final verdict to be challenged (once the appeal process has been exhausted) in the absence of something significantly new. If there is nothing significantly new—but we nonetheless allow the issue of guilt or innocence to be retried—then the danger emerges of inconsistent verdicts on the same evidence.[52] Two inconsistent jury verdicts, reached on the same evidence, about D's guilt of an offence raise an insoluble problem of legitimacy. How do we know which verdict is correct? The danger of inconsistency and the attendant problem of legitimacy

[49] I. H. Dennis, *op. cit.*, Chap. 2.

[50] This is not to say that a violation of the defendant's Convention rights in the course of the proceedings (whether in the obtaining of evidence or non-disclosure of material or otherwise) necessarily means that a subsequent conviction is illegitimate. Much depends on the type of right violated, the nature of the violation and the importance of the evidence in question. This complex question requires much more discussion than I can provide here, but the proposition just put derives support from the recent cases of *Khan (Sultan) v. United Kingdom* [2000] Crim.L.R. 684; *Davis, Rowe and Johnson, The Times* July 17, 2000.

[51] In the *Crown Court Study*, carried out by M. Zander and P. Henderson for the Royal Commission on Criminal Justice (Research Study No. 19, H.M.S.O., 1993 at p. 163) criminal justice professionals were asked whether they found the jury's verdict in the cases in which they had taken part surprising in the light of the evidence. Judges and barristers replied that they found the verdict surprising in 14% or 15% of cases and unsurprising in 86% or 85% of cases (the figures for the police and CPS were about 10% higher for surprising verdicts). The authors of the study go on to explain that acquittals gave rise to surprise considerably more frequently than convictions. I take "surprising" to mean against the weight of the evidence, and therefore as some indication of the view of an experienced observer that a mistake might have been made.

[52] As Lord Devlin recognised in *Connelly v. D.P.P.* [1964] A.C. 1254 at p. 1353.

provides us with a further powerful reason for maintaining the double jeopardy rule as a general rule forbidding the reopening of jury verdicts. When allied to the other considerations of finality, fairness and efficiency it makes an overwhelming case for keeping the general rule.

We are however used to the idea that new evidence of innocence, a previously unknown alibi witness for example, calls into question the legitimacy of a conviction. It suggests that a mistake has been made that calls for investigation and possible rectification. Similarly the emergence of significant new evidence of guilt calls into question the legitimacy of an acquittal. It suggests likewise that a mistake has been made. Why should we not investigate and if necessary rectify the mistake, so as to lead to a retrial? It is not apparent now that a different verdict on a second trial would be inconsistent, given significant new evidence. The criminal justice system exists to enforce the criminal law, and the correct enforcement of the criminal law against those whom we have reason to believe may be guilty is a matter of state policy. The interests of justice seem therefore to call for a retrial in these circumstances. A retrial will resolve the legitimacy problem of the first acquittal and forward the aims of criminal justice if the defendant is in fact guilty.

The question then should be whether there are reasons sufficiently powerful to defeat the case for being able to reopen the acquittal. As we have seen, the policy argument that retrials for the same offence would undermine efficient investigation and prosecution has little force where we restrict retrials to cases where new evidence has become available that was not reasonably discoverable before the first trial. The interests of finality of legal process ought to be subordinate to the interests of the legitimacy of the process. There seems to be little merit in drawing a line under an outcome which we now have good reason to believe to be wrong, particularly in the most serious cases where the safety of the community is most strongly engaged. There is no abuse of state power in the sense of the state obtaining an unfair advantage over the defendant, because the retrial will be concerned with significant new evidence and the principle of equality of arms will continue to apply. The fairness of the retrial in other respects is discussed further below. A retrial will not be in violation of the defendant's rights under the ECHR. It seems therefore that the best argument against reopening an acquittal is founded on the unfairness of disturbing the defendant's security and of subjecting him to the distress and anxiety of a retrial. This unfairness does not look particularly compelling where there is strong new evidence of guilt *and* we take into account the insecurity and distress caused to victims if the acquittal is not reopened.

This last point about the interests of victims leads to a possible further argument for a power to reopen acquittals in certain circumstances. The argument is founded on the ECHR and is admittedly wholly speculative, but perhaps it is not so bizarre that it can be dismissed out of hand. Consider the following hypothetical. V is married to D who is violent and jealous. V has an affair with W. D finds out about the affair. Subsequently someone shoots at V and W, killing W and injuring V. There is eyewitness evidence identifying D as the gunman but at D's trial the eyewitness becomes confused and uncertain under cross-examination. D is acquitted of the murder of W and the attempted murder of V. The day after the acquittal D sends V an email message telling her that he was the gunman and that she had better come back and live with him. V refuses and goes into hiding. Three months later D finds V and shoots and injures her. Could V have a claim against the UK government for breach of her rights under the Convention?

Under Article 2(1) everyone's right to life shall be protected by law. In *Osman v. United Kingdom*[53] the European Court of Human Rights stated[54]:

> "the Court notes that the first sentence of Art. 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction . . . the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions".

Accordingly in *Osman v. UK* the Court accepted that Article 2 might require States not only to have substantive laws against unlawful killing, but also to take preventive operational measures to protect an identified individual whose life is at risk, and known to be at risk, from the criminal acts of a third party. The use of such measures would of course have to be authorised by law, and the Court indicated that they should be such as it would be reasonable to expect the State to have in place. The facts of *Osman* were different from the hypothetical, but there is an element of similarity in that both cases concern the State's positive obligations towards potential victims of individuals believed to be targeting them. For this reason the Court's approach to the applicant's argument about the State's duty under Article 2 is thought-provoking. In the hypothetical V's life was known to be at risk from D who might try again to kill her. However, in the absence of a specific threat by D to kill her, or repeated acts of harassment, it is not clear that effective measures were currently available to protect V from the risk. Might V then argue that by not having in the law a procedure for reopening D's acquittal on new evidence the UK government had failed to comply with its obligation to protect her life? She might maintain that it would be reasonable to expect this procedure to be in place since the possibility of reopening an acquittal is expressly permitted by the Convention. The objects of this procedure could be argued to be not only the doing of justice in respect of past offences, but also the protection of potential future victims from a repetition of the conduct in question. If so, we might then fairly expect the procedure to be accompanied by powers of arrest and detention of the defendant in appropriate cases.

For some (perhaps many) this argument will seem several steps too far. It would certainly go beyond anything Strasbourg has done to date. Nonetheless, it has become clear in recent years that Convention rights may impose positive obligations on States to amend their criminal law,[55] and the increasing emphasis in the Strasbourg jurisprudence on the need to take account of victims' interests may suggest that the wind is blowing in the direction of this kind of argument.

[53] [1999] 1 F.L.R. 193, ECtHR.

[54] *Ibid.*, para. 115.

[55] In *A v. United Kingdom* (1998) 27 E.H.R.R. 611 the European Court of Human Rights held that the common law defence of reasonable chastisement of a child was too imprecise to provide a jury with adequate guidance on the permissible degree of force that could be used to discipline a child. Consequently the UK was found to have violated the child's right under Art. 3 to freedom from inhuman or degrading treatment when a stepfather who beat a nine year old boy with a garden cane, causing bruising to the child's legs and buttocks, was acquitted by a jury of assault occasioning actual bodily harm having relied on the defence.

The scope and limits of a new evidence exception

(a) Strength of the new evidence

The Macpherson report referred to "fresh and viable" new evidence as a possible threshold for the new exception. The Law Commission impliedly rejects this as insufficient. In the Commission's view the case for the acceptability of the new exception should depend not simply on whether the new evidence is credible ("viable") but on how much difference it makes to the prosecution's case at the first trial. The Law Commission recommends a test of whether the new evidence would strengthen the prosecution case to the point where it is highly probable that a reasonable jury, properly directed, would convict. We can safely assume that this would be a higher hurdle than the 51 per cent evidential sufficiency criterion for first prosecution used by the CPS. It would be a strict standard that would reinforce the argument that a retrial would be in the interests of justice. It is a stricter standard than that contained in the ECHR, which refers in Article 4(2) of Protocol 7 merely to "evidence that could affect the outcome of the case".

The Home Affairs Committee prefers a different approach which focuses on the safety of the previous acquittal rather than on the strength of a second prosecution. The Committee is uneasy about the risk of prejudice arising where the High Court[56] makes an official prediction that it is highly probable that a jury would convict in a retrial.[57] The Committee suggests therefore that the test should be whether the new evidence makes the previous acquittal unsafe, "thus putting the emphasis on the past acquittal rather than appearing to prejudge any future second trial".[58] This is consistent with the argument from legitimacy discussed above and represents a more coherent approach to the question of when a court could justify setting aside an acquittal.[59] However, it would also be right to insist that the new evidence required for this purpose should be evidence that is significant and substantial. This is because the presumption of the legitimacy of an acquittal should be regarded as a strong one which cannot be overturned by evidence that does not reach a certain threshold of weight.

(b) Offences to which the new exception would be applicable

CP 156 proposes that the possibility of reopening an acquittal should be available only where the offence alleged is of a certain minimum seriousness.[60] This proposal is an essential element of the trade-off between the interests of justice and the interests of finality. The Commission argues that it is not necessary to have the exception for all offences, and suggests that public opinion would tolerate the occasional wrongful acquittal "in the ordinary run of offences against property and

[56] The court to which an application to quash an acquittal and order a retrial would be made: CP 156, para. 5.68.

[57] HAC Report, para. 40.

[58] HAC Report, para. 41.

[59] I confess to having modified my view on this point from the one I expressed in an editorial in [1999] Crim.L.R. 928. I still think the Law Commission was right to reject the Macpherson formula as too weak, but I am now persuaded by the argument from prejudice that the focus should be on the safety of the acquittal rather than on the strength of a new prosecution.

[60] Para. 5.27.

minor assaults".[61] This would represent popular acceptance of the price that sometimes has to be paid for the presumption of innocence. The use of a proportionality threshold in this context seems sound, and we could reinforce the point by saying that the protection of victims is not such a pressing consideration in these cases of less serious harm.

The question then is where to draw the line. When is the threshold of proportionality crossed? CP 156 recommends that the new exception should be available only where the sentence on a retrial is likely to be of a certain minimum severity; the suggestion is three years custody following conviction after a not guilty plea.[62] This figure is arbitrary in the sense that it has no specific grounding. It appears that the Commission's intention is that the exception should be available in a wide range of offences, but only where the offence is a serious one on the facts, so that a substantial custodial penalty would be likely. A term of three years is offered essentially as a cockshy. The objections to this condition are that it is impracticable and unfairly indeterminate. It is impracticable in this sense. It would require the court that has to decide whether to order a retrial to make a predictive sentencing judgment on the assumption that a retrial would end in a conviction after a not guilty plea. However, it cannot be known at this stage what course the retrial may take, what evidence may emerge, and, crucially, what mitigation may be offered. How can a court make a confident prediction on such an unknown matrix of facts? The only cases surely will be ones where sentencers invariably give long custodial terms for particular types of offence. In other cases—say woundings or burglaries —it seems that some acquittals would be subject to the possibility of being re-opened but others would not be. This introduces too many contingencies into the relationship between justice and finality. It is unfair to defendants who will be left in a state of uncertainty about the status of the acquittal, and it is unfair to victims who will not know whether the point of closure has been reached or not.

There are several alternatives. One would be to extend the exception to all offences punishable with imprisonment, irrespective of the actual penalty which is likely on a retrial. This would go much too far, taking in many of the cases where the Law Commission believes that public opinion would tolerate the occasional wrongful acquittal. A narrower rule would restrict the exception to indictable offences only. This would certainly include the most serious offences, but also a number of others for which it is not clear that an exception is needed. An editorial in the Review suggested that a better proposal would be to restrict the exception to a list of offences punishable with the most severe penalty, namely life imprisonment.[63] The list would thus include such offences as murder, rape, arson, robbery and wounding with intent to do grievous bodily harm. These are the offences from which victims may justifiably demand the greatest degree of protection, and which figure most often in discussion about the merits of a new exception. People should not "get away with murder" is a cliche, but it also provides a valuable criterion of seriousness in this context. The Home Affairs Committee has adopted the life

[61] CP 156, para. 5.23.
[62] *Ibid.*, para. 5.29.
[63] [1999] Crim.L.R. 928.

sentence criterion as part of its recommendations in support of a new exception.[64]

(c) Fair (re)trial and abuse of process

A critical problem for any new exception in practice will be ensuring that a retrial will be fair. There is a real danger of prejudicial publicity arising from the reporting of a decision to quash an acquittal on the ground of significant new evidence. For this reason it is essential that the High Court (assuming that it is the High Court which is given the jurisdiction over the new power to quash acquittals and order retrials) should have to be satisfied that it would be in the interests of justice to order a retrial. A power to order reporting restrictions would be a necessary element of the jurisdiction. Equally the judge at the retrial should retain the discretion to stay the proceedings as an abuse of process if, despite the restrictions, publicity has occurred to a degree which would prejudice the fairness of the retrial.[65] The abuse of process discretion is needed also to cater for other developments between the quashing of the acquittal and the retrial which mean that the retrial would not be in the interests of justice.

(d) How many retrials?

There is an overwhelming case for saying that the state should be allowed only one second bite at the cherry. This is a limited exception to a principle rightly perceived as fundamental. A defendant acquitted a second time, where there has been significant new evidence of guilt, must be able to say that the legitimacy of this verdict is now beyond question.[66] Any further attempts by the state to re-open the matter will look like an unwillingness to accept the adjudications of its own institutions, vindictiveness against the defendant and an abuse of state power in continuing to devote resources to further prosecutions against the defendant. In these circumstances it would be doubtful how far any subsequent verdict of guilty could carry the necessary moral authority.

Tainted acquittals

This procedure was introduced by section 54 of the Criminal Procedure and Investigations Act 1996. It is aimed at the defendant who benefits from an attack on the integrity of the criminal justice system itself, involving interference with, or intimidation of, a juror or witness.[67] It seems beyond dispute that such interference or intimidation constitutes a "fundamental defect" in the first trial for the purposes of Article 4(2) of Protocol 7.[68] The Law Commission is also on sure ground in claiming justification for this exception to the rule against double jeopardy. An acquittal procured by criminal offences against the adjudicative process itself plainly lacks moral authority and has a very substantial question mark over its factual accuracy. A retrial is needed to resolve the issue of legitimacy, and in this case there are no serious arguments of hardship to the defendant against a retrial. A defendant

[64] HAC Report, para. 24.
[65] Extensive publicity on the Internet might be an example.
[66] The Law Commission comments that it is "scarcely conceivable that it might be in the interests of justice to invoke this exception more than once against the same defendant in respect of the same alleged facts"; CP 156, para. 5.58.
[67] CP 156, para. 6.6.
[68] *Ibid.*, paras. 6.4 and 6.5.

who is proved to have deliberately corrupted the first trial in his favour has no standing to complain of the distress to which a retrial will expose him. Even if the corruption was carried out by someone else the defendant has benefited from it, and it is hardly conceivable that the benefit could be wholly innocent. There is no interest in finality in such a case.

CP 156 makes a number of proposals for fine-tuning the tainted acquittal procedure. It seems clear that it should extend to interference with or intimidation of a judge or magistrate.[69] On the other hand it is not so clear that the necessity for a conviction of an administration of justice offence should be dropped.[70] The Law Commission recommends that it should be replaced with a requirement that the High Court should be satisfied to the criminal standard of proof that such an offence has been committed, the rationale being that the person responsible for the interference or intimidation might not be identified or otherwise available for prosecution. This is dubious. If a jury verdict in the defendant's favour is to be set aside on the ground that it was wrongfully procured, justice is better seen to be done if there is as it were a corresponding jury verdict that the trial was compromised by interference or intimidation. Finally, the Commission's proposals[71] for amending the procedure for determining whether to quash an acquittal so that the procedure complies with Article 6 of the Convention plainly deserve support.

Codifying the rule(s) against double jeopardy

In accordance with its objective of codification of the criminal law, the Law Commission proposes that the current law should be put into statutory form.[72] The proposal is to replace the *autrefois* rule and the *Connelly* discretion with a new composite rule which would prohibit prosecution of a person not only for an offence of which he or she had previously been acquitted or convicted but also for an offence founded on the same or substantially the same facts as such an offence. The new rule would be made subject to the exceptions discussed above.

Having been a long-time advocate of codification I applaud this proposal. I would, however, make two comments about it. One is that it is essential, as suggested earlier, for any new legislation to make clear that the abuse of process discretion remains available to the judge who has to conduct a retrial. The High Court which quashes an acquittal in the light of new evidence will have a discretion under the proposal whether to order a retrial in the interests of justice, and factors indicative of abuse of process would be relevant factors to take into account. But this discretion cannot take account of events intervening between the order and the retrial, such as prejudicial publicity. Accordingly the Commission's further proposal[73] to retain abuse of process as a reason for stopping the retrial at a later stage must be accepted. The second comment is that the proposal to unify the present law overlooks the point that the justifying arguments against double jeopardy work somewhat differently in the *autrefois* rule and the *Connelly* discretion. The *autrefois* rule is firmly underpinned by the need for consistency in criminal verdicts as well as the general principle of humanity that insists that the state may only prosecute a

[69] *Ibid.*, para. 6.8.
[70] *Ibid.*, para. 6.12
[71] *Ibid.*, para. 6.25 *et seq.*
[72] *Ibid.*, para. 4.16.
[73] *Ibid.*, para. 7.8.

citizen once for a given offence. The argument from consistency may be much weaker in the case of the *Connelly* discretion; it depends on how similar or dissimilar the different offences are. This throws the weight of justification on to considerations of the unfairness and inefficiency of separate trials of different offences. These considerations, although powerful, are not necessarily as persuasive, which may help to account for the ambivalence displayed by the European Court of Human Rights as to the scope of the rule against double jeopardy in the Convention. CP 156 rather glosses over this difference in justifying theory, although it has to be said that it is doubtful whether anything would have changed had the Commission addressed the issue more directly. In conclusion, therefore, the proposal to codify both parts of the protection against double jeopardy may be accepted.

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THE DOCTRINE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS REGARDING STATES' DUTY TO PUNISH HUMAN RIGHTS VIOLATIONS AND ITS DANGERS

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INTRODUCTION

The Inter-American Court of Human Rights ("Inter-American Court") demands that states party to the American Convention on Human Rights ("American Convention") investigate, prosecute, and punish every violation of rights protected by the convention. The Inter-American Court underscored this duty through a consistent body of case law, and recognized the obligation as emerging from the commitment of states to ensure and guarantee rights protected by the American Convention and to satisfy victims' rights. According to the court, victims of breaches to the American Convention are entitled to retribution through the punishment of their offenders. This Article raises concerns about that doctrine, described as the "duty to punish doctrine."

Individual rights are always in conflict: Every right implies a restriction both on states to carry out their policies and on individuals to enjoy their personal liberty. This Article illustrates how the broad scope of victims' rights enshrined by the Inter-American Court's duty to punish doctrine restricts the scope of defendants' rights within domestic criminal justice systems. If the doctrine is applied as it has developed thus far, it will have a counterproductive and

dangerous impact on the already conflicted relationship between individual rights and states' criminal systems.

Part I describes the role of the Inter-American Court in the development of human rights protections in the Inter-American system. Part I also explains the development of the court's duty to punish doctrine. After detailing the origins and general characteristics of the doctrine, this Article examines the Inter-American Court's decision in *Bulacio v. Argentina*[1] and its impact on Argentine domestic criminal proceedings. Part II analyzes the dangers of the duty to punish doctrine. Part III suggests an alternative approach to human rights violations as taken by the European Court of Human Rights. Finally, this Article concludes with a call to restrict the way in which the Inter-American Court has broadened victims' rights.

I. THE DUTY TO PUNISH DOCTRINE WITHIN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

A. THE INTER-AMERICAN SYSTEM AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS' JURISDICTION

The Inter-American system of human rights protection is comparable to other international and European systems designed to protect individuals from state violence and oppression.[2] The system centers on victims of state abuse.[3] The Inter-American Court plays a

1. *See* Bulacio v. Argentina, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100, ¶ 10 (Sept. 18, 2003) (holding the State of Argentina responsible for the death of a young person detained by police forces in violation of several protected rights under the American Convention, and demanding the State provide the victim's next of kin with different types of reparations).

2. *See* SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 1 (1997) (providing a thorough analysis of the Inter-American human rights system).

3. *See* Jorge Cardona Llorens, *La Funcion de la Corte Interamericana de Derechos Humanos [The Function of the Inter-American Court of Human Rights], in* MEMORIA DEL SEMINARIO: EL SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI [Report of the Workshop: The Inter-American System Protection of Human Rights at the Threshold of the Twenty First Century] 331 (2d ed. 2003), *available at* www.corteidh.or.cr/docs/libros/Semin1.pdf (elaborating that an individual cannot be a party before the court and a state can only be brought to the court by the court itself or by another state).

major role in this system and acts as an autonomous judicial institution. The court's purpose is to interpret and apply the American Convention and to decide contentious cases against states party to the treaty.[4] The court's judgments are binding on these states since they have accepted the treaty's competence.[5]

Similar to the International Court of Justice, the Inter-American Court is charged with establishing states' international responsibility for breaches of the American Convention. In addition, the court offers redress for victims of verified human rights violations by providing reparations.[6] The court is not a criminal tribunal and does not have jurisdiction over individuals, only over states.[7] The Inter-American Court itself said:

> The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.[8]

4. *See* Organization of American States, American Convention on Human Rights art. 26, Nov. 22, 1969, O.A.S. T.S. No. 36 [hereinafter ACHR] (requiring state parties to adopt all measures necessary to promote all the rights set forth in the charter of the Organization of American States); Corte Interamericana de Derechos Humanos, Information, http://www.corteidh.or.cr/historia.cfm (select "English version" hyperlink) (last visited Aug. 29, 2007) [hereinafter Inter-American Court Information] (noting that to date, twenty-four American nations have ratified or adopted the American Convention: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Perú, Dominican Republic, Suriname, Uruguay and Venezuela). Of the twenty-four states which have ratified the convention, twenty-one have accepted the jurisdiction of the Inter-American Court. *Id.*

5. *See* ACHR, *supra* note 4, art. 62 (providing jurisdiction for the Inter-American Court of Human Rights arising out of Article 62(3) of the Convention); *see also* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 281 (2003) (analyzing exhaustively the grounds for jurisdiction of the Inter-American Court of Human Rights and its practice).

6. Jo M. Pasqualucci, *Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure*, 18 MICH. J. INT'L L. 1, 8-9 (1996) (explaining that the Inter-American Court provides reparations for victims where a state violates any right protected under the American Convention).

7. *See* Cardona Llorens, *supra* note 3, at 336 (explaining that the Inter-American Court, as a human rights tribunal, is distinct in nature from an international criminal tribunal in that international criminal tribunals hear cases involving state agents and specific actors, but human rights tribunals focus on reparations to victims of the abuses).

In pursuit of victims' reparations, the Inter-American Court developed a consistent body of case law regarding a states' duty to punish perpetrators of human rights violations.[9] The consequences of these decisions apply not only to offender states, but also to all states party to the treaty. Although the Inter-American Court is not a criminal tribunal, its decisions have a direct impact on the scope of defendants' rights in domestic criminal proceedings.[10]

B. THE DEVELOPMENT OF THE DUTY TO PUNISH DOCTRINE JURISPRUDENCE

1. Velásquez-Rodríguez and Emerging States' Duties With Respect to Human Rights Violations

In 1988, the Inter-American Court delivered its first judgment in the contentious *Velásquez-Rodríguez v. Honduras* decision.[11] The case concerned the commission of grave human rights violations, such as the systematic practice of forced disappearances by the State of Honduras.[12] In the case, the Inter-American Court asserted:

8. *See* Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 134 (July 29, 1988).

9. Editorial, *Las Reparaciones en el Sistema Interamericano de Proteccion de los Derechos Humanos [Reparations in the Inter-American System of Human Rights]*, 22 CEJIL GACETA 1 (noting Inter-American Court case law has not only successfully granted economic reparations to the victims of human rights abuses, but also has gone beyond granting only economic reparations).

10. *See* Julieta Di Corleto, *El Derecho de las Victimas al Castigo a los Responsibles de Violaciones Graves a los Derechos Humanos [Victims Rights to the Punishment of Those Responsible of Serious Violations of Human Rights]*, 2004-A REVISTA JURIDICA LA LEY 702, 703 (2004) (pointing out that the Inter-American Court's decisions are restricting the scope of defendants' rights in domestic criminal proceedings).

11. *See generally Velásquez-Rodríguez*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 2 (alleging that the State had violated the right to life under Article 4, the right to humane treatment under Article 5, and the right to personal liberty under Article 7 of the American Convention).

12. *See id.* ¶ 147 (recounting a period between 1981 and 1984 where

> The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights [to life and physical integrity of the person in the instant case] is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.[13]

The *Velásquez-Rodríguez* holding is a consequence of the Inter-American Court's interpretation of Article 1(1) of the American Convention.[14] The court explained:

> Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.[15]

According to the *Velásquez-Rodríguez* holding, two state obligations arise from Article 1(1) of the American Convention. First, states must respect the "rights and freedoms recognized by the Convention,"[16] and second, states must "ensure the free and full exercise of [those] rights . . . to every person subject to its

approximately 150 people disappeared in a similar systematic fashion such that people where taken by force, in public, by men in unidentified vehicles with tinted windows and fake license plates from Honduras and were never recovered).

13. *Id.* ¶ 176.

14. ACHR, *supra* note 4, art. 1(1) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.").

15. *Velásquez-Rodríguez*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 164 (stating that the Inter-American Court may find a violation of Article 1(1) even if the Commission did not allege such a violation occurred).

16. *Id.* ¶ 165 (declaring that the protection of human rights serves to prove the existence of certain inalienable "attributes of the individual that cannot be legitimately restricted" by the government).

jurisdiction."[17] The Inter-American Court clarified the meaning of the second obligation as follows:

> This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. *As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention* . . . .[18]

Moreover, the Inter-American Court enshrined the obligation to punish not only in cases involving crimes committed by the state apparatus, but also in cases of crimes committed by private individuals. The court stated:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[19]

Finally, although the Inter-American Court stressed the need for criminal punishment in this decision, it did not order the state of Honduras to carry out the criminal proceedings needed to achieve that goal.[20] The Inter-American Court took a traditional approach to international human rights law, declaring that Honduras breached the American Convention and must pay a fair compensation to the victims' next of kin.[21]

17. *Id.* ¶ 166 (implying that the adjudicating entity should be structured in a way to guarantee the free exercise of the rights provided by the American Convention to all people).

18. *Id.* (emphasis added).

19. *Id.* ¶ 172.

20. *Id.* ¶¶ 174, 194 (announcing a duty to punish, but omitting any particular criminal punishment in the judgment beyond reparations for the next of kin).

21. *Id.* ¶ 194 (declaring that the form and amount of payment to the victims' families would be decided by the Inter-American Court, barring agreement between Honduras and the Inter-American Commission within six months of this decision).

2. Further Developments of the Duty to Punish Doctrine and the Prominence of a Victim's Right to Have the Offender Punished

Velásquez-Rodríguez involved gross human rights violations that were part of a systematic state practice, and deprived victims of their right to live free from torture. Following the decision, commentators thought the Inter-American Court's duty to punish doctrine would only apply to cases concerning comparable human rights violations, and in fact, subsequent cases did involve such violations.[22] However, the Inter-American Court decision in *Velásquez-Rodríguez* did not restrict the scope of the duty to punish doctrine to this set of facts. Instead, the court asserted that states must prosecute and punish every violation of any right protected by the American Convention.[23] Thus, the Inter-American Court's language suggests a broader scope for the doctrine, maintaining that the doctrine is applicable to any violation of the rights protected by the American Convention.

For instance, in *Godínez-Cruz v. Honduras*, the Inter-American Court maintained the broad language of the duty to punish doctrine.[24] *Godínez-Cruz* concerned similar facts to those assessed in *Velásquez-Rodríguez* and were part of the same systematic practice in Honduras.[25] Moreover, *Caballero-Delgado v. Colombia* also concerned detentions and forced disappearances with presumption of death carried out by the Colombian Army.[26] In addition, *Paniagua-*

22. *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2578 (1991) ("Although the judgment suggested that a duty to punish applies to "every" violation of the American Convention, it is unlikely that the Court intended the obligation to extend to all violations, regardless of the severity of the breach. Instead, the Court's reasoning should, pending further clarification, be confined to the especially serious violations raised in the case before it—disdisappearances, probable torture, and probable extra-judicial execution.").

23. *See Velásquez-Rodríguez*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 161-167 (requiring states to adopt such measures as necessary to prevent further infringement on basic human rights in compliance with Article 1 of the American Convention because to not do so would constitute a breach of the state's duty to ensure the free and full exercise of those rights to persons within its jurisdiction).

24. Godínez-Cruz v. Honduras, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 175 (Jan. 20, 1989) (implying that states have a duty to organize the government apparatus in a way that ensures the full enjoyment of one's human rights).

25. *See id.* ¶ 3 (alleging a teacher was abducted by government agents).

26. Caballero-Delgado v. Colombia, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22, ¶¶ 3-5 (Dec. 8, 1995) (attributing Caballero-Delgado and Santana's abduction to the fact that Caballero was involved in the Santander Teacher's Union).

Morales v. Guatemala involved a massive practice of arbitrary detentions, kidnappings, ill-treatment, and deprivations of life carried out by Guatemala.[27]

In deciding these cases, the Inter-American Court stressed the obligation of states to take every measure needed to end impunity.[28] In *Paniagua-Morales*, the court stated, "the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives."[29] Also, by deciding these cases, the court complemented the *Velásquez-Rodríguez* decision by validating the normative sources of the duty to punish doctrine. Furthermore, while maintaining the obligation of states to investigate, prosecute, and punish every human rights violation emerging from Article 1(1) of the American Convention, the Inter-American Court started to underscore the importance of fulfilling the rights that victims have within domestic criminal proceedings.[30]

According to the Inter-American Court, victims' rights provided by the American Convention come from two sources. The first is Article 25 of the American Convention, which provides victims with a right to judicial protection, an effective remedy against violations of their rights.[31] The court stated in *Loayza-Tamayo v. Peru*:

> Article 25 in relation to Article 1(1) of the American Convention obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, *inter*

27. Paniagua-Morales v. Guatemala, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, ¶¶ 4-12 (Mar. 8, 1998) (describing Paniagua-Morales' abduction in exchange for information from the State).

28. *Id.* ¶ 173 (defining impunity as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention").

29. *Id.*

30. *Id.* ¶ 174.

31. ACHR, *supra* note 4, art. 25 (stating the Convention provides victims with prompt and effective judicial review of alleged violations of protected rights by any state party).

> *alia*, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered.[32]

The second normative source of victims' rights is Article 8(1) of the American Convention, which guarantees victims a fair trial.[33] Article 8 of the American Convention is almost entirely dedicated to protecting the procedural rights of the accused within domestic criminal systems.[34] This is a basic norm found in almost every Western Constitution granting defendants due process rights.[35] However, its peculiarity is that it also protects "[every person's] rights . . . of a civil, labor, fiscal, or any other nature."[36] According to the Inter-American Court, this leads to asserting the right of the victim to a fair trial during the prosecution of offenders. From the court's perspective, the fair trial guaranty is quite important and serves to protect not only defendants but also victims in criminal proceedings.[37]

The Inter-American Court initially developed the idea of the victims' fair trial guaranty in *Genie-Lacayo v. Nicaragua*.[38] The court stated that "[i]n order to establish violation of Article 8, it is

32. Loayza-Tamayo v. Peru, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 168 (Nov. 27, 1998) (rejecting the admissibility of a request for interpretation of a previous judgment of the Inter-American Court against Peru).

33. ACHR, *supra* note 4, art. 8(1) (defining a fair trial as one held in a timely manner by an independent court).

34. *Id.* art. 8 (outlining that these procedural rights include the presumption of innocence, timely notice of an action, the assistance of a translator, and the representation by counsel).

35. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 266-68 (1993) (stating that approximately thirty-eight national constitutions explicitly guarantee the right to a fair trial or hearing and twenty-one national constitutions explicitly guarantee the right to defense in criminal cases, while the right to be presumed innocent is explicitly included in sixty-seven national constitutions).

36. ACHR, *supra* note 4, art. 8.

37. *See, e.g.*, Bulacio v. Argentina, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100, ¶ 162 (Sept. 18, 2003) (holding that Argentina violated several articles of the American Convention, including Article 8, because of the detrimental effect it had on the victim rather than the effect it had on the accused).

38. Genie-Lacayo v. Nicaragua, 1997 Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 12 (Jan. 29, 1997) (involving Nicaragua's violation of several articles of the American Convention in response to the death of a young citizen).

necessary, first of all, to establish whether the accusing party's procedural rights were respected in the trial to determine those responsible for the death of young Genie-Lacayo."[39] In another case, the court explained:

> Article 8(1) of the Convention must be given a broad interpretation based on both the letter and the spirit of this provision . . . . Thus interpreted, the aforementioned Article 8(1) of the Convention also includes the rights of the victim's relatives to judicial guarantees . . . *[and] recognizes the right . . . to have [the crimes] effectively investigated, . . . those responsible prosecuted for committing said unlawful acts; [and] to have the relevant punishment, where appropriate, meted out.*[40]

The court also stated that Article 25 of the American Convention "is closely linked to Article 8(1) . . . . Consequently, it is the duty of the State to investigate human rights violations, prosecute those responsible and avoid impunity."[41] Therefore, Article 25 and Article 8 of the American Convention are interpreted as protecting victims' rights against states' abuses, and thus requiring satisfaction,[42]

39. *Id.* ¶ 75 (outlining parameters by which to judge Nicaragua's actions relative to Genie-Lacayo's rights under the American Convention).

40. Blake v. Guatemala, 1998 Inter-Am. Ct. H.R. (ser. C) No. 36, ¶¶ 96-97 (Jan. 24, 1998) (emphasis added) (deciding that Guatemala violated several rights protected by the American Convention and ordering the State to provide both monetary and "satisfaction" reparations). The same doctrine was repeated in several subsequent cases. *See* 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 219 (July 5, 2004) (holding Colombia responsible for the deaths and forced disappearances of several persons and requiring the State to comply with multiple types of reparations); Las Palmeras v. Colombia, 2001 Inter-Am. Ct. H.R. (ser. C) No. 90, ¶¶ 59-67 (Dec. 6, 2001) (determining that Colombia violated several rights protected by the American Convention after finding the State responsible for the death of two persons, and opening the reparations phase of the case); Durand v. Peru, 2000 Inter-Am. Ct. H.R. (ser. C) No. 68, ¶¶ 111, 131, 146 (Aug. 16, 2000) (deciding Peru violated several rights protected by the American Convention and ordering the State to provide reparations of different types).

41. Loayza-Tamayo v. Peru, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶¶ 169-170 (Nov. 27, 1998) (reiterating that states are obligated "to use all the legal means at its disposal" to combat violations of rights protected by the American Convention).

42. *See* Pasqualucci, *supra* note 6, at 24 (positing that in addition to monetary restitution for medical and legal expenses, courts may also require a truthful public disclosure, apology, and admission).

criminal prosecution, and punishment of perpetrators as forms of reparations.[43]

The Inter-American Court also made important specifications in *Barrios Altos v. Peru*, which concerned killings practiced by death squadrons of Peruvian armed forces in their alleged fight against the *Sendero Luminoso* guerrilla.[44] In its judgment, the court pointed out:

> [A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[45]

The holdings in *Caballero-Delgado*,[46] *Paniagua-Morales*,[47] *Loayza-Tamayo*,[48] and *Barrios Altos*[49] demonstrate that, in contrast to

43. *See id.* at 10 (stating that as currently ratified, the American Convention enables the Inter-American Court to order a state to provide remedies to the victims, including monetary compensation, termination of imprisonment, and medical care); *see also* Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1417-18 (2002) ("The Inter-American Court has interpreted Articles 25 and 8 as directly related: the former requires the state to provide human rights victims access to a criminal trial as reparations for the violation, and the latter requires the criminal trial be conducted in a way that guarantees procedural fairness to victims.").

44. Barrios Altos v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 42 (Mar. 14, 2001) (recounting Peru's efforts to quash an investigation into the deaths of alleged members of *Sendero Luminoso* by members of the Peruvian military and to provide amnesty to the perpetrators of the killings).

45. *See id.* ¶ 41 (declaring that enactment of a law incompatible with the American Convention necessarily violates the convention); *see also* Barrios Altos v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 14 (Sept. 3, 2001) (establishing that this holding is not only applicable to the specific facts there assessed, but also to any situation where amnesty laws apply).

46. Caballero-Delgado v. Colombia, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22, ¶¶ 3-5 (Dec. 8, 1995) (involving an illegal capture and detention by Colombia).

47. *See generally* Paniagua-Morales v. Guatemala, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 1 (Mar. 8, 1998) (considering possible instances of illegal "abduction, arbitrary detention, inhuman treatment, torture and murder" by Guatemala).

48. *See generally* Loayza-Tamayo v. Peru, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 3 (Nov. 27, 1998) (discussing Peru's alleged violations of various articles of the American Convention).

the original *Velásquez-Rodríguez* decision, the Inter-American Court has not only ordered states to pay monetary compensations to victims for declared breaches to the American Convention, but has also required states to carry out criminal judicial proceedings to punish persons responsible for crimes assessed in the particular cases examined.[50]

C. *BULACIO* AS A "WITNESS CASE": THE BROAD SCOPE OF THE DUTY TO PUNISH DOCTRINE

The Inter-American Court clarified three issues in *Bulacio*.[51] First, the duty to punish doctrine applies to all human rights violations and is not limited to the massive or gross violations previously described. Second, the doctrine not only rejects amnesty provisions, provisions on prescription, or the establishment of measures designed to eliminate responsibility—those legal institutions explicitly rejected in *Barrios Altos*—but also rejects any "domestic legal provision or institution" viewed as an obstacle to punishment.[52] Furthermore, *Bulacio* illustrates that when the complete exercise of defendants' rights conflicts with victims' rights, the Inter-American Court explicitly privileges the latter.[53] Therefore, this Article posits that while broadening victims' rights, *Bulacio* demonstrates that application of the duty to punish doctrine by domestic criminal courts may restrict the constitutional rights of defendants.

49. *See generally Barrios Altos*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 1 (reviewing Peru's alleged violations of the Obligation to Respect Rights in Article 1(1) and Domestic Legal Remedies in Article 2 of the American Convention).

50. *See id.* ¶ 51(5) (ordering Peru to conduct an investigation into the human rights abuses found in the case, and to prosecute and punish the relevant perpetrators); *Loayza-Tamayo*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 192(6) (ruling that Peru must conduct an investigation into the human rights abuses found in the judgment and punish those responsible appropriately); *Caballero-Delgado*, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22, ¶ 72(5) (stating that Colombia must continue judicial proceedings in regard to the human rights abuses detailed in the case and punish those responsible in accordance with domestic law).

51. Bulacio v. Argentina, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100, ¶ 2 (Sept. 18, 2003) (discussing potential Argentinean human rights violations under the American Convention).

52. *See id.* ¶ 117 (asserting that, without this provision, the American Convention lacks effective protection).

53. *See id.* ¶¶ 114-117 (explaining that due process necessitates a timely defense, free of undue delays that may thwart a victim's case).

1. The Facts of Bulacio

Police officers in the city of Buenos Aires illegally detained and beat seventeen year-old Walter Bulacio.[54] After telling numerous people about the police abuse, he died approximately one week after the incident, arguably as a consequence of his injuries.[55] Domestic investigation of the case led to the criminal prosecution of a police officer. However, the investigation lasted longer than ten years and extinguished due to statutory limitations under Argentinean criminal law.[56] While an appeal challenging that decision was being examined by the Argentinean Supreme Court of Justice, the Inter-American Court delivered its judgment.

2. The Inter-American Court's Judgment and Its Consequences in Domestic Criminal Proceedings

In *Bulacio*, the Inter-American Court reiterated that states party to the American Convention have a duty to punish every violation of the rights recognized therein.[57] However, in an unprecedented assertion, the court added "extinguishment provisions *or any other domestic legal obstacle* that attempts to impede the investigation and punishment of those responsible for human rights violations are inadmissible."[58] The court held "*no domestic legal provision or institution*, including extinguishment, can oppose compliance with the judgments of the Court regarding investigation and punishment of those responsible for human rights violations."[59]

Furthermore, the Inter-American Court said, although not explicitly, that the defendant's exercise of procedural rights must be

54. *See id.* ¶ 3(1) (stating that the Argentine Federal Police eventually released Bulacio free of charge although the reason for his detention remains unknown).

55. *See id.* ¶ 3(2) (noting that the day following his detention, Bulacio admitted himself into a hospital where doctors diagnosed him with a cranial traumatism).

56. *See id.* ¶ 3(25) (pointing out that the Prosecutor's Office appealed the court's decision that this action was extinguished).

57. *See id.* ¶ 110 (proclaiming that victims of human rights violations and their next of kin have the right to demand states fulfill their duties under the American Convention).

58. *Id.* ¶ 116 (emphasis added) (invoking the obligations outlined in Articles 1(1), 2, and 25 of the American Convention).

59. *Id.* ¶ 117 (emphasis added) (stating that if the alternative were true, the rights guaranteed by the American Convention would be unenforceable).

limited to permit the full satisfaction of a victim's right to punish offenders.[60] In this case, the defendant introduced several presentations and appeals which delayed the court to the extent that the case was closed due to statute of limitations considerations. Therefore, the Inter-American Court claimed that domestic courts cannot tolerate the use of excessive resources by the defendant, stating:

> This manner of exercising the means that the law makes available to the defense counsel has been tolerated and allowed by the intervening judiciary bodies, forgetting that their function is not exhausted by enabling due process that guarantees defense at a trial, but that they must also ensure, within a reasonable time, the right of the victim or his or her next of kin to learn the truth about what happened and for those responsible to be punished.[61] The right to effective judicial protection therefore requires that the judges direct the process in such a way that undue delays and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights.[62]

The court concluded that "it is necessary for the State to continue and conclude the investigation of the facts and to punish those responsible for them."[63] As in prior cases, the Inter-American Court ordered the domestic court to carry out the prosecution prescribed and to punish the persons responsible for Bulacio's murder, despite the fact that domestic courts had already closed the case.[64] The Argentinean court was obligated to follow the Inter-American Court's decision[65] and subsequently ordered the continuation of the

60. *Id.* ¶¶ 113-115 (declaring judges responsible of conducting trials in a manner that does not allow impunity by delay).

61. *Id.* ¶ 114 (expanding upon the defense counsel's plea for extinguishment of the criminal action).

62. *Id.* ¶¶ 114-115 (characterizing the defense counsel's filings as attempts to frustrate the victim's case).

63. *Id.* ¶ 121 (allowing Bulacio's next of kin to participate in any aspect of the continuing investigation and mandating that the investigation be made public upon its completion).

64. *See id.* ¶ 162(4) (ordering the State to continue investigations, punish the violators, and publicize all conclusions).

65. *See* ACHR, *supra* note 4, art. 68(1); *see also* Corte Suprema de Justicia [CSJN] Argentinean Supreme Court of Justice, 23/12/2004, "Espósito, Miguel Angel s/incidente de prescripción de la acción penal promovido por su defensa," La Ley [L.L.] (2004-E-224) (Arg.), ¶ 6 [hereinafter *Espósito*] (stating that this decision is binding on the State of Argentina under Article 68(1) of the American

criminal prosecution in spite of statutory limitations.[66] This decision is troublesome because under the Argentinean constitutional tradition, the applicability of the statute of limitations is intimately linked to the constitutional right to be tried within a reasonable time.[67] Although punishing perpetrators of horrible crimes (like that committed against Walter Bulacio) is of great importance, the facts under domestic investigation in *Bulacio* were not those to which under international law the statutory limitations should not apply—the actions were neither a crime against humanity nor a war crime.[68]

D. THE DUTY TO PUNISH DOCTRINE TODAY

To date, the Inter-American Court has maintained the duty to punish doctrine. All of the cases in which the court applied the doctrine concerned horrible crimes committed by the state apparatus, where

Convention and that the Argentinean Supreme Court of Justice must follow the precedent of the Inter-American Court).

66. *See Espósito*, *supra* note 65, ¶ 12 (explaining that, notwithstanding other reasons discussed in the case, the Argentinean Supreme Court of Justice does not share the restrictive approach to the right of defense set forth by the Inter-American Court because that right is protected under Article 18 of the National Constitution).

67. See *id.* (explaining that Article 18 of the Argentine National Constitution provides the inviolability of the right to due process in the defense of the person and of rights); Corte Suprema de Justicia [CSJN] [Argentinean Supreme Court of Justice], 10/03/2004, "Barra, Roberto Eugenio Tomás s/ defraudación por administración fraudulenta," La Ley [L.L.] (2004-B-898) (Arg.), ¶ 6; Corte Suprema de Justicia [CSJN] [Argentinean Supreme Court of Justice], 29/11/1968, "Mattei," La Ley [L.L.] (1968-272-188) (Arg.), ¶ 10; ACHR, *supra* note 4, art. 7 (maintaining that any person detained shall be promptly brought before a judge and entitled to trial within a reasonable time, and that every person has the right to an impartial hearing to substantiate any criminal accusation and to determine his rights and obligations); *see also Argentina Introductory and Comparative Notes*, *in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 29, 32 (Gilbert H. Flanz ed., Marcia W. Coward trans., 1995) (providing a this translation of Article 18 of the Argentine National Constitution: "No inhabitant of the Nation may be punished without prior trial based on a law in force prior to the offense, or tried by special commissions, or removed from the jurisdiction of the judges designated by the law in force prior to the offense. No one can be compelled to testify against himself, or be arrested except by virtue of a written order from a competent authority. The right to due process in the defense of the person and of rights is inviolable . . .").

68. *See* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. 1, Nov. 26, 1968, 754 U.N.T.S. 73, 18 I.L.M. 68 (indicating that under international law statutes of limitations do not apply to these crimes).

grave human rights violations occurred during internal armed conflicts or states of emergency in Latin and Central American.[69] In

69. *See* Blanco-Romero v. Venezuela, 2005 Inter-Am. Ct. H.R. (ser. C) No. 138, ¶ 125 (Nov. 28, 2005) (holding Venezuela responsible for several deaths and forced disappearances and other violations of rights enshrined by the American Convention, as well as ordering the State to comply with several measures including the punishment of those responsible for the crimes as a way of reparation); Gutiérrez-Soler v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 127 (Sept. 12, 2005) (declaring Colombia breached several clauses of the American Convention and ordering the State to comply with numerous measures and reparations, including the prosecution and punishment of those responsible); Moiwana Community v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 233 (June 15, 2005) (ordering Suriname to comply with different types of reparations including the prosecution and punishment of those responsible as a result of its violation of rights protected by the American Convention); Serrano-Cruz Sisters v. El Salvador, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 218 (Mar. 1, 2005) (finding El Salvador violated rights protected by the American Convention and ordering prosecution and punishment of those responsible); Carpio-Nicolle v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 117, ¶ 155 (Nov. 22, 2004) (holding Guatemala breached the American Convention by murdering and injuring several people, and ordering reparations including the punishment of the officials responsible for those violations of the victim's rights); Plan de Sánchez Massacre v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(2) (Nov. 19, 2004) (deciding reparations, including the duty to punish the perpetrators on behalf of the victims and next of kin, where more than 268 people died and many other were abused and raped in a massacre conducted by Peruvian state officials in 1982); Tibi v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 280(3)-(10) (Sept. 7, 2004) (holding Ecuador violated Articles 1, 5, 7, 8, and 21 of the American Convention and different Articles of the Inter-American Convention to Prevent and Punish Torture, and ordering reparations to the victim including the prosecution and punishment of those responsible); Gómez-Paquiyauri Brothers v. Peru, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 231, 253(1)-253(3), 253(22) (July 8, 2004) (maintaining Peru violated several rights protected by the American Convention, as well as different articles of the Inter-American Convention to Prevent and Punish Torture, and ordering different forms of reparations for the victim's next of kin, including the reopening of a criminal case in order to punish those responsible); 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶¶ 254, 295(1)-295(4) (July 5, 2004) (finding Colombia responsible for the deaths and forced disappearances of several persons, in violation of many rights protected by the American Convention, and requiring the State to comply with different types of reparations including those related with criminal justice); Urrutia v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 194 (Nov. 27, 2003) (holding Guatemala breached several rights protected by the American Convention, and requiring the State to identify, prosecute, and punish those responsible); Mack-Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301(1)-(6) (Nov. 25, 2003) (declaring Guatemala responsible for violations of several rights protected by the American Convention, and demanding that the State provide the victims and the victims' next of kin with different

these cases, the court emphasized that it "is likewise needed for competent ordinary criminal courts to investigate and punish the law enforcement staff members that take part in violations of human rights cases."[70] The Inter-American Court also maintains "the State shall refrain from resorting to amnesty, pardon, statute of limitations and from enacting provisions to exclude liability, as well as measures, aimed at preventing criminal prosecution or at voiding the effects of a conviction."[71] Moreover, as in *Bulacio*, the court ordered El Salvador, "in compliance with its obligation to investigate the reported facts, to identify and punish those responsible and to conduct a genuine search for the victims, to eliminate all the obstacles and mechanisms *de facto* and *de jure* that hinder compliance with these obligation [sic] . . . ."[72]

To summarize, the court's duty to punish doctrine not only governs states' international responsibility for human rights violations and victim redress in a traditional, compensatory approach, but also asserts that offenders must be punished. This approach applies to cases of grave human rights violations, as well as to every violation of any of the rights protected by the American Convention. It also applies to both violations committed by the state apparatus and those resulting from private crimes. Additionally, within criminal procedures directed toward punishing offenders, the Inter-American Court forbids states from taking positive actions like enacting amnesties, offering forgiveness, or favoring extinguishments of criminal prosecutions; furthermore, the court also refuses to allow domestic legal provisions or institutions which would impede punishment to apply.[73] By doing all this, I believe the Inter-American Court is changing the balance between defense and accusation enshrined by Western constitutionalism.[74]

reparations including the ability to prosecute and punish those responsible).

70. *See Gutiérrez-Soler*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 97 (proving that states must not exonerate those responsible, plead a statute of limitations bar, or permit any measure delaying prosecution or conviction).

71. *See id.*

72. Serrano-Cruz Sisters v. El Salvador, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 180 (Mar. 1, 2005).

73. *See Moiwana Community*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 167 (reasoning that if states employed such measures, the American Convention would lack actual authority to prosecute abuses and deliver justice to the victims).

74. *See* DAVIDSON, *supra* note 2, at 175 (noting that where a state does not supply the necessary information concerning complainant's allegations once the

II. CONCERNS RAISED BY THE INTER-AMERICAN COURT'S DUTY TO PUNISH DOCTRINE

Although the Inter-American Court has explicitly claimed that the duty to punish doctrine is applicable when any right protected by the American Convention is violated, either by state officials or by private individuals, it has always been applied in cases of crimes committed from the state apparatus. Moreover, the cases in which the doctrine has been applied also show that the failure of the states to prosecute and punish grave human rights violations was in general due to their own lack of will to do so.

Because cases concerning human rights violations are brought against states, the activism of external and independent organizations is required to ensure states compliance and domestic enforcement. In the Inter-American system, in particular, the tradition of state atrocities demanded that independent organizations maintain strong oversight to ensure states comply with and enforce human rights. Therefore, the Inter-American Court's mandate requiring states to prosecute human rights violations is of great importance. However, beyond the outcomes of the specific cases decided by the court, concerns linger regarding the future application of the duty to punish doctrine and the consequences that its application may produce within domestic criminal systems.

There are two reasons for these concerns. First, the Inter-American Court's decisions invoking the duty to punish doctrine might impinge on defendants' rights in concrete criminal cases, thereby interfering with a domestic tribunal's ability to consider a defendant's constitutional rights in making its decision, as witnessed in *Bulacio*. Second, the Inter-American Court has given the doctrine a broad scope which, in combination with the language it has used, may generate trouble when applied by domestic courts. Namely, a "criminal law of the enemy" might emerge.

Commission has accepted a petition, the facts in the petition will be assumed true so long as there is no other evidence purporting a different conclusion per Article 42 of the Commission Regulations).

A. THE INTERFERENCE WITH DOMESTIC CRIMINAL PROCEEDINGS CHALLENGING WESTERN CONSTITUTIONALISM TRADITION

Prior to the *Bulacio* decision, the Inter-American Court referred to its jurisdiction, stating that the tribunal

> does not act as an appellate court or a court for judicial review of rulings handed down by the domestic courts. All it is empowered to do . . . is call attention to the procedural violations of the rights enshrined in the Convention . . . however, it lacks jurisdiction to remedy those violations in the domestic arena . . . .[75]

However, *Bulacio* illustrates that the Inter-American Court does act like an appellate court.[76] The Inter-American Court explicitly required the Argentine domestic court not to tolerate acts of the defendant exercised within his right to defense; thus, it cannot be perceived as respecting domestic judicial decisions.[77] Additionally, the court explicitly demanded the continuation of a prosecution which had already been extinguished based on statute of limitations considerations.[78] The problematic side of this issue is not just the interference: regional human rights tribunals were created in order to interfere with domestic institutions and require them to comply with human rights. Their basic original goal was to interfere.[79] The more

75. *See* Genie-Lacayo v. Nicaragua, 1997 Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 94 (Jan. 29, 1997).

76. *See* Bulacio v. Argentina, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100, ¶ 162(4) (Sept. 18, 2003) (demanding that Argentina continue investigating the facts of the case).

77. *See id.* (mandating that Argentina ultimately punish those responsible and requiring Argentina to pay reparations to the victim's next of kin).

78. *See id.* ¶¶ 3(24)-(25), 4 (establishing that although the appellate court determined the cause of action was extinguished, the Inter-American Court was able to consider the case pursuant to Articles 62 and 63(1) of the Convention); *see also Espósito*, *supra* note 65, ¶ 9 (opinion of Justice Carlos Fayt) ("[I]f taken as a derivation of the interpretation of the American Convention carried out by the Inter-American Court, we can conclude that we should apply with no legal basis and retroactively the principle of non-applicability of statutory limitations to the defendant Miguel Angel Espósito, that tribunal would be—in a certain way—deciding over the destiny of a person who did not declare, nor could declare, his responsibility.") [translation by author].

79. It could be argued that the original goal of the regional courts was to make states comply with human rights but not by directly interfering with domestic institutions; instead regional courts could garner compliance by different means,

problematic issue, as seen in *Bulacio*, is that the Inter-American Court asked a domestic court to limit a defendant's exercise of his constitutional rights.

The cause for this judgment is easily traceable. Part II described how the Inter-American Court's affords victims' rights the same protection as it does defendants' procedural rights, if not more. For instance, in *Bulacio* and subsequent cases, the court held that even where domestic courts respect defendants due process rights, courts must also satisfy a victim's right to punish the offender. Yet, the Inter-American Court has given more weight to the latter, thereby challenging what might be the core of Western society's constitutionalism: a higher protection of defendants' rights as opposed to states' or victims' interest in punishment.[80]

Western constitutionalism tradition is based on the historic belief that the criminal system is a state's main tool for oppression. Indeed, human rights law has always supported this belief, and its main concern within criminal justice is the protection of the rights of the accused.[81] It is true that Western criminal law seeks to punish guilty offenders; however, since the Enlightenment, it is more accurate to understand criminal law as a means for limiting states' violence and as a tool designed to avoid every prosecution and punishment carried out in violation of individual rights.[82] By challenging the

such as declaring international responsibility of the noncompliant states or by applying political sanctions to those states.

80. *See* DAVIDSON, *supra* note 2, at 210 (discussing the Inter-American Court's ability to weigh evidence as it sees fit (citing Velasquez-Rodriguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 127-128 (July 29, 1988) (noting that standards of proof in international proceedings are more informal than in domestic proceedings)).

81. *See* Bassiouni, *supra* note 35, at 253-54 ("Neither democracy nor human rights can exist without one another—and neither can exist without the individual protection of persons brought into the criminal process, because it is in that arena where most human rights violations occur.").

82. *See* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 360 (1986) (citing DOUGLAS GREENBURG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776, at 228-36 (1976) (accounting for how Enlightenment theorists instigated American criminal law reforms)); *see also* Timothy A. Razel, Note, *Dying to Get Away With It: How the Abatement Doctrine Thwarts Justice—And What Should Be Done Instead*, 75 FORDHAM L. REV. 2193, 2201 (2007) ("The Enlightenment also produced the notion of due process protections for criminal defendants, which was enshrined in

constitutional rights of a defendant to exercise a defense, as the Inter-American Court did in *Bulacio*, the court is interfering with this tradition.

In its decision following the Inter-American Court's judgment in *Bulacio*, the Argentine Supreme Court asserted:

> [T]he Inter-American Court's decision resolves the collision between the right of the defendant to develop a wide defense and to the right of having the process decided within a reasonable time, intimately related to the statute of limitations as one of the proper tools to comply with that right, . . . through their subordination to the rights of the accuser, on the grounds that a violation of human rights under the terms of the American Convention on Human Rights has been ascertained.[83]

It then intelligently added:

> [W]e are in front of a paradox in that it is only possible to comply with the duties imposed to the Argentine state by the human rights international jurisdiction by restricting the rights to a defense and by having a judicial decision within a reasonable time.[84]

the U.S. Constitution." (citing Jennie L. Cassie, Note, *Passing the Victims' Rights Amendment: A Nation's March Toward a More Perfect Union*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 647, 649-50 (1998)).

83. *Espósito*, *supra* note 65, ¶ 14 [translation by author] (lamenting that the American Convention lacks a framework to guide the court in deciding which procedural rights of the offender may be legitimately restricted).

84. *Id.* ¶ 16 [translation by author] (justifying the Argentinian Supreme Court's decision to impose restrictions on defendants' procedural rights by citing to how the Inter-American Court required the restrictions in order to assure protection of the rights set forth in the American Convention); *see also* Corte Suprema de Justicia [CSJN] Argentinean Supreme Court of Justice, 14/6/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.," La Ley [L.L.] (2005-S-1767) (Arg.), ¶ 9 [hereinafter *Simón*] (resulting from an Inter-American Court decision, the Argentine Supreme Court said that in order to punish violations of human rights the State must remove all its possible obstacles, including both the prohibition against *ex post facto* laws and res judicata). This is due not only to Article 68(1) of the American Convention, but also to Argentina's constitutional design, which has held various international conventions about human rights—including the American Convention—at the same level of the Constitution itself. *See* Thomas Buergenthal, *Implementation of the Judgments of the Court*, *in* 1 MEMORIA DEL SEMINARIO: EL SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI [Report of the Workshop: The Inter-American System Protection of Human Rights at the Threshold of the Twenty First Century], *supra* note 3, at 175, 190 (explaining that "for States in

B. DEFENDANTS TREATED AS ENEMIES: THE POTENTIAL VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHT TO A DEFENSE AND TO BE PRESUMED INNOCENT IN DOMESTIC PROCEEDINGS

The decisions of the Inter-American Court are binding on states party to the American Convention, and provide guidance regarding the interpretation states must give to rights protected therein.[85] However, question remains as to how likely domestic institutions are to welcome the duty to punish doctrine. Arguably, the doctrine is creating a special system of criminal law, namely a "criminal law of the enemy."[86] This new approach to criminal law, already visible in some legal systems[87] and recently proposed in others,[88] is designed to combat serious threats to Western systems of government like terrorism.[89] The approach, designed to work with "enemies," is to run

which the Convention has the status of domestic law, particularly constitutional law or law superior to that to ordinary domestic law, the 'obligation to comply with the judgment of the Court' assumed by a state party under Article 68(1), converts the judgment of the Court into a treaty obligation which, as such, enjoys the same normative status under domestic law as the treaty itself").

85. See ACHR, *supra* note 4, art. 1 (declaring that member states are obligated to respect certain basic rights and freedoms of all people, and asserting that ratification or adherence to the Convention binds that ratifying or adhering nation).

86. *See* Daniel R. Pastor, *La Deriva Neopunitivista de Organismos y Activistas Como Causa del Desprestigio Actual de los Derechos Humanos* [The Nonpunitive Drift of Agencies and Activists as a Cause of Present Loss of Prestige of the Human Rights], *in* 1 Nueva Doctrina Penal 73, 73-114 (2005), *available at* http://www.juragentium.unifi.it/es/surveys/latina/pastor.htm (criticizing the case law produced by the Inter-American system of human rights protection and the approach to criminal law taken by human rights NGOs in the Argentinean context); *see also Simón*, *supra* note 84, ¶ 96 (opinion of Justice Carlos Fayt) (describing the theory of the "criminal law of the enemy"); GÜNTHER JAKOBS, LA CIENCIA DEL DERECHO PENAL ANTE LAS EXIGENCIAS DEL PRESENTE [The Science of Criminal Law Before the Exigencies of the Present] (2000) (explaining the theoretical grounds, main characteristics, and promoting the application of a system called "criminal law of the enemy" in the modern world).

87. In general, the new approach is apparent in statutes addressing the prevention and fight against terrorism. Examples include legislation by the United States, Germany and Spain.

88. For example, Argentina.

89. *See generally* GÜNTHER JAKOBS & MANUEL CANCIO MELIÁ, "DERECHO PENAL" DEL ENEMIGO? ["CRIMINAL LAW" OF THE ENEMY?] (2003) (describing and analyzing the theory of the "criminal law of the enemy" and its applications in current legislations of Western societies).

parallel to the ordinary criminal system for "citizens." One of its main characteristics is the relaxation of individual rights and liberal criminal law principles. Under the "criminal law of the enemy," constitutional principles assumed by criminal law shall not represent an obstacle to punishment.[90]

Two categories of defendants are likely to confront domestic criminal systems in countries bound by the Inter-American Court's duty to punish doctrine. In the first category are defendants charged with crimes constituting violations of rights protected by the American Convention. In the second category are defendants charged with crimes that do not constitute breaches to the American Convention. While the latter group would enjoy the full exercise of their right to a defense and every other guaranty under the due process of law, the former would not. Under this system, every person accused of committing a crime in violation of any right protected by the American Convention would likely be treated the way enemies are treated under "criminal law of the enemy" systems. For these offenders, the Inter-American Court stated that "no domestic legal provision or institution" could impede punishment.[91] The unequal treatment thus created for these defendants accused of crimes violating the American Convention would be flagrant.

To determine that no domestic legal provision or institution, or factual or judicial mechanism, could impede punishment is excessive. Are defendants' constitutional rights included within the "domestic legal provisions or institutions" that the Inter-American Court rejects as well? Additionally, orders requiring that domestic courts stop tolerating defendants' exercise of their right to a defense, as the Inter-American Court did in *Bulacio*, are also excessive.

The point is that the Inter-American Court's words are dangerous. Could they be interpreted to mean that a lack of evidence is a "legal

90. *Simón*, La Ley [L.L.] (2005-S-1767) (Arg.), ¶ 95 (Fayt, J., dissenting) (quoting Pérez del Valle, Carlos, *Sobre los Orígenes del "Derecho Penal de Enemigo": Algunas Reflexiones en Torno a Hobbes y Rousseau [On the Origins of the "Criminal Law of the Enemy": Some Reflections as to Hobbes and Rousseau]*, *in* Cuadernos de Política Criminal No. 75 (2001)).

91. *See* Bulacio v. Argentina, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100, ¶ 116 (Sept. 18, 2003) (maintaining that the American Convention requires states to adopt any provision necessary to guarantee no one is denied the right to judicial protection).

obstacle" to punishment and thereby dismiss a defendant's constitutional presumption of innocence? This would be an undesired outcome of the application of the Inter-American Court's doctrine. The basic aim of the right to be presumed innocent is to avoid the unequal treatment of defendants based on the crimes they are accused of having committed. The basic claim of the presumption of innocence is that every person, accused of whatever crime, is entitled to equal rights when confronting a state's criminal system.[92] This presumption might be eliminated by the Inter-American Court's duty to punish doctrine because courts might deprive defendants of their constitutional rights during trial on the grounds that the allegation involved violation of a right protected by the American Convention.

Indeed, if domestic courts strictly apply the Inter-American Court's words, the accusation of having violated any right protected by the American Convention allows the promotion of a trial where "no domestic legal provision or institution" could impede punishment. In those cases the whole posture of criminal trials would be nonsense. By definition, criminal trials are arranged to conduct state actions ending in punishment only by enforcing the legal provisions and institutions in place to ensure that states comply with individual rights. Furthermore, the long list of rights protected by the American Convention makes domestic courts' application of the doctrine even more dramatic and concerning.[93] The list is so long that

92. *See* ACHR, *supra* note 4, art. 8(2) (providing that as long as guilt has not already been proven, every person accused of a crime will be presumed innocent). *But see* DAVIDSON, *supra* note 2, at 297 (observing that the American Convention does not specify what standard of proof ought to be required of the state in proving guilt which can affect one's presumption of innocence).

93. *See* ACHR, *supra* note 4, arts. 3-25 (delineating specific fundamental rights, including the right to a juridical personality under Article 3, to life under Article 4, to humane treatment under Article 5, to freedom from slavery under Article 6, to personal liberty under Article 7, to a fair trial under Article 8, to freedom from *ex post facto* laws under Article 9, to freedom of conscience and religion under Article 12, to freedom of thought and expression under Article 13, to freedom of association under Article 16, to freedom of assembly under Article 15, to participate in government under Article 23, to equal protection under Article 24, and to judicial protection under Article 25; but also the right to a compensation under Article 10, to privacy and honor under Article 11, to reply under Article 14, to a name under Article 18, to a nationality under Article 20, to property under Article 21, and to freedom of movement and residence under Article 22). It is difficult to think of a crime that does not collide with any of these rights.

almost every offender could potentially be tried under a system "for enemies" if domestic courts follow the Inter-American Court's decisions.[94]

While the Inter-American Court developed this doctrine in response to cases involving massive or grave state atrocities that arguably amounted to crimes against humanity, the court has always referred to the duty to punish doctrine as applicable to any violation of rights protected by the American Convention. If this is truly the case, then any violation of the right to private property, either committed by state officials or by private actors, might promote the obligation of the state to have those offenses punished. No legal obstacle could be raised, for instance, against the criminal punishment of any fraud or robbery, nor could such an obstacle be raised against the punishment of slander. Almost every offender would become "an enemy" with no right to invoke a defense or to be presumed innocent.

Finally, it is important to note that the countries party to the American Convention are all Latin or Central American countries.[95] The Inter-American Court is very prestigious in many of those countries, and its decisions are used not only as a basic tool for the interpretation of the provisions of the American Convention, but also as a guide for constitutional adjudication.[96] Encouraging these states to punish and enshrine criminal punishment as the most important means for improvement of social values is not a good idea. Latin and Central American countries' history shows that every time any "threat" that "must be punished" is aroused, tragedy begins. In fact, the majority of the crimes that the Inter-American Court punished were committed by states in their alleged fight against terrorism. In

94. *See* Michael Ignatieff, *Human Rights as Idolatry*, *in* HUMAN RIGHTS AS POLITICS AND IDOLATRY 53, 90 (2001) (pointing out that "rights inflation—the tendency to define anything desirable as a right—ends up eroding the legitimacy of a defensible core of rights").

95. *See* Inter-American Court Information, *supra* note 4 (listing the Latin and Central American countries party to the Convention).

96. *See* Corte Suprema de Justicia [CSJN] Argentinean Supreme Court of Justice, 26/9/1996, "Giroldi, Horacio David y otro s/ recurso de casación," La Ley [L.L.] (1996-G-342) (Arg.), ¶ 11 (noting how Argentina's National Supreme Court of Justice asserted that the decisions of the Inter-American Court of Human Rights must serve as a guide for interpreting the provisions of the American Convention on Human Rights).

"wars on terror," states have usually fallen into terrorism themselves. Therefore, when the idea of punishment as a "must be" is claimed, the result is grave state abuses, individual rights infringements, and the punishment of innocent people.[97]

The path taken by the Inter-American Court of Human Rights is the wrong one because it makes the duty to punish doctrine applicable not only for state crimes but also for common crimes (crimes committed by private persons), and it can be used by states as a free ride to combat crime.[98]

III. AN ALTERNATIVE APPROACH: THE DOCTRINE OF THE DUTY TO PROSECUTE HUMAN RIGHTS VIOLATIONS UNDER THE EUROPEAN SYSTEM OF PROTECTION OF HUMAN RIGHTS

Following the Inter-American Court's decision in *Velásquez-Rodríguez*, the European Court of Human Rights developed a similar body of case law regarding the need for state investigation of human rights violations. However, the European Court's approach is less punitive than that of the Inter-American Court because prosecution and punishment of offenders is not considered the only means for victims' redress and is only required in cases of grave state crimes such as killings, suspicious deaths under official custody, and ill-treatment.

Article 13 of the European Convention of Human Rights and Fundamental Freedoms ("European Convention") gives victims of breaches the right to an effective remedy.[99] In *Aksoy v. Turkey*, the

97. *See* Pastor, *supra* note 86, at 90-91 (lamenting that the fervor for human rights has led international organizations and activists to promulgate abuses of the fundamental rights of the accused).

98. I wonder, if the United Sates were a party of the American Convention on Human Rights, how hard would it be to frame the atrocities committed by U.S. officials in the prisons of Abu Ghraib and Guantanamo Bay, or the restriction of detainees' rights as necessary to comply with the duty to punish doctrine? Is it not possible that the United States could claim its actions were required in order to comply with its international duty prescribed by the Inter-American Court of Human Rights to remove "any legal obstacle or institution" impeding punishment?

99. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter

European Court interpreted Article 13 as requiring "the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision."[100]

In contrast with the Inter-American Court's doctrine set forth in *Velásquez-Rodríguez*, requiring criminal investigation, prosecution, and punishment for every breach of the American Convention, the European Court stated the scope of Article 13 will depend on the complaint alleged.[101] Criminal prosecution is only required in cases of grave facts, such as suspicious death or ill-treatment allegedly committed by the state apparatus.[102] In a recent case reaffirming the doctrine set forth in *Aksoy*, the European Court stated:

> [T]he scope of the state's obligation under Art. 13 varies depending on the nature of the applicant's complaint, and in certain situations the Convention requires a particular remedy to be provided. Thus, in cases of suspicious death or ill-treatment, given the fundamental importance of the rights protected by Arts. 2 and 3, Art. 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.[103]

In these cases, Article 1 of the European Convention,[104] requiring parties to secure protected rights and freedoms to everyone within their jurisdiction, is interpreted by the European Court in a manner

ECHR] ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").

100. Aksoy v. Turkey (No. 26), 1996-VI Eur. Ct. H.R. 2260, 2286.

101. *Id.*

102. *See* Menesheva v. Russia, App. No. 59261/00, 44 Eur. H.R. Rep. 56, 1162, 1162-63 (2007) (judgment Mar. 9, 2006) (involving a Russian national who alleged that she was unlawfully arrested, detained, and mistreated by the authorities).

103. *Id.* at 1176 (ruling that Russia violated Article 13 of the European Convention by failing to effectively investigate the victim's allegations of ill-treatment, and, therefore, the court ordered the State to compensate the victim).

104. ECHR, *supra* note 99, art. 1 (prohibiting discrimination based on the following: "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition").

similar to the interpretation given by the Inter-American Court to Article 1(1) of the American Convention:

> Where an individual raises an arguable claim that he or she has been seriously ill-treated by the police in breach of Art. 3, that provision, read in conjunction with the State's general duty under Art. 1 of the Convention . . . requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible.[105]

However, the European Court restricted its doctrine to cases involving violations of the right to life or the right to be free from torture and inhumane or degrading treatment or punishment.[106] The European Court has never said that every time a state or private actor violates a right protected by the European Convention, victims have the right to have offenders punished, as the Inter-American Court has done.[107]

105. *Menesheva*, App. No. 59261/00, 44 Eur. H.R. Rep. 56, at 1174 (requiring these investigations to be "independent, impartial and subject to public scrutiny" and that they be completed expeditiously and competently).

106. *See* Bekos v. Greece, App. No. 15250/02, 43 Eur. H.R. Rep. 2, 22, 35 (2006) (judgment Dec. 13, 2005) (asserting that Article 1 of the European Convention demands an official investigation after any violation of Article 3). *See generally* Jankauskas v. Lithuania, App. No. 59304/00, ¶ 35(2), http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database (follow "HUDOC" hyperlink; then enter "59304/00" in application number field) (finding a violation of Article 8 of the European Convention but not requiring the State to provide an effective investigation); Kaya v. Turkey (No. 65), 1998-I Eur. Ct. H.R. 297, 324 (requiring official investigation following any deaths resulting from use of state force under Article 2 of the European Convention).

107. States' duty to carry out criminal proceedings as set forth by the European Court in cases involving violations of the right to life or to be free from torture may emerge from the difficulty of making domestic courts determine civil or administrative liability, absent a declaration of criminal liability. *See* Aksoy v. Turkey (No. 26), 1996-VI Eur. Ct. H.R. 2260, 2287 (declaring the State's failure to conduct a criminal investigation and sentencing "was tantamount to undermining the effectiveness of any other remedies that may have existed"); *see also* Ognyanova v. Bulgaria, App. No. 46317/99, 44 Eur. H.R. Rep. 7, 169, 196, 199 (2007) (judgment Feb. 23, 2006) (holding Bulgaria in violation of Article 13 of the European Convention where authorities failed to conduct an effective investigation, and ordering payment of the claimant's costs and expenses); *Menesheva*, App. No. 59261/00, 44 Eur. H.R. Rep. 56, at 1176 (concluding Russia failed to conduct an effective criminal investigation thereby limiting remedies, such as damages, available to the victim).

Indeed, even in a case were the European Court held that Turkey violated a person's right to life, it nevertheless stated:

> It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence . . . or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence.[108]

Furthermore, the European Court stated, "neither Article 13 nor any other provision of the Convention guarantees an applicant a right to secure the prosecution and conviction of a third party or a right to "private revenge."[109]

The European Court further explained that even in cases involving violations of the right to life, a victim's redress can be fulfilled by establishing responsibility for the crime in civil or administrative processes. In the European Court's words:

> It is true that [this tribunal] has found on occasion a violation of Article 13 in cases involving allegations of unlawful killing by or with the connivance of the members of the security forces . . . on account of the authorities' failure to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible . . . . However, it is to be observed that those cases, arising out of the conflict in south-east Turkey in the 1990s, were characterized by the absence of any such investigations into the applicants' complaints . . . . It was precisely this element which led the Court to find that the applicants in those cases had been deprived of an effective remedy, in that they had not had the possibility of establishing liability for the incidents . . . whether by applying to join criminal proceedings as an intervening party or by instituting proceedings before the civil or administrative courts.[110]

108. Öneryildiz v. Turkey, App. No. 48939/99, 2004-XII Eur. Ct. H.R. 79, 117 (2004) (judgment Nov. 30, 2004) (involving two Turkish nationals who blamed the authorities for their relatives' death when a municipal rubbish tip in Istanbul exploded).

109. *Id.* at 134 (discussing how Article 13 differentiates between types of remedies available for the violations of different rights).

110. *Id.* (adding that "[w]hat is important is the impact the State's failure to comply with its procedural obligation under Article 2 had on the deceased's family's access to other available and effective remedies for establishing liability on the part of State officials or bodies for acts or omissions entailing the breach of their rights under Article 2 and, as appropriate, obtaining compensation").

Interestingly, even in cases where the European Court found criminal investigation and punishment necessary, the court never ordered states to carry out prosecutions and criminal punishments in the operative paragraphs of its decisions. Moreover, the European Court never required states to take any measure in criminal proceedings already open, to re-open criminal cases already extinguished, or to initiate proceedings never initiated. When it found states had not complied with their duty to carry out criminal proceedings, the European Court simply declared the breach to the European Convention and required payment of monetary compensations to the victims.[111]

For example, in *Tanli v. Turkey*, the European Court found Turkey responsible for the death of a person in police custody where the three police officers accused of killing the victim were acquitted at trial because the cause of the death was not established.[112] The court declared the State's responsibility for the detainee's death and established that the State failed to conduct an effective criminal investigation. However, the European Court limited its decision to declaring Turkey's breaches of the European Convention and to ordering payment of fair compensation to the victim's next of kin. It did not order the State to re-open the case, as the Inter-American Court did in *Bulacio*.[113]

111. *See* Tanli v. Turkey, App. No. 26129/95, 2001-III Eur. Ct. H.R. 213, 217, 220, 238-39 (involving a Turkish national who blamed the government for torturing and murdering his son while he was under police custody for allegedly aiding and abiding the PKK).

112. *Id.* at 239 (awarding non-pecuniary damages of GBP 20,000 for the victim's next of kin and non-pecuniary damages of GBP 10,000 for the victim).

113. *Id. See generally* Ognyanova v. Bulgaria, App. No. 46317/99, 44 Eur. H.R. Rep. 7, 169, 196, 199 (2007) (judgment Feb. 23, 2006) (providing, generally, a similar assessments of facts and method of ruling by the European Court); Iovchev v. Bulgaria, App. No. 41211/98, ¶¶ 98, 116 (Feb. 2, 2006), http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database (follow "HUDOC" hyperlink; then enter "41211/98" in application number field) (deciding Bulgaria violated different procedural rights protected by the European Convention and ordering the State to repair the victim with monetary compensation); Kaya v. Turkey (No. 65), 1998-I Eur. Ct. H.R. 297, 323, 333 (deciding that Turkey conducted an artificial and ineffective investigation, violating Article 2 of the European Convention, and ordering state payment of monetary compensation as reparation); Ergi vs. Turkey (No. 81), 1998-IV Eur. Ct. H.R. 1751, 1779, 1784, 1785 (finding Turkish authorities failed to protect the right to life and lacked adequate and effective investigation of the victim's death, and ordering payment of

Finally, the limited doctrine set forth by the European Court is not applicable when the crimes assessed were not committed by the state apparatus. Violations of the right to life and the right to be free from torture, inhumane, or degrading treatment or punishment raise a state duty to carry out criminal proceedings only "in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility."[114]

CONCLUSION

> *"An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."*[115]

State atrocities have a widespread record in modern history. Whether and how to punish gross violations of human rights have always been key and complex issues with which societies have had to deal.[116] There is no doubt that states must punish crimes against humanity.[117] It is also a generally accepted view that hideous crimes

monetary compensation as reparation).

114. *Ognyanova*, App. No. 46317/99, 44 Eur. H.R. Rep. 7, 169, 191 (awarding only non-pecuniary and out-of-pocket expenses to applicants and dismissing the applicants' other claims for "just satisfaction").

115. THOMAS PAINE, *Dissertations on First Principles of Government, in* RIGHTS OF MAN, COMMON SENSE, AND OTHER POLITICAL WRITINGS 385, 408 (Mark Philip ed., Oxford Press 1995).

116. *See generally* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (Beacon Press 1998), *reprinted in* 14 NEGOTIATION J. 319 (1998) (describing and analyzing the different experiences and approaches taken by societies leaving behind regimes of massive state atrocities); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 41-104 (1996) (describing trials of former state officials who committed hideous crimes, analyzing their political and legal problems, and describing Argentina's transition to democracy, its policies regarding the promotion of human rights, and the trial conducted against the military juntas).

117. It is worth noting that it might be dangerous to use the category of "crimes against humanity." *See* David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 120 (2004) ("[T]alk of crimes against humanity whose perpetrators are 'enemies of humanity' threatens to demonize the perpetrators, to brand them as less than human, and hence to expel them from the circle of those who deserve human regard. The obvious paradox is that doing so undercuts the root idea of international human rights, namely that *everyone* deserves human regard." (emphasis in original)).

should be punished. The punishment of crimes is desirable in every state under the rule of law, and the more hideous the crime, the more desirable a need for punishment. However, that cannot mean that in order to punish crimes, states are to disregard defendants' rights.[118] Yet, the existence of a victim's right to punish an offender is likely to produce this unwanted consequence.

Through consistent development of case law, the Inter-American Court maintained that every violation of any of the rights protected by the American Convention, including both public and private violations, must be punished by states party to the Convention. Part III explained why this doctrine is dangerous. The way in which the Inter-American Court has broadened victims' rights results in the restriction of some of the most valuable rights achieved by Western civilizations: the rights of the people accused of having committed a crime. Not in vain, every national constitution provides rights to defendants but not to victims. Nothing is more dangerous for individuals than the states' criminal power. Therefore, law cannot simultaneously assure both criminal procedural rights to defendants and a victim's right to punish an offender. The existence of a duty to punish will likely lead to abuse of power and infringement of individual rights.[119]

As *Bulacio* illustrated, the decision to provide both protection to defendants' rights and a victim's right to have offenders punished is equivalent to eliminating defendants' rights. It has been clear since the Enlightenment that to be effective, the rights of the defendants should carry more weight than the desire for prosecution and punishment. As noted, individual rights were created to prevent states' abuses of power during the investigation, prosecution, and

118. *See generally* Agnes Heller, *The Limits to Natural Law and the Paradox of Evil, in* ON HUMAN RIGHTS 149, 152 (Stephen Shute & Susan Hurley eds., 1993) (asserting that to disregard defendants' rights in order to punish sinister state crimes erodes the legitimacy of the states).

119. Pastor, *supra* note 86, at 94. Western constitutions are especially concerned about protecting defendants' rights, while never mentioning rights associated with victims of crimes. *See* George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 551 (2005) (explaining that constitutions "are devoted to the problem of a fair trial for the accused, not the issue of justice for those who have suffered from crime").

punishment of crimes. The basic nature of individual rights requires that they supersede states' and victims' interest in punishing illegal conduct. If the human rights movement serves to protect people from state abuses, it has to make a choice between the protection of defendants' rights and victims' right to punishment. The Inter-American Court's duty to punish doctrine promotes the violation of an individual's right to equal treatment and to be presumed innocent. It also permits the violation of a defendant's right to defense in a fair trial. Therefore, the Inter-American Court's doctrine is counterproductive because it infringes on the very objectives of the Inter-American system of human rights protection. As the Inter-American Court stated, "[t]he safeguard of the individual in the face of the arbitrary exercise of the power of the State is the primary purpose of the international protection of human rights."[120] In addition, "the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power."[121]

Of course, victims' rights look appealing when dealing with state atrocities because they make the punishment of sinister criminals easier. Moreover, the very creation of regional systems of human rights protection, such as the Inter-American system, emerged from the need to have international tribunals hear victims of states' crimes, and direct states on how to deal with human rights violations. However, to excessively broaden the scope of victims' rights produces unwanted legal outcomes under the rule of law. The European Court has good reason to differentiate its approach from its Inter-American counterpart.

In its approach to fight against state officials' impunity, the Inter-American Court gives states excessive power. Ironically, the court is

120. Baena-Ricardo v. Panama, 2003 Inter-Am. Ct. H.R. (ser. C) No. 104, ¶¶ 78, 128 (Nov. 28, 2003) (holding that the Inter-American Court "has the authority, inherent in its attributions, to determine the scope of its own competence, and also of its orders and judgments, and compliance with the latter cannot be left to the discretion of the parties").

121. The Word "Laws" in Article 30 of the American Convention on Human Rights (Advisory Opinion), 1986 Inter-Am. Ct. H.R. (ser. A) No. 6, ¶¶ 21, 38 (May 9, 1986) (defining "laws" as a "general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose").

using state criminal punishment as a tool to prevent and deter state abuses.[122] This collides with the very same idea of protection of human rights. As Cardona Llorens said, "the rights recognized by the human rights treaties must be interpreted in a way to protect the individual against the state."[123] Every time a criminal trial is developed, defendants' rights are in danger. More importantly, every time the state's criminal system is called into action, innocent people might suffer infringements on their freedoms.

By approaching every human rights violation as if it could only be responded to with punishment, the Inter-American Court might enhance states' power to punish and weaken individuals' rights. If domestic courts welcome the duty to punish doctrine in literal terms, criminal law would no longer limit states' power against individuals. If an obligation to punish exists, consequently, the obligation not to punish when the evidentiary burden is not met or by using *ex post facto* laws does not exist anymore. The obligation to investigate and prosecute without infringing on human dignity would also not exist anymore. In short, if an obligation to punish exists, the rights of the accused do not exist anymore. There would no longer be the criminal law that Western societies enshrined since the Enlightenment, but an unlimited criminal system.[124]

122. *See* Di Corleto, *supra* note 10, at 704 (clarifying that lack of a specifically outlined duty to investigate and punish human rights abuses in various international human rights conventions does not signify that there is no such duty).

123. *See* Cardona Llorens, *supra* note 3, at 321 [translation by author].

124. *See* Pastor, *supra* note 86, at 85 ("This ideology of an infinite punishment does not admit alternatives to criminal law. To claim this in such a categorical way and with no tolerance for solutions other than punitive is equivalent to re-found a medieval and counter-illustrated criminal law already superseded long time ago".) [translation by author].

Part II
Substantive Criminal Law

[10]

NULLA POENA SINE LEGE

By JEROME HALL †

NULLA poena sine lege has several meanings.[1] In a narrower connotation of that specific formula it concerns the treatment-consequence element of penal laws: no person shall be punished except in pursuance of a statute which fixes a penalty for criminal behavior. Employed as *nullum crimen sine lege,* the prohibition is that no conduct shall be held criminal unless it is specifically described in the behavior-circumstance element of a penal statute. In addition, *nulla poena sine lege* has been understood to include the rule that penal statutes must be strictly construed. A final, important signification of the rule is that penal laws shall not be given retroactive effect. Obviously, it is necessary to keep each of the above meanings distinct.

I. Origins

The view one finds most frequently expressed is that the rule, despite its Latinity, is not of Roman origin[2] but was born in eighteenth century Liberalism. The matter is not so simple. A few threads persist to perplex; they refute an all-too-facile history, even though they may not establish a clear, unbroken line of development.[3]

True it is that the "extraordinary" offenses of Roman jurisprudence suggest almost unlimited discretion in the judiciary. But side by side with *extraordinaria judicia* may be found insistence upon pre-definition of offense and penalty. As regards first malefactors, magisterial discretion probably joined appeal to the populace to provide specific decisions, which, in course of time, defined "ordinary" offenses governed by pre-

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1. See Roux, Cours de Droit Criminel Francais (1927) 16; 1 Garraud, Droit Penal Francais (3rd ed., 1913) § 137. The most detailed discussion I have seen is de la Morandiere, De La Regle Nulla Poena Sine Lege (1910) (Recueil Sirey).

2. Schottlaender, Die geschichtliche Entwicklung des Satzes: Nulla poena sine lege (1911) Strafrechtliche Abhandlungen, Heft 132, at 1; Matzke, Juristische Wochenschrift, 7 July 1934; Klee, *Strafe ohne geschriebenes Gesetz* (1934) D. J. Z. 641-643; Drost, Das Ermessen des Strafrichters (1930) 80 ff.

3. See Strachan-Davidson, 1 Problems of the Roman Criminal Law (1912) 103, 104.

scribed rule.[4] There is evidence, also, that though specified penalties could be mitigated, they could not be increased.[5] Certainly as to Roman citizens, and in the ordinary course of administration, there were long periods when prescribed penalties had to be strictly adhered to.[6] This rule reached its most rigorous statement in the Roman law with Sulla who insisted that for certain crimes both offense and penalty be exactly described in the statute under which the accusation was brought.[7]

The prohibition against retroactivity of penal laws was well known and followed under Sulla; long before that it appears to have been approved by the Greeks.[8] Under Augustus several penal laws were declared to be non-retroactive, although not until 440 A.D. was the principle itself enacted.[9]

The rule in its several aspects thus had a vague and checkered Roman history. But clouded as it is in the uncertainty of sporadic expression, flanked by the well-known *extraordinaria judicia*, appeals to the populace, and such wide powers as those under the Principate, nevertheless certain minima appear — more than enough to require that the search for origins be directed far back of the eighteenth century.

We shall not inquire into the ramifications of the rule in the Middle Ages[10] nor into the question whether the penalization by canon law of "offenses against conscience" completely barred its application to major crimes.[11] Without doubt, the mediaeval doctrine of the primacy of law was deeply rooted[12] until challenged in its theological, authoritarian

4. *Id.* at 108.

5. D. 48. 19. 42; D. 50. 17.

6. D. 50. 16. 131 provides: *"Poena non irrogatur, nisi quae quaque lege vel quo alio jure specialiter huic delicto imposita est."* 12 SCOTT, THE CIVIL LAW (1932) 278 ("a penalty is not inflicted unless it is expressly imposed by law, or by some other authority."). See also D. 50. 16. 244. ". . . an appeal cannot be taken from a penalty, for where anyone is convicted of an offense, the penalty for it is fixed, and must be paid at once."

"Hence, the differences between these things becomes apparent, because certain penalties are prescribed for certain illegal acts; but this is not the case with fines, as the judge has power to impose any fine he pleases, unless the amount which he may impose is fixed by law." *Ibid.*; 11 SCOTT, *supra*, at 296.

7. See SCHOTTLAENDER, *op. cit. supra* note 2, at 9, 10.

8. 2 VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE (1922) 139, 140.

9. SCHOTTLAENDER, *op. cit. supra* note 2, at 16 ff; see also *"Nemo potes mutare consilium suum in alterius iniuriam."* D. 50. 17. 75. Code 1.14.7.

For a summary of this history see Dash v. Van Kleeck, 7 Johns. 477 (N. Y. 1811).

10. See GRAF and DIETHERR, DIE DEUTSCHEN RECHTSSPRICHWORTER (1864) 286, Nos. 7, 9, 10; DANIELS and GRUBEN, DIE GLOSSE ZUM SACHSISCHEN WEICHBILDRECHT, § 334.

11. See PETRONCELLI, IL PRINCIPIO DELLA NON RETROATTIVITA DELLE LEGGI IN DIRITTO CANONICO, 29 PUBBLICAZIONI DELLA UNIVERSITA CATTOLICA DEL SACRO CUORE (1931).

12. See GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (Trans. Maitland, 1927) 74.

aspect by the rise of the modern state. On the other hand, one must not read into ancient doctrine those special meanings which the rule took on in the eighteenth and nineteenth centuries. Hence those who find the origin of *nulla poena*, in its present significance, in Magna Carta[13] are on unsettled territory. At the same time, it is probable that *"lex terrae"* in the famous 39th clause did mean more than procedural guarantees. More likely was it a limitation of both process and substantive law upon the royal prerogative.[14]

In English history the principle of law as limitation is prominent from the time of the Charter of Henry the First; it is reiterated in the Constitution of Clarendon in 1164. Magna Carta is the great symbol of the socio-political forces that established the supremacy of the Rule of Law in England;[15] with Bracton it is already urged vigorously. The movement is evidenced rather than created by subsequent petitions and bills of right.[16] The rise of Parliament plays an important part;[17] and,

13. See METZGER, STRAFRECHT (1933) 77.

14. "The struggle was waged to secure trial in properly constituted courts of justice and in accordance with established law. The latter requirement would apply equally to substantive rules as far as they existed, and to procedure." VINOGRADOFF in MAGNA CARTA COMMEMORATION ESSAYS (1917) 85; see also POWICKE in *id.*, at 121; MCKECHNIE, MAGNA CARTA (2d ed. 1914) at 379, 380, 394; MCILWAINE, HIGH COURT OF PARLIAMENT (1910) at 55.

15. Over five hundred years ago, Fortescue wrote: "In such a Constitution, under such [humane] laws, every man may live safely and securely." And those who look only to eighteenth and nineteenth century liberalism for the origin of concern for the individual, should read the ringing passage, in which he says: "Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally." DE LAUDIBUS LEGUM ANGLIAE (trans. Gregor, 1874) c. 27, at 94.

16. See the Resolution of March 29, 1628 passed by the House, quoted by POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS (1882) 225, and the Petition of Grievances of Commons to James I, 1610, quoted *id.*, at 221.

17. Compare the following with eighteenth and nineteenth century liberalism on the Continent: Sir Robert Phillips—" . . . the Right of the Subject is thus bulwarked by the law of the kingdom . . ." ". . . I can live although another without title be put to live with me; nay, I can live, although I pay Excises and Impositions for more than I do: but to have my liberty, which is the soul of my life, taken from me by power, and to be pent up in a gaol without remedy by law, and thus to be so adjudged to perish in gaol; O improvident ancestors! O unwise forefathers! To be so curious in providing for the quiet possession of our lands, and liberties of parliament, and to neglect our persons and bodies, and to let them die in prison, and that *durante bene placito*, remediless. If this be Law, why do we talk of our Liberties."

Coke: ". . . it is against law, that men should be committed, and no cause shewed . . . it is not I, Edward Coke, that speaks it, but the Records that speaks it; we have a national appropriate Law to this nation . . . "

"Then the House of Commons came to the following Resolutions: Resolved. '1. That no Freeman ought to be detained or kept in prison, or otherwise restrained by the command of the king or privy council, or any other, unless some cause of the commitment, detainer, or restraint be expressed, for which by law he ought to be

indeed, it is parliamentary influence which in fact transformed what might only in a very vague style be termed *nulla poena* into some real approximation to the rule. For with legislation came gradual subordination of common law and, also, the distinctive techniques of statutory construction which characterize the continental significance of the rule.[18]

But England ran far ahead of the continent in imposing law upon government. The Prussian Code of 1721 provided that offenses which were not enumerated in the territorial code nor provided for by the imperial law, should be judged *ex aequo et bono,* except that the more difficult cases should be personally decided by the king. The Bavarian Code of 1751 directed that cases not provided for by the Code should be decided *"ex aequitate et analogia juris,"* and the Austrian Code of 1769 provided that "cases not set forth in the Code should be decided according to the principles laid down in the Code."[19]

Long before the French Revolution,[20] the movement for codification had advanced some of the ideas underlying *nulla poena* on its technical side. Indeed, it was in the Code of the Austrian monarch, Joseph II, (1787) that specific prohibition of analogy first entered the modern criminal law.[21] The English tradition of the rule of law,[22] translated by

committed, detained, or restrained'." Proceedings in Parliament Relating to Liberty of the Subject, 3 STATE TRIALS (1627–1628) at 65, 66, 78, and 82.

18. "A penal law then, shall not be extended by construction. The law of England does not allow of constructive offenses, or of arbitrary punishments. No man incurs a penalty unless the act which subjects him to it, is clearly both within the spirit and the letter of the statute imposing such penalty. 'If these rules are violated,' said Best, C. J. in the case of Fletcher v. Lord Sondes [3 Bingham 580], 'the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws!'" DWARRIS, A GENERAL TREATISE ON STATUTES (1873) at 247.

19. See SCHOTTLAENDER, *op. cit. supra* note 2, at 43–44. Affinity with the German law of June, 1935, is apparent. See note 43, *infra.*

20. "The main thesis of this work [Essay of GLOBIG and HUSTER on CRIMINAL LEGISLATION (1783)] was the need of a code which contained a complete and plain formulation of the criminal law." VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW (1916) 248.

That the Constitutio Bambergensis (1507), Arts. 125–126, prohibited inferior courts from applying customary penal law and also prohibited analogy by inferior justices. See SCHOTTLAENDER, *op. cit. supra* note 2, at 36–37.

21. See VON BAR, *op. cit. supra* note 20, at 252.

22. The American Declaration of Independence complained that the king "has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries;" and the American Colonies generally had asserted the English tradition guaranteeing against conviction for any crime except by the law of the land; see also " . . . William Penn in the preface to the plan of government prepared for Pennsylvania, in 1682, declared that 'any government is free to the people under it, *where the laws rule, and the people are a party to those laws*'." 2 KENT, COMMENTARIES (1896) 4, n. (a); *cf.* N. Y. Act of 13 May 1691; Mass. Const. of 1780, Art. 12; Laws of Mass. 1672, at 1; 1702, at 1; 1750, at 1; 1784, at 1.265; 1795, at 1; all cited in State v. Danforth, 3 Conn. 112, 118 (1819).

eighteenth century French philosophers[23] into terms expressive of the Revolutionary ideology, joined with the continental movement for codification to provide *nulla poena* with its particular, current meanings.

We must remember, too, that in revolutionary France the thesis of judicial severity and arbitrariness in the *ancien régime* was, rightly or wrongly, almost unquestioned. That proposition coincided with and facilitated the rise to power of the legislature.[24] Lafayette, who participated actively in the Revolutionary Assembly of 1789, proposed the drafting of a Declaration of the Rights of Man — his inspiration coming, it is said, from the Virginia Declaration. On August 26, 1789, the famous *Déclaration* appeared, containing in its eighth article the provision: *"Null ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au delit et légalement appliquée."* The *Déclaration* fixed the prevailing meanings of *nulla poena* not only as a basic constitutional safeguard of the individual against oppressive government but also as a cardinal tenet of penal law. The rule was restated in the French Constitution of September 3, 1791; it was not repeated in the *Code Pénal* of 1791, although the Military Code of that year did contain it.[25] It reappeared in the French Code of 1810, thence to remain practically unchanged.[26]

The rule was incorporated in the Bavarian Code drafted by Feuerbach in 1813; not until 1850 did it appear in the Prussian Constitution, nor until 1851 in the Prussian Code,[27] and not until 1870 in the Reich Code. It was omitted from the Reich constitutions of 1849 and 1871, although it appeared in most of the federal state constitutions — Bavaria's as early as 1818, Wurtenberg's in 1819.[28]

Feuerbach is generally credited with the statement of *nulla poena* in its current form. His *Lehrbuch des peinlichen Rechts* first appeared in 1801 — at the peak of liberal revolutionary reform, at the zenith of Classicism in general. He enunciated three principles[29] and declared that

23. For Voltaire's drastic experience in France and his appreciation of English law and liberty, see DICEY, LAW OF THE CONSTITUTION (1931) 180, 185–186.

24. See M. Bergasse's address in the Assemblee Nationale, quoted by BUCHEZ et ROUX, 2 HISTOIRE PARLEMENTAIRE DE LA REVOLUTION FRANCAISE 284.

25. Pt. 1, Arts. 1 and 2.

26. See the present article 4 of the Code pénal: *"Nulle contravention, nul délit, nul crime ne peuvent être punis de peines qui n'étaient pas prononcées par la loi avant qu'ils fussent commis."*

27. The Prussian Code of 1794 [Intro. Sec. 87] provided that "acts and omissions which are not prohibited by the laws cannot be regarded as crimes." But "laws" here included Natural Law. SCHOTTLAENDER, *op. cit. supra* note 2, at 49.

28. Prohibition of analogy was included in the Projects for German Penal Codes in 1909, 1913, 1919, and 1925. See ACKERMANN, DAS ANALOGIEVERBOT IM GELTENDEN UND ZUKUNFTIGEN STRAFRECHT (1934) Heft 348, STRAFRECHTLICHE ABHANDLUNGEN.

29. Par. 24.

they should be adopted without exception: *nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali.*[30]

Feuerbach's integration of prevailing political ideology with the criminal law was simple enough: one who violates the liberty guaranteed by the social contract and safeguarded by penal law commits a crime.[31] All future offenders cannot be known in advance and physically coerced; hence, he argued that the essential purpose of punishment must be deterrence by threat, *i.e.*, it must be psychological. Incidental purposes were direct deterrence by witnessing the infliction of punishment, making the state secure through incapacitation of the offender, and reformation of offenders.[32] Like Bentham[33] he insisted upon strict adherence to the statute; he rejected analogy completely; and his general view of the judicial function would, by later standards, be regarded as extremely narrow, even naive.[34] But his plan was not mere terrorism; he would temper penalty with humanitarianism. To his theory of psychological constraint, Feuerbach added those principles regarding the punishment of offenders which have generally been associated with English Utilitarianism and Classical penology. These philosophical views and the political ideology that fused them with the law have persisted — and not least as regards retroactivity of penal law.

II. Retroactivity

English history is not without a number of instances of *ex post facto* penalization[35] — some for very serious offenses.[36] These were political cases that arose during turbulent Stuart times. They are suggestive of the use of the coercive legal apparatus during crises rather than relevant to the general problem of retroactivity. No constitutional provision expressly forbids retroactivity in England as does the American Constitution. But the bias against such penal legislation is deeply embedded

30. The current German slogan merely omits the last word (legal) in Feuerbach's third rule. See Schmitt (1934) D. J. Z. 691.

31. Lehrbuch des peinlichen Rechts (1801) par. 28.

32. *Id.* at par. 133.

33. Bentham had written: "Hence the first law with which a great code ought to be begun, should be a general law of liberty — a law which should restrain delegated powers, and limit their exercise to certain particular occasions, for certain specific causes." Principles of Penal Law, Pt. 3, ch. xx; 1 Works (Bowring 1843) 576.

34. Compare Livingston for the fullest American expression of these views.

35. Recent examples of ex post facto legislation are the lex van der Lubbe and like treatment of Communists which rode in the face of prohibitions in the Weimar constitution. The "execution" of Roehm and his associates was also subsequently declared "legal".

36. King v. Thurston, 1 Lev. 91, 83 Eng. Rep. 312 (1663); for other instances collected, see Calder v. Bull, 3 Dall. 386 (U. S. 1798).

in the common law.[37] A mere handful of truly retroactive public laws are found in the English reports,[38] and these seem invariably to have been intended to relieve an individual or a group from what was deemed an unjust hardship.[39]

In a sense, to be sure, all case law — and that includes jurisprudence interpretative of statutes or codes — operates retroactively. For only fictitiously can it be said that all acts found to be criminal upon trial were criminal when committed. The fact is that it is the subsequent decision which reaches back into time and places the authoritative stamp of criminality upon the prior conduct. The theory is otherwise. In most cases, too, it is reasonably certain in advance that particular acts will be declared criminal; but there are the exceptions. There are behavior and circumstances with regard to which no one can say that they were within the prescription; there are cases, landmarks in every modern system of law, where the courts make new law by their redefinition of statutes or of jurisprudence. The lines shade imperceptibly into one another. Proof of substantial, if not complete, non-retroactivity as regards judicial decision must rest upon the inertia of language, facts, and moral ideas, and upon the utility of concepts (including rules of law) to function as reasonably reliable vehicles of the common aspects of phenomena that may be far apart chronologically. In any event, the relatively rare appearance of judicial penal legislation provides no reason for not barring retroactivity in its simpler statutory manifestation where it is clearly present.

An additional problem needs to be fairly confronted. Underlying the revulsion against retroactivity of penal laws is a simple assumption: it is unjust that what was legal when done should be subsequently held criminal, that what was punishable by a minor sanction when committed should later be punished more severely. Obviously there will be no disagreement as to these value-judgments if the act when done was moral,

37. Even Bentham wrote: "This is one of the noblest characteristics of the English tribunals: they have generally followed the declared will of the legislator with scrupulous fidelity, or have directed themselves as far as possible by previous judgments . . . This rigid observance of the laws may have had some inconveniences in an incomplete system, but it is the true spirit of liberty which inspires the English with so much horror for what is called an ex post facto law." 1 Works (Bowring 1843) 326. See Allen, Law in the Making (2d ed. 1930) at 274 ff.; Phillips v. Eyre, L. R. 6 Q. B. 1, 23 (1870); R. v. Griffiths, [1891] 2 Q. B. 145, 148. But see *Ex parte* Clinton, 6 State Trials (N.S.) 1105, 1107 (1845).

38. See Allen, *op. cit. supra* note 37, at 275–276.

39. *Ibid.* The American colonies early provided against retroactivity. As to substantive law, the problem has rarely been raised in the Supreme Court. See Cummings v. Missouri, 71 U. S. 277 (1866); *Ex Parte* Garland, 71 U. S. 333 (1866), both outgrowths of post civil war legislation. On the problem generally, see Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence* (1936) 20 Minn. L. Rev. 775.

or at least not immoral. But why should not the perpetrator of a clearly immoral act be punished by subsequently enacted law? Why not in such cases increase an existing penalty to one that is "adequate"? Does not "substantial justice" require affirmative replies?

Apologists of retroactivity ridicule the notion that the lawbreaker is entitled to notice of the possible penalty he may incur. While they wish "to strike terror into the hearts of criminals,"[40] they argue that experience and observation have amply demonstrated that sanctions do not deter, and that it is a vestige of a rationalistic age to believe that the would-be offender will weigh the advantage of his crime against the evil of his possible punishment. Yet criminals who give no heed to any possible punishment are elsewhere said by these same criminologists to be such students of the law that they operate in areas which are just beyond the reaches of the statute.[41] This paper cannot elaborate upon the validity of the fundamental values that lie at the basis of the judgment which heartily condemns retroactivity of penal laws. Premised is a "value cosmos," which is something quite different from either formal ethics or "preferential attitudes."

But there is another phase of the problem and another body of opinion which should be mentioned here. I refer to the insistence by many criminologists, in the United States, as elsewhere, that the criminal act should be entirely ignored, that punishment, or, as they prefer, "treatment", should depend entirely upon the personality of the offender and his dangerousness to society. This notion goes beyond challenge of the guarantee against retroactivity; since it eliminates requirement of any act whatever — post-law or ante-law — as regards the basis for subjection to penal treatment, relative occurrence of behavior becomes irrelevant.

A plausible rationalization of deliberate retroactivity cannot be made. More important, because more convincingly challenged, is *nullum crimen sine lege* interpreted as a prohibition on the use of analogy.

III. Analogy and Interpretation

Analogy is, strictly speaking, a likeness of relationships. But the term has a more popular connotation, and it is that to which the law more nearly adheres. To illustrate what is popularly termed "reasoning by analogy": two phenomena resemble each other in certain features which are regarded not as accidental but as essential and which are deemed to preponderate over the known differences. A proposition is known to be true of one phenomenon; it is then inferred to be true of the other.

40. See Franck, quoted by Cantor, *Prison Reform in Germany—1933* (1934) 25 J. Crim. L. 84, 88.

41. See Franck, quoted by Preuss, *Punishment by Analogy in National Socialist Penal Law* (1936) 26 J. Crim. L. 847, 848.

Reasoning by analogy is not applied to things which are almost identical; such reasoning is applied only when similarities are limited in number and it is admitted that significant differences also exist.

Analogical reasoning in law means something quite different from this. Indeed, the use of the term "legal analogy" is misleading and obscures its differences from the doctrine of extensive interpretation. For under the theory of this doctrine, it being granted that statute or rule R correctly applies to the X situation, the Y situation is subsumed under R by *logical* analogy if Y resembles X in a number of particulars which outweigh known important differences. Thus, under extensive interpretation the same rule is applied to both situations. Legal analogy applies only where the differences are so important as to make improper the subsumption of X and Y under the same rule. Hence, "judicial legislation" more truly describes what is involved in so-called legal analogy. Offense Y, though "sufficiently" different from offense X so as not to be subsumable under R, does have important characteristics in common with X. Because of these, it is thought that Y should be punishable.

It is debatable whether, and to what extent, the above distinction between analogy and extensive interpretation is operative in the judicial process, especially at the periphery of facts and symbols. One's judgment of the value of the distinction will turn upon opinions held regarding the role of the concept in the actual mental process, including the possible indirect effects of the distinction as a general determinant of judicial attitude. Certainly the common assumption in debate on *nulla poena*, as to its importance in the judicial process, is clear. When, however, basic theories regarding adjudication are under fire, it seems superfluous to consider the niceties of the problem. But we may note some of the implications that lie near the surface.

No two cases are identical; yet all cases have some common characteristic. Upon the level of generality selected for the criteria of likeness or dissimilarity depends the outcome. Hence it is clear that there are no formal limits which the analogical method cannot reach. Also, just as every similarity in two factual situations enhances the analogy, so differences, as they mount, diminish it. Any two situations, facts or events have some similarities, some differences. How can one decide which preponderates? It necessarily follows, also, that there is an inevitable competition between analogies. A new situation has some characteristics in common with those admittedly included under Statute A; but other characteristics are like those admittedly included under Statute B. Which statute shall be the basis of the new rule? With a multitude of statutes that are quite alike in principle, it is fallacious to assume that any one must necessarily be closer to the act in question than any other. A fact-situation has some characteristics of situations admittedly included under

a statute, and some of other situations which were admittedly, perhaps even specifically, excluded from the statute. Which principle, if any, applies?

To some degree these difficulties apply to extensive interpretation as well as to analogy. But extensive interpretation is limited by the broadest actual denotation which the words symbolize. The standard is an objective one and may be contrasted with the derivation of factual referents resulting from imaginative expansion of a statute into an all-embracing "principle." Back of extensive interpretation are the language institution and a long body of experience which apply some check on the process of identifying fact-situations. Beyond some point, words used as symbols, not principles, cannot be persuasively stretched, situations cannot be identified. Legal analogy, however, is a break from the meaning of words however stretched. But how much of a break is permitted? Where is there a body of experience with legal analogy, *i.e.*, judicial legislation, that can exert a restraining effect upon its application? The only possible limits may arise from the practices of judges representative of a common culture — practices that might conceivably, over a period of time, fix some general framework for such legislation. But at the outset only the vaguest of ideational factors can limit the pursuit of "principle."

Hence we arrive at a central distinction between the use of analogy in England and the United States, and that recently proposed on the continent. Anglo-American judges have made use of logical analogy[42] in the application of case law; and this process has generally been so slow and detailed as to be hardly perceptible except to careful search. It has for the most part — and here I speak of the growth of criminal law over the centuries, not of particular leaps that undoubtedly can be found — kept pace with change in the language institution itself. It has amounted mostly to an all-but-unnoticed bringing-up-to-date of old terms — so that, filled with new content, they refer more adequately to the changed conditions. When American writers speak of expanding criminal case law by analogy they do not mean deliberate law-making, avowed and apparent to all; they are speaking of analogy in its more proper logical connotation, *i.e.*, extensive interpretation.

At the same time, it is perfectly clear that the traditional theory which limits judicial authority to routine application of the legislative intent is no longer tenable. Only infrequently are the intentions of a large group of legislators determinable to any great extent. Rarer yet will these intentions, or those of the majority, be uniform or specific. With

42. "It is characteristic that leading English and American treatises on statutory construction do not even refer in their indices to the term 'analogy,' and the few cases in which the terms of a statute have received an extended application beyond their possible literal meaning, are clearly exceptional or anomalous." See Freund, *Interpretation of Statutes*, (1917) 65 U. of Pa. L. Rev. 207, at 226, 227, 230.

passage of time difficulties mount. Although conditions arise which the legislators could not possibly have had in mind, the fiction of mere application persists.

But rejection of traditional theories or dogmas of statutory interpretation does not require or justify the conclusion that statutes play no actual role whatever in the judicial process. Admittedly, the formal statement of the rule persists absolutely unchanged. The social milieu is not apt to be so utterly novel as to render completely unknowable at least the general purpose of the statute. Mores persist; linguistic change is slow. The court arrives at a judgment which will not jar the mores, which, by and large, substantially effectuates words as understood at the date of decision and which adheres to the rule as written.

Contrast these limitations of language, formal rule, and declared purpose with the requirement that after all the above linguistic, social, and psychological factors have played their parts, as they inevitably must, if the fact-situation still falls outside the rule, it must nevertheless in certain eventualities be punishable.[43]

Considered in the abstract, a persuasive argument can be made to support the deliberate and constant use of legislative powers by the courts in disregard of the certainty of existing law. But only by analysis of specific aspects of the problem in the light of actual conditions can valid judgment result. The problem of division of labor between legislature and judiciary concerns partly questions of efficiency, partly political and ethical values. To this issue we shall shortly recur.

On the technical side of the question, it is apparent from decisions of the *Reichsgericht*, which still includes judges of the older regime, that analogy offers the magistrate an opportunity to escape the labor of diligent research and study of the penal code by easy resort to "principle" and "sound feelings of the people." It is equally clear that these judges have extended analogy to areas of immorality or misconduct which the legislature intended to leave unpunished.[44] But it is especially significant

43. The German Act of June 28, 1935, provides: "Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act." Compare Holmes, J., in McBoyle v. U. S., 283 U. S. 25, at 27 (1931), citing United States v. Bhagat Singh Thind, 261 U. S. 204, at 209 (1923).

It is admitted that the German judge had been freed from narrow interpretation for more than a decade prior to 1935. See Dahm, Special Report for the International Congress of Comparative Law at 3, 4. Hence, extensive interpretation operated in Germany prior to and at the time of the Act of June, 1935 which abolished *nulla poena*. This act, to have meaning, must obviously be understood to go beyond extensive interpretation.

44. *E.g.*, incest although the act was not consummated; homosexuality by women; acts criminal within the jurisdiction, but committed outside the jurisdiction when they

that analogy has apparently been little resorted to in Germany despite the Act of June 28, 1935[45] — due, to some extent, perhaps, to the *Reichsgericht's* reversal of the first cases to be appealed. If the power is so little used, then obviously analogy does not serve its avowed purpose. The penal laws in their multiplicity apparently do not contain the wide gaps that were declared to exist.

"Substantial justice" does not suffer from lack of laws. On the contrary, modern penal law suffers from superfluity, not paucity of statutes. By comparison with lack of detection, lack of complaint, and lack of knowledge of criminality, failure to punish the guilty, resulting from inadequacy of the penal code, must constitute an almost trivial defect, although it is true the effect of analogizing by petty magistrates in cases that are not appealable is unknown. Aside from the possibility of such magisterial zeal, the injunction to employ analogy has effect, if anywhere, in the formation of a repressive attitude that must tell not only in the interpretation of laws but in the finding of facts as well.[46] This indication is strengthened by the fact that the judge is not permitted to nullify any existing penal law even though the sound feelings of the people are indifferent or even hostile to it. There is no injunction to allow the morally innocent to escape; only the command to widen the net of punishability.

The supporting theme runs in terms of society versus the criminal[47] — although elsewhere the traditional view of the individual as outside of or opposed to the Community is vigorously rejected. If what people thought Lombroso said were only true! If the criminal actually stood apart, marked and labeled like the leper, there might be justification for reversion to the simplicity of primitive justice. But, in the light of known facts, this view is fantastic in its unreality. The supposition is that "the criminal" is not only perfectly well known but that he is known in advance of trial. That the criminal is a unique, atavistic being, recognizable on sight, is a bias deeply rooted in the public mind, which only rational, deliberate analysis can overcome; such an analysis is sought to be attained by law, *i.e.*, by determined abeyance of decision until a prescribed process of careful deliberation shall have been concluded. As to petty infractions, it is absurd to speak of criminals in the popular sense. Yet analogy is applied to these offenses upon an indiscriminate "State versus evil individual" thesis. As to serious wrongs which arouse moral indignation, one may depend upon judges the world over to extend interpretation in these instances as far as is permissible; very rarely, indeed,

were not criminal. See Frankfurter Zeitung, June 24, 1936; R. G. 27/3/36 Deutsche Justiz, 1936, 774; R. G. 18/2/36, Deutsche Justiz, 1936, 609.

45. The Act is set forth in note 43, *supra*.

46. See BECCARIA, ESSAY ON CRIMES AND PUNISHMENTS (1770) 14, 15; MONTESQUIEU, SPIRIT OF LAWS (1748) Bk. XI, Ch. VI.

47. See Radin, *Enemies of Society* (1936) 27 J. CRIM. L. 328.

does a modern penal code lack sufficient instrumentalities — certainly not as regards major wrongs. An excessive judicial conservatism may for a time allow a few malefactors to escape; that is the price paid for the larger benefits conferred. But the legislature soon intervenes where it becomes necessary.

Yet it would be somewhat delusive to imagine that the Classical conception of the judicial function persists. Especially as regards interpretation of statutes have there been profound changes; but it is difficult to generalize about these. The rule of strict construction of penal statutes played a peculiar and important role in eighteenth century England when a humanitarian ideology propagated by Beccaria, Romilly, Howard, Buxton and others rose against a severe and undiscriminating written law. Statutes perfectly clear in their meaning were distorted to exclude numerous situations that came before the courts. "Strict" construction was any construction, however fantastic, that saved the offender from the capital penalty. This movement and its significance with reference to the strict interpretation of penal statutes I have discussed elsewhere at length.[48] So far as generalization here makes any sense, it may be said that in most cases where the weight of precedent is not great English and American courts now construe penal statutes with a view to carrying out the legislative intention. Where the statute is clear, words are given normal meanings; the rules of grammar are not strained.

Difficulties arise where ambiguities exist — and that, by general agreement, is the point where *nulla poena* is now relevant. To comprehend the significance of the jurisprudence interpreting penal statutes requires techniques and theories which have hardly yet been applied; certain it is that little can be learned simply from the language of the courts or of the traditional treatises. Only the most tentative generalizations may, therefore, be hazarded as to American cases: where the ambiguity applies to a procedural or formal matter, there seems to be a tendency to resolve the uncertainty against the accused. This tendency seems especially noticeable when the crime is serious and public opinion is aroused. Elsewhere, strict construction, in the sense of giving the accused the benefit of doubt, persists.[49] The problem needs complete reformulation and analysis which cannot be undertaken here.[50]

But manifest are the hazards of officially instructing judges, especially minor magistrates who can be removed at will by the political authorities,

48. HALL, THEFT, LAW AND SOCIETY (1935) especially Ch. 3.

49. ROUX, *op. cit. supra* note 1, at 84; 1 GARRAUD, *op. cit. supra* note 1, at art. 146, p. 303; Rex v. Halliday, [1917] A. C. 260, at 274.

50. One need is to fix the meanings of the terms "strict" and "liberal." The extant literature confuses even the primary distinctions between (1) construction favorable to or unfavorable to the accused, and (2) construction concerned with objective meanings of words.

that they must hold facts clearly outside a statute to be punishable, and that they must do so by reference to what they imagine to be the attitude or "feelings of the people." Even if this power were confined to the major courts, it would still be fraught with many difficulties, *e.g.*, official abuses, indifference, irrelevance or uncertainty of public morals, changing attitudes, ethical invalidity of public standards in many regards, and occasional public hostility to certain laws or public admiration for certain offenders. Finally, even if many of the premises and objectives underlying advocacy of the use of analogy are accepted, there remains the important question whether modernized legislation is not the sounder method.

Failure to comprehend the more complex methods by which guarantees against governmental abuses are provided by Anglo-American law has caused certain European criminologists to assert recently, in defense of their innovations, that *nulla poena* does not exist in England or America. In a sense this may be a narrow, literal truth, but as intended by these writers, it is certainly a substantial error.[51] The propositions, *nullum crimen sine lege, nulla poena sine lege,* as they developed on the continent at the end of the eighteenth century and as they are there understood, premise inclusive penal codification. In a few American states, which have substituted penal codes or collections of statutes for the common law of crimes, a somewhat generally accurate parallel can be drawn; the qualifications would run along lines suggested by distinctive techniques of adjudication and by the differences resulting from reference to a wide net-work of precedent utilized to interpret words in a penal code. In perhaps a majority of American states, as in England, despite the large and constantly increasing volume of statutes, there exists a residuum of common law which makes *nulla poena* irrelevant in its specific continental sense; it certainly complicates even broad comparison.

It is not difficult, however, to find some approximation in English legal history to contemporary continental abandonment of *nulla poena.* The ancient prerogative of the Crown exercised in the issuance of numerous decrees, the powers of the Council, the decisions of the judges during some centuries of creative building of the common law — all are suggestive. For almost two hundred years the Court of Star Chamber exercised a wide jurisdiction over crimes, and "it punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases . . . although no positive law or continued custom of common

51. See Marshall, C. J., in United States v. Wiltberger, 5 Wheat. 76, 96 (U. S. 1820): "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated." Compare note 43, *supra.*

law giveth warrant to it."[52] Despite subsequent condemnation of the Star Chamber, the Court was really a popular tribunal. But it was abolished in 1641. Since then law, in its narrow connotation, has been the avowed single authority. Close adherence to precedent, especially in England, has strengthened that authority. But there has been one striking exception, perhaps not unrelated to the abolition of the Star Chamber, and that has to do with misdemeanors.[53] In recent years it has generally been forgotten that from 1660 to 1860, the courts, without any specific precedent, frequently punished conduct which was *contra bonos mores,* or which openly outraged public decency,[54] or which was subsumable under some similar generalization; and there are scattered instances of the courts having continued this practice after 1860.[55]

The shock produced by *Rex v. Manley*[56] in 1933 indicates how rarely courts in England have exercised this discretionary power in recent years, and how firmly the tradition of law is there established. Probably the larger part of English criminal law is now statutory, and penal statutes have typically been rather narrow and specific. It is clear that such statutes are not extended by analogy; even where acts fall within the words of a statute they will not be held punishable unless they are also within the spirit, not of "the people," but of the statute as fixed by common understanding of the language.[57]

Hence, even as to misdemeanors generally, it cannot be said that there is very great similarity between the functioning of the English judge and recent continental innovations regarding analogy, which, it must be remembered, apply to all crimes. And in analyzing the infinitely more difficult problem of the processes employed by Anglo-American judges in transforming the law, one must not confuse the deliberate invention of new rules with the relatively unconscious subsumption of unanticipated or

52. Hudson, quoted in 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (5th ed. 1935) 504.

53. And, of course, as regards juvenile delinquency.

54. See 4 BLACKSTONE, COMMENTARIES 65; HAWKINS, PLEAS OF THE CROWN (8th ed. 1824) c. 5, § 4; 1 EAST, PLEAS OF THE CROWN (1716) cc. 1, 3, 4.

55. Reg. v. Stephenson, 13 Q. B. D. 331 (1884); see STEPHEN, A DIGEST OF THE CRIMINAL LAW (1878) 106, 107.

56. Defendant falsely stated she had been robbed, thus causing police officers to make an investigation to discover the offender. She was convicted of effecting "a public mischief." Rex v. Manley, [1933] 1 K. B. 529. And see Stallybrass, *Public Mischief* (1933) 49 L. Q. REV. 183; Jackson, *Common Law Misdemeanors* (1937) 9 CAMB. L. J. 193.

57. See notes 18 and 51, *supra;* THE GAUNTLET, 4 C. P. 184 (1872); Farwell, L. J. in Baylis v. Bishop of London, [1913] 1 Ch. 127, 137; Scrutton, L. J. in Hartnett v. Fisher, [1927] 1 K. B. 402, 424 ("This court sits to administer the law; not to make new law if there are cases not provided for"); ALLEN, *op. cit. supra* note 37, at 184–185, for several examples where, though judges heartily disapproved of a rule of law, they felt themselves "powerless to change the rule."

even unintended sets of facts under old prescriptions — a process found in both code and common law adjudication, and a phenomenon inseparable from the endless interaction of a growing language and changing socio-economic institutions.[58]

At first glance, it might appear that under such generalties as *contra bonos mores*, "outrage to public decency", or "injury to public morals", there is an almost unlimited discretion.[59] No doubt, the possibilities for such discretion do exist; no doubt at various periods in both English and American history these powers were widely used. But an examination of cases decided in recent years indicates that a strong legal tradition imposes sharp limitations on the operation of such statutes.[60]

There are other potent, though more subtle, forces affecting Anglo-American jurisprudence than the principle of *stare decisis* rigorously applied. They operate to effectuate the ends which are sought on the continent through *nulla poena sine lege*. It is only necessary to recall that European scholars of the eighteenth century, especially French, looked to England as the home of political liberty; and that thence a number of forms of English criminal procedure, along with related political and constitutional guarantees, made their way into continental countries. A wide array of ethical-political principles incorporated into fundamental law, and made warp and woof of popular and official tradition over a period of centuries — these provide nicer and, no doubt, more effective guarantees of individual security and freedom from arbitrary penalization than can result from any formal expression of *nulla poena* which is isolated from actual administration of law.

58. See HALL, *loc. cit. supra* note 48.

59. See Schinnerer, *Analogie und Rechtsschopfung* (1936) 55 ZEITSCHRIFT FUR STRAFRECHTSWISSENSCHAFT, Heft 6, at 771; DAHM, SPECIAL REPORT FOR THE INTERNATIONAL CONGRESS OF COMPARATIVE LAW (1937).

60. See Sec. 675 (present sec. 43) of the New York Penal Code. There are, obviously, two all-important limitations on the statute: it is confined to misdemeanors; and the vast majority of misdemeanors are specifically described in the Code. Finally, as to the relatively small area provided for by Sec. 43, the judges have imposed numerous restrictions. See People v. Baylinson, 211 App. Div. 40, 43, 206 N. Y. Supp. 804, 807 (1st Dep't 1924); People v. Tylkoff, 212 N. Y. 197, 105 N. E. 835 (1914); People v. Burke, 243 App. Div. 83, 84, 276 N. Y. Supp. 402, 404 (1st Dep't 1934), *aff'd without opinion*, 267 N. Y. 571, 196 N. E. 585 (1935); People v. Ward, 148 Misc. 94, 96, 266 N. Y. Supp. 466, 468 (Ct. Sar. 1933); *In re* Farley, 143 N. Y. Supp. 305 (Sup. Ct. 1913); People v. Helmes, 144 Misc. 695, 259 N. Y. Supp. 911 (Ct. Chen. 1932).

Cases involving other parts of Section 43 (675) Penal Law include: People v. Most, 171 N. Y. 423, 430, 64 N. E. 175, 178 (1902); People v. Nesin, 179 App. Div. 869, 167 N. Y. Supp. 49 (2d Dep't 1917); People v. Heinlein, 172 N. Y. Supp. 669 (Ct. West. 1918).

IV. RECHSSTAAT

Upon an analysis somewhat similar to that presented above, the Permanent Court of International Justice held that application of the German law of June 28, 1935[61] to Danzig was in violation of the requirement that the government of the city be by rule of law (*Rechsstaat*).[62] The rationale of the decision is clear. In a formal sense, however, "law" may be said to be simply the will of the State; under this generalization whatever the State's officials do in pursuance of the declared will of the State is "legal". There is no *logical* reason why the State's commands must be specific. Hence, with perfect consistency one may contend that the German law is no violation of *Rechsstaat*; and, indeed, the like position may be taken as regards simply one all-inclusive command, for example, punish "socially dangerous" conduct.

But it is perfectly clear that *"Rechsstaat"* is something more than an abstraction to which any nebulous interpretation can be applied. Its meaning can be ascertained only by reference to its actual, historical context. This meaning has been generally expressed as limitation upon the application of force by government, such limitation to be effected by prescription and application of specific rules. Hence the direct object of *Rechsstaat* is to confine discretion.[63]

It is also apparent that some circumstances, or our knowledge of them, are of such an intrinsically general nature that it is impossible to define them specifically.[64] And, it is axiomatic that no scheme of legal administration can escape the uncertainties imposed by the imperfections of human nature. Some may seek an escape from this rather disconcerting reality by a barrage at an alleged belief in a mechanically certain legal apparatus.[65] Recognition of the maximum limits of certainty in the judicial process may be the first step towards enlightenment. But the major problem is the discovery of the particular spheres of relative cer-

61. See note 43, *supra*.

62. Advisory Opinion of Dec. 4, 1935, Series A/B-No. 65. The vote was 9 to 3, the dissenting judges being Polish, Italian and Japanese — the last only placing his dissent on divergence from the view that the law was inconsistent with *Rechsstaat*.

63. See Permanent Court of International Justice, Series A/B. Judgments, Orders and Advisory Opinions, No. 65, Dec. 4, 1935, pp. 53, 56.

64. This distinction is not recognized by those who, on the basis of an occasional necessarily very general statute, argue that analogy restricts more rigorously than does interpretation. If such a result is reached, it is not because analogy is restrictive, but because legal tradition persists and is especially suspicious of analogy.

65. To those who hold that rules of law are of little consequence in the judicial process, *Rechsstaat* is sheer fiction. This view can be understood as a reaction from an other-worldly philosophy that contemplates the legal rule only as ideal. But there is a sound psychological approach to the problem of the concept as reality. Instead of dogmatic denials of the existence and effectiveness of legal concepts, a scientific position would hold conclusions in abeyance, while research proceeded open-mindedly.

tainty and uncertainty. It is more than a fair hypothesis that throughout the entire body of the law numerous specific concepts abound and elicit reasonably uniform responses in their application, though the complete results depend not only upon the legal rules but also upon institutional non-legal behavior and upon common ideas and standards born of recurrent similar experience in a particular culture. *Rechsstaat* can mean no more than attainment of the maximum possible certainty through implementation of specific rules. It means no less.

In light of the position that code and statute occupy in continental law, the judgment of scholars that *nullum crimen, nulla poena sine lege* constitute the essence of *Rechsstaat,* in its penal aspect, was quite unchallenged until two years ago.[66] Law, to be sure, may be viewed solely as a means to the attainment of social purposes. As a mere instrument there is no reason why it should be surrounded by an aura of inviolability; on the contrary there is every reason for modification, repeal and manipulation as occasion requires.

But law has also been so long and so closely identified with uniformity, equality, order, fairness and stability that it is in fact impossible to separate it from these universal ideas and ideals. Law in its operation is both the immediate observable representation of these ideas and their abstract symbolization. As such, law is an end in itself, one of the great values of civilization, and for the most part, the only concretely manifest side of an ideal justice. *Rechsstaat* is a significant aspect of this value, and it is little wonder that its preservation is warmly espoused.[67]

V. Treatment of Offenders

Nullum crimen sine lege was never literally followed. As regards juveniles, vagabonds, mendicants, persons without visible means of support, and others, only a distortion of words can deduce a merely formal requirement that there be an act (*crimen*). There is a long tradition regarding vagabonds and mendicants in English law; hardly ever has treatment of them and of other special classes accorded with otherwise rigorous insistence upon specific definition of criminality.[68] Again, as

66. See Gerland, *Artikel 116* (Nipperday) Die Grundrechte und Grundpflichten der Reichsverfassung (1929) at 368. Compare Gerland, *The German Draft Penal Code and Its Place in the History of Penal Law,* 11 J. Comp. Leg. & Int. Law (3rd Series, 1929) at 21, 25, 30 with Gerland, *Neues Strafrecht,* Deutsche Juristen-Zeitung (1933) 857, at 860.

67. See McIlwain, *Government by Law* (1936) 14 For. Affairs 185.

68. As regards some of these classes it will be noted that they have not been regarded as really criminal. Hence, abandonment of *nullum crimen* (especially as to juveniles) has meant individualized and humane treatment. Similar reasons urge like treatment of other classes, *e.g.,* drug addicts, and prostitutes.

My proposal to extend like treatment to petty thieves [Theft, Law and Society (1935) Ch. 7] has been criticized on the one hand because it might make possible long

regards certain other offenses such as acts against good morals, it is exceedingly difficult, if not impossible, to frame specific definitions; besides, a long legal tradition together with restriction of such inclusive statutes to minor offenses would make insistence upon *nullum crimen* impracticable in this particular. With reference to political offenses, the matter is quite a different one;[69] there is no doubt as to the opposing views of liberalism to autocracy regarding that. Apart from the cases of special classes of persons, and offenses requiring inherently necessary vague definition, *nullum crimen* has persisted in most liberal states.

As to *nulla poena sine lege* in its reference to punishment, however, there has been very considerable departure from classical views. Indeterminate sentence, probation, suspended sentence, nominal sentence, waiver of felonies on pleas to misdemeanors, compromise, modified sentence, "good time" laws, parole, and pardon have almost completely transformed eighteenth century law and penological ideas.[70]

On first impression, one might believe that these departures from *nullum crimen, nulla poena* suggest the proper objective for our times, which might be expressed as retention of *nullum crimen* and abandonment of *nulla poena.* That solution is, however, quite questionable. The centering of recent criminologists on the personality of the offender has as its corollary the complete abandonment of *nullum crimen.*

Even more cogent a reason for questioning the proposal that *nullum crimen* be retained and *nulla poena* be abandoned is that the two rules are inextricably interwoven. Complete abandonment of *nulla poena* means complete individualization of punishment. In effect the guarantee has vanished almost entirely, if *anything* can be done to any convicted person. It might be rare indeed that the murderer with political connections would escape serious punishment while the impotent petty thief

incarceration of petty offenders. This criticism is irrelevant to the proposal actually made, for the text makes it quite clear that (1) *existing maximum sentences* were accepted as the *upper limits* of incarceration; and, more than that (2) the purpose was to discover a method of *eliminating punishment entirely* so far as many of these petty offenders were concerned. Obviously, the nature of treatment is as important as its duration. Other criticism of the proposal was that it was too restricted. As to this, aside from referring to this paper generally, and to purposes of the criminal law other than rehabilitative ones, all that can be said here in addition is that the major objective was to formulate a general theory regarding individualization, rather than to advance a particular reform.

69. "He who in order to weaken the spirit of resistance of the population, spreads in time of war or when war is imminent such rumors as may weaken this spirit is punishable by imprisonment." [up to 15 years]. Polish Cr. Code, Sec. 104.

70. See, *e.g.,* Gehlke, Criminal Actions in the Common Pleas Courts of Ohio (1936) 292. California, except for two or three instances where *minimum* sentences are fixed by statute, requires the judge to impose an entirely indeterminate sentence. Cal. Penal Code (Deering, 1937), Sec. 1168; *Ex parte* Lee, 177 Cal. 690, 171 Pac. 959 (1918); *A Digest of Indeterminate Sentence Laws and Parole Rules* (1928) 18 J. Crim. L. 580.

languished in jail, or that for any reason petty offenders were the more severely punished. But those extreme cases must be comprehended in any program that purports to supply valid answers to the perplexing problems that are involved. The current issues can be indicated most briefly by reference to demands being made in the United States, as elsewhere, for sentencing boards together with complete elimination of prescribed penalties. The judge, it is argued, should be confined entirely to the conduct of the trial; his participation should end when a verdict is reached. Sentences, we are informed, should be wholly indeterminate; treatment, if any is necessary, should be prescribed by an administrative board of experts who have opportunity to study the offender and knowledge concerning rehabilitation. As noted, the argument occasionally extends to advocacy of entire elimination of any criminal act. Presumably, the "anti-social" person will in some sort of proceeding be declared "dangerous" and placed in the hands of the sentencing tribunal. Not punishment but only measures of "social defense" are to be applied.[71]

This argument and rationalization are familiar as representative of the Positivist School.[72] But they have been given a different and insidious emphasis by continental Neo-Positivists who accept the strictures of the older Positivism on law as a limitation on official conduct but with even greater zest reject the humanitarianism which accompanied that development.[73] It is impossible to ignore the various purposes implicit in a particular system of criminal law and its administration as well as actual ability to attain those purposes which should be sought; in this field, if any, it is necessary to insist that theory have some fair correspondence to fact. And in all this, it must be remembered that in the last analysis *nulla poena* represents the most cherished of all the values involved in the administration of the criminal law. What is actually done is the ultimate basis for judgment. What is done to the criminal is a very real

71. ". . . *par une nouvelle Ecole . . . l'interprétation doit chercher le même but que la peine, c'est-à-dire à mieux assurer le défense social . . . Il est difficile de voir dans cette tendance un progrès, car elle n'est qu'un retour, peut-être inconscient, à l'arbitraire des peines, si dangereux pour la liberté individuelle.*" VIDAL, COURS DE DROIT CRIMINEL (1916), at 78–9; see also Cornil, *La Mesure de Sureté Envisagée Objectivement* (1929) DROIT PENAL ET CRIMINOLOGIE, 825.

72. De la Morandiere observes acutely (*op. cit. supra* note 2, at 280) that Ferri would make all criminals responsible, *e.g.*, a person who was insane when he committed a crime is not now punished. But such a person, if "socially dangerous", would under positivist ideas be incarcerated. The issues are debatable except that it seems clear that the very general concepts of "insanity" and "mental disease" would be supplanted by the much more nebulous concept, "social danger." It also seems clear that until the nature of incarceration and of treatment change radically, it is sophistry to distinguish "social defense" from punishment. Even as to juveniles in Belgium, Racine states that they almost invariably write letters pleading to be released. See SPECIAL REPORT TO INTERNATIONAL CONGRESS OF COMP. LAW (1937).

73. See Cantor, *op. cit. supra* note 40, at 89.

index to the degree of civilization. Hence, whatever shortcomings the Classicists had, it is to their abiding credit that they said not only *nullum crimen sine lege,* but much more, that they said *nulla poena sine lege.*

Criminologists generally are prone to assume that the discretion exercised by an administrative board will be "wise and good"; it will not be arbitrary and severe like judicial discretion in the *ancien régime.* Unfortunately, history records other eventualities — and in places where knowledge and social altruism reached the highest peaks in human development. What, indeed, is wise discretion? How does it differ from official arbitrariness? Until these questions can be answered correctly and with some degree of certainty, the issues between Classicists and Positivists remain unresolved.

Yet it is impossible in the abstract to condemn or to praise abandonment of *nulla poena* as regards treatment of criminals. It all depends. It depends upon the premises made regarding the purposes of the criminal law and its administration, and even more upon the actual facts which condition objectives and may radically modify otherwise splendid purposes. Are wise judges available and in sufficient number? Is "treatment" really treatment, or does that, as well as the equally euphemistic "social defense," really mean punishment, perhaps of a repressive sort that harks back to the darkest chapters in human history? If it be assumed that one is humane and is seriously searching for truth, the question remains, is there really a body of knowledge which permits discovery of socially dangerous persons in advance of their criminal behavior or that assures humane and sound treatment of offenders? Or are the social disciplines, at best, so uncertain in their verities and so difficult to comprehend that only the exceptional scholar can master them? These are the issues that should check propaganda and guide sound theory. These are the actualities that should form the basis for decision as to whether the present need may not be for improvement of administration in its already far-flung field rather than further abandonment of law.

VI. Political and Philosophical Considerations

In its eighteenth century context *nulla poena* meant limitation upon government and consequent protection for the individual. That meaning has persisted. Yet, when one finds that Denmark introduced analogy a few years ago, that Italy in her 1930 Code reaffirmed *nulla poena* including non-retroactivity, and when we note that Poland did likewise, that Germany has departed from the rule, and that Russia discarded it entirely in 1926, we must conclude that no facile identification of *nulla poena* with a particular type of government will suffice. It would, how-

ever, be much more fallacious to assume that political forces are not involved.

In Germany, the judge had been freed from "slavish adherence to the statute" long before 1935,[74] and this had been influenced by overpowering post-war economic changes. Inflation and bankruptcy coincided with contracts calling for payment in gold and providing for creditors' remedies which, if pursued, would have brought chaos. Legal classicism, already condemned by philosophy, gave way before an infusion of equitable principles that overrode the rules of law.[75] The judge, applying the penal law under pressure of a strongly centralized government, itself the creature of economic and moral collapse, found ready-made the work of Liszt and his followers; and the fact that scientific criminology was constructed in a liberal age did not make it any the less instrumental in carrying out the dictates of authoritarian government. The law of June, 1935 was but one of numerous legal and constitutional changes that characterize the new regime. Such legal change becomes comprehensible only when placed in the whole context of economic conditions and political ideology.[76]

The new Italian Code of 1930 was adopted some years after the Fascist Revolution. Stability of government joined a strong legalist tradition. Again, in Italy a highly developed Natural Law philosophy may, in some spheres and to some extent, have retarded the full sweep of countervailing views.[77] The setting up of special tribunals to hear political offenses in disregard of constitutional law,[78] and the very broad definition of crimes,[79] along with the turning over of the chief interests of the

74. The 1927 draft of a German Penal Code had already incorporated many of the views of the positivist school. See Gerland, *op. cit. supra* note 66, at 28 ff.

75. See 107 DECISIONS OF THE R. G., CIVIL CASES 87 (November 28, 1923).

76. Such an analysis would need to be supplemented, and could be most interestingly, by a study of the personalities of those largely responsible for radical legal change. As to Roland Freisler, credited with a major role in the departure from *nulla poena*, see 61 Juristische Wochenschrift (1932) 2203. His career includes: Bolshevik official in Russia, censure by Bar Associations, and a series of fines in criminal courts, chiefly for slander. Of quite another order is the complete change of position among intellectuals after a revolution. No better example can be had than that of the eminent Prof. Gerland. See note 66, *supra*. Finally, account would need to be taken of those who are not won over by the revolutionary ideology. Several of these are to be found in the *Reichsgericht*, and their persistent adherence to the older legal tradition may be seen from their refusal to affirm convictions by analogy. *E.g.*, R. G. 27/3/36 D. J. 1936, 774, and R. G. 18/2/36, D. J. 1936, 609.

77. See HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930) 279, ff. And as to recent natural law in Germany, *id.* at 246, 247.

78. See Cantor, *The Fascist Political Prisoners* (1936) 27 J. CRIM. L. 169.

79. *E.g.*, Art. 282: "Whoever commits an offense against the honor or prestige of the Head of Government shall be punished with penal servitude from one to five years." See also note 69, *supra*.

state to administrative boards no doubt facilitated retention of traditional law in the ordinary run of offenses.[80]

The German Act of June, 1935 is conservative by comparison with the Russian Penal Code of 1926. Here all "socially dangerous" behavior is punishable, and the standards of dangerousness are the objectives of the Revolution. Yet there has been a long series of significant changes in Soviet law, making it difficult to generalize with reference to the entire period of its operation. In the first instance, one may inquire to what extent Russian views on law represent a phase of revolutionary propaganda rather than normal viewpoints. Lenin announced that the Communist Dictatorship is "a dictatorship untrammelled by any law, an absolute rule, a power that is based directly on violence" . . .[81] This enunciates the Marxist attack upon law as an instrument of the ruling class. Hence, a classless society will have no need of it.[82] Under some such broad formula as "socially dangerous" the judge will function to attain and preserve the objects of the Revolution. Yet Lenin himself retreated from this theoretical position. The fourteenth Congress of the Communist Party demanded a return to legality.[83] Others argued that non-legality was bad for the peasants. The Code of Criminal Procedure, Article 5, contained guarantees against illegal arrest, although the special police were not hampered by judicial review. And the new Soviet Constitution purports to introduce a Bill of Rights of far-reaching effect. Even as regards treatment of juveniles, the Russians have abandoned their former position and now resort to admittedly punitive measures.[84]

During revolution, law, especially criminal law, is used as a party weapon. But law soon transcends the transitory revolutionary conditions, and copes with people and situations that cannot be treated by simple reference to revolutionary ideals. Non-political situations affecting especially the person and the family give rise to conflict; quite apart from the reaches of political doctrine, specific issues may be decided by law or arbitrarily. Both the uniformity and fairness that universally characterize law and the security which its administration instills should recommend themselves to autocratic states no less than to democracies. Indeed, there is even greater reason why an authoritarian state should be a *Rechsstaat*; this is a point that does not escape Italian and Hun-

80. See generally Steiner, *The Fascist Conception of Law* (1936) 36 COL. L. REV. 1267.

81. Quoted in Mirkine-Guetzévitch, *The Public Law System of the Sovietic Dictatorship*, (3rd Series 1930) 12 J. COMP. LEG. & INT. L. 248, at 250.

82. See Dobrin, *Soviet Jurisprudence and Socialism* (1936) 52 L. Q. REV. 402.

83. Mirkine-Guetzévitch, *op. cit. supra* note 81, at 249.

84. See Berman, *Juvenile Delinquency, the Family and the Court in the Soviet Union* (1937) 42 AM. J. SOC. 682.

garian commentators, for example, in their arguments for retention of *nulla poena*.[85]

Several common traits characterize these revolutionary movements in authoritarian states. Special police are exempt from legal constraint; they arrest, try, execute, and exile without check by law or courts. Again, appeal is limited. Special tribunals for the trial of political offenders may be depended upon to effectuate the will of the government. Sweeping abrogation of Constitutional guarantees limits the area of governmental constraint; compared with the suspension of the Bill of Rights in the Weimar Constitution, the abrogation of *nulla poena* seems a trifle. To be added to the various factors noted above is the whole stream of prevailing philosophic thought as interpreted by dominant leaders to implement their political aims. Upon its particular conjunction with these factors depends the significance of any rule of law.

Authoritarian political theory supports authority. Its attack upon *nulla poena* consists in stressing the paramount importance of the Community[86] in order to justify subordination of the individual. To these are added special theories of leadership and of popular law.[87] The Leader has a mystic power of divining the people's spirit and can best formulate its will in laws.[88] "Some legislation, to be sure, relating to more or less complex aspects of life is not the reflection of the sound feelings of the people. It must represent only the Leader's will. The Leader's will, however, never clashes with the sound feelings of the people.

That these views are largely articles of faith, not knowledge, seems all-too-apparent. Rulers have made similar pretensions before, and philosophy has often been their handmaiden. But the idealist view of the State, even though combined with a psychological need for faith and obedience, cannot obscure the fact that States act through governments and governments through men — who, alas, are limited, all-too-human beings.

But the difficulty with much of the current criticism of analogy is that it is premised upon a dislike of actual results reached under authoritarian government. The reasoning is backwards: dictatorship is an unmitigated evil; it has abolished *nulla poena*; therefore, abolition of *nulla poena* is necessarily improper. But one must consider Denmark and other liberal

85. See The Special Reports written by Professor Racz and Delitala for the International Congress of Comparative Law, Hague (1937).

86. See notes 78, 80, *supra*.

87. See MARX, GOVERNMENT IN THE THIRD REICH (1936); ERMARTH, THE NEW GERMANY; NATIONAL SOCIALIST GOVERNMENT IN THEORY AND PRACTICE (1936).

88. RICHTER, 5 DEUTSCHES RECHT (1935) 365, translated in Marx, *op. cit. supra* note 87, at 91.

countries which have also departed, at least to some extent, from *nulla poena*. If the treatment of offenders is humane and the administration of criminal justice is wise, is not the greater freedom of the judge desirable?

It is in the light of this latter argument that one can understand the sweeping inroads of Positivism upon liberal government generally. That the abolition of law took place first in the treatment of juveniles is all-significant as an index of the motivation behind the movement for individualization. But the possibilities of this movement are now apparent; and it is understandable, too, why Liszt, von Hippel and Exner are quoted by German criminalists today.[89] For the abolition of *nulla poena* provides a sieve through which can flow not only humanity and science but also repression and stupidity. Dictatorship will not brook interference by law (unless in particular instances the goal can be achieved nonethe-less); the wise and humane community seeks the freedom to utilize its resources to aid the weak and the maladjusted. Only by careful study of the actual results of the abandonment of law can one arrive at a valid judgment. An occasional democracy like Denmark, wise beyond most in social science and sympathetic to the unadjusted, tries to achieve a fuller utilization of her altruism and skill. But the retention of *nulla poena* by the vast majority of liberal states — indeed, the move to intensify legality, as in Belgium with reference to juvenile delinquency[90] — indicates that traditional political attitudes endure where they have taken firm root.

Nothing is more superficial than to lay at the door of the present German and Russian governments complete accountability for their current law. The roots are deeply grounded; and, indeed, there is no more fascinating or ironical page in intellectual history than their adoption of a legal philosophy largely propagated by men who have since been personally disowned, even exiled.

The major problems dealt with in the above discussion parallel the moot issues of modern jurisprudence. Some further understanding of

89. See Matzke, Juristische Wochenschrift, 7 July, 1934; see also Klee, 1934, D J.Z. 641-643.

90. See the exceptionally well considered Special Report of Aimée Racine to the International Congress of Comparative Law, Hague, 1937, p. 23, wherein is discussed the insistence of a group of Belgium scholars and lawyers that the juvenile is entitled to at least as much legal protection as the criminal. Racine concludes: *"Nous pensons qu'en ce qui les [delinquants] concerne, il faut appliquer aussi strictement que possible la règle* nullum crimen sine lege: *ne pas considérer comme vol de la part d'un enfant ce qui n'est point vol pour un adulte; ne pas accorder la correction paternelle, si l'inconduite ou l'indiscipline ne revêtent un caractère de réelle gravité. Et s'il reste par ci par là un cas où l'intervention judiciaire paraîte opportune, mais où elle ne pourrait se réaliser qu'au moyen d'une interprétation extensive, ce n'est point une raison pour se départir de la règle en question . . . Pareille incertitude doit être évitée aux enfants et à leurs familles."* . . .

these problems may result from thoughtful consideration of certain far-reaching principles which underlie analyses of many legal problems. From this more general point of view, the final answers given to the question whether *nulla poena* should be maintained are based upon the outcome of two fundamental considerations. As a matter of fact, is it possible for human conduct, particularly that of judges, to be significantly guided by concepts, *i.e.*, legal rules? Secondly, what are the political and social values of the answerer?

Until recently, these inquiries have been posed quite differently. Traditionally, the problem has been analyzed in terms of rules of law versus discretion, of "justice with and without law", of equity versus law, and so on — extending clearly back to Aristotle, and, no doubt, beyond. Two apparently distinctive sets of conditions, two unique psychological processes have been noted, described, and usually opposed: adjudication according to prescribed rule, and adjudication without rule but according to certain more or less intuitively apprehended ideas of justice — sometimes advanced as Equity or higher, *i.e.*, Natural Law, or as Reason.

In recent years, adjudication by law has been increasingly challenged, both as a value and as a fact. The modern movement may conveniently be dated from Jhering,[91] and its social and emotional impetus can be suggested by noting that it coincided with Marxism.[92] No later writer has equalled Jhering's satire of a "heaven of concepts". But the anti-conceptualism which he fostered has advanced far beyond his formulation of the issues. The Free Law school of jurisprudence took up the attack on "mechanical jurisprudence", derogatorily described as "slot-machine" adjudication. It assumed a constructive position with reference to those areas of the private law whose further growth was not determined by weighty precedent. Here the courts were to legislate without hesitancy or disguise and — save for such an occasional voice in France as Saleilles' — were to draw their premises not from the suggestiveness of existing codes and rules, but from the needs of the social problem[93] confronting the judge. In the United States, Holmes adopted this program to some extent as regards what he termed the "interstitial areas" of the private law. Later, Mr. Justice Cardozo applied these views, elaborated into a more conscious social-utilitarianism, to important segments of the judicial process. But judicial legislation in those areas untouched by existing private law was not the last phase of the Free Law movement. For in the United States, at least, a natural,

91. See JHERING, LAW AS A MEANS TO AN END (1913) 320.

92. Jhering, born in 1818, published DER ZWECK IM RECHT in 2 volumes in 1877, 1883. Marx, born in 1818, published DAS KAPITAL in 1867. Liszt, born in 1851, published LEHRBUCH DES DEUTSCHEN STRAFRECHTS in 1881.

93. These needs are never viewed as ethical or cultural, but always as economic.

if not welcome, offspring of this school is so-called Legal Realism, which, in its extreme form, denies completely the efficacy of rules of law to prevent or to determine any controversy. The implications of this position are of overshadowing importance. For if rules are relatively inconsequential factors in governing the relations of men as well as the decisions of judges, then there is no distinction between the administration of private and criminal law; precedent is necessarily ignored as a figment of the legalistic mind and a popular myth. The whole field of legal relations, including litigation, becomes an "interstitial area." Psychology, preferably of the subconscious, supplants knowledge of legal rules and their correct deliberate application. So, also, self-conduct in accordance with law becomes an illusion. The traditional analyses of rule versus discretion, law versus equity, etc., become meaningless. Thus, an intellectual movement, born of a vital necessity to modernize legal systems and advanced by some of the most brilliant of modern philosophers, falls into dangerous dogmatism.

The initial opposition to excessive reliance upon concepts and complete acceptance of traditional abstractions was important and worthy. But the validity of the initial positivist movement provides no intellectual defense of its ultimate manifestations. On the contrary, rejection of the efficacy of legal rules is both an illogical and unscientific nonsequitur of the truth inhering in attempts to develop an empirical science of law — though not, indeed, of the exaggeration and exhortation found there all too frequently.

The relationship between modern criminology and sociological jurisprudence is apparent, as is that between extreme positivism and extreme realist jurisprudence; but it is obvious that there is every shade of opinion concerning these relationships and that the above generalizations are merely for purposes of analysis, not identification of particular views. Recent continental application of the Free Law school ideology to penal law — one of the most instructive phenomena in all jurisprudence — should reveal to criminologists and to extreme Legal Realists what are some of the practical possibilities of uncontrolled positivism.

VII. Conclusion

Emphasis has been deliberately placed upon certain merits of Classicism and certain shortcomings of Positivism, but not because that represents an ultimate appraisal of each school; rather because the present need is to secure a fair and sympathetic understanding of the Classicists and their contributions. The great advance of the Positivists should not, and, indeed, cannot be ignored. But corrections are necessary; and

no better method of procedure can be adopted than revaluation in light of the fundamental significance of Classicism.

The Classicists arose in an age of despotic governments, harsh laws, and arbitrary judges. The Positivists inherited relatively liberal government and the benign attitudes fostered by their predecessors. They were free to disregard, for a time, the lesson of Classicism and to concentrate upon what they regarded as scientific. In an age when democracy can no longer be assumed, but must be deliberately conserved — or, perhaps, even achieved — the writings of both schools of thought should be completely re-examined. One principle, at least, should be quite apparent: criminology cannot profitably ignore politics or law, unless it desires to run the danger of fostering evils far greater than those it seeks to eliminate. For there is more involved than repression or elimination of anti-social persons. Transcending that particular social purpose are others, not the least of which concerns the means and methods employed. Hence the chief task that now confronts criminologists is a phase of what is one of the most vital problems of our times: from the point of view of democratic societies, what is the most desirable relationship between Science and other human Values? Hidden conflicts must be discovered and expressed if sensible decisions are to be made.

If one asks why, at bottom, retroactivity of penal laws is objectionable, why all sentences should not be capital or at least unusually cruel, why, other factors constant, unequal sentences are unjust if applied to like offenders in like circumstances, the answers will inevitably take the form of certain "first principles." Once these "fundamental" values are rejected, no amount of argument carries the slightest weight. One can strive only to discover one's values and to understand them — in itself an endless task. Those lying at the basis of liberal democracy affirm the significance and ineffable worth of the individual human being. No person is regarded as good enough to dominate any normal human being. Even the all-powerful state, indeed, especially the all-powerful state, must use the regular channels of due process before any individual can be punished. So, but a few months ago, the United States Supreme Court, an agency of the most powerful capitalist society ever known, declared that a negro communist had been improperly convicted. Around an accused, however degenerate, legal procedure and prescribed rules provide a cloak of dignity and self-esteem. That is the solemn and deliberate regard of liberal democracy for the humblest of its citizens. The price for consistency with an ideal of the basic worth of each individual may sometimes be paid grudgingly, but in the long run it is deemed a pittance for the benefits conferred, the values expressed. If present, specific devices for achieving and preserving these values are supplanted by discretion, which, without doubt, does have an important and proper sphere

of operation, other devices must be discovered and employed to safeguard what is paramount. Quite apart from theoretical questions of ethics is the need to lead raw behavior into human channels. Law wisely applied — though it falls short of achieving this purpose — is one of the best instructors that society has discovered. In light of the above discussion it is necessary to conclude that there should be a strong presumption in favor of legal control of penalization. The burden of proof should be on those who claim superior knowledge and ability to attain better results by extra-legal methods.

[11]

HATE SPEECH IN CONSTITUTIONAL JURISPRUDENCE: A COMPARATIVE ANALYSIS

*Michel Rosenfeld**

INTRODUCTION

Hate speech—that is, speech designed to promote hatred on the basis of race, religion, ethnicity or national origin—poses vexing and complex problems for contemporary constitutional rights to freedom of expression.[1] The constitutional treatment of these problems, moreover, has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary from one setting to the next. There is, however, a big divide between the United States and other Western democracies. In the United States, hate speech is given wide constitutional protection while under international human rights covenants[2] and in other Western democracies, such as Canada,[3] Germany,[4] and the United Kingdom,[5] it is largely prohibited and subjected to criminal sanctions.

The contrasting approaches adopted by the United States and other Western democracies afford a special opportunity to embark on a comparative analysis of the difficult problems posed by hate speech and of the various possible solutions to them. As we shall see, in the United States, hate speech and the best ways to cope with it are conceived differently than in other Western

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[1] I use the term "constitutional rights" in a broad sense that encompasses both rights arising under national constitutions and those established by international human rights covenants, notwithstanding that, strictly speaking, the latter may be treaty based rights rather than constitutional rights.

[2] *See* discussion *infra* Part III.D.

[3] *See* discussion *infra* Part III.A.

[4] *See* discussion *infra* Part III.C.

[5] *See* discussion *infra* Part III.B.

democracies. This is due, in part, to differences in social context, and, in part, to differences in approach. It may be tempting, therefore, to endorse a purely contextual approach to hate speech encompassing a broad array of diverse constitutional responses ranging from American *laissez faire* to German vigilance. Given the trend toward globalization and the instant transnational reach of the internet, however, a purely contextual approach would seem insufficient if not downright inadequate. For example, much Neo-Nazi propaganda is now generated in California and transmitted through the internet to countries like Canada or Germany where Neo-Nazi groups have established a much more significant foothold than in the United States.[6] In as much as such propaganda generally amounts to protected speech in the United States, there seems to be little that can be done to limit its spread beyond American soil. Does that justify calling for a change of constitutional jurisprudence in the United States? Or, more generally, do present circumstances warrant a systematic rethinking of constitutional approaches to hate speech?

In this Article I will concentrate on these questions through a comparison of different existing constitutional approaches to hate speech. Before embarking on such a comparison, however, I will provide in Part I a brief overview of some of the most salient issues surrounding the constitutional treatment of hate speech. In the next two parts, I will examine the two principal contrasting constitutional approaches to hate speech. Part II will focus on the United States and analyze hate speech within the broader free speech jurisprudence under the American Constitution. Part III will deal with the alternative approach developed in other Western democracies and largely endorsed in the relevant international covenants. Finally, Part IV will compare the two contrasting approaches and explore how best to deal with hate speech as a problem for contemporary constitutional jurisprudence.

[6] *See* B'NAI B'RITH ANTI-DEFAMATION LEAGUE, THE SKINHEAD INTERNATIONAL; A WORLDWIDE SURVEY OF NEO-NAZI SKINHEADS, (Irwin Suall ed., 1995); Robert A. Jordan, *Spreading Hatred*, THE BOSTON GLOBE, Nov. 26, 1988, at 25; Paul Geitner, *Noting Neo-Nazi Material, Internet Blocks Site*, THE CHATTANOOGA TIMES, Jan. 27, 1996, at A8. *See also* UEJF & LICRA v. Yahoo!, Inc. & Yahoo! France, T.G.I. Paris, May 22, 2000 (holding that the display and auction of Nazi paraphernalia over the internet in France amounts to criminal violation, and is not protected speech). The French court order ordering Yahoo! to pay plaintiffs 10,000 Francs and to make it impossible for French internet users to view Nazi items on Yahoo's auction cite was held unenforceable in the United States on First Amendment grounds. Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001).

I. HATE SPEECH AND FREEDOM OF EXPRESSION: ISSUES AND PROBLEMS

The regulation of hate speech is largely a post World War II phenomenon.[7] Prompted by the obvious links between racist propaganda and the Holocaust, various international covenants[8] as well as individual countries such as Germany,[9] and in the decade immediately following the war the United States,[10] excluded hate speech from the scope of constitutionally protected expression. Viewed from the particular perspective of a rejection of the Nazi experience and an attempt to prevent its resurgence, the suppression of hate speech seems both obvious and commendable.

Current encounters with hate speech, however, are for the most part far removed from the Nazi case. Whereas in Nazi Germany hate speech was perpetrated by the government as part of its official ideology and policy, in contemporary democracies it is by and large opponents of the government and, in a wide majority of cases, members of marginalized groups with no realistic hopes of achieving political power who engage in hate speech. Moreover, in some cases those punished for engaging in hate speech have been members of groups long victimized by racist policies and rhetoric, prosecuted for uttering race based invectives against those whom they perceive as their racist oppressors. Thus, for example, it is ironic that the first person convicted under the United Kingdom's Race Relations Law criminalizing hate speech was a black man who uttered a racial epithet against a white policeman.[11]

Like Nazi racist propaganda, some of the straightforward racist invectives heard today are crude and unambiguous. Contemporary hate speech cannot be confined, however, to racist

[7] *See* Friedrich Kübler, *How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 336 (1998).

[8] *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 20(2), 999 U.N.T.S. 171, S. EXEC. DOC. E, 95-2 (1978) (entered into force Mar. 23, 1976) (stating that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law").

[9] For a discussion of the extensive German regulation against hate speech, see Kübler, *supra* note 7, at 340-47.

[10] *See* Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding the constitutionality of a statue criminalizing group defamation based on race or religion). Although *Beauharnais* has never been formally repudiated by the Supreme Court, it is fundamentally inconsistent with more recent decisions on the subject. *See* discussion *infra* Part II.

[11] *See* Anthony Skillen, *Freedom of Speech*, *in* CONTEMPORARY POLITICAL PHILOSOPHY: RADICAL STUDIES 139, 142 (Keith Graham ed., 1982).

insults. Precisely because of the strong post-Holocaust constraints against raw public expressions of racial hatred, present day racists often feel compelled to couch their racist message in more subtle ways. For example, anti-Semites may engage in Holocaust denial or minimizing under the guise of weighing in on an ongoing historians' debate. Or, they may attack Zionism in order to blur the boundaries between what might qualify as a genuine debate concerning political ideology and what is pure and simple anti-Semitism. Similarly, American racists have on occasion resorted to what appears to be a scientific debate or invoked certain statistics—such as those indicating that proportionately blacks commit more crimes than whites—to promote their prejudices under the disguise of formulating political positions informed by scientific fact or theory.

Even these few observations suffice to establish that not all contemporary instances of hate speech are alike. Any assessment of whether, how, or how much, hate speech ought to be prohibited must, therefore, account for certain key variables: namely *who* and *what* are involved and *where* and *under what circumstances* these cases arise.

The *who* is always plural, for it encompasses not only the speaker who utters a statement that constitutes hate speech, but the target of that statement and the audience to whom the statement in question is addressed—which may be limited to the target, may include both the target and others, or may be limited to an audience that does not include any member of the target group.[12] Moreover, as already mentioned, not all speakers are alike. This is not only because of group affiliation. Thus, in the

[12] The identity of the audience involved may be relevant for a variety of reasons, including assessing the harm produced by hate speech, and devising effective legal means to combat hate speech. For example, demeaning racist propaganda aimed at a non-target audience may be a necessary step in the creation of a political environment wherein policies of genocide might plausibly be implemented. *See generally* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954). Thus, the German people might never have countenanced the Nazi policy of extermination of the Jews, had they not been desensitized through years of vicious anti-Semitic propaganda. *See* FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 87 (1981). Consistent with this, hate speech directed at a non-target audience might well be much more dangerous than if exclusively addressed to a target-group audience.

From the standpoint of devising workable legal responses, the differences between different speakers and different target group audiences may also be very important. For example, in the United States where hate groups like the Neo-Nazis and the Ku Klux Klan are relatively marginalized and lack major financial means, allowing private tort suits by affected members of the relevant target groups may lead to expensive verdicts with crippling effects on the hate group's ability to function. *See Klansmen Sued over Shooting at S.C. Nightclub*, THE ATLANTA J. CONST., Nov. 1, 1998, at 6A (reporting crippling effect on Ku Klux Klan of a $37.8 million verdict over a church fire).

context of dominant majority group hate speech against a vulnerable and discriminated against minority, the impact of the hate speech in question is likely to differ significantly depending on whether it is uttered by a high government official or an important opposition leader or whether it is propaganda by a marginalized outsider group with no credibility.[13] Furthermore, even the same speaker may have to be treated differently, or at least may have a different impact which ought to be considered legally relevant, depending on whom is the target of his or her hate message. Assuming, for the sake of argument, that black hate speech against whites in the United States is not the equivalent of white hate speech against blacks, what about black anti-Semitism? Ought it be considered as yet another instance of black (albeit inappropriate) response to white oppression?[14] Or as an assault against a vulnerable minority? In other words, is black anti-Semitism but one aspect of a comprehensible resentment harbored by blacks against whites? Or is it but a means for blacks to carve out a common ground with white non-Jews by casting the Jews as the common enemy? And does it matter, if the dangers of anti-Semitism prove greater than those of undifferentiated anti-white hatred?

The *what* or message uttered in the context of hate speech also matters, and may or may not, depending on its form and content, call for sanction or suppression. Obvious hate speech such as that involving crude racist insults or invectives can be characterized as "hate speech in form." In contrast, utterances such as Holocaust denials or other coded messages that do not explicitly convey insults, but are nonetheless designed to convey hatred or contempt, may be referred as "hate speech in substance." At first glance, it may seem easy to justify banning hate speech in form but not hate speech in substance. Indeed, in the context of the latter, there appear to be potentially daunting line-drawing problems, as the boundary between genuine scholarly, scientific or political debate and the veiled promotion of racial hatred may not always be easy to draw. Moreover, even

[13] For example, Neo-Nazis in the United States are so marginalized and discredited that virtually no one believes that they pose any realistic danger. In contrast, a statement (that is better qualified as anti-Semitic rather than as an instance of hate speech) to the effect that the Jews have too much influence in the United States because they control the media—which is in part true—and the banks—which is patently false—uttered by the country's highest military official a few years back caused quite an uproar and led to his resignation. *See* Editorial, *Counting the Jews*, NATION, Oct. 3, 1988, at 257.

[14] Because of prevailing social and economic circumstances, it has often been the case that the whites with whom black ghetto dwellers have the most—often unpleasant—contacts, namely shopkeepers and landlords, happen to be Jews. *See* Vince Beiser, *Surviving The Rage in Harlem*, JERUSALEM REP., Feb. 8, 1996, at 30.

hate speech in form may not be used in a demeaning way warranting suppression.[15]

Finally, *where* and *under what circumstances* hate speech is uttered also makes a difference in terms of whether or not it should be prohibited. As already mentioned, "where" may make a difference depending on the country, society or culture involved, which may justify flatly prohibiting all Nazi propaganda in Germany but not in the United States. "Where" may also matter within the same country or society. Thus, hate speech in an intra-communal setting may in some cases be less dangerous than if uttered in an inter-communal setting. Without minimizing the dangers of hate speech, it seems plausible to argue, for example, that hate speech directed against Germans at a Jewish community center comprising many Holocaust survivors, or a virulent anti-white speech at an all black social club in the United States, should not be subjected to the same sanctions as the very same utterance in an inter-communal setting, such as an open political rally in a town's central square.[16]

Circumstances also make a difference. For example, even if black hate speech against whites in the United States is deemed as pernicious as white hate speech against blacks, legal consequences arguably ought to differ depending on the circumstances. Thus, for example, black hate speech ought not be penalized—or at least not as much as otherwise—if it occurs in the course of a spontaneous reaction to a police shooting of an innocent black victim in a locality with widespread perceptions of racial bias within the police department.

More generally, which of the above mentioned differences ought to figure in the constitutional treatment of hate speech depends on the values sought to be promoted, on the perceived harms involved, and on the importance attributed to these harms. As already noted, the United States' approach to these issues differs markedly from those of other Western democracies. Before embarking on a comparison of these contrasting approaches however, it is necessary to specify two important points concerning the scope of the present inquiry: 1) there will be

[15] For example, in the United States the word "nigger" is an insulting and demeaning word that is used to refer to a person who is black. When uttered by a white person to refer to a black person, it undoubtedly fits the label "hate speech in form." However, as used among blacks, it often serves as an endearing term connoting at once intra-communal solidarity and implicit condemnation of white racism.

[16] What accounts for their difference is that the oppressed are in a different position than the oppressors. Reaction by the oppressed even if tinged with hatred should therefore arguably be somewhat more tolerated then hate messages by members of traditionally oppressor groups.

no discussion of the advantages or disadvantages of various approaches to the regulation of hate speech, such as imposition of criminal versus civil liability; and 2) since all the countries which will be discussed below including the United States deny protection to hate speech that incites violence—or, to put it in terms of the relevant American jurisprudence, that poses "a clear and present danger"[17] of violence—what follows will not focus on such speech. Instead, it will be on hate speech that incites racial hatred or hostility but that falls short of incitement to violence. This last limitation is important for two reasons. First, prohibiting hate speech that constitutes a clear incitement to immediate violence hardly seems a difficult decision. Second, criticism of the United States for tolerating hate speech does not always seem to take into account the difference between incitement to violence and incitement to discrimination or hatred. But, unless this difference is kept in mind, the discussion is likely to become confusing. Indeed, the key question is not whether speech likely to lead to immediate violence ought to be protected, but rather whether hate speech not likely to lead to such immediate violence, but capable of producing more subtle and uncertain evils, albeit perhaps equally pernicious, ought to be suppressed or fought with more speech.

II. HATE SPEECH AND THE JURISPRUDENCE OF FREE SPEECH IN THE UNITED STATES

Freedom of speech is not only the most cherished American constitutional right, but also one of America's foremost cultural symbols.[18] Moreover, the prominence of free speech in the United States is due to many different factors, including a strong preference for liberty over equality, commitment to individualism, and a natural rights tradition derived from Locke which champions freedom from the state—or negative freedom—over freedom through the state—or positive freedom.[19] In essence, free speech rights in the United States are conceived as belonging to the individual against the state, and they are enshrined in the First Amendment to the Constitution as a prohibition against government interference, rather than as the imposition of a

[17] *See* Schenk v. United States, 249 U.S. 47 (1919).

[18] *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 7 (1986).

[19] For a thorough discussion of the distinction between positive and negative liberty, see ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118-72 (1969).

positive duty on government to guarantee the receipt and transmission of ideas among its citizens.[20]

Even beyond hate speech, freedom of speech is a much more pervasive constitutional right in the United States than in most other constitutional democracies.[21] Indeed, Americans have a deep seated belief in free speech as a virtually unlimited good and a strong fear that an active government in the area of speech will much more likely result in harm than in good. In spite of this, however, there have been significant discrepancies between theory and practice throughout the twentieth century, with the consequence that American protection of speech has been less extensive than official rhetoric or popular belief would lead one to believe. For example, although political speech has been widely recognized as the most worthy of protection,[22] for much of the twentieth century, laws aimed at suppressing or criminalizing socialist and communist views were routinely upheld as constitutional.[23] With respect to communist views, therefore, American protection of political speech has been more limited than that afforded by most other Western democracies.

American theory and practice relating to free speech is ultimately complex and not always consistent. Accordingly, to better understand the American approach to hate speech—which has itself changed over time[24]—it must be briefly placed in its proper historical and theoretical context.

In the broadest terms, one can distinguish four different historical stages in which the perceived principal function of free speech saw significant changes. On the other hand, there have also been four principal philosophical justifications of free speech, which have informed or explained the relevant constitutional jurisprudence. Moreover, the philosophical justifications do not necessarily correspond to the historical stages, but rather intertwine and overlap with them. Nor do sharp boundaries separate the four historical stages which run into each other and in

[20] The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." U.S. CONST. amend. I.

[21] *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (involving a flag burning at the 1984 Republican National Convention in Dallas, Texas); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (concerning a crude parody of a church leader); New York Times Co. v. United States, 403 U.S. 713 (1971) (involving the publication of classified diplomatic information susceptible of adversely affecting sensitive peace negotiations). In each case, the Supreme Court held that the expression involved was constitutionally protected.

[22] *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[23] *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925); Debs v. United States, 249 U.S. 211 (1919).

[24] *See infra* notes 43-56 and accompanying text.

which free speech fulfills various different functions. The principal marking point between these various stages is a shift in the *dominant* function of free speech. All this makes for a complex construct with a large number of possible permutations. Accordingly, only the broadest outlines of the historical and theoretical context of American free speech jurisprudence will be considered in what follows.

Of the four historical stages of free speech, the first three have had definite—if often only implicit—influences on the Supreme Court's free speech jurisprudence. In contrast, the fourth stage, which is still in its infancy, thus far has had virtually no effect on the judicial approach to free speech issues, though it has already made a clear imprint on certain legislators and scholars.[25] The first of these historical stages dates back to the 1776 War of Independence against Britain, and establishes protection of the people against the government as the principal purpose of free speech.[26] Once democracy had become firmly entrenched in the United States, however, the principal threat to free speech came not from the government but from the "tyranny of the majority." Accordingly, in stage two, free speech was meant above all to protect proponents of unpopular views against the wrath of the majority.[27] Stage three, which roughly covers the period between the mid-1950s to the 1980s, corresponds to a period in the United States in which many believed that there had been an end to ideology,[28] resulting in a widespread consensus on essential values.[29] Stage three is thus marked by pervasive conformity, and the principal function of free speech shifts from lifting restraints on *speakers* to insuring that *listeners* remain open-minded.[30] Finally, beginning in the 1980s with the rapid expansion of feminist theory, critical race theory and other alternative discourses—all of which attacked mainstream and official speech as inherently oppressive, white male dominated discourse—there emerged a strong belief in the pluralization and fragmentation of discourse. Consistent with that belief, the principal role of free speech in stage four becomes the protection of oppressed and marginalized discourses and their

[25] An example of legislation consistent with stage four is the ordinance held unconstitutional in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). For an example of scholarship informed by a stage four perspective, see MARY J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

[26] *See* BOLLINGER, *supra* note 18, at 144.

[27] *Id.*

[28] *See, e.g.*, DANIEL BELL, THE END OF IDEOLOGY (1965).

[29] *See* BOLLINGER, *supra* note 18, at 143-44.

[30] *Id.*

proponents against the hegemonic tendencies of the discourses of the powerful.[31]

Of these four stages, stage three affords the greatest justification for toleration of hate speech,[32] while stage four provides the strongest case for its suppression—at least to the extent that it targets racial or religious minorities. Stages one and two do not provide clear cut answers as the perceived evils of hate speech are likely to fluctuate depending on the circumstances. Assuming in stage one that hate speech is not promoted by government, the magnitude of the harms associated with it would depend on the degree of sympathy or revulsion which it produces in official circles. In stage two, on the other hand, even if those who engage in hate speech constitute but a very small minority of the population, the danger posed by hate speech would depend on whether political majorities tend to agree with that speech's underlying message, or whether they are seriously disturbed by it and firmly committed to combating the views it seeks to convey.

Assessment of how hate speech might fare under the four different historical stages is made much more difficult if the four main philosophical justifications for free speech in the United States are taken into proper account. These four justifications can be referred to respectively as: the justification from democracy; the justification from social contract; the justification from the pursuit of the truth; and the justification from individual autonomy.[33] As we shall see, each of these justifications ascribes a different scope of legitimacy to free speech. Moreover, even different versions of the same justification lead to shifts in the boundaries between speech that requires protection and speech that may be constitutionally restricted, and such shifts are particularly important in the context of hate speech.

The justification from democracy is premised on the conviction that freedom of speech serves an indispensable function in the process of democratic self-government.[34] Without the freedom to convey and receive ideas, citizens cannot successfully carry out the task of democratic self-government. Accordingly, political speech needs to be protected, but not necessary all

[31] *See, e.g.*, MATSUDA ET AL., *supra* note 25; MACKINNON, *supra* note 25.

[32] For an extended argument in favor of such toleration from a stage three perspective, see BOLLINGER, *supra* note 18.

[33] For an extensive discussion of philosophical justifications of free speech that both overlaps with, and differs from, the present discussion, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

[34] The principal exponent of this view was Alexander Meiklejohn. *See* MEIKLEJOHN, *supra* note 22.

political speech.[35] If the paramount objective is the preservation and promotion of democracy, then anti-democratic speech in general, and hate and political extremist speech in particular, would in all likelihood serve no useful purpose, and would therefore not warrant protection.[36]

The justification from social contract theory is in many ways similar to that from democracy, but the two do not necessarily call for protection of the same speech. Unlike the other three justifications, that from social contract theory is at bottom procedural in nature. Under this justification, fundamental political institutions must be justifiable in terms of an actual or hypothetical agreement among all members of the relevant society,[37] and significant changes in those institutions must be made only through such agreements. Just as with justification from democracy, in justification from social contract there is a need for free exchange and discussion of ideas. Unlike the justification from democracy, however, social contract cannot exclude *ex ante* any views which, though incompatible with democracy, might be relevant to a social contractor's decision to embrace the polity's fundamental institutions or to agree to any particular form of political organization. Accordingly, the justification from social contract seems to require some tolerance of hate speech, if not in form then at least in substance.

The justification from the pursuit of the truth originates in the utilitarian philosophy of John Stuart Mill. According to Mill, the discovery of truth is an incremental empirical process that relies on trial and error and that requires uninhibited discussion.[38] Mill's justification for very broad freedom of expression was imported into American constitutional jurisprudence by Justice Oliver Wendell Holmes, and became known as the justification based on the free marketplace of ideas.[39] This justification, which has been dominant in the United States ever since,[40] is premised on the firm

[35] Meiklejohn himself had a broad view of political speech, and advocated an extensive protection of it.

[36] It is of course possible to maintain that toleration of extremist anti-democratic speech would tend to invigorate the proponents of democracy and hence ultimately strengthen rather than weaken democracy. Be that as it may, toleration of anti-democratic views is not logically required for purposes of advancing self-governing democracy. For example, advocacy of violent overthrow of democratically elected government and establishment of a dictatorship need not be protected to ensure vigorous debate on all plausible alternatives consistent with democracy.

[37] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 11-12 (1971).

[38] *See* JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* ON LIBERTY AND OTHER ESSAYS 1 (John Gray ed., 1991).

[39] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[40] *See* SCHAUER, *supra* note 33, at 15-16.

belief that truth is more likely to prevail through open discussion (even if such discussion temporarily unwittingly promotes falsehoods) than through any other means bent on eradicating falsehoods outright.

Mill's strong endorsement of free speech was rooted in his optimistic belief in social progress. According to his view, truth would always ultimately best falsehood so long as discussion remained possible, and hence even potentially harmful speech should be tolerated as its potential evils could best be minimized through open debate. Accordingly, Mill advocated protection of all speech so long as it falls short of incitement to violence.

Although Holmes's *justification* of free expression is very similar to Mill's, his *reasons* for embracing the free marketplace of ideas differ. Unlike Mill, Holmes was driven by skepticism and pessimism and expressed grave doubts about the possibility of truth. Because of this, Holmes justified his free marketplace approach on pragmatic grounds. Since most strongly held views eventually prove false, any limitation on speech is most likely grounded on false ideas. Accordingly, Holmes was convinced that a free marketplace of ideas was likely to reduce harm in two distinct ways: it would lower the possibility that expression would be needlessly suppressed based on falsehoods; and it would encourage most people who tend stubbornly to hold on to harmful or worthless ideas to develop a healthy measure of self-doubt.[41]

Like Mill, Holmes did not endorse unlimited freedom of speech. For Holmes, speech should be protected unless it poses a "clear and present danger" to people, such as falsely shouting "fire" in a crowded theater and thereby causing panic.[42] Both Mill's and Holmes's justification from the pursuit of truth justify protection of hate speech that does not amount to incitement to violence. Indeed speech amounting to an "incitement to violence" is but one instance of speech that poses a "clear and present danger." In the end, whether speech incites to violence or creates another type of clear and present danger, it does not deserve protection—under the justification from the pursuit of truth—because it is much more likely to lead to harmful action than to more speech, and hence it undermines the functioning of the marketplace of ideas.

In the end, Mill and Holmes represent two sides of the same coin. Mill overestimates the potential of rational discussion while Holmes underestimates the potential for serious harm of certain types of speech that fall short of the clear and present danger test.

[41] *See Abrams*, 250 U.S. at 630.

[42] *See* Schenk v. United States, 249 U.S. 47 (1919).

The justification from the pursuit of truth is at bottom pragmatic. As we shall see below, however, because both the Millian and Holmesian pragmatic reasons for the toleration of hate speech are based on dubious factual claims, they may in the end undermine rather than bolster any pragmatic justification of tolerance of hate speech that falls short of incitement to violence.[43]

Unlike the three preceding justifications, which are collective in nature, the fourth justification for free speech, that from autonomy, is primarily individual-regarding. Indeed, democracy, social peace and harmony through the social contract, and pursuit of the truth, are collective goods designed to benefit society as a whole. In contrast, individual autonomy and well-being through self-expression are presumably always of benefit to the individual concerned, without in many cases necessarily producing any further societal good.

The justification from autonomy is based on the conviction that individual autonomy and respect require protection of virtually unconstrained self-expression.[44] Accordingly, all kinds of utterances arguably linked to an individual's felt need for self-expression ought to be afforded constitutional protection. And consistent with this, the justification from autonomy clearly affords the broadest scope of protection for all types of speech.

As originally conceived, the justification from autonomy seemed exclusively concerned with the self-expression needs of speakers. Since hate speech could plausibly contribute to the fulfillment of the self-expression needs of its proponents, it would definitely seem to qualify for protection under the justification from autonomy.

Under a less individualistic—or at least less atomistic—conception of autonomy and self-respect, however, focusing exclusively on the standpoint of the speaker would seem insufficient. Indeed, if autonomy and self-respect are considered from the standpoint of listeners, then hate speech may well loom as prone to undermining the autonomy and self-respect of those whom it targets. This last observation becomes that much more urgent under a stage four conception of the nature and scope of legitimate regulation of speech. Indeed, if the main threat of unconstrained speech is the hegemony of dominant discourses at

[43] For an extended critique of the use of pragmatism to justify free speech protection of hate speech that does not pose a clear and present danger of violence, see MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 150-96 (1998).

[44] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); David A. J. Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1975).

the expense of the discourses of oppressed minorities, then self-expression of the powerful threatens the autonomy of those whose voices are being drowned, and hate speech against the latter can only exacerbate their humiliation and the denial of their autonomy.

As these last observations indicate, the possible intersections between the four historical stages and the four philosophical justifications are multiple and complex. Current American constitutional jurisprudence concerning hate speech, however, relies by and large on the justification from the pursuit of truth and tends to espouse implicitly a stage three—or a combination of stage two and stage three—vision on the proper role of speech.

Judicial treatment of hate speech in the United States is of relatively recent vintage. Indeed, approximately fifty years ago, in *Beauharnais* v. *Illinois*,[45] the Supreme Court upheld a conviction for hate speech emphasizing that such speech amounted to group defamation, and reasoning that such defamation was in all relevant respects analogous to individual defamation, which had traditionally been excluded from free speech protection. Beauharnais, a white supremacist, had distributed a leaflet accusing blacks, among other things, of rape, robbery and other violent crimes. Although Beauharnais had urged whites to unite and protect themselves against the evils he attributed to blacks, he had not been found to have posed a "clear and present danger" of violence.

Beauharnais has never been explicitly repudiated, but it has been thoroughly undermined by subsequent decisions. Already, the dissenting opinions in *Beauharnais* attacked the Court's majority rationale, by stressing that both the libel and the "fighting words."[46] exceptions to free speech involved utterances addressed to individuals, and were hence unlikely to have any significant impact on public debate. In contrast, group libel was a public, not private, matter and its prohibition would inhibit public debate.

The current constitutional standard, which draws the line at incitement to violence, was established in the 1969 *Brandenburg* v. *Ohio*[47] decision. *Brandenburg* involved a leader and several members of the Ku Klux Klan who in a rally staged for television (in front of only a few reporters) made several derogatory remarks mainly against blacks, but also some against Jews. In addition,

[45] 343 U.S. 250 (1952).

[46] In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Supreme Court held that insults addressed to an individual that were so offensive as to readily prompt a violent reaction did not fall within the ambit of constitutionally protected speech.

[47] 395 U.S. 444 (1969).

while not threatening any imminent or direct violence, the speakers suggested that blacks should return to Africa and Jews to Israel, and announced that they would petition the government to act, but that if it refused they would have no other recourse than to take matters in their own hands. Selected portions of this rally were later broadcast on local and national television.

The Supreme Court in a unanimous decision set aside Brandenburg's criminal conviction concluding that the Klan may have advocated violence, but that it had not incited it. Significantly, in drawing the line between incitement and advocacy, the Court applied to hate speech a standard it had recently established to deal with communist speech involving advocacy of forcible overthrow of the government.[48] In so doing, the Court's decision raises the question of whether hate speech ought to be equated with (politically) extremist speech. While the intricacies of this issue remain beyond the scope of this Article, two brief observations seem in order. First, extremist speech based on a political ideology like communism is above all political speech and does not necessarily involve personal hatred. Second, even if extremist speech involved such hatred—e.g., if communists seek to fuel passions against those whom they call "capitalist pigs"—such hatred cannot be simply equated with virulent anti-Semitism or racism.

If one case has come to symbolize the contemporary political and constitutional response to hate speech in the United States, it is the Skokie case in the late 1970s. This case arose out of a proposed march by Neo-Nazis in full SS uniform with swastikas through Skokie, a suburb of Chicago with a large Jewish population, including thousands of Holocaust survivors. The local municipal authorities took measures—including enacting new legislation—designed to prevent the march, but both state and federal courts eventually invalidated the measures as violative of the Neo-Nazis' free speech rights.[49]

The Neo-Nazis made it clear that their choice of Skokie for the march was intended to upset Jews, by confronting them with their message. The constitutional battle focused on whether the proposed march in Skokie would amount to an "incitement to violence." Based on the testimony of Holocaust survivors residing in Skokie, who asserted that exposure to the swastika might provoke them to violence, a lower state court determined that such

[48] *See* Yates v. United States, 354 U.S. 298 (1957) (holding conviction for mere advocacy unconstitutional).

[49] *See* Smith v. Collin, 436 U.S. 953 (1978); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977);

a march could be prohibited.[50]

That decision was reversed on appeal, on the ground that the lower court had wrongly concluded that the proposed march had met the "incitement to violence" requirement.[51] While acknowledging the intensity of the likely feelings of Holocaust survivors, the court held that they were not sufficient to prohibit the proposed march.[52] The court did not specify what standard would have to be met to justify banning display of the swastika. What if a Jew who is not a Holocaust survivor had testified that a Neo-Nazi march with a Swastika would move him to violence? Or else, what if a gentile had thus testified?

These uncertainties illustrate some of the difficulties associated with the "incitement to violence" standard, even if one assumes that it is the right standard. Be that as it may, the Skokie controversy ultimately fizzled, for after their legal victories, the Neo-Nazis decided not to march in Skokie. Instead, they marched in Chicago far from any Jewish neighborhood.[53] Because of their very marginality, and because they had no sway over the larger non-target audience in the United States, the actual march by the Neo-Nazis did much more to showcase their isolation and impotence than to advance their cause. Under those circumstances, allowing them to express their hate message probably contributed more to discrediting them than a judicial prohibition against their march.

Because of contextual factors prevalent in the United States during the late 1970s, the result in the Skokie case may appear to be pragmatically justified, and to fit within a stage three conception of free speech.[54] Indeed, in as much as the Neo-Nazi message had no appeal, and reminded its listeners of past horrors as well as of the fact that the United States had to go to war against Hitler's Germany, it could conceivably be analogized to a vaccine against total complacency. Moreover, by the very falsehood of its ring, utterance of the Neo-Nazi message could well be interpreted as reinforcing the belief in a need for virtually unlimited free speech associated with the justification from the pursuit of the truth.[55]

[50] Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d. 21 (Ill. 1978).

[51] *Id.* at 24.

[52] *See id.*

[53] *See Smith*, 439 U.S. at 916 (Blackmun, J., dissenting).

[54] For an extended argument in support of the judicial handling of the Skokie case within the scope of a stage three conception, see BOLLINGER, *supra* note 18.

[55] It is significant, consistent with these observations, that Jews were on both sides of the Skokie controversy, as civil rights organizations defended the Neo-Nazis' right to speak. For a further analysis of this fact, see Michel Rosenfeld, *Extremist Speech and the*

Even if the Skokie case was rightly decided, the constitutional jurisprudence which it helped to shape has proved quite troubling when applied under less favorable circumstances. This conclusion becomes manifest from a consideration of the case of *R.A.V. v. City of St. Paul*,[56] involving the burning of a cross inside the fenced yard of a black family by young white extremists.[57] The latter were convicted under a local criminal ordinance which provided in relevant part that:

> Whoever places on public or private property a symbol, object, . . . but not limited to, a burning cross or Nazi swastika, which one knows . . . arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct. . . .[58]

In a unanimous decision, the U.S. Supreme Court reversed the conviction, holding the above ordinance unconstitutional for two principal reasons: First, it targeted speech that would not amount to an incitement to violence; and second, even granting that a burning cross qualified as "fighting words," thus meeting the incitement standard, by criminalizing some incitements but not others, the ordinance was based on impermissible viewpoint discrimination. Indeed, while the ordinance criminalized expression likely to incite violence on the basis of race or religion, it did not criminalize similar expression equally likely to incite violence on other bases, such as homosexuality.

Because of the pervasive nature of racism and the long history of oppression and violence against blacks in the United States, and given the frightening associations evoked by burning crosses, the situation in *R.A.V.* cannot be equated with that involved in the Skokie case. Of course, swastikas tend to inspire as much fear and anger in Jews as burning crosses do in blacks. The major difference between the Skokie case and *R.A.V.*, however, has to do not with the perniciousness of the respective symbols involved, but with the different factual and emotional impact of these symbols on the target and non-target audiences before whom they were meant to be displayed.

Significantly, the Holocaust survivors who testified that the proposed Neo-Nazi march in Skokie would lead them to violence emphasized that their reaction would be triggered by memories of the past. Moreover, though there was some anti-Semitism in the

Paradox of Tolerance, 100 HARV. L. REV. 1457, 1487 (1987) (book review).

[56] 505 U.S. 377 (1992).

[57] The burning of a cross, long a practice of white supremacists, such as those belonging to the Ku Klux Klan, has been a symbol of virulent racism much like the display of the swastika has been associated with virulent anti-Semitism.

[58] St. Paul Bias-Motivated Crime Ordinance (1990), *quoted in R.A.V.*, 505 U.S. at 380.

United States in the 1970s, the small fringe Neo-Nazis were so discredited that it seemed most unlikely that they would in any way, directly or indirectly, advance the cause of anti-Semitism.[59] In contrast, cross burning produced fears not only concerning the past but also the present and the future, and not based on events that had taken place across an ocean, but on events that had marked the sad history of race relations in the United States from the founding of the republic. Indeed, the cross burning in *R.A.V.* occurred in a racially mixed neighborhood, in an era in which several homes of black persons who had moved into white neighborhoods had been burned, in efforts to dissuade members of a growing black middle class from moving into white neighborhoods.[60]

In sum, though both the proposed march in *Skokie* and the cross burning in *R.A.V.* were meant to incite hatred on the basis of religion and race respectively, their effects were quite different. *Skokie* mainly produced contempt for the marchers and a reminder that there was little danger of an embrace of Nazism in the United States. *R.A.V.*, on the other hand, played on pervasive, and to a significant degree justified, fears concerning race relations in America. Undoubtedly, cross burning itself is rejected as repugnant by the vast majority of Americans. The underlying racism associated with it, and the message that blacks should remain in their own segregated neighborhoods, however, unfortunately still have adherents among a non-negligible portion of whites in America.

The ultimate difference between the impact of the hate speech in *Skokie* and that in *R.A.V.* relates to the emotional reactions of the respective target and non-target audiences involved. In *Skokie*, the vast majority of Jews felt no genuine present or future threat whereas the non-target gentile audience felt mainly contempt and hostility towards the Nazi hate message. In *R.A.V.*, however, the target audience definitely experienced anger, fear and concern while the non-target audience was split along a spectrum spanning from revulsion to mixed emotions to

[59] This last observation may no longer hold true in view of certain more recent events, which have increased the profile of white supremacist extremists. For example, in a recent incident, several children were shot at a Jewish day-care center in Los Angeles. *See* Terry McDermott, *Panic Pierces Illusion of Safety*, L.A. TIMES, Aug. 11, 1999, at A1. In Chicago, a white supremacist went on a shooting spree which included the firing of many shots that did not cause any injuries near a synagogue. *See Suspect In Racial Shootings Had a Troubled Past*, CHRON. OF HIGHER EDUC., July 16, 1999, at A8. During that same spree, however, that individual killed both a Black and Asian person. *See id.*

[60] *See, e.g.*, *Second Racial Attack in Two Weeks*, UPI, Nov. 20, 1984, Tuesday, AM Cycle; [untitled], UPI, Feb. 18, 1997, LEXIS, Nexis, Library, UPI File.

downright sympathy for the substance of the hate message if not for its form.[61]

III. THE TREATMENT OF HATE SPEECH UNDER INTERNATIONAL HUMAN RIGHTS NORMS AND IN THE CONSTITUTIONAL JURISPRUDENCE OF OTHER WESTERN DEMOCRACIES

If free speech in the United States is shaped above all by individualism and libertarianism, collective concerns and other values such as honor and dignity lie at the heart of the conceptions of free speech that originate in international covenants or in the constitutional jurisprudence of other Western democracies. Thus, for example, Canadian constitutional jurisprudence is more concerned with multiculturalism and group-regarding equality.[62] For its part, the German Constitution sets the inviolability of human dignity as its paramount value,[63] and specifically limits freedom of expression to the extent necessary to protect the young and the right to personal honor.[64]

These differences have had a profound impact on the treatment of hate speech. In order to better appreciate this, I shall briefly focus on salient developments in three countries and under certain international covenants. The three countries in question are Canada, the United Kingdom and Germany.

[61] As this article was going to press, the U.S. Supreme Court decided *Virginia v. Black*, 123 S. Ct. 1536, 538 U.S. ___ (2003), in which it held that criminalizing cross burning with an intent to intimidate was constitutional, but that the Virginia statute before it was unconstitutional because it treated cross burning as prima facie evidence of intent to intimidate. Writing for the Court, Justice O'Connor noted that throughout the history of the Ku Klux Klan, "cross burnings have been used to communicate both threats of violence and messages of shared ideology." *Id.* at 1545. Because cross burnings have frequently been followed by beatings, lynchings, shootings and killings of African-Americans, they either amount to incitements to violence or they create a reasonable fear in those whom they target of becoming victims of impending violence. On the other hand, when cross burnings are carried out at meetings exclusively attended by members of Klan, the most likely intent is communication of group solidarity among fellow believers in the ideology of white supremacy. Accordingly, the Court's decision in *Black* is consistent with *R.A.V* and with the "incitement to violence" standard applied in hate speech cases.

[62] *See* Kathleen Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77 (1992).

[63] *See* Grundgesetz [GG] art. 1 (F.R.G.), *translated in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 227 (Ulrich Karpen ed., 1988).

[64] *See* Grundgesetz [GG] art. 5(2) (F.R.G.), *translated in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 228 (Ulrich Karpen ed., 1988).

A. *Canada*

It is particularly interesting to start with the contrast between the United States and Canada, two neighboring countries which were once British colonies and which are now advanced industrialized democracies with large immigrant populations with roots in a vast array of countries and cultures. Moreover, while Canada has produced a constitutional jurisprudence that is clearly distinct from that of the United States, the Canadian Supreme Court has displayed great familiarity with American jurisprudence.[65]

Although both the United States and Canada are multiethnic and multicultural polities, the United States has embraced an assimilationalist ideal symbolized by the metaphor of the "melting pot" while Canada has placed greater emphasis on cultural diversity and has promoted the ideal of an "ethnic mosaic."[66] Consistent with this difference, the Canadian Supreme Court has explicitly refused to follow the American approach to hate speech. In a closely divided decision, the Canadian Court upheld the criminal conviction of a high school teacher who had communicated anti-Semitic propaganda to his pupils in the leading case of *Regina* v. *Keegstra*.[67]

Keegstra told his pupils that Jews were "treacherous," "subversive," "sadistic," "money loving," "power hungry" and "child killers." He went on to say that the Jews "created the Holocaust to gain sympathy." He concluded that Jews were inherently evil and expected his students to reproduce his teachings on their exams in order to avoid bad grades.[68]

The criminal statute under which Keegstra had been convicted prohibited the willful promotion of hatred against a group identifiable on the basis of color, race, religion or ethnic origin.[69] The statute in question made no reference to incitement to violence, nor was there any evidence that Keegstra had any intent to lead his pupils to violence.

In examining the constitutionality of Keegstra's conviction, the Canadian Supreme Court referred to the following concerns as

[65] One example is the thorough discussion of American decisions and rejection of the American approach in the majority opinion in Canada's leading hate speech case, *Regina v. Keegstra*, [1990] 3 S.C.R. 697.

[66] *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 14 (1995).

[67] *Keegstra*, [1990] 3 S.C.R. 687.

[68] *See id.* at 714.

[69] *See id.* at 713.

providing support for freedom of expression under the Canadian Charter:

> (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.[70]

Thus, the Canadian protection of freedom of expression, like the American, relies on the justifications from democracy, from the pursuit of truth and from autonomy. The Canadian conception of autonomy, however, is less individualistic than its American counterpart, as it seemingly places equal emphasis on the autonomy of listeners and speakers.

In spite of these affinities, the Canadian Supreme Court refused to follow the American lead and draw the line at incitement to violence. Stressing the Canadian Constitution's commitment to multicultural diversity, group identity, human dignity and equality,[71] the Court adopted a nuanced approach designed to harmonize these values with those embedded in freedom of expression. And based on this approach, the Court concluded that hate propaganda such as that promoted by Keegstra did not warrant protection as it did more to undermine mutual respect among diverse racial, religious and cultural groups in Canada than to promote any genuine expression needs or values.

In reaching its conclusion, the Canadian Court considered the likely impact of hate propaganda on both the target-group and on non-target group audiences. Members of the target group are likely to be degraded and humiliated, to experience injuries to their sense of self-worth and acceptance in the larger society, and may as a consequence avoid contact with members of other groups within the polity.[72] Those who are not members of the target group, or society at large, on the other hand, may become gradually de-sensitized and may in the long run become accepting of messages of racial or religious inferiority.[73]

Not only does the Canadian approach to hate speech focus on gradual long-term effects likely to pose serious threats to social cohesion rather than merely on immediate threats to violence, but

[70] *Id.* at 728.

[71] *See id.* at 736.

[72] *See id.* at 746.

[73] *See id.* at 747.

it also departs from its American counterpart in its assessment of the likely effects of speech. Contrary to the American assumption that truth will ultimately prevail, or that speech alone may not lead to truth but is unlikely to produce serious harm, the Canadian Supreme Court is mindful that hate propaganda can lead to great harm by bypassing reason and playing on the emotions. In support of this, the Court cited approvingly the following observations contained in a study conducted by a committee of the Canadian Parliament:

> The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.[74]

In short, the Canadian treatment of hate speech differs from its American counterpart in two principal respects: First, it is grounded on somewhat different normative priorities; and second, the two countries differ in their practical assessments of the consequences of tolerating hate speech. Under the American view, there seems to be a greater likelihood of harm from suppression of hate speech that falls short of incitement to violence than from its toleration. From a Canadian perspective, on the other hand, dissemination of hate propaganda seems more dangerous than its suppression as it is seen as likely to produce enduring injuries to self-worth and to undermine social cohesion in the long run.

B. *The United Kingdom*

Unlike the United States and Canada, the United Kingdom does not have a written constitution. Nevertheless, it recognizes a right to freedom of expression through its adherence to international covenants, such as the European Convention on Human Rights, and through commitment to constitutional values inherent in its rule of law tradition.[75] Moreover, the United

[74] *Id.*

[75] *See* European Convention on Human Rights and Fundamental Freedoms [ECHR], Nov. 4, 1950, art. 10, 213 U.N.T.S. 221; Regina v. Sec'y of State for the Home Dep't, *ex parte* Brind, 1 A.C. 696 (1991) (holding that freedom of expression is considered a basic right under both written and unwritten constitutions). Furthermore, through adoption of the Human Rights Act of 1998, which became effective in October 2000, the United Kingdom has incorporated ECHR Article 10 into domestic law, thus making it directly applicable before British courts. *See* Thomas Morton, *Free Speech v. Racial Aggravation*, 149 NEW L.J. 1198 (1999).

Kingdom has criminalized hate speech going back as far as the seventeenth century. The focus of British regulation of free speech has shifted over the years, starting with concern with reinforcing the security of the government, continuing with preoccupation with incitement to racial hatred among non-target audiences, and culminating with the aim of protecting targets against racially motivated harassment. As we shall see, the results of British regulation have been mixed, with significant success against Fascists and Nazis, but with much less success in attempts to defuse racial animosity between whites and non-whites.

The seventeenth century offense of seditious libel punished the utterance or publication of statements with "an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty . . . or to promote feelings of ill-will and hostility between different classes of . . . [her] subjects."[76] To the extent that seditious libel allows for punishment of political criticism of the government, it contravenes a core function of modern freedom of expression rights. Although seditious libel was primarily used to punish those perceived to pose a threat to the monarchy, occasionally, it was used in the context of what today is called "hate speech."[77] Thus, in *Regina* v. *Osborne*[78] the publishers of a pamphlet that asserted that certain Jews had killed a woman and her child because the latter's father was a Christian were convicted of seditious libel. As a consequence of distribution of the pamphlet some Jews were beaten and threatened with death.[79] As this case involved direct incitement to violence and a clear threat to the maintenance of public order, it may be best viewed as vindicating government dominance and control rather than as protecting the Jews from group defamation.

Because seditious libel can be used to frustrate criticism of government, it can pose a threat to the kind of vigorous debate that is indispensable in a working democracy. Significantly, as used in the early twentieth century, seditious libel became rather ineffective as convictions could only be obtained upon proof of direct incitement to violence or breach of public order.[80] In 1936, Parliament adopted Section 5 of the Public Order Act.[81] This

[76] ANTHONY LESTER & GEOFFREY BINDMAN, RACE AND LAW IN GREAT BRITAIN 345 (1972).

[77] *Id.*

[78] 2 Swanst. 503n (1732).

[79] *See* LESTER & BINDMAN, *supra* note 76, at 345.

[80] *Id.* at 347.

[81] Public Order Act, 1936, 1 GEO. 6, c. 6, § 5 (Eng.).

legislation, which proved useful in combating the rise of British Fascism prior to and during World War II, relaxed the seditious libel standards in two critical respects: first it allowed for punishment of speech "likely" to lead to violence even if it did not actually result in violence; and, second it allowed for punishment of mere intent to provoke violence.[82]

After World War II, the United Kingdom enacted further laws against hate propaganda, consistent with its obligations under international covenants.[83] Thus, in 1965, the British Parliament enacted Section 6 of the Race Relations Act (RRA 1965) which made it a crime to utter in public or to publish words "which are threatening, abusive or insulting" and which are intended to incite hatred on the basis of race, color or national origin.[84]

The RRA 1965 focuses on incitement to hatred rather than on incitement to violence, but it reintroduces proof of intent as a prerequisite to conviction. This makes prosecution more difficult, as evinced by the acquittal in the 1968 *Southern News* case.[85] The case involved a publication of the Racial Preservation Society, which advocated the "return of people of other races from this overcrowded island to their own countries." At trial the publishers asserted that their paper addressed important social issues and that it did not attempt to incite hatred. Because of the prosecution's failure to establish the requisite intent, the net result of *Southern News* was the dissemination of its racist views in the mainstream press, and a judicial determination that its message was a legally protected expression of a political position rather than illegal promotion of hate speech.

The problem posed by *Southern News* was remedied by removal of the intent requirement in the Race Relations Act of 1976 (RRA 1976).[86] Moreover, the RRA 1965 did lead to a series of convictions, but a number of these were obtained against leaders of the Black Liberation Movement in the late 1960s, raising disturbing questions if not about the law itself, at least about its enforcement. For example, in *Regina* v. *Malik*,[87] the black defendant was convicted and sentenced to a year in prison

[82] *See* Nathan Courtney, *British and U.S. Hate Speech Legislation: A Comparison*, 19 BROOK. J. INT'L L. 727, 731 (1993).

[83] *Id.* at 733.

[84] Race Relations Act, 1965, c. 73, § 6 (1) (Eng.).

[85] This is an unreported case discussed in the *London Times*. *See Race Act not a Curb*, TIMES (London), Mar. 28, 1968, at 2.

[86] *See* Race Relations Act, 1976, c. 74, § 70 (Eng.), *quoted in* D.J. WALKER & MICHAEL J. REDMAN, RACIAL DISCRIMINATION: A SIMPLE GUIDE TO THE PROVISIONS OF THE RACE RELATIONS ACT OF 1976, at 215-16 (1977).

[87] R. v. Malik, [1968] 1 All E.R. 582, 582 (C.A. 1967).

for having asserted that whites are "vicious and nasty people" and for stating, inter alia,

> I saw in this country in 1952 white savages kicking black women. If you ever see a white man lay hands on a black woman, kill him immediately. If you love our brothers and sisters you will be willing to die for them.[88]

The defendant admitted that his speech was offensive to whites but argued that he had a right to respond to the evils that whites had perpetrated against blacks.[89] In another case, four blacks were convicted of incitement to racial hatred for a speech made at Hyde Park's Speakers' Corner in which they called on black nurses to give the wrong injection to white people.[90] The court was unswayed by the defendants' claim that they were expressing their frustrations as blacks who had to endure white racism.[91]

The laws discussed thus far have focused on threats to the public and on promotion of hatred through persuasion of non-target audiences. In 1986, however, Parliament added Section 5 of the Public Order Act, which made hate speech punishable if it amounted to harassment of a target group or individual, and in 1997 it enacted the Protection from Harassment Act.[92] These provide more tools in the British legal arsenal against hate speech, but have not thus far led to any clearer or more definitive indication of the ultimate boundaries of punishable hate speech in the United Kingdom. In the end, the problem may have to do less with the particular legal regime involved, than with the social and political context in which that regime is embedded. As already mentioned, British legislation has been much more successful in combating fascism and Nazism than in dealing with hatred between whites and non-whites. Perhaps the reason for that difference is that a much greater consensus has prevailed in Britain concerning fascism than concerning the absorption and accommodation of the large, relatively recent influx of racial minorities.

[88] *Bitter Attack on Whites*, THE TIMES (London), July 25, 1967, at 1.

[89] Although the above cited passage urges violence if certain conditions are met, it clearly falls short of an "incitement" to violence. Actually, to the extent that it advocates violence to combat violence, it arguably preaches self-defense rather than mere aggression.

[90] *See Sentences Today on Four Coloured Men*, TIMES (London), Nov. 29, 1967, at 3.

[91] *Id.*

[92] *See* Public Order Act, 1986, c. 64, §§ 5-6 (Eng.); Protection From Harassment Act, 1997, c. 40, § 7 (Eng.).

C. *Germany*

The contemporary German approach to hate speech is the product of two principal influences: the German Constitution's conception of freedom of expression as properly circumscribed by fundamental values such as human dignity and by constitutional interests such as honor and personality;[93] and the Third Reich's historical record against the Jews, especially its virulent hate propaganda and discrimination which culminated in the Holocaust.

Unlike the United States, and much like Canada, Germany treats freedom of expression as one constitutional right among many, rather than as paramount or even as first among equals. Whereas under the Canadian Constitution, freedom of expression is limited by constitutionally mandated vindications of equality and multiculturalism, under the German Basic Law, freedom of expression must be balanced against the pursuit of dignity and group-regarding concerns.[94]

The contrast between the German approach and other approaches to freedom of speech, such as the American or the Canadian, is well captured in the following summary assessment of the German Constitutional Court's treatment of free speech claims:

> First, the value of personal honor always trumps the right to utter untrue statements of fact made with knowledge of their falsity. If, on the other hand, untrue statements are made about a person after an effort was made to check for accuracy, the court will balance the conflicting rights and decide accordingly. Second, if true statements of fact invade the intimate personal sphere of an individual, the right to personal honor trumps freedom of speech. But if such truths implicate the social sphere, the court once again resorts to balancing. Finally, if the expression of an opinion—as opposed to fact—constitutes a serious affront to the dignity of a person, the value of personal honor triumphs over speech. But if the damage to reputation is slight, then again the outcome of the case will depend on careful judicial balancing.[95]

[93] *See* discussion *supra* notes 64, 65.

[94] The values underlying the Basic Law's approach of freedom of expression were discussed by the German Constitutional Court in the landmark *Lüth* case, BverfGE 7, 198 (1958) (stating that the Basic Law "establishes an objective order of values . . . which centers upon dignity of the human personality developing freely within the social community . . .") (translated in DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 363 (2d. ed. 1997)).

[95] KOMMERS, *supra* note 94, at 424.

In broad terms, freedom of speech, like other constitutional rights in Germany, is in part a negative right—i.e., a right against government—and, in part a positive right—i.e., a right to government sponsorship and encouragement of free speech.[96] In contrast to the Anglo-American approach, which in its Lockean tradition regards fundamental rights as inalienable and as preceding and transcending civil society, the German tradition regards fundamental rights as depending on the (constitutional) state for their establishment and support. Consistent with this, the more free speech rights are conceived and treated as positive rights, the easier it becomes to pin on the state responsibility for hate speech which it may find repugnant, but which it does not prohibit or punish. Furthermore, the German constitutional system is immersed in a normative framework that is more Kantian than Lockean, thus requiring a balancing of rights and duties not only on the side of the state but also on that of the citizenry.[97]

As in the United States, in Germany freedom of speech is legitimated from the respective standpoints of the justification from democracy, from the pursuit of truth and from autonomy. These justifications are conceived quite differently in Germany than in the United States, however, with the consequence that the nature and scope of free speech rights in Germany stand in sharp contrast to their American counterparts. Indeed, because of its constitutional commitment to "militant democracy,"[98] the German justification from democracy does not encompass extremist anti-democratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets. The German justification from the pursuit of truth, on the other hand, does not embrace its American counterpart's Millean presuppositions. This emerges clearly from the German Constitutional Court's firm conviction that established falsehoods can be safely denied protection without hindrance to the pursuit of truth.[99] Finally, the German justification from autonomy is not centered on the autonomy of the speakers, as its American counterpart has proven to date. Instead, the German justification implies the need to strike a balance between rights and duties, between the individual and the community, and between the self-expression needs of

[96] *Id.* at 386.

[97] *See id.* at 298, 305.

[98] *See* Grundgesetz [GG] art. 21 (F.R.G.), *translated in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 236 (Ulrich Karpen ed., 1988).

[99] *See, e.g.*, *Holocaust Denial Case*, 90 BVerfGE 241 (1994).

speakers and the self-respect and dignity of listeners.

The contemporary German constitutional system is grounded in an order of objective values, including respect for human dignity and perpetual commitment to militant democracy.[100] As such, it excludes certain creeds and thus paves the way for content-based restrictions on freedom of speech which would be unacceptable under American free speech jurisprudence.[101] Undoubtedly, the German Basic Law's adoption of certain values and the consequent legitimacy of content-based speech regulation originated in the deliberate commitment to repudiate the country's Nazi past, and to prevent at all costs any possible resurgence of it in the future. Within this context, concern with protection of the Jewish community and with prevention of any rekindling of virulent anti-Semitism within the general population has left a definite imprint not only on the constitutional treatment of hate speech, but also on the evolution of free speech doctrine more generally.

Evidence of this can be found in the Constitutional Court's landmark decision in the 1958 *Lüth Case.*[102] *Lüth* involved an appeal to boycott a post-war movie by a director who had been popular during the Nazi period as the producer of a notoriously anti-Semitic film. Lüth, who had advocated the boycott and who was an active member of a group seeking to heal the wounds between Christians and Jews, was enjoined by a Hamburg court from continuing his advocacy of a boycott. He filed a complaint with the Constitutional Court claiming a denial of his free speech rights.

The Constitutional Court upheld Lüth's claim and voided the injunction against him, noting that he was motivated by apprehension that the reemergence of a film director who had been identified with Nazi anti-Semitic propaganda might be interpreted, especially abroad, "to mean that nothing had changed in German cultural life since the National Socialist period. . . ."[103] The Court went on to note that Lüth's concerns were very important for Germans as "[n]othing has damaged the German reputation as much as the cruel Nazi persecution of the Jews. A

[100] Neither Article 1 of the Basic Law which enshrines human dignity nor Article 21 which establishes militant democracy are subject to amendment and are thus made permanent fixtures of the German constitutional order.

[101] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding hate speech prohibition unconstitutional on ground that it promoted viewpoint discrimination by targeting racial hatred, but not hatred against homosexuals). See *supra* Part II and accompanying notes for a discussion of the *R.A.V.* case.

[102] BverfGE 7, 198 (1958).

[103] KOMMERS, *supra* note 94, at 367.

crucial interest exists, therefore, in assuring the world that the German people have abandoned this attitude. . . ."[104] Accordingly, in balancing Lüth's free speech interests against the film director's professional and economic interests, the Court concluded that "[w]here the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual economic interests must, in principle, yield."[105]

Germany has sought to curb hate speech with a broad array of legal tools. These include criminal and civil laws that protect against insult, defamation and other forms of verbal assault, such as attacks against a person's honor or integrity, damage to reputation, and disparaging the memory of the dead.[106] Although the precise legal standards applicable to the regulation of hate speech have evolved over the years,[107] hate speech against groups, and anti-Semitic propaganda in particular, have been routinely curbed by the German courts. For example, spreading pamphlets charging "the Jews" with numerous crimes and conspiracies, and even putting a sticker only saying "Jew" on the election posters of a candidate running for office were deemed properly punishable by the courts.[108]

Under current law, criminal liability can be imposed for incitement to hatred, or for attacks on human dignity against individuals or groups determined by nationality, race, religion, or ethnic origin.[109] Some of these provisions require showing a threat to public peace, while others do not.[110] But even when such a showing is necessary, it imposes a standard that is easily met,[111] in sharp contrast to the American requirement of proof of an incitement to violence.

Perhaps the most notorious and controversial offshoot of Germany's attempts to combat hate speech relate to the prohibitions against denying the Holocaust, or to use a literal translation of the German expression, to engage in the "Auschwitz lie."[112] Attempts to combat Holocaust denials raise difficult questions not only concerning the proper boundaries between fact and opinion, but also concerning the limits of academic freedom.

These issues came before the Constitutional Court in the

[104] *Id.*

[105] *Id.*

[106] *See* Kübler, *supra* note 7, at 340.

[107] For an account of the most important changes, see *id.* at 340-47.

[108] *See id.* at 343-44.

[109] *See id.* at 344.

[110] *Id.* at 345.

[111] *See id.* at 344, n.32.

[112] *Id.* at 344-46.

Holocaust Denial Case in 1994.[113] This case arose as a consequence of an invitation to speak at a public meeting issued by a far right political party to David Irving, a revisionist British historian who has argued that the mass extermination of Jews during the Third Reich never took place. The government conditioned permission for the meeting on assurance that Holocaust denial would not occur, stating that such denial would amount to "denigration of the memory of the dead, criminal agitation, and, most important, criminal insult, all of which are prohibited by the Criminal Code."[114] Thereupon, the far right party brought a complaint alleging an infringement of its freedom of expression rights.

Relying on the distinction between fact and opinion and emphasizing that demonstrably false facts have no genuine role in opinion formation, the Constitutional Court upheld the lower court's rejection of the complaint. In so doing, the Court cited the following passage from the lower court's opinion:

> The historical fact itself, that human beings were singled out according to the criteria of the so-called "Nuremberg Laws" and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special, personal relationship vis-à-vis their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception to be understood as part of a group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others, and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny these events denies vis-à-vis each individual the personal worth of [Jewish persons]. For the person concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him.[115]

In short, given the special circumstances involved, Holocaust denial is seen as robbing the Jews in Germany of their individual and collective identity and dignity, and as threatening to undermine the rest of the population's duty to maintain a social and political environment in which Jews and the Jewish community can feel themselves to be an integral part.

Holocaust denial in relation to the Jews in Germany presents a very special case. But what about the fact/opinion distinction in

[113] 90 BVerfGE 241 (1994).
[114] KOMMERS, *supra* note 94, at 383.
[115] *Id.* at 386.

other contexts? Or hate speech and insults against other individuals or groups?

The Constitutional Court rendered a controversial decision bearing on the fact/opinion distinction in the *Historical Fabrication Case.*[116] That case involved a book claiming that Germany was not to be blamed for the outbreak of World War II, as that war was thrust upon it by its enemies. The Court held that the book's claim amounted to an "opinion"—albeit a clearly unwarranted one—and was thus within the realm of protected speech.[117] While who is to blame for the outbreak of the war is clearly more a matter of opinion than whether or not the Holocaust took place, the line between fact and opinion is by no means as neat as the Constitutional Court's jurisprudence suggests. For example, is admission of the Holocaust coupled with the claim that the Jews brought it on themselves a protected opinion or such a gross distortion of the facts as to warrant equating the "opinion" involved with assertion of patently false facts?

Insults linked to false statements targeting groups other than Jews was at the core of the Constitutional Court's decision in the *Tucholsky I Case*,[118] which dealt with display of a bumper sticker on a car with the slogan "soldiers are murderers." The bumper sticker in question had been displayed by a social science teacher who was a pacifist and who objected to Germany's military role in the 1991 Gulf War. Moreover, the above slogan had a long pedigree in German history as it was the creation of the writer Kurt Tucholsky, an Anti-Nazi pacifist of the 1930s who was stripped of his German citizenship in 1933.

The lower court interpreting the slogan literally found it to be a defamatory incitement to hatred which assaulted the human dignity of all soldiers. By asserting that all soldiers are murderers, the slogan cast them as unworthy members of the community. Based on this analysis, the social science teacher was fined for violating the criminal code's prohibition against incitement to hatred against an identifiable group within society.

The Constitutional Court, construing the slogan as an expression of opinion, held it to be constitutionally protected speech. In so doing, the Court asserted that the slogan should not be construed literally. Emphasizing that the slogan had been displayed next to a photograph from the Spanish Civil War showing a dying soldier who had been hit by a bullet accompanied by an inscription of the word "why?"; the Court interpreted the

[116] 90 BVerfGE 1 (1994).
[117] *See* KOMMERS, *supra* note 94, at 387.
[118] 21 EuGRZ 463-65 (1994).

message of the slogan as casting soldiers as much as victims as it had as killers. Accordingly, the slogan could be interpreted as an appeal to reject militarism, by asking why society forces soldiers—who are members of society as everyone else—to become potential murderers and to expose them to becoming victims of murder.

The Constitutional Court's decision provoked an angry reaction among politicians, journalists and scholars.[119] The Court revisited the issue as it reviewed other criminal convictions in cases involving statements claiming that "soldiers are murderers" or "soldiers are potential murderers," in its 1995 *Tucholsky II Case*.[120] Noting that the attacks involved were not against any particular soldier but against soldiers as agents of the government, the Court reiterated that the statements involved amounted to constitutionally protected expressions of opinion rather than to the spreading of false facts. The Court recognized that public institutions deserve protection from attacks that may undermine their social acceptance. Nonetheless, the Court concluded that the right to express political opinions critical or even insulting to political institutions, rather than to any segment of the population, outweighed the affected institutions' need for protection.

These two decisions illustrate some of the difficulties involved in drawing cogent lines between fact and opinion, and between acceptable—and in a democracy indispensable—political criticism and inflammatory excesses threatening the continued viability of public institutions. This notwithstanding, in Germany the prohibitions against hate speech are firmly grounded. The only open questions concern their constitutional boundaries in cases that do not involve anti-Semitism or the Holocaust.

D. *International Covenants*

Freedom of speech is protected as a fundamental right under all the major international covenants on human rights adopted since the end of World War II, such as the 1948 U.N. Universal Declaration of Human Rights,[121] the 1966 United Nations Covenant on Civil and Political Rights (CCPR),[122] and the 1950

[119] *See* KOMMERS, *supra* note 94, at 392-93.
[120] *Id.* at 393.
[121] *See* BASIC DOCUMENTS ON HUMAN RIGHTS 25 (Ian Brownlie, Q.C. ed., 3rd ed. 1992) (setting forth the text for Article 19 of the 1948 Universal Declaration of Human Rights).
[122] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 19, 999 U.N.T.S. 171, S. EXEC. DOC. E, 95-2 (1978) (entered into force Mar. 23, 1976).

European Convention on Human Rights (ECHR).[123] These covenants, however, do not extend protection to all speech, and some such as the CCPR specially condemn hate speech.[124] A particularly strong stand against hate speech, which includes a command to states to criminalize it, is promoted by Article 4 of the 1965 International Convention on the Elimination of All forms of Racial Discrimination (CERD) Article 4 provides in relevant part, that:

> State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. . . .
> [State Parties] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination . . . and also the provision of any assistance to racist activities, including the financing thereof. . . .
> Shall declare illegal and prohibit organizations . . . and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law. . . .

The United States attached a reservation to its ratification of CERD, since compliance with Article 4 would obviously contravene current American free speech jurisprudence.[125]

International bodies charged with judicial review of hate speech cases have, by and large, embraced positions that come much closer to those prevalent in Germany than to their United States counterpart. For example, in *Faurisson v. France*,[126] the U.N. Human Rights Committee upheld the conviction of Faurisson under France's "Gayssot Act" which makes it an offence to contest the existence of proven crimes against humanity. Faurisson, a French university professor, had promoted the view that the gas chambers at Auschwitz and other Nazi camps had not been used for the purposes of extermination, and claimed that all the people in France knew that "the myth of the gas chambers is a dishonest fabrication."

The Human Rights Committee decided that Faurisson's

[123] European Convention on Human Rights and Fundamental Freedoms [ECHR], Nov. 4, 1950, art. 10(2), 213 U.N.T.S. 221.
[124] *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 20(2), 999 U.N.T.S. 171, S. EXEC. DOC. E, 95-2 (1978)
[125] *See* Kübler, *supra* note 7, at 357.
[126] U.N. GAOR, Hum. Rts. Comm., 58th Sess., Annex, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

conviction for having violated the rights and reputation of others was consistent with the free speech protection afforded by Article 19 of CCPR. Since Faurisson's statements were prone to foster anti-Semitism, their restriction served the legitimate purpose of furthering the Jewish community's right "to live free from fear of an atmosphere of anti-[S]emitism."

Notwithstanding its support for Faurisson's conviction, the Human Rights Committee noted that the "Gayssot Act" was overly broad in as much as it prohibited publication of bona fide historical research which would tend to contradict some of the conclusions arrived at the Nuremberg trials. Thus, whereas suppression of demonstrably false facts likely to kindle hatred is consistent with United Nations standards, suppression of plausible factual claims or of opinions based on such facts would not be justified even if it happened to lead to increased anti-Semitism.

The European Court of Human Rights has also upheld convictions for hate speech as consistent with the free speech guarantees provided by Article 10 of the ECHR. An interesting case in point is *Jersild v. Denmark*.[127] The Danish courts had upheld the convictions of members of a racist youth group who had made derogatory and degrading remarks against immigrants, calling them among other things, "niggers" and "animals," and that of a television journalist who had interviewed the youths in question and broadcast their views in the course of a television documentary that he had edited. The journalist appealed his conviction to the European Court, which unanimously stated that the convictions of the youths had been consistent with ECHR standards, but which by a twelve to seven vote held that the journalist's conviction violated the standards in question.

The convictions of the youths for having treated a segment of the population as being less than human were consistent with the limitations on free speech for "the protection of the reputation or rights of others" imposed by Article 10 of the ECHR.[128] The conviction of the journalist for aiding and abetting the youths had been premised on the finding that the broadcast had given wide publicity to views that would otherwise have reached but a very small audience, thus exacerbating the harm against the targets of the hate message. The European Court's majority stressed that the journalist had not endorsed the message of his racist interviewees; and had tried to expose them and their message in terms of their social milieu, their frustrations, their propensity to

[127] App. No. 15890/89, 19 Eur. Ct. H.R. Rep. 1 (1995) (Commission report).

[128] *See* European Convention on Human Rights and Fundamental Freedoms [ECHR], Nov. 4, 1950, art. 10(2), 213 U.N.T.S. 221.

violence and their criminal records as posing important questions of public concern; concluding that conviction had been disproportionate in relation to the permissible aim of protecting the rights and reputations of the target group because the journalists had no intent of promoting hatred, the legitimacy of his conviction turned on a balancing of his expression rights in reporting facts and conveying opinions about them and the harms imposed by the hate message on its targets. Both the majority and the dissenters on the European Court agreed that balancing was the proper approach. They disagreed, however, concerning how much weight should be borne by the competing interests involved. From the standpoint of the dissenters, the majority placed too much weight on the journalist's expression rights and too little on the protection of the dignity of the victims of hatred. The dissenters emphasized the fact that the journalist had edited down the interviews to the point of principally highlighting the racial slurs, and that he had at no point in the documentary expressed disapproval or condemnation of the statements uttered by his interviewees.

In the end, the disagreements between the majority and the dissent in *Jersild* center on the proper interpretation to be given to the general tenor of the documentary and to the attitude displayed in it by the journalist through his interviews and reports. Accordingly, just as it became plain in the context of hate speech regulation in Germany, prohibitions against crude insults and patently false statements of fact generally seem legally manageable. On the other hand, issues depending on opinions or on drawing the often elusive line between fact and opinion, present much more troubling questions. With this in mind and in light of the different approaches to hate speech outlined above, it is now time to explore how best to deal with hate speech in the context of contemporary constitutional concerns.

IV. CONFRONTING THE CHALLENGES OF HATE SPEECH IN CONTEMPORARY CONSTITUTIONAL DEMOCRACIES: OBSERVATIONS AND PROPOSALS

The preceding analysis reveals that protection of hate speech as well as its prohibition raise serious and difficult problems. Not all hate speech is alike, and its consequences may vary from one setting to another. Furthermore, to the extent that hate speech produces harms that are not immediate, these may be uncertain and hard to measure. The impact of hate speech also seems to

depend to a significant extent on the medium of its communication. Thus, an oral communication to a relatively small audience at Speakers' Corner in London's Hyde Park should not be automatically lumped together with a posting on the Internet available worldwide on the web.

The two contrasting approaches to hate speech adopted by the United States and by other Western democracies each has certain advantages and drawbacks. The main advantage of the American approach is that it makes for relatively clear cut boundaries between permissible and impermissible speech. And, at least in cases in which hate speech poses little threat to its targets and its message is repudiated by an overwhelming majority of its non-target audience, as in the Skokie case, tolerance may be preferable. Indeed in that case, the dangers stemming from suppression and possible spread underground of hate speech would seem to outweigh the harm from unconstrained communication.

The chief disadvantage of the American approach is that it is not attuned to potentially serious harms that may unfold gradually over time or have their greatest immediate impact in remote places. In addition, the American approach tends to remain blind to the considerable potential harm that hate speech can cause to the equality and dignity concerns of its victims or the attitudes and beliefs of non-target audiences. The latter groups may reject the explicit appeal to hate but nonetheless be influenced by the more diffuse implicit message lurking beneath the surface of that appeal.[129]

The principal advantage to the approach to hate speech prevalent outside the United States is that it makes for unequivocal condemnation of it as morally repugnant, and at least in some cases, such as in the United Kingdom's efforts against the spread of fascist hate propaganda discussed above, it can play an important role in the struggle against extremist anti-democratic political movements. Furthermore, as exemplified by contemporary Germany's steadfast and continuous pursuit against anti-Semitic hate propaganda, vigorous prohibition and enforcement can bolster the security, dignity, autonomy and well being of the target community while at the same time reminding non-target groups and society at large that the hate message at

[129] This may have occurred for many whites in connection with the *R.A.V.* case. *See* discussion *supra* note 101. These whites most likely found the cross burning repugnant, but nonetheless did not want to live in a racially mixed neighborhood. They may even have hidden that belief from themselves by rationalizing that it is better to have a racially segregated neighborhood to avoid the kind of ugly violence exemplified by cross burning.

stake is not only repugnant and unacceptable, but that it will not be tolerated, and that those who are bent on spreading it will be punished.

The principal disadvantages to the approach to hate speech under consideration, on the other hand, are: that it inevitably has to confront difficult line drawing problems, such as that between fact and opinion in the context of the German scheme of regulation; that when prosecution of perpetrators of hate speech fails, such as in the British *Southern News* case discussed above,[130] regulation may unwittingly do more to legitimate and to disseminate the hate propaganda at issue than a complete absence of regulation would have;[131] that prosecutions may be too selective or too indiscriminate owing to (often unconscious) biases prevalent among law enforcement officials, as appears to have been the case in the prosecutions of certain black activists under the British Race Relations Act;[132] and, that since not all that may appear to be hate speech actually is hate speech—such as the documentary report involved in *Jersild*[133] or a play in which a racist character engages in hate speech, but the dramatist intends to convey an anti-hate message—regulation of that speech may unwisely bestow powers of censorship over legitimate political, literary and artistic expression to government officials and judges.

In the last analysis, none of the existing approaches to hate speech are ideal, but on balance the American seems less satisfactory than its alternatives. Above all, the American approach seems significantly flawed in some of its assumptions, in its impact and in the message it conveys concerning the evils surrounding hate speech. In terms of assumptions, the American approach either underestimates the potential for harm of hate speech that is short of incitement to violence, or it overestimates the potential of rational deliberation as a means to neutralize calls to hate. In terms of impact, given its long history of racial tensions, it is surprising that the United States does not exhibit greater concern for the injuries to security, dignity, autonomy and well being which officially tolerated hate speech causes to its black minority. Likewise, America's hate speech approach seems to unduly discount the pernicious impact that racist hate speech may

[130] *See supra* note 85.

[131] This disadvantage should not be overestimated, however. Indeed, if most prosecutions against a certain type of hate succeed and only a few fail, then conceivably prohibition may on the whole be preferable to freedom spread through lack of regulation.

[132] *See* Race Relations Act, 1976 (Eng.), *cited in* D.J. WALKER & MICHAEL J. REDMAN, RACIAL DISCRIMINATION: A SIMPLE GUIDE TO THE PROVISIONS OF THE RACE RELATIONS ACT OF 1976 *passim* (1977).

[133] App. No. 15890/89, 19 Eur. Ct. H.R. Rep. 1 (1995) (Commission report).

have on lingering or dormant racist sentiments still harbored by a non-negligible segment of the white population.[134] Furthermore, even if we discount the domestic impact of hate speech, given the worldwide spread of locally produced hate speech, such as in the case of American manufactured Neo-Nazi propaganda disseminated through the worldwide web, a strong argument can be made that American courts should factor in the obvious and serious foreign impact of certain domestic hate speech in determining whether such speech should be entitled to constitutional protection. Finally, in terms of the message conveyed by refusing to curb most hate speech, the American approach looms as a double-edged sword. On the one hand, tolerance of hate speech in a country in which democracy has been solidly entrenched since independence over two hundred years ago conveys a message of confidence against both the message and the prospects of those who endeavor to spread hate.[135] On the other hand, tolerance of hate speech in a country with serious and enduring race relations problems may reinforce racism and hamper full integration of the victims of racism within the broader community.[136]

The argument in favor of opting for greater regulation of hate speech than that provided in the United States rests on several important considerations, some related to the place and function of free speech in contemporary constitutional democracies, and others to the dangers and problems surrounding hate speech. Typically, contemporary constitutional democracies are increasingly diverse, multiracial, multicultural, multireligious and multilingual. Because of this and because of increased migration, a commitment to pluralism and to respect of diversity seem inextricably linked to vindication of the most fundamental individual and collective rights. Increased diversity is prone to making social cohesion more precarious, thus, if anything, exacerbating the potential evils of hate speech. Contemporary democratic states, on the other hand, are less prone to curtailing

[134] In this connection, it is significant that following a steep rise in racist incidents involving hate speech on university campuses throughout the United States, several universities, including the University of Michigan and Stanford University adopted regulations against hate speech. These were, however, struck down as unconstitutional by lower courts because they restricted speech falling short of the incitement to violence standard. *See* Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); Corry v. Stanford, No. 74039 (Cal. Super. Ct. Santa Clara Co. Feb., 27, 1995) (applying constitutional standard incorporated in state law and made applicable to private universities).

[135] This is the view defended in BOLLINGER, *supra* note 18.

[136] For a discussion of the uses of tolerance of hate speech to promote existing racism, see Rosenfeld, *supra* note 55, at 1457, 1487.

free speech rights than their predecessors either because of deeper implantation of the democratic ethos or because respect of supranational norms has become inextricably linked to continued membership in supranational alliances that further vital national interests.

In these circumstances, contemporary democracies are more likely to find themselves in a situation like stage four in the context of the American experience with free speech rather than in one that more closely approximates a stage one experience.[137] In other words, to drown out minority discourse seems a much greater threat than government prompted censorship in contemporary constitutional democracies that are pluralistic. Actually, viewed more closely, contemporary pluralistic democracies tend to be in a situation that combines the main features of stage two and stage four. Thus, the main threats to full fledged freedom of expression would seem to come primarily from the "tyranny of the majority" as reflected both within the government and without, and from the dominance of majority discourses at the expense of minority ones.

If it is true that majority conformity and the dominance of its discourse pose the greatest threat to uninhibited self-expression and unconstrained political debate in a contemporary pluralist polity, then significant regulation of hate speech seems justified. This is not only because hate speech obviously inhibits the self-expression and oopportunity of inclusion of its victims, but also, less obviously, because hate speech tends to bear closer links to majority views than might initially appear. Indeed, in a multicultural society, while crude insults uttered by a member of the majority directed against a minority may be unequivocally rejected by almost all other members of the majority culture, the concerns that led to the hate message may be widely shared by the majority culture who regard of other cultures as threats to their way of life. In those circumstances, hate speech might best be characterized as a pathological extension of majority feelings or beliefs.

So long as the pluralist contemporary state is committed to maintaining diversity, it cannot simply embrace a value neutral mindset, and consequently it cannot legitimately avoid engaging in some minimum of viewpoint discrimination. This is made clear by the German example, and although the German experience has been unique, it is hard to imagine that any pluralist constitutional democracy would not be committed to a similar position, albeit to a lesser degree.[138] Accordingly, without adopting German free

[137] *See supra* notes 22-29 and accompanying test.

[138] This includes even the United States, which for all its professed commitment to a

speech jurisprudence, at a minimum contemporary pluralist democracy ought to institutionalize viewpoint discrimination against the crudest and most offensive expressions of racism, religious bigotry and virulent bias on the basis of ethnic or national origin.

Rejection of a content-neutral approach to speech does not contravene the four philosophical justifications of free speech discussed above, but it does somewhat alter the nature and scope of speech protected under some of them. In terms of the justification from democracy, whereas tolerating hate speech is not inherently at odds with maintaining a free speech regime compatible with the flow of ideas required to sustain a well functioning democracy, it is inconsistent with the smooth functioning of a democracy marked by an unswerving commitment to pluralism. Accordingly, either the justification from democracy is regarded as constrained by the need to sustain pluralism, or conceived as linked to a particular kind of democracy grounded on pluralism. In either case, in a polity committed to pluralism, hate speech could not conceivably contribute in any legitimate way to democracy.

A similar argument can be advanced in relation to the justification from social contract. Either commitment to pluralism is not subject to alteration through agreement, or it is assumed that preservation of basic individual and collective dignity is in the self-interest of every contractor, and thus not prone to being bargained away in the course of agreeing to any viable pact. Consequently, hate speech could be safely banned without affecting the integrity of the social contract justification.

In view of the earlier discussion of the justification from autonomy,[139] it is obvious that it goes hand in hand with a ban against hate speech so long as the autonomy of speakers and listeners is given equal weight. In other words, if autonomy is taken as requiring dignity and reciprocity, then it demands banning hate speech as an affront against the basic rights of its targets.

free speech jurisprudence anchored on viewpoint neutrality, has in certain cases upheld restrictions on speech that seem based on viewpoint bias. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 544-45 (1951) (Frankfurter, J., concurring) (characterizing clearly political speech of members of the Communist Party advocating—but not inciting to violence or creating any imminent present danger of—the violent overthrow of the government as speech that ranks "low" "on any scale of values which we have hitherto recognized"). This confuses the *category* of speech involved, namely political speech, which has traditionally been ranked as the highest, and the *content* of the speech, which had been indeed rejected as repugnant by the vast majority of Americans.

[139] *See supra* note 43 and accompanying text.

Unlike the above justifications, the pursuit of truth does not depend on whether or not one embraces pluralism. Nevertheless, if one rejects the presumptions made by Mill and Holmes, the banning of hate speech can be amply reconciled with commitment to the pursuit of truth. The justification for rejecting the Millean and Holmesian presumptions has been persuasively made by the Canadian Supreme Court in the *Keegstra* case discussed above.[140] Moreover, banning definitively proven falsehoods, such as unequivocal denial of the Holocaust, cannot conceivably hinder pursuit of the truth.

Opinion based hate speech may not be as convincingly dismissed, but it is difficult to see how hate speech in form could contribute to furthering the truth. The same cannot automatically be said about the broader message lurking beneath hate-based opinion. Thus a racist belief or opinion may be based on fears or concerns which may not themselves be worthless from the standpoint of pursuit of the truth. For example, sentiments against recent immigrants belonging to different races or cultures may stem from fears of challenges against one's economic security and cultural values. Whether and to what degree such fears may be warranted are certainly questions which ought to be freely discussed from the standpoint of pursuit of the truth. Consistent with this, special caution should be exercised when dealing with what appears to be hate speech in substance, but is not hate speech in form.

From a theoretical standpoint, it is quite possible to draw a bright line between fears and concerns and racist animus. Arguing that immigration from a former colony should be curtailed because it will result in a loss of jobs among the natives and result in undesired changes in the local culture is certainly distinguishable from the hate message that the immigrants in question are "animals" who should be shipped back to their country of origin,[141] even if one recognizes that the former message is implicitly incorporated into the latter. Because of the ambiguity and openness to several inconsistent interpretations of some messages which may plausibly amount to hate speech in substance, the above mentioned line may not always be easy to draw in practice. As we shall examine below, that standing alone does not afford a good reason for tolerating all opinion-based hate speech. In short, whether couched as hate speech in form or as hate speech in

[140] See *supra* Part III.A and accompanying notes for a discussion of the *Keegstra* case.

[141] *Cf.* Jersild v. Denmark, App. No. 15890/89, 19 Eur. Ct. H.R. Rep. 1 (1995) (Commission report). For a discussion of *Jersild*, see *supra* Part III.D and accompanying notes.

substance, expressions of racial animus do not advance the search for the truth and thus do not call for protection from the standpoint of the justification from pursuit of the truth.[142]

Although consistent with the four philosophical justifications of freedom of speech, to become fully acceptable from a practical standpoint, regulation of hate speech must cope satisfactorily with the vexing problems identified in our review of current regulation outside the United States. The principal problems encountered involve line drawing, bias, difficulties in interpretation leading to suppression of speech deserving of protection and/or to toleration of certain hate messages, and facilitation of government or majority driven censorship.

Most of these problems are raised in the prevalent American criticism against regulation based on the so called "slippery slope" argument.[143] Pursuant to this argument, since it is impossible to draw neat lines imposing verifiable constraints on judges and legislators, once the door to regulation is open ever so slightly it is bound gradually to open wider, eventually allowing for censorship of all kinds of legitimate yet unpopular speech. Accordingly, failure to confront the "slippery slope" problem may lead to dangerous erosion of free speech.

Unless one adopts a Holmesian view of speech,[144] the "slippery slope" argument is largely unpersuasive, and this seems particularly true in the context of hate speech. Indeed, in many cases, such as those involving Holocaust denial, cross burning, displaying swastikas, and calling immigrants "animals," there do not appear to be any line drawing problems. These cases involve clearly recognizable expressions of hate which constitute patent assaults against the dignity of those whom they target, and which fly in the face of even a cursory commitment to pluralism. On the other hand, there are cases of statements, which some groups may find objectionable or offensive, but which raise genuine factual or value based issues, and which ought therefore be granted protection. For example, strong criticism of the Pope for his opposition to contraception and to homosexual relationships as being "indifferent to human suffering caused by overpopulation and an enemy of human dignity for all" may be highly offensive to Catholics, but even in a country where Catholics are a religious minority should clearly not be officially censored, punished or

[142] In this connection, it is important to distinguish between *expression* of racial animus and *reporting* such animus. Conveying information concerning whether one is a racist, as opposed to uttering racial epithets, can of course contribute to discovery of the truth.

[143] *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

[144] *See supra* notes 39-42 and accompanying text.

characterized as hate speech.

There is of course a gray area between these two fairly clear cut areas, in which there are difficult line drawing problems, as exemplified by the German controversy over the claim that "soldiers are murderers."[145] Line drawing problems, however, are quite common in law as they tend to arise whenever a scheme of regulation attempts to draw a balance among competing objectives. Such line drawing problems may well be exacerbated when a fundamental right like free speech is involved, but that justifies, at most, deregulating the entire gray area, not toleration of all hate speech falling short of incitement to violence.

In the last analysis, the best way to deal with the problems likely to arise in connection with regulation of hate speech is to approach them consistent with a set of fundamental normative principles, and in light of key contextual variables. In other words, the standards of constitutionally permissible regulation of hate speech should conform to fundamental principles that transcend geographical, cultural and historical differences,[146] and at the same time remain sufficiently open to accommodate highly relevant historical and cultural variables. The fixed principles involved are openness to pluralism and respect for the most elementary degree of autonomy, equality, dignity and reciprocity.[147] The variables, on the other hand, include the particular history and nature of discrimination, status as minority or majority group, customs, common linguistic practices, and the relative power or powerlessness of speakers and their targets within the society involved.

To minimize difficulties and to reduce the possibility of bias, regulation of hate speech should focus on efforts to reconcile the fixed principles and the relevant variables. This focus should determine, among other things, how far within the gray area regulation should extend. Thus, for example, given their different historical experiences with anti-Semitism, it seems reasonable that

[145] *See supra* notes 119-20 and accompanying test.

[146] That does not necessarily mean that these are universal, only that they ought to be common to contemporary pluralist constitutional democracies. For a more extended discussion of the question of universalism of human rights, see Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249 (1999).

[147] This standard establishes a bare minimum which seems adequate in the context of speech regulation, but not in that of government policy. For example, this standard would allow for criticism of a particular religion on the grounds it is too restrictive, an enemy of progress, or indifferent to the rights of women. While these statements may offend believers, it cannot be fairly said that they deprive them of the most elementary degree of dignity. However, a government policy attacking such religion, or making it difficult for its adherents to freely practice it would require meeting a much higher standard.

Germany should go further than the United States in prohibiting anti-Semitic speech that falls within the gray area. Although American and German Jews are entitled to the same degree of dignity and inclusion within their respective societies, greater restrictions on anti-Semitism are required in Germany than in the United States in order to achieve comparable results.

Recourse to the above mentioned approach is also likely to minimize bias in the regulation of hate speech. One way in which this can be achieved is by taking into account historically significant differences between the proponents and intended targets of hate messages. Thus, racist speech by a member of a historically dominant race against members of an oppressed race are likely to have a more severe impact than racist speech by the racially oppressed against their oppressors. Even if this does not justify selective regulation of hate speech, it does call for greater leniency when the racially oppressed is at fault, and for taking into account as a mitigating factor the fact—found in some of the British cases discussed above[148]—that the racist speech of a member of an oppressed racial group was in response to the racism perpetrated by members of the oppressor race. Furthermore, if these contextual variables are properly accounted for, it becomes less likely that majority biases will dominate prosecutorial or judicial decisions.

CONCLUSION

Hate speech raises difficult questions that test the limits of free speech. Although none of the constitutional regimes examined in these pages leaves hate speech unregulated, there are vast differences between the minimal regulation practiced in the United States and the much more extensive regulation typical of other countries and of international covenants. Both approaches are imperfect, but in a world that has witnessed the Holocaust, various other genocides and ethnic cleansing, all of which were surrounded by abundant hate speech, the American way seems definitely less appealing than its alternatives. As hate speech can now almost instantaneously spread throughout the world, and as nations become increasingly socially, ethnically, religiously and culturally diverse, the need for regulation becomes ever more urgent. In view of these important changes the state can no longer justify commitment to neutrality, but must embrace pluralism,

[148] *See* discussion *supra* Part III.B and accompanying notes.

guarantee autonomy and dignity, and strive for maintenance of a minimum of mutual respect. Commitment to these values requires states to conduct an active struggle against hate speech, while at the same time avoiding the pitfalls bound to be encountered in the pursuit of that struggle. It would of course be preferable if hate could be defeated by reason. But since unfortunately that has failed all too often, there seems no alternative but to combat hate speech through regulation in order to secure a minimum of civility in the public arena.

[12]

FREEDOM OF RELIGION AND CRIMINAL LAW: A LEGAL APPRAISAL

From the Principle of Separation of Church and State to the Principle of Pluralist Democracy?

Piet Hein van Kempen

1. Introduction: Criminal Law, Liberty, and Human Rights

Criminal law and human rights have a complicated relationship – even more so when religion or belief is involved in that relationship. The main objective of substantive criminal law is to establish and maintain the legal order of the state. From a human rights point of view, that order should be construed as the democratic state based on the rule of law. If the legal order is interfered with, substantive criminal law may actually be enforced through the procedures of criminal law. So protection of the legal order may necessarily engage the application of criminal law, at times to protect freedom of religion within that order. That, however, does not mean that criminal law may be applied whenever the order is infringed or is in danger of being breached. Criminal law is and must be regarded as a so called *ultimum remedium*, which means that conduct should only be criminalised and criminal law only applied as a last resort, i.e., if all other avenues are inadequate to remedy the infringement of the legal order. In fact, then, the *ultimum remedium* rule is a principle of subsidiarity, but a very fundamental one, for it rests on an important basic principle: negative liberty.

With Isaiah Berlin negative liberty can be explained as the absence of man-made obstacles that block human action.[1] This connotes the liberty to act as one wishes, the situation in which one is free from coercion by others. Of all law, criminal law orders and prohibitions coerce individuals and society in the most forceful way. Furthermore, criminal justice is the most severe instrument at the disposal of the authorities in a democratic state based on the rule of law in times of peace, for it can result in the ultimate consequence: deprivation of property and deprivation of freedom

[1] Berlin, Isaiah (1958), *Two Concepts of Liberty*, reprinted in: Berlin, Isaiah (2002). *Liberty*, (edited by Henry Hardy), Oxford: Oxford University Press, p. 195, and in the same edition, Berlin, Isaiah, 'Final Retrospect', p. 325.

(in some countries even of life). Criminal law thus forcefully violates negative liberty. The concept of negative liberty, on which the *ultimum remedium* principle thus rests, finds firm support in the system of human rights, both on a theoretical level and in practice. Not only are human rights, especially civil rights, based on the notion of liberty; more than that, the application of criminal law involves the infringement of human rights, regularly affecting the right to liberty, the right to privacy, and sometimes the right to freedom of speech or the right to freedom of religion. Human rights serve to protect individuals against the state, while criminal law by contrast is principally an instrument in the hands of the state to direct the individual and society. Human rights are thus primarily about freedom and criminal law primarily about restriction. From the point of view of human rights, criminal law may only be applied insofar as it meets the conditions of international and national human rights law under which it is permitted to restrict the enjoyment of human rights. This also applies with regard to the right to freedom of religion.

Interestingly, both the European and the Inter-American Court of Human Rights consider freedom of religion one of the foundations of a democratic society.[2] It has even been argued that the obligation on states not to allow an individual's religion to affect his human rights is now *jus cogens* law.[3] This would mean that it is a peremptory norm from which no derogation is ever permitted. From the point of view of the human right to freedom of religion, interference with religion by the state is therefore highly problematic, perhaps even more so than with most other human rights. Considering the nature of criminal law this seems especially to be the case whenever the state influences the right to freedom of religion by the application of criminal law.

This paper discusses how criminal law and religion should or should not be involved with each other from the point of view of the right to freedom of religion. With that in mind I shall address several interrelated questions. Section 2: what does the principle of separation of church and state require, what interests does it serve, and does it allow for criminal law measures that are explicitly concerned with matters of religion or belief? Section 3: what does the human right to freedom of religion in

[2] See *e.g.* ECtHR (GC), Judgment of 13 February 2003, Appl. 41340/98, para 90 (*Refah Partisi (the Welfare Party) v. Turkey*), respectively I-ACtHR, Judgement of 5 February 2001, para 79 (*'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile*).

[3] See Dickson, Brice (1995), 'The United Nations and Freedom of Religion', *ICLQ* vol. 44, p. 332.

general imply about the relation between state and religion? Sections 4 and 5: to what extend does the right to freedom of religion oppose, allow or require criminal law measures that deal explicitly with religion or belief? And finally, in section 6: is the principle of pluralist democracy better suited to regulating the relation between the state and religion when it comes to criminal law than the separation principle?

As regards the analyses of international human rights law, the emphasis of this contribution is the International Covenant on Civil and Political Rights (ICCPR, 1966) and the European Convention on Human Rights (ECHR, 1950). The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the 1981 UN Declaration), the American Convention on Human Rights (ACHR, 1969), and the African Charter on Human and People's Rights (AfChHPR, 1981) will only be considered insofar as these instruments or the jurisprudence based thereon provide relevant direction on the issues under discussion.[4] Finally, it is important to note that the human right to freedom of religion is generally considered to include both religion and fundamental non-religious beliefs.[5] This, in any case, is the meaning by which the right is understood here. Examples of such non-religious beliefs are atheism, agnosticism, pacifism, and communism. Mere opinions and ideas of non-belief *simpliciter* are usually not regarded as fundamental.

2. Separation of Church and State: Interests and Concepts

The principle of separation of church and state entails that state institutions and religious institutions should be separate and independent from each other. If used in a more generic sense – as I do here – the principle is about the separation of state and religion as such. This separation is often regarded as an important condition for the existence of the democratic state based on the rule of law. Another important requirement for such a state model is that the authorities recognise and secure human rights.

[4] All the human rights instruments mentioned in this contribution are published in Van Kempen, P.H.P.H.M.C. (ed.) (2010), *International and Regional Human Rights Documents*, Nijmegen, Wolf Legal Publishers.

[5] See, *e.g.*, Taylor, Paul M. (2005), *Freedom of Religion. UN and European Human Rights Law in Practice*, Cambridge: Cambridge University Press, p. 128; Evans, Malcolm D. (1997), *Religious Liberty and International Law in Europe*, Cambridge: Cambridge University Press, p. 202–204, 213–214, 231–236, 250–252, and 289–293; see on the ICCPR and the ECHR also *infra* subsections 3.1 and 3.2.

This raises the question of how the separation principle and human rights relate to each other. More specifically, what is interesting is the extent to which the human right to freedom of religion demands the separation of church and state. In order to be able to elaborate on this it is useful first to present a brief survey of different concepts of the separation principle and the interests it protects.

2.1 *Protection of Three Separation Interests*

From an historical point of view the principle of church and state can be understood as protecting several interests, of which I mention only three.

(I) First, it serves to protect institutions of religion or belief and the autonomy of their faith from the state.
(II) A second function is the protection of the state against institutions and forces of religion or belief.
(III) The principle has, furthermore, occasionally been called upon to protect the individual's freedom of personal, voluntary and autonomous choice of religion or fundamental non-religious beliefs from the intrusions of either state or institutions of faith, as well as of both working together.[6]

Fulfilment of separation interests I and II will to some extent also serve interest III, for that will protect the individual from control by the combined power of the state and institutions of religion or belief. The question is, however, whether the separation principle aims to ensure interest III beyond that inherent effect of satisfying the first two interests. In other words, does the separation principle protect the individual's freedom of religion or belief as an interest on its own? Insofar as the separation principle has a basis in the human right to freedom of religion, it almost certainly would have to, since this third interest mirrors the human right of freedom of religion rather explicitly. So one next has to see whether the separation principle is being adopted under international human rights law to protect the right to freedom of religion. Meanwhile, the concurrence between interest III and this human right definitely does not mean that interests I and II would not be relevant to the right, too. All interests are relevant to the right of freedom of religion, as is explained below in the

[6] See Witte, John (2006), 'Facts and Fictions About the History of Separation of Church and State', *Journal of Church and State* vol. 48, p. 15–46. He recognises in total five concerns in the name of separation of church and state.

discussion of the ICCPR, the ECHR as well as the ACHR and the AfChHPR, which is when consideration will also be given to how, and the extent to which the protection of these three interests is achieved via the separation principle.

2.2 *Three Concepts of Separation*

That a separation between church and state advances protection of the aforementioned interests says little about what such separation actually involves. Frequently, three major concepts or levels of separation are recognised: strict separation, neutrality and accommodation.[7] Within each of these concepts two dimensions should be recognised: the degree to which state action either burdens or favours religion and fundamental non-religious belief, respectively the degree of identification between the state and institutions of religion or belief.[8]

Strict separation then demands that the state does not interfere with the affairs of these institutions and that the state and the public domain are completely free from religion and belief. The institutions may not be aided by the state and in principle neither may they be burdened by it. In this concept the state is secular in nature and it maintains the largest possible distance from religion.[9] So this concept in particular leaves no room for the state to endorse criminal law measures that expressly aim to protect or repress religion or belief, the more so because criminal law must already in general be regarded as an *ultimum remedium*.

This does not necessarily hold for the concept of neutrality. This second concept above all implies impartiality towards religions, denominations and beliefs. When the state involves itself with these matters it should do so in a way that does not favour one faith over another. The consequence

[7] Cf. Chemerinsky, Erwin (2008), 'Why Church and State should be Separate', *Wm. & Mary L. Rev.* vol. 49, p. 2196–2198; Goldschmidt, Jenny E. & Titia Loenen (2007), 'Religious Pluralism and Human Rights in Europe: Reflections for Future Research', in Loenen, Titia & Jenny E. Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, Antwerpen – Oxford: Intersentia, p. 314. See for a greater variety of models Ahdar, Rex & Ian Leigh (2005), *Religious Freedom in the Liberal State*, Oxford: Oxford University Press, p. 67–97.

[8] On these two dimensions, see Durham, Cole (1996), 'Perspectives on Religious Liberty: A Comparative Framework', in Van der Vyver, Johan D. & John Witte, *Religious Human Rights in Global Perspective: Legal Perspectives*, The Hague: Martinus Nijhoff Publishers, p. 448–449.

[9] On the term secularisation, see Joas, Hans (2006), 'Does Modernisation lead to Secularisation?', in Joas, Hans & Alan Wolfe, *Beyond the Separation between Church and State? (WRR-Lecture 2006)*, The Hague: WRR/Scientific Council for Government Policy, p. 17–18.

of this is that the state may not be related to a certain religion or belief. Within this concept the state may therefore apply criminal law measures that are explicitly concerned with matters of religion or belief, provided these measures do not benefit or burden any of the religions and beliefs over any other.

The least demanding separation is offered by the concept of accommodation. This primarily holds that the state may not establish an institution of religion or belief, nor may it coerce anyone to participate in any religion or belief. The state can, however, be substantially involved with religions and beliefs, and it can even be permissible under this concept for a state to align itself with a particular faith. So under this third concept it is acceptable for a state to indentify itself with a certain religion or belief, and to present the common history and tradition of faith and state in its affairs. That might even mean that criminal law is applied in order to afford special protection to a particular religion or belief. It can be argued that this separation concept in fact does not constitute a separation between religion and state, partly because in this concept the state is not impartial and furthermore it is not actually independent of all religious institutions, particularly not in appearance.

The question now is whether the separation of church and state in any form is required in international (global and regional) human rights law. Insofar this is the case I shall explore which vision of the separation of church and state in general ensues from human rights law. While doing so it is of course necessary to understand that many variations of the principle of separation of church and state can be found in between the three major concepts just described. Subsequently a look will also be taken at the extent to which the three interests discussed above – *viz.*, protection of institutions of religion or belief (I), of the state (II), and of the personal faith of the individual (III) – are reflected and ensured in human rights provisions on the freedom of religion and the associated case law. In this respect it is important to note that all international human rights treaties primarily aim to protect individual rights against intrusion by state authorities. It is thus to be expected that international jurisprudence on the freedom of religion is on any account directly concerned with one side of separation interest III, i.e. the protection of individuals in their relation to the state, and to some extent with separation interest I, i.e., the protection of religious institutions against the state. What is interesting now is whether protection against religious institutions is also afforded by international human rights law to individuals (the other side of separation interest III), and to the state (separation interest II).

3. The Separation of Church and State in International Human Rights Jurisprudence

The right to freedom of religion is globally guaranteed in Articles 18 and 27 ICCPR[10] and regionally in Article 10 ECHR, Article 12 ACHR, and Article 8 AfChHPR. None of these provisions expressly requires the separation of church and state.

3.1 *The ICCPR*

Nevertheless, at least a crucial requirement of the concept of separation at the lowest level – accommodation – is mirrored in Article 18 ICCPR, when this provision emphasises that 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.' It has been made clear by the Human Rights Committee (HRC) that this applies equally to theistic, non-theistic and atheistic beliefs, as well as to the right not to profess any religion or belief.[11] Furthermore, the freedom to have or to adopt a religion or belief necessarily entails the freedom to choose a religion or belief, to retain one's religion or belief, to change one's religion or belief, and to adopt atheistic views.[12] So the state may not in any way limit these rights nor ever coerce individuals in any of these directions. The Committee is clearly in favour, however, of a higher level of separation. Indeed, the HRC accepts situations in which a certain religion is recognised as a state religion or one that is established as official or traditional.[13] But it is critical of this.[14] The Committee demands that the distinction between the state church and other churches is at least

[10] See also Article 2 (general state obligations), Article 4 (emergency), Article 20 (prohibition of religious hatred), Article 24 (rights of the child), and Article 26 (equal protection) ICCPR.

[11] HRC, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (Article 18)', 30 July 1993, para 2. See also HRC, View of 15 July 2003, Comm. 878/1999, para 7.2 (*Kang v. Republic of Korea*).

[12] HRC, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (Article 18)', 30 July 1993, para 5; see also para 8.

[13] The Committee on the Elimination of Discrimination against Women seems to employ a stronger requirement when it speaks of the obligation 'to ensure the *de facto* separation of the secular and religious spheres'; see CEDAW, Concluding Observations, *Dominican Republic*, CEDAW A/53/38/Rev.1 vol I (1998), para 351.

[14] Cf. recently HRC, Concluding observations, *Georgia*, CCPR A/63/40 Vol. I (2009), para 72 (15), and furthermore, *e.g.*, HRC, Concluding observations, *Norway*, CCPR A/33/40 (1978), para 240; HRC, Concluding observations, *Norway*, CCPR A/36/40 (1981), para 366; HRC, Concluding observations, *Costa Rica*, A/49/40 vol. 1 (1994), para 158; HRC, Concluding Observations, *Finland*, CCPR A/41/40 (1986), para 210–213.

objective and reasonable and it even dared to hint at total separation.[15] Coalitions between the state and a church may in any event not result in any impairment of the enjoyment of rights to freedom of religion nor in any discrimination against adherents to other religions or non-believers (see also Article 26 ICCPR on non-discrimination).[16] Thus it is permitted to aid religions as long as this does not favour one religion over others.[17] On the other hand, the separation of church and state may not pushed too far. It may not be applied in such a manner that it becomes broadly impossible to manifest one's religion in public, as was made clear in a French case on the prohibition against attending public schools while wearing so-called "conspicuous" religious symbols. The Committee held that *laïcité* (the French concept of the separation principle) would not seem to require forbidding wearing such common religious symbols as a skullcap (or *kippah*), a headscarf (or *hijab*), or a turban.[18] Eventually the HRC seems to support a pluralist view of society.[19]

In view of the purpose of international human rights law it is no surprise that the jurisprudence of the Human Rights Committee on the freedom of religion is indeed particularly troubled with the protection of individuals against the state, being one side of separation interest III. Thus the application by the state of an 'ideology conversion system' in order to induce change of prisoners' beliefs is clearly in violation of Article 18 ICCPR. The same holds true for limitations by law on inter-religious marriages. And the necessity to belong to one of the religious denominations officially

[15] HRC, Concluding Observations, *The United Kingdom*, CCPR A/46/40 (1991), para 402.

[16] HRC, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (Article 18)', 30 July 1993, para 9 and 10. On the basis of the non-binding 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, a much less demanding position is chosen by the Special Rapporteur on the implementation of this declaration: 'an official or State religion in itself is not opposed to human rights. The State should not, however, take control of religion by defining its content, concepts or limitations, apart from those which are strictly necessary, as provided in' Article 1 § 3 of the 1981 Declaration, and in Article 18 ICCPR; see E/CN.4/1996/95/Add.1 (1996) (Addendum on Pakistan), para 81.

[17] See HRC, Concluding Observations, *Israel*, CCPR/C/79/Add.93 (1998), para 28; HRC, View of 3 November 1999, Comm. 694/1996, para 10.6 (*Waldman v. Canada*).

[18] HRC, Concluding Observations, *France*, CCPR A/63/40, Vol. I (2009), para 82 (23).

[19] HRC, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (Article 18)', 30 July 1993, para 8: 'The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.'

recognised by the Government in order to be eligible to run for public office or the requirement for judges to take a religious oath before they can be appointed are also contraventions of the prohibition against state coercion under the International Covenant.[20] In a similar way, Article 18 ICCPR disallows constitutional provisions that declare that individuals professing the state religion are bound to bring up their children in the same faith.[21] With regard to the beliefs of specific individuals, then, a clear separation between church and state is obligated.

At the same time, though, these prohibitions protect the individual against institutions of religion or belief, for it prevents these from holding power over individuals via conditions in law that in fact compel persons to retain or adopt a certain religion. This protection of the other side of separation interest III is indirect, however, since the Covenant does not subdue the relation between individuals and institutions of faith as such: protection may be offered only insofar as infringement of the freedom of religion by such institutions falls within the responsibility of the state. For example, in the case of *Delgado Páez versus Colombia* the state authorities had no obligation to effect the decision by the church authorities on who could teach religion and in what manner it should be taught.[22]

Some decisions of the Committee also entail an indirect protection of separation interest II: the abovementioned prohibitions of religious conditions for public office, religious oaths for judges, and constitutional religious duties decrease the possibilities open to religious institutions to control politics and justice since it prevents the administration and the judiciary of the state from being solely in the hands of people who belong to one or more certain religions. In line with this, the autonomy of political parties is recognised under the International Covenant, in that such parties are allowed to exclude from their members individuals who adhere to a (certain) religion or belief.[23]

Finally, separation interest I – i.e. the protection of institutions of faith from the state – is on the other hand again sometimes directly safeguarded. Article 18 ICCPR does not allow the state to refuse legal recognition of religious entities unless the requirements are met for limitation of

[20] See respectively HRC, Concluding Observations, *Morocco*, CCPR/CO/82/MAR (2004), para 27; HRC, Concluding Observations, *Lebanon*, CCPR/C/79/Add.78 (1979), para 23; HRC, Concluding Observations, *Ireland*, CCPR/C/IRL/CO/3 (2008), para 21.

[21] HRC, Concluding observations, *Norway*, A/49/40 vol. 1 (1994), para 93.

[22] HRC, View of 12 July 1990, Comm. 195/1985, para 5.7 and 5.8 (*William Eduardo Delgado Páez v. Columbia*).

[23] HRC, View of 24 March 2004, Comm. 1138/2002, para 8.6 (*Arenz v. Germany*).

the right to freedom of religion.[24] Such refusal might for example be legitimate if the religious entity propagates extreme religious ideas which are in violation of criminal law or which otherwise cause serious disturbances of public order or safety.

3.2 *The ECHR*

On the basis of Article 9 ECHR the European Court of Human Rights (ECtHR) has built up a body of jurisprudence on the right to freedom of religion that is somewhat more developed than that of the Human Rights Committee. Article 9 ECHR applies to believers, atheists, agnostics, sceptics and the unconcerned,[25] and it thus includes the right to hold or not to hold religious beliefs and to practise or not to practise a religion, as well as to change one's religion or belief.[26/27] Time and again the European Court has held 'that in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial'.[28] And although the court does not expressly demand a secular state, it emphasises that the notion of secularism is consistent with the values underpinning the Convention.[29]

[24] HRC, View of 21 October 2005, Comm. 1249/2004, para 7.2–7.4 (*Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*); HRC, View of 26 July 2005, Comm. 1207/2003, para 7.2–7.6 (*Sergei Malakhovsky & Alexander Pikul v. Belarus*).

[25] ECtHR, Judgment of 25 May 1993, Appl. 14307/88, para 31 (*Kokkinakis v. Greece*); ECtHR, Judgment of 5 April 2007, Appl. 18147/02, para 71–74 (*Church of Scientology Moscow v. Russia*).

[26] ECtHR, Judgment of 8 July 2008, Appl. 40825/98, para 90 (*Religionsgemeinschaft der Zeugen Jehovas v. Austria*); ECtHR, Judgment of 13 December 2001, Appl. 45701/99, para 114 (*Metropolitan Church of Bessarabia v. Moldova*); ECtHR (GC), Judgment of 18 February 1999, Appl. 24645/94, para 34 (*Buscarini v. San Marino*).

[27] Although the ECHR – which is an instrument of the Council of Europe (CoE) – is of mayor importance to the European Union (EU) too, the union also has a general human rights instrument of its own: the 2000 Charter of Fundamental Rights of the European Union. See as regards these religion rights Article 10 of the Charter. Furthermore, these rights are also acknowledged by the Organization for Security and Cooperation in Europe (OSCE); see section 9.4 of the 1990 Document of the Copenhagen meeting of the Conference on the Human Dimension.

[28] See *e.g.*, ECtHR, Judgment of 3 May 2007, Appl. 71156/01, para 131 (*Gldani Congregation of Jehovah's Witnesses v. Georgia*); ECtHR, Judgment of 8 July 2008, Appl. 40825/98, para 97 (*Religionsgemeinschaft der Zeugen Jehovas v. Austria*); ECtHR (GC), Judgment of 18 March 2011, Appl. 30814/06, para 60 and 62 (*Lautsi v. Italy*).

[29] ECtHR (GC), Judgment of 10 November 2005, Appl. 44774/98, para 114 (*Leyla Şahin v. Turkey*); ECtHR (GC), Judgment of 13 February 2003, Appl. 41340/98, para 93 (*Refah Partisi (the Welfare Party) v. Turkey*). See also ECtHR, Judgment of 1 July 1997, Appl. 20704/92, para 27–30 (*Kalaç v. Turkey*), in which the applicants' infringement of the principle of secularism was important for the judgement of the court that the limitations on the right to manifest one's religion did not violate Article 9 ECHR.

Obviously, the Court does not mean to imply that society should be secularised in any factual-sociological respect, its consideration only connotes that secularisation is the appropriate principle on which to base the nature and organisation of the state. So with this case law the European Court seems to be clearly in favour of the second concept of separation, i.e. neutrality, but it sometimes bows to the first separation concept of strict separation. Yet that does not connote that a state that practices the third concept – accommodation – will as such be held to be violating the European Convention.[30] In common with most international courts and committees, the ECtHR only decides on the manner in which policies, laws, practices etcetera are applied to or affect a concrete individual. With that it hardly ever rules in general as to the compatibility of these domestic policies, laws and practices with the ECHR.[31] So states are silently allowed to identify or even align themselves with a particular belief, but bearing in mind the foregoing the Court is clearly not keen on such associations.[32] Some systems – such as those based on the sharia[33] – are ruled out right away by the Court as being in contradiction with the Convention system. The bottom line is that state authorities are not permitted to assess the legitimacy of religious beliefs in any way.[34] Moreover, limitations, burdens as well as privileges for religion and religious groups must be applied in a non-discriminatory manner.[35]

Ultimately, neutrality and secularism seem, however, only instrumental for the ECtHR to effect a more fundamental view of the relationship between state and religion. Rather than the HRC, the ECtHR consistently

[30] Cf. ECionHR, Report of 9 May 1989, Appl. 11581/85, para 45 (*Darby v. Sweden*): 'However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion.' See more elaborated Evans, Caroline (2001), *Freedom of religion under the European Convention on Human Rights*, Oxford: Oxford University Press, p. 80–87.

[31] Cf. ECtHR, Judgment of 25 November 1996, Appl. 17419/90, para 50 (*Wingrove/The United Kingdom*); ECtHR (GC), Judgment of 26 December 2000, Appl. 30985/96, para 77 (*Hasan & Chaush v. Bulgaria*).

[32] See also the unappreciative way in which the Court approaches the relation between the Greek authorities and Greek Orthodox Church in, *e.g.*, ECtHR, Judgment of 26 September 1996, Appl 18748/91, para 44–53 (*Manoussakis v. Greece*).

[33] ECtHR (GC), Judgment of 13 February 2003, Appl. 41340/98, para 123–128 (*Refah Partisi (the Welfare Party) v. Turkey*).

[34] See, *e.g.*, ECtHR, Judgment of 14 June 2007, Appl. 77703/01, para 113 (*Svyato-Mykhaylivska Parafiya v. Ukraine*); ECtHR (GC), Judgment of 10 November 2005, Appl. 44774/98, para 107 (*Leyla Şahin v. Turkey*).

[35] ECtHR, Judgment of 8 July 2008, Appl. 40825/98, para 92 and 96 (*Religionsgemeinschaft der Zeugen Jehovas v. Austria*); ECtHR, Judgment of 3 May 2007, Appl. 71156/01, para 140–142 (*Gldani Congregation of Jehovah's Witnesses v. Georgia*); ECtHR, Judgment of 29 November 1997, Appl. 25528/94, para 47 (*Canea Catholic Church v. Greece*).

stresses the necessity of pluralism, which is considered to be indissociable from a democratic society, the only political model contemplated in the convention and the only one compatible with it.[36,37] In case pluralism results in tension, which is considered to be an unavoidable consequence, the authorities may not remove the cause of tension by eliminating pluralism, but have to ensure that the competing groups tolerate each other.[38] So states not only have a negative obligation to refrain from interfering with matters of religion, they also have a positive duty to protect pluralism and thus protect the religious and fundamental non-religious beliefs of individuals against overly strong religious institutions, groups and other individuals. This may imply that the state has a duty to provide information capable of contributing to a debate in a democratic society on matters of major public concern by drawing attention to the dangers emanating from religious groups which were commonly referred to as sects.[39] The positive obligation may even require of the state that it dissolves a religious political party that favours policies incompatible with the standards of the Convention and democracy.[40] This is an important conclusion, since it raises the question of the extent to which positive obligations to protect pluralist democratic society may require the state to apply criminal law in order to effect such protection. So the conclusion (section 6) will consider how this positive obligation may affect the relationship between the right to freedom of religion and criminal law.

Indeed, Article 9 of the European Convention, too, first and foremost aims to guard individuals against the state. With that it at least backs up one side of separation interest III. For example, the state may not award parental rights over children to one of the parents in preference to the other

[36] See *e.g.*, ECtHR (GC), Judgment of 29 June 2007, Appl. 15472/02, para 84(b) and (h) (*Folgerø v. Norway*); ECtHR, Judgment of 5 April 2007, Appl. 18147/02, para 71–74 (*Church of Scientology Moscow v. Russia*); ECtHR (GC), Judgment of 13 February 2003, Appl. 41340/98, para 86 and 90–91 (*Refah Partisi (the Welfare Party) v. Turkey*).

[37] Notably, the concept of pluralist democracy is something different than a plurality of legal systems within a state; cf. ECtHR (GC), *Refah Partisi (the Welfare Party) v. Turkey*, para 117–128.

[38] See *e.g.*, ECtHR, Judgment of 14 December 1999, Appl. 38178/97, § 53, (*Serif v. Greece*); ECtHR, Judgment of 16 December 2004, Appl. 39023/97, para 96 (*Supreme Holy Council of the Muslim Community v. Bulgaria*).

[39] ECtHR, Judgment of 6 November 2008, Appl. 58911/00, para 96, 99 and 101 (*Leela Förderkreis E.V. v. Germany*).

[40] ECtHR (GC), Judgment of 13 February 2003, Appl. 41340/98, para 102–103 (*Refah Partisi (the Welfare Party) v. Turkey*).

parent simply because that parent is a member of a certain religious community.[41] The ECtHR has, furthermore, offered protection against criminalisation of proselytism in the case of *Kokkinakis versus Greece*, which will be discussed below.[42] More absolutely prohibited are obligations on civil servants to state that they are atheists or that their religion does not allow them to take the oath if they want to make a solemn declaration instead of taking an oath when being sworn in. The same applies to the duty of elected members in parliament to take a religious oath in order to be appointed.[43]

These examples make it clear that other interests of the separation of church and state are either directly or indirectly protected, too. As has already been explained above with regard to the Human Rights Committee's jurisprudence on similar cases, the prohibitions with regard to religious oaths also protect the individual against religious institutions (the other side of separation interest III), albeit indirectly. Just as the HRC, the European Court is reluctant to interfere directly in the relation between the church and its followers. In the case of *Duda & Dudová versus the Czech Republic* – which was about a priest of the Czechoslovak Hussite Church who was dismissed by a decision of the board of the diocese – the Court held that judicial determination of issues such as the continuation of a priest's service within a church would be contrary to the principles of autonomy and independence of churches.[44]

The religious oaths prohibitions furthermore once again imply indirect protection of the state against religious institutions (separation interest II). The need to protect this second separation interest has, however, also been emphasised more directly by the ECtHR. In several cases the European Court made it expressly clear that the state is authorised – perhaps even obligated – to protect pluralist democracy against extremist

[41] ECtHR, Judgment of 23 June 1993, Appl. 12875/87, para 33 (*Hoffmann v. Austria*); ECtHR, Judgment of 16 December 2003, Appl. 64927/01, para 38–43 (*Palau-Martinez v. France*); in both cases the complainants were Jehovah's Witness.

[42] ECtHR, Judgment of 25 May 1993, Appl. 14307/88, para 31 (*Kokkinakis v. Greece*). See also ECtHR, Judgment of 24 February 1998, Appl. 23372/94, para 59–61 (however see para 54–55) (*Larissis v. Greece*).

[43] See respectively ECtHR, Judgment of 21 February 2008, Appl. 19516/06 (*Alexandridis v. Greece*); ECtHR (GC), Judgment of 18 February 1999, Appl. 24645/94, para 29–41 (*Buscarini v. San Marino*).

[44] ECtHR, Decision of 30 January 2001, Appl. 40224/98, para 1 (*Duda & Dudová v. the Czech Republic*); cf. ECtHR, Judgment of 23 September 2008, Appl. 48907/99, para 42 (*Ahtinen v. Finland*).

religious political movements by, *e.g.*, limiting the right to manifest one's religion, the imposition of duties on civil servants to refrain from taking part in fundamentalist religious movements, and compulsory retirement of such servants for lack of loyalty to the secular foundation of the state.[45] In the case of *The Welfare Party versus Turkey* the court found that the dissolution of an entire religious political party and a disability barring its leaders from carrying on any similar activity for a specified period was in conformity with the state's positive obligations to secure human rights and democracy.[46] The state, however, is not permitted to ban a generally recognised religion or belief as such.

What is more, the protection of separation interest I – i.e. protection of religious institutions from the state – also has a firm basis in the jurisprudence of the European Court. It too considers such institutions important for ensuring pluralism and for a proper functioning of democracy.[47] Thus as a principle, the state is not allowed to intervene in the domestic affairs of religious institutions nor assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.[48] So the state may not take measures in favour of a particular leader or specific organs of a divided religious community, nor seek to compel the community or part of it to place itself, against its will, under a single leadership.[49] Neither is a refusal by the domestic authorities to grant legal-entity status to religious communities or associations of believers reconcilable with the right to freedom of religion in relation to the freedom of association.[50]

[45] ECtHR (GC), Judgment of 13 February 2003, Appl. 41340/98, para 90–95 (*Refah Partisi (the Welfare Party) v. Turkey*); ECtHR (GC), Judgment of 10 November 2005, Appl. 44774/98, para 109–116 (*Leyla Şahin v. Turkey*); ECtHR, Judgment of 23 June 1997, Appl. 20704/92, para 27–31 (*Kalaç v. Turkey*).

[46] ECtHR (GC), Judgment of 13 February 2003, Appl. 41340/98, para 103 (*Refah Partisi (the Welfare Party) v. Turkey*). Cf. ECtHR, Judgment of 11 December 2006, Appl. 13828/04 (*Kalifatstaat v. Germany*).

[47] ECtHR, Judgment of 12 March 2009, Appl. 42967/98, para 47 (*Löffelman v. Austria*); ECtHR, Judgment of 5 October 2006, Appl. 72881/01, para 61 (*Moscow Branch of the Salvation Army v. Russia*).

[48] ECtHR, Judgment of 13 December 2001, Appl. 45701/99, para 117 (*Metropolitan Church of Bessarabia v. Moldova*).

[49] ECtHR, Judgment of 14 December 1999, Appl. 38178/97, para 52, (*Serif v. Greece*); ECtHR, Judgment of 16 December 2004, Appl. 39023/97, para 75 and 96 (*Supreme Holy Council of the Muslim Community v. Bulgaria*); ECtHR (GC), Judgment of 26 December 2000, Appl. 30985/96, para 78–89 and (*Hasan & Chaush v. Bulgaria*).

[50] ECtHR, Judgment of 8 July 2008, Appl. 40825/98, para 62 (*Religionsgemeinschaft der Zeugen Jehovas v. Austria*); ECtHR, Judgment of 5 October 2006, Appl. 72881/01, para 58, 71 and 97–98 (*Moscow Branch of the Salvation Army v. Russia*).

3.3 *The ACHR and the AfChHPR*

The case law on the right to freedom of religion in Article 12 of the American Convention on Human Rights is rather limited. As far as I have been able to verify, it does not contain any express views on the separation of church and state. Nevertheless, relevant to this separation is that the approach of the Inter-American Commission on Human Rights (I-ACionHR) in an important respect seems to be in line with that of the European Court, in that the principle of pluralist democracy may be decisive if several human rights interests around religion clash. In the *Last Temptation of Christ* case the Commission pointed out that the right to freedom of expression 'is the basis of the pluralism necessary for harmonious coexistence in a democratic society, which, as any kind of society, is made up of individuals of different convictions and beliefs'.[51] Ultimately, however, the Inter-American Commission possibly favours neutrality over pluralism, since it in addition held that the State is required to abstain from interfering in any way in the adoption, maintenance or change of personal convictions of a religious or other nature. The State may not use its authority to protect the conscience of certain individuals, according to the Commission. Could an obligation on the state to draw attention to the dangers emanating from religious groups, as the European Court put forward in a case, be in agreement with these requirements? Anyhow, in considering a state report the Inter-American Commission – again in line with the case law of the European Court – stressed absolute neutrality of the state with regard to severe tensions between different religions.[52] The views of the European Court as regards pluralism appear to be more clearly supported by the Inter-American Court of Human Rights (I-ACtHR). In the *Last Temptation of Christ* case the latter court confirmed that the right to freedom of religion is one of the foundations of democratic society.[53] Moreover, the I-ACtHR in a different case (on freedom of expression) expressly referred to case law of the ECtHR to underpin the importance of democracy, while it subsequently made clear that pluralism, tolerance and the spirit of openness are constitutive conditions

[51] See the Commission's grounds in I-ACtHR, Judgement of 5 February 2001, para 74 (*'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile*).

[52] Cf. I-ACionHR, Report on the Situation of Human Rights in *Guatemala*, OEA/Ser.L/V/II.61, Doc. 47 rev. 1 (1983), chapter VI, under D.5.

[53] I-ACtHR, Judgement of 5 February 2001, para 79 (*'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile*)

for that.[54] Friendly relations between state and church are a desirable part of that.[55]

The case law on the right to freedom of religion in Article 8 of the African Charter on Human and Peoples' Rights does not offer any insight into how the African Commission and the African Court on Human Rights view the separation of church and state and the interests protected by it. In fact, Article 8 AfChHPR provides the weakest protection of this right, for it merely states that 'Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.' This right, which notably does not expressly include the right to maintain, adopt, or change religious or non-religious beliefs, is hardly expanded, if at all, in the case law of the Commission and Court.[56] It is therefore not possible to establish whether the African human rights bodies favour the principle of the separation of church and state or the principle of pluralist society or neither of these.

3.4 *The Separation Interests Colliding and The Principle of Pluralist Democracy*

The fulfilment of separation interest I and II can – at least theoretically – be perfectly in harmony with each other: the state does not impede with matters of religious and fundamental non-religious belief, while institutions of belief do not interfere with the affairs of the state, which also means that the state should not accept such interference. Neither is separation interest III problematic insofar as it concerns the protection of individuals in their relation to the state. Satisfying this interest requires the state to fulfil its negative obligation not to interfere with the freedom of religion of individuals. Tension between the interests might arise, however, with the satisfaction of the other side of separation interest III: the individual's freedom of personal, voluntary and autonomous choice of religious or fundamental non-religious beliefs from the intrusions of institutions of belief. By requiring the state actively to take measures to both protect and restrict freedom of religion and belief in order to guarantee a

[54] I-ACtHR, Judgment of 2 July 2004, para 112–116 and 128 (*Herrera-Ulloa v. Costa Rica*).

[55] Cf. I-ACionHR, Report on the Situation of Human Rights in *Guatemala*, OEA/Ser.L/V/II.61, Doc. 47 rev. 1 (1983), Conclusions and Recommendations, section D, preliminary recommendation nr. 6.

[56] Cf. AfCionHPR, Report of October 1995, Comm. 25/89, 47/90, 100/93 (1195), para 45 (*Free legal Assistance Group v. Zaire*).

pluralist democratic society and secure the right to freedom of religion for everyone, the state is actually required on the basis of human rights to intervene in matters of religion and belief. Such intervention in fact easily intrudes on the separation of church and state, i.e., on separation interest I. Thus, one could argue that separation interest III cannot be regarded as a real separation interest insofar it requires restriction or positive protection of the freedom of religion beyond the level of protection of that freedom that is inherent to fulfilling separation interests I and II. In different words: fully securing separation interest III will clearly imply that the state cannot be truly neutral, let alone stand strictly aloof from burdening or aiding certain religions or beliefs. The right to freedom of religion as interpreted in international human rights case law therefore at least seems to exclude the separation between state and religion in a strict sense. Moreover, the separation principle, which as such is hardly mentioned, if at all, in that case law, seems primarily to be a means to the end of securing a pluralist democratic society. Considering that pluralist democratic society thus appears to be a leading principle the question now is whether international human rights law does oppose, allow or require criminal law measures that directly aim to restrict or protect the individual right to freedom of religion.

4. Freedom of Religion and Criminal Law

4.1 *Some Remarks on Religion and Belief as Inevitable Fundamentals of Criminal Law*

Even though many democratic states go to great lengths to avoid moralistic legislation or at least to circumvent the introduction of moralistic grounds for legislation, criminal law is about good and evil and criminal law prohibitions are thus also the result of the moral history of the state. Usually that moral history is largely determined by those religions or beliefs that dominated society within the state involved or that at least were followed by the ruling authorities. Thus, in Europe, for example, views on criminal law principally stem from the Judaeo-Christian tradition, while in the Middle East criminal law is mainly influenced by the Islamic faith. With this criminal law and religion or belief are to some extent fundamentally intertwined.[57]

[57] Cf. Berger, Benjamin L. (2008), *Moral Judgment, Criminal Law and the Constitutional Protection of Religion*, 40 S.C.L.R. (2d), p. 513–516.

The effects of these faith-based morals on criminal law become even more the objects of dispute than before when society becomes more secularised, with the arrival of migrants who have different religious backgrounds than the autochthonous population, and with an increasingly globalising world. As, in a rudimentary sense, criminal law also rests on a particular religion or belief, the use of criminal law by the state can lead to an at least somewhat concealed tension with freedom of religion, since criminal law obviously applies also to individuals and groups that hold other beliefs than the one on which it is based. For example, the offences of murder, assault and burglary aim to prevent the killing and molestation of and theft from religious authorities as much as anyone else. Conversely, religious authorities are just as much prohibited by criminal law from committing these offences or perpetrating rape, fraud, handling stolen goods or environmental offences as any ordinary citizen is. Most of these offences, however, are commonly accepted as rightfully deserving of punishment. But such is not the case for all criminal law legislation, for example not insofar it applies to honour killing, human and animal sacrifice, female circumcision, sex with children, the prohibition of blood transfusion to minors for religious reasons, bigamy, interreligious marriages, the use of drugs, and ritual slaughtering of animals.

Although I will not elaborate further on the fact that the roots of a criminal law system always, at least to some extent, lay in a certain religion or belief, to my mind it is important to comprehend this in any discussion of criminal law and freedom of religion. This also applies to the following. In the next two subsections I give a brief review of what international human rights instruments expressly require from criminal law as regards the right to freedom of religion. Subsequently, section 5 is be mainly concerned with criminal law that directly aims to protect or restrict religion or belief, and which is not so commonly accepted. The criminal law issues to be discussed in that section are: blasphemy, apostasy, and proselytism.

4.2 *Protection by Criminal Law of the Right to Freedom of Religion*

Article 1 of the 1945 Charter of the United Nations makes it clear that respect for human rights and fundamental freedoms without distinction as to *inter alia* religion should be achieved for all.[58] This first of all implies that the state itself has a negative obligation not to discriminate on the basis of religion. This prohibition is explicitly provided for in many legally

[58] See also Article 55 Charter of the United Nations.

binding instruments, *e.g.*, Articles 2 § 1 and 27 ICCPR, Article 14 ECHR and Article 1 Protocol Twelve ECHR, Article 1 ACHR, and Article 2 AfChHPR. From the viewpoint of criminal law, however, it is more interesting to consider whether the state has a positive obligation to take criminal law measures to protect religious and fundamental non-religious beliefs against threats and the actions of others.

Positive obligations to protect beliefs against such discriminations by non-state parties are indeed enshrined in different instruments. For example, Article 20 ICCPR states that any 'advocacy of [...] religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' This provision is relevant here because religious hatred is often aimed at other religions. In addition, Article 26 of the Covenant holds that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination' on the ground of *inter alia* religion.[59] Even though the Human Rights Committee has not expressly stated so in its General Comment on the freedom of religion, particularly the duty under Article 20 ICCPR requires the application of criminal law.[60] Especially when it comes to violence, criminal law is after all an essential element for protection against it by the legal system. More specific in this regard is Article 13 § 5 ACHR, which demands that 'any advocacy of [...] religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of [...] religion [...] shall be considered as offenses punishable by law.' Criminal law is thus necessitated. Moreover, the Inter-American case law requires states to effectively investigate, prosecute and punish those responsible for severe violence against believers.[61] Similar duties are not to be found in the ECHR as such, nor in the AfChHPR.[62] The case law of the European Court of Human Rights

[59] See fairly similar Article 2 and 4 of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 UN Declaration).

[60] Cf. HRC, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (Article 18)', 30 July 1993, para 7 and 9.

[61] See, *e.g.*, I-ACionHR, Report of 16 October 1996, Case 10.256, para 118–119, 123–131, and 140–141 (*Dianna Ortiz v. Guatemala*).

[62] As regards Europe, other instruments do contain such obligations, however. For the EU, see Article 13 § 1 of the Treaty establishing the European Community (the Council may take appropriate action to combat discrimination based on religion or belief), and Article 21 § 1 Charter of Fundamental Rights of the European Union (any discrimination based on *inter alia* religion or belief shall be prohibited). For the OSCE, see section 40 of the 1990 Document of the Copenhagen meeting of the Conference on the Human Dimension (the participating states declare that they will take effective measures, including the adoption

nevertheless implies that the right to freedom of religion in Article 9 ECHR requires the applicability of national criminal law against violence towards participants of religious meetings.[63] Moreover, the Court seems to hold the view that Article 9 ECHR implies that unlawful burning of religious literature needs to fall within the scope of the criminal law.[64] Neither duties, however, entail that the anti-religious aspect of the illegal conduct should be an express component of the applicable criminal law provisions.

The foregoing also shows that discrimination of individuals and groups of people has many appearances. Physical violence, offending and expulsion are only some examples. As we have just seen, international human rights law requires protection by criminal law as far as religious hatred that constitutes incitement to violence is concerned. This, however, certainly does not imply that states are not permitted to criminalise conduct in order to protect the freedom of religion outside the scope of incitement to violence. In fact, many states do employ criminal law to protect against disturbance or obstruction of religious meetings and the conduct of religious ceremonies, discrimination on the basis of religion, and insulting religious feelings. A rather common offence in this respect is blasphemy.

4.3 *Restriction by Criminal Law of the Right to Freedom of Religion*

The freedom to have, adopt, or change one's religious or fundamental non-religious beliefs is an absolute right under the International Covenant. It cannot be limited in any way and is non-derogable as well (see Article 4 § 2 ICCPR). So the use of for example penal sanctions to compel believers

of laws, to provide protection against any acts that constitute incitement to violence against persons or groups based on *inter alia* religious discrimination, hostility or hatred, including anti-Semitism), and para 1 of Permanent Council Decision No. 621 on Tolerance and The Fight against Racism, Xenophobia and Discrimination (PC.DEC/621 of 29 July 2004), taken at the 2004 Twelfth Meeting of the Ministerial Council in Sofia (the participating States commit to consider enacting or strengthening, where appropriate, legislation that prohibits discrimination based on, or incitement to hate crimes motivated by *inter alia* religion.)

[63] ECtHR, Judgment of 3 May 2007, Appl. 71156/01, para 96–97 and 114 (*Gldani Congregation of Jehovah's Witnesses v. Georgia*); the duty to criminalise the conduct of the perpetrators is not expressly put forward by the Court, but it is a necessary consequence of the duty to prosecute them. Cf. ECtHR, Judgment of 21 June 1988, Appl. 10126/82, para 31–33 (*Plattform 'Ärzte für das Leben'/Oostenrijk*).

[64] ECtHR, Judgment of 3 May 2007, Appl. 71156/01, para 111, 117 and 133–134 in relation to 143–144 (*Gldani Congregation of Jehovah's Witnesses v. Georgia*).

or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert, is absolutely forbidden by the Human Rights Committee under reference to Article 18 § 2 ICCPR.[65] It is not permitted to limit or derogate from this right under the American Convention either (see Article 27 § 2 ACHR). A somewhat different regime applies under the European Convention. Although the right to hold, not to hold or to change one's religious or fundamental non-religious beliefs is not subject to a limitation clause, it can be derogated from in case of a state of emergency (see Article 15 § 2 ECHR). The least solid in this regard is Article 8 AfChHPR: the right to freedom of religion, which is rather marginally guaranteed by this provision, may be widely limited and, although the African Charter does not provide for a derogation clause, further limitations may be applied under Article 27 § 2 AfChHPR in the interest of the rights of others, collective security, morality and common interest.[66]

Distinct from the right to have, adopt, or change one's beliefs (the so called *forum internum*[67]) is the right to manifest one's beliefs (the *forum externum*). The state is authorised to limit this right under all of the conventions. The ICCPR, ECHR and ACHR in fact contain the same three conditions for such limitations: these must be prescribed by law, they must be necessary, and they must be aimed at protecting public safety, order, health, morals, or the rights or freedoms of others.[68] It can thus be concluded that insofar as there is no state of emergency, criminal law may in no way whatsoever limit the *forum internum* under the International Covenant as well as the European and American Convention, but it may to a certain extent limit the right to manifest one's religious or fundamental non-religious beliefs. With this some important legal boundaries for criminal law with regard to religion are established. So, for example, the HRC in principle holds it to be incompatible with the right to manifest one's religion to apply criminal law against individuals for their refusal to

[65] HRC, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (Article 18)', 30 July 1993, para 5.

[66] AfCionHPR, Report of 15 November 1999, Comm. 140/94, 141/94, 145/95, para 41–43 (*Constitutional Rights Project, Civil Liberties Organisation & Media Rights Agenda v. Nigeria*).

[67] On the scope of the *forum internum* under the ICCPR and the ECHR, see Taylor, Paul M. (2005), *Freedom of Religion. UN and European Human Rights Law in Practice*, Cambridge, Cambridge University Press, p. 115–202.

[68] See Article 18 § 3 ICCPR, Article 9 § 2 ECHR, and Article 12 § 3 ACHR. See likewise Article 1 § 3 of the 1981 UN Declaration.

be drafted for compulsory service when this is a direct expression of their genuinely held religious beliefs.[69] Furthermore, the HRC rejects criminal law provisions that penalise the failure of leaders of religious organisations to register their statutes.[70] And the ECtHR disapproves of penalising the use of premises as a place of worship without prior authorisation, most certainly when the authorities refuse to authorise that use on grounds which are or may not be compatible with the right to freedom of religion.[71] Moreover, the European Court condemns the application of criminal law against, *e.g.*, a person for merely presenting himself as the religious leader of a group that willingly followed him.[72]

What has just been said clearly does not imply that religion and belief can be completely excluded from the reach of criminal law. For one reason because international human rights law entails positive obligations to criminalise certain religion based conduct. Of particular relevance in that regard are Article 20 ICCPR and Article 13 § 5 ACHR. Both these provisions require protection by criminal law against religious hatred that constitutes incitement to violence. In the 1993 Vienna Declaration adopted at the World Conference on Human Rights, all governments were furthermore even called upon 'to take all appropriate measures' – so apparently also criminal law if necessary – 'in compliance with their international obligations and with due regard to their respective legal systems to counter intolerance and related violence based on religion or belief, including practices of discrimination against women and including the desecration of religious sites, recognising that every individual has the right to freedom of thought, conscience, expression and religion.'[73] Furthermore it is important that the state has a duty – which can be based on *e.g.* the principle of state sovereignty – to establish and maintain order in society. To prevent interferences with that order, criminal law can and sometimes even must be applied. So, as has already been mentioned in subsection 4.1, the criminal law system in principle aims to both protect and limit religious authorities and individuals in exactly the same way as anybody else.

[69] HRC, View of 3 November 2006, Comm. 1321, 1322/2004, para 8.3–8.4 (*Yoon & Choi v. Republic of Korea*).

[70] HRC, Concluding Observations, *Uzbekistan*, CCPR A/56/40 vol. I (2001), para 24.

[71] ECtHR, Judgment of 26 September 1996, Appl 18748/91, para 47–53 (*Manoussakis v. Greece*).

[72] ECtHR, Judgment of 17 October 2002, Appl. 50776/99, para 56–61 (*Agga v. Greece*).

[73] See section II.A.22 of the 1993 Vienna Declaration.

5. Some Specific Criminalisations that Expressly Concern Religion and Belief

How do prohibitions of blasphemy, apostasy, and proselytism fit into this international framework of obligations to protect and duties to limit manifestations of religion and belief? And how do they relate to the separation interests, the separation principle, and the principle of a pluralist society? I shall now discuss whether these criminalisations are opposed, allowed or required by these different parameters.

5.1 *Criminal Law Prohibition of Blasphemy*

Blasphemy in a narrow sense can be described as defamation of the god or gods of a religion. In a broader definition scurrilous criticism of saints, prophets and other religious figures, sacred documents and objects, religious institutions, religious ministers and leaders and/or fundamental tenets may also constitute to blasphemy. Many countries still have laws making blasphemy a criminal offence. These offences of course protect religion, but at the same time they easily may restrict the manifestation of fundamental non-religious beliefs, such as agnosticism and atheism. The question now is whether these blasphemy criminalisations are permissible.

a. *The ICCPR and the 1981 UN Declaration*

The Human Rights Committee does not hold criminal law prohibitions of blasphemy as such in contravention with the ICCPR. In the light of the right to freedom of expression it is nevertheless tremendously distrustful of such offences, especially if they can be construed as a threat to public order.[74] This is even so if the offence only constitutes a misdemeanour.[75] Therefore this human rights expert body requires states to include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous.[76] In viewing of criminal

[74] HRC, Concluding Observations, *Ireland*, CCPR A/48/40 (1993), para 587 and 607; HRC, Concluding Observations, *Canada*, CCPR/C/103/Add.5 (1997), para 196.

[75] HRC, Concluding Observations, *The United Kingdom – the Crown Dependencies of Jersey, Guernsey and the Isle of Man*, CCPR A/55/40 vol. I (2000), see section IV under H.

[76] HRC, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (Article 18)', 30 July 1993, para 9. Cf. HRC, Concluding Observations, *New Zealand*, CCPR A/39/40 (1984), para 174, 391, and 393; HRC, Concluding Observations, *Finland*, CCPR A/34/40 (1979), para 413.

law provisions that criminalise blasphemy, the HRC not only condemns these when they contravene the right to freedom of expression, it also appears to reject them if they extend to only one or some religions.[77] So if the law contains blasphemy prohibitions, is seems that they should be applicable to all religions equally.

The approach of the HRC appears to be supported by the Special Rapporteur on the implementation of the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Although he expressly recognises that blasphemy as an offence against belief may be subject to special legislation, the Rapporteur also emphasises that this can only be so if certain conditions are met. For one, such laws may not be discriminatory. Furthermore, they may not be so vague as to jeopardise human rights, procedural guarantees should be attached to them, and a balanced attitude must be maintained. The Rapporteur moreover claims that applying 'the death penalty for blasphemy appears disproportionate and even unacceptable.'[78]

b. *The Regional Human Rights Conventions*

A somewhat different approach is taken in the case law on the European Convention. The former European Commission on Human Rights (ECionHR) stipulated that the existence of a criminal law prohibition of blasphemy does not as such raise any doubts as to its necessity and that the religious feelings of citizens may deserve criminal law protection against indecent attacks that attain a certain level of severity on the matters held sacred by them.[79] In *Chaudhury against the United Kingdom*, a case on Salman Rushdie's 'Satanic Verses', the applicant complained that the Moslem religion is not protected against abuse or scurrilous attacks and that the offence of blasphemy relates only to Christianity. The former European Commission on Human Rights (ECionHR) considered that freedom of religion in Article 9 ECHR does not provide a right to bring criminal proceedings or any other specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals. Hence, the Commission implied,

[77] See HRC, Concluding Observations, *The United Kingdom*, CCPR A/46/40 (1991), para 402. Cf. also Committee on the Elimination of Racial Discrimination (CERD), Concluding observations, *France*, CERD A/44/18 (1989), para 50.

[78] See E/CN.4/1996/95/Add.1 (1996) (Addendum on Pakistan), para 82.

[79] ECionHR, Decision of 7 May 1982, Appl. 8710/79, para 12 (*X. Ltd. and Y v. The United Kingdom*).

the Convention does not therefore demand that blasphemy prohibitions must be applicable to all religions.[80]

The European Court does not take a clear stance against blasphemy offences either. In the case of *Wingrove versus The United Kingdom*, the Court indeed leaves the impression that it would be in favour of the abolition of blasphemy laws, but at the same time it recognises that the offence of blasphemy cannot by its very nature lend itself to precise legal definition, and furthermore that it can pursue the legitimate aim of protecting the rights of others.[81] In other cases the Court even holds that 'as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration'.[82] This is no different if the blasphemy probation only extends to one particular faith. Although the court regards this as an 'anomaly' in the case of *Wingrove*, it refuses to reject this state of affairs because 'it is not for the European Court to rule *in abstracto* as to the compatibility of domestic law with the Convention.'[83] Nor does the Court make a problem of it when a criminal law prohibition of blasphemy is not limited to defamation of a god or gods.[84] Meanwhile, the foregoing certainly does not imply that the ECHR entails a right to be protected by criminal law from blasphemy or other expressions that scurrilously criticise or offend religion or feelings of fundamental belief. Protecting the rights of others can be a justification – or maybe even an obligation – for limiting the right to freedom of expression under Article 10 § 2 ECHR; it is, however, not part of the right to freedom of religion under Article 9 § 1 ECHR.[85] Moreover, although states have a wider margin of appreciation in connection with insults of 'intimate personal convictions within the sphere of morals or religion' than in relation to other forms of expression,[86] such limitations are in principle only allowed if the expression

[80] ECionHR, Decision of 5 March 1991, Appl. 17439/90, para 1 and 2 (*Choudhury v. The United Kingdom*).

[81] ECtHR, Judgment of 25 November 1996, Appl. 17419/90, para 57 and 58, 42 and 48 (*Wingrove v. The United Kingdom*).

[82] ECtHR, Judgment of 20 September 1994, Appl. 13470/87, para 49 (*Otto-Preminger Institute v. Austria*); ECtHR, Judgment of 13 September 2005, Appl. 42571/98, para 24 (*İ.A. v. Turkey*).

[83] ECtHR, Judgment of 25 November 1996, Appl. 17419/90, para 50 (*Wingrove v. The United Kingdom*).

[84] See ECtHR, Judgment of 13 September 2005, Appl. 42571/98, para 17 and 28–31 (*İ.A. v. Turkey*).

[85] See elaborately Taylor, Paul M. (2005), *Freedom of Religion. UN and European Human Rights Law in Practice*, Cambridge, Cambridge University Press, p. 87–96.

[86] See, *e.g.*, ECtHR, Judgment of 13 September 2005, Appl. 42571/98, para 25 (*İ.A. v. Turkey*).

reaches a sufficient degree of severity; it apparently must be at least 'gratuitously offensive'.[87]

As far as I have been able to ascertain, the case law of the supervisory bodies on the ACHR en the AfChHPR does not contain anything on blasphemy prohibitions and the right to freedom of religion.

c. *Conclusion on Blasphemy*

Rather differently from the Human Rights Committee, the European Court and the former European Commission do not explicitly criticise criminal law prohibitions of blasphemy and they even expressly allow that such offences do not apply on an equal footing to all religions alike. These different approaches have some important consequences as to the separation of church and state, as well as to guaranteeing pluralist democracy. A first result of it is that states are less discouraged under the European Convention than under the International Covenant to interfere in the field of religious and fundamental non-religious beliefs. The ECtHR's lenient approach is already problematic when one takes into consideration that criminal law is an *ultimum remedium* and even more so when religion is concerned. A further consequence is that the European approach offers a much poorer degree of separation between church and state than does the Human Rights Committee. In fact, with regard to blasphemy prohibitions the European case law only fits in the lowest separation level, i.e. accommodation, since it does not at all force the state to be neutral and impartial, let alone to apply strict separation. The European approach, on the other hand, leaves the state more room to actively secure pluralist democracy, for blasphemy prohibitions can in some situations – theoretically anyway – help to protect the rights and position in society of others.

However, this could at best be so if at least two conditions are met. First, the prohibition should extend to all religions equally. This prevents the law from displaying identifications of the state with only one or a few religions and it avoids unequal protection of religions by the law. Otherwise the offence harms the neutral and impartial position of the state and might even be an obstacle to pluralist democracy. In case

[87] See, *e.g.*, ECtHR, Judgment of 20 September 1994, Appl. 13470/87, para 49 and 56 (*Otto-Preminger Institute v. Austria*); ECtHR, Judgment of 13 September 2005, Appl. 42571/98, para 24 (*İ.A. v. Turkey*); ECtHR, Judgment of 31 October 2006, Appl. 72208/01, para 47 (*Klein v. Slovakia*). The criterion was not fulfilled in ECtHR, Judgment of 31 January 2006, Appl. no. 64016/00, para 52 (*Giniewski v. France*).

unequal protection is afforded, the principle of pluralist democracy in my view would require that at least those religions that are most threatened have to be protected by the prohibition. Usually this will mean that not the religion of the majority should be primarily be protected, but first and foremost the religion of minorities. Second, the prohibition should in principle apply only to defamation of gods. The more the values that fall within the prohibition the greater will be the inequality of protection between religious and fundamental non-religious beliefs. Since the gods are exclusive to religions, their specific protection can more easily be regarded as objectively and reasonably justified than protection of other values. Once figures, documents, objects and institutions that are fundamental to religions are specifically protected by criminal law as well, an explanation is demanded for why similar values of fundamental non-religious beliefs are not offered such special protection, too. Third, blasphemy prohibitions should be applied with the utmost restraint, for it may not fundamentally favour religions over fundamental non-religious beliefs. This means, for example, that atheists should be able to articulate that gods do not exist and that religions are unwelcome in the same way as religious believers may express that god does exist and their religion is the only acceptable path for everyone. It is therefore submitted that the approach of the ECtHR as regards blasphemy offences does not secure the neutrality and impartiality of the state for religious and fundamental non-religious beliefs alike, nor does it aid the principle that the state must secure pluralist democracy.

Moreover the question can be raised whether these offences are desirable at all. In my view they are not. They hardly serve any of the separation interests, if at all: blasphemy prohibitions in principle do not protect institutions of belief against the state and not at all vice versa, nor do they essentially protect religious individuals against these institutions or against the state. The primary aim is to offer protection of religious individuals or groups from the expression of other individuals or groups. The separation principle, however, does not concern the relationship between private individuals and groups. Furthermore, it is important that, although these prohibitions could indeed be used to actively secure pluralist democracy, this certainly does not necessarily mean that pluralism calls for such criminal laws. The state can also offer individuals or groups that consider themselves to be victims of blasphemous and repugnant expressions to their faith access to the civil courts to obtain redress. An additional important advantage here would be that the last resort principle (*ultimum remedium*) is genuinely complied with. In case civil law

offered insufficient protection against serious threats of certain religions or beliefs, then criminal law should in my view only be applied in such a manner that all religions and beliefs are equally protected against, *e.g.*, defamation, slander, libel, and redundantly offensive speech. Conversely, by the way, this means that exercising religious expression should not be offered a wider margin in this regard than exercising fundamental non-religious expression and in principle even expression in general. In other words: freedom of expression should in my opinion not be offered a principled broader protection under the right to freedom of religion than under the right to freedom of expression, nor vice versa.[88]

5.2 *Criminal Law Prohibition of (Manifesting) Apostasy*

Apostasy is the abandonment or rejection of one's faith. So changing one's religion for another or for a fundamental non-religious belief such as atheism or agnosticism constitutes at least a form of apostasy. In several countries apostasy is considered to be a criminal law offence, and in some states it is even punishable and is indeed punished with the death penalty. These offences do protect certain religions (in practice always the religion of the regime in power) but not freedom of religion. In fact the prohibition of apostasy severely restricts the possibility to choose a religion or fundamental non-religious belief other than the one protected by the offence. With that it seriously restricts religion and belief in general.

a. *The ICCPR and the 1981 UN Declaration*

According to the Human Rights Committee the Article 18 § 1 ICCPR freedom 'to have or to adopt a religion or belief of his choice' necessarily entails the freedom to replace one's current religion or belief with another or to adopt atheistic views.[89] This is an absolute freedom which debars any pressure, coercion or restriction that would impair the right to change or recant one's religion or belief. This is not only underpinned in

[88] Cf. HRC, View of 18 October 2000, Comm. 736/1997, para 11.7 (*Ross v. Canada*), and I-ACtHR, Judgement of 5 February 2001, para 70–73 and 79–80 (*'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile*).

[89] HRC, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (Article 18)', 30 July 1993, para 5. See furthermore, *e.g.*, HRC, Concluding Observations, *Jordan*, CCPR A/49/40 vol. 1 (1994), para 235; HRC, Concluding Observations, *Nepal*, CCPR A/50/40 (1995), para 70.

Article 18 § 2 ICCPR, the Special Rapporteur on the implementation of the 1981 UN Declaration has confirmed it as well.[90] So apostasy as such may not be criminalised.

That the right to change one's religion is absolute does not strictly imply a right to manifest apostasy. Indeed one could question whether such a right exists under the International Covenant's right to freedom of religion. Article 18 § ICCPR only specifies that everyone has a right 'to manifest his religion or belief in worship, observance, practice and teaching'. Literally taken this does not per se include the right to manifest the change as such but only to manifest the acts, ceremonies, rituals, symbols, objects and clothing, etcetera that are characteristic of the religion or belief to which the apostate has turned. Manifesting the new belief will indirectly, of course, also draw attention to the fact that the individual has changed his belief. But that is not always equivalent to manifesting the change as such.

Interestingly, the HRC concludes with regard to Sudan that 'domestic provisions regarding the crime of apostasy were not compatible with articles 6 and 18 of the Covenant.'[91] On a different occasion the HRC has clarified that imposition of capital punishment 'for offences which cannot be characterised as the most serious, including apostasy [...] is incompatible with article 6 of the Covenant', which provision guarantees the right to life.[92] However, what is more interesting here is that the Committee also established that the Sudanese prohibition breached Article 18 ICCPR. The challenged provision, Article 126 § 1 of the 1991 Penal Code stipulates: 'Every Muslim who advocates the renunciation of the creed of Islam, or who publicly declares his renouncement thereof by an express statement or conclusive act, shall be deemed to commit the offence of apostasy.'[93] This provision seems to be aimed at the manifestation of apostasy, not at apostasy as such (in which case it would of course be rather difficult to uphold the offence). Thus the Committee is apparently of the opinion that

[90] Report, 'Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', A/51/542/Add.2 (1996) (Addendum on Sudan), para 147.

[91] HRC, Concluding Observations, *Sudan*, CCPR A/46/40 (1991), para 501, 513 and especially 519. Cf. HRC, Concluding Observations, *Egypt*, CCPR A/48/40 vol. I (1993), para 683.

[92] HRC, Concluding Observations, *Sudan*, CCPR A/53/40 (1998), para 119. Cf. HRC, Concluding Observations, *Iran*, CCPR A/48/40 vol. I (1993), para 207.

[93] See Report, 'Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', A/51/542/Add.2 (1996) (Addendum on Sudan), para 20.

criminal law prohibitions against manifesting apostasy contravene Article 18 ICCPR.

A similar stance appears to be taken by the Special Rapporteur on the basis of the 1981 UN Declaration. With regard to proselytism, conversion and apostasy he draws attention 'to the need to abide by international standards laid down in the field of human rights, including the freedom to change religion and the freedom to manifest one's religion or belief, either individually or in community with others, in public or in private, subject only to limitations prescribed by law.'[94] So the Rapporteur in any case identifies a right to apostasy as such. But it seems that he is also of the opinion that Article 1 of the 1981 UN Declaration implicitly recognises a right to manifest apostasy. If that truly were the case, it can still be limited. Oddly, the Rapporteur expressly refers to only one of the conditions for such limitations as required by *e.g.* Article 1 § 3 of the 1981 UN Declaration and Article 18 § 3 ICCPR. Considering his general reference to international standards, it could however well be argued that the Rapporteur is of the opinion that all the other limitation conditions are indeed applicable here as well.

Neither the HRC nor the Rapporteur explain why or how the right to manifest apostasy is contained in the right to religion in Article 18 ICCPR. Considering that human rights should be interpreted and applied as so as to make their safeguards practical and effective, this approach is nevertheless preferable. But even if one were to hold that the right to manifest apostasy is not necessarily a part of the right to freedom of religion, this would not necessarily leave the apostate empty-handed. It seems to me that the right to express that one has changed one's belief and the reasons for that is in any case covered by the right to freedom of expression in Article 19 ICCPR. This right may be restricted according to Article 19 § 3 ICCPR, but only by limitations that are provided by law and are necessary to respect the rights or reputations of others or to protect national security, public order, public health or morals. Although the possibilities for restriction are somewhat broader for the right to freedom of expression, then, as regards the right to manifest one's religion or belief, serious or total prohibitions against manifesting apostasy seem to be disallowed under these conditions, the more so when one considers that criminal law is *ultimum remedium*.

[94] Report, 'Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', E/CN.4/1996/95/Add.1 (1996) (Addendum on Pakistan), para 84.

b. *The Regional Human Rights Conventions*

As mentioned above, Article 9 of the European Convention includes the right to hold or not to hold religious beliefs and to practise or not to practise a religion, as well as to change one's religion or belief. This right can – except in a state of emergency – not be limited, and a criminal law prohibition of apostasy as such is thus out of the question. Similarly as with regard to the ICCPR, the right to manifest apostasy may be read into Article 9 ECHR – which also limits the right to manifest one's religion or belief to 'worship, teaching, practice and observance' – and will anyway fall within the right to freedom of expression in Article 10 ECHR. The case law of the European Court offers no further clarification on this.

Article 12 § 1 of the American Convention provides everyone with the right 'to change one's religion or beliefs'. The case law of the Inter-American Commission clarifies that this treaty provision 'requires that the State abstain from interfering in any way in the adoption, maintenance or change in their personal convictions of a religious or other nature.'[95] And the second section of this article conveys that restrictions that impair the right to change one's religion or beliefs are prohibited. So herewith the American Convention entails an absolute right to apostasy, and with that it absolutely excludes the possibility to prohibit apostasy as such by criminal law or any law at all. An obvious interpretation of the text of Article 12 § 1 ACHR – of which the construction differs significantly from Article 18 ICCPR – would furthermore be that everyone has the right to profess this right to apostasy 'either individually or together with others, in public or in private'. Such a reading would mean that manifestations of apostasy are protected by this provision as well. These manifestations then may be restricted only insofar as the limitations are prescribed by law and are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. It will be hard to argue that criminal law prohibitions against manifesting apostasy are indeed necessary to be able to guarantee these aims. If such an interpretation were not be followed, the right to manifest apostasy is in any event protected by the right to freedom of expression in Article 13 ACHR.

As for Article 8 AfChHPR, this provision does not stipulate the right to maintain, adopt, or change beliefs. Moreover, at the time of writing, nor has such a right been read into this provision by the Commission or Court.

[95] See the Commission's grounds in I-ACtHR, Judgement of 5 February 2001, para 74(c) (*'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile*).

c. *Conclusion on Apostasy*

Criminalisation of apostasy as such is absolutely prohibited under international human rights law; criminal law prohibitions against manifesting apostasy are not. Although such prohibitions must meet the conditions for restriction of the human rights involved (the right to manifest one's belief or the right to freedom of expression), the human rights system does not categorically oppose such criminal offences.

That certainly does not mean, though, that the same holds true if the issue is considered from the point of view of the principle of the separation of state and church. Criminalising apostasy or even manifesting apostasy entails severe interference with matters of belief. It would fundamentally contravene the concept of strict separation of church and state. The same applies with regard to the separation concept of neutrality, especially if the prohibition does not apply equally to all religions and beliefs alike, which usually seems to be the case. But even if it does apply equally to all religions and beliefs, this still implies a non-neutral position of the state, since the prohibition than predominantly benefits the religion held by the majority, while the minority faiths are actually most in need of protection of the right to freedom of religion. In fact, one could easily argue that prohibitions against manifesting apostasy are even incompatible with the third separation concept, i.e. accommodation, since such prohibitions might de facto coerce people to keep on participating in a certain religion and thus interfere with faith at too fundamental a level.

All of this even follows if extremely offensive or violent manifestations of apostasy are involved. This does not after all alter the fact that the state intrusively – i.e. via criminal law – and unnecessarily interferes with religious matters. The state can proceed against such adverse conduct on the basis of religiously neutral offences, such as hate speech, defamation, harassment, or bodily harm. That would further serve the principle that criminal law is particularly *ultimum remedium* with regard to religion, and that criminal law should therefore involve itself as little as possible expressly with matters of religion and belief.

Furthermore, the principle of pluralist democracy is seriously harmed by apostasy prohibitions, since they are an impediment to the free exchange of thoughts and obstruct the possibility for people to live their lives according to their own belief, culture and ideas. Meanwhile, criminal law prohibitions of (manifesting) apostasy do not at all assist the three separation interests. On the contrary: they unite state and religion and

make individuals with regard to their religion or belief more dependent on both state and certain religious institutions. Considering all the arguments just posed, I am of the opinion that not only criminal law prohibitions of apostasy as such, but also of manifesting it, are categorically incompatible with the right to freedom of religion.

5.3 *Criminal Law Prohibition of Proselytism*

Proselytism denotes the practice of attempting to convert individuals or groups to another religion or belief. For example, Jehovah's Witnesses are often engaged in proselytisation, while it is not uncommon in Islam, either, where it is often referred to as jihad.[96] None of the general human rights treaties nor the 1981 UN Declaration expressly provide a right to proselytism nor an obligation to limit it. While prohibitions of proselytism first and foremost involve the restriction of the freedom of religion, they are often enacted with a view to protecting the dominant faith in a country or the state religion or belief.

a. *The ICCPR and the 1981 UN Declaration*

Although the right to proselytise is not explicitly provided for in the International Covenant, it is implicit in Article 18 ICCPR, according to one member of the Human Rights Committee.[97] Furthermore, from the report of the Special Rapporteur on the implementation of the 1981 UN Declaration it can be concluded that prohibition of proselytising can constitute to violations of Article 1 of the Declaration.[98] Since this provision does not explicitly contain a right to proselytise, it apparently is regarded to fall within the right to manifest one's religion. In a later report the Rapporteur confirmed this most defensible view.[99] Since the right to manifest one's religion may be restricted,[100] the right to proselytise too

[96] See Arzt, Donna E. (1990), 'The Application of International Human Rights Law in Islamic States', *HRQ* vol. 12, p. 211.

[97] HRC, Summary Records, *Morocco*, CCPR/C/SR.1789 (1999), para 61 (Mr. Amor). Cf. CERD, Summary Records, *Morocco*, CERD/C/SR.1024 (1994), para 32–33.

[98] Report, 'Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', E/CN.4/1996/95 (1995), para 27.

[99] Report, 'Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', E/CN.4/1996/95/Add.1 (1996) (Addendum on Pakistan), para 84.

[100] See *supra* section 4.3.

may be subject to restrictions. Although it is not clear what the HRC is willing to accept in this regard, one can be certain that the restriction may not be absolute since the restriction conditions in Article 18 § 3 ICCPR have to be met.[101] It is not apparent whether the Committee is willing to accept that such restrictions are brought about through criminal law legislation.

b. *The Regional Human Rights Conventions*

A right to proselytism is also acknowledged on the basis of the right to freedom of religion by the European Court. In the case of *Kokkinakis versus Greece* the ECtHR expounds that Article 9 ECHR 'includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief" [...] would be likely to remain a dead letter.'[102] The right is rather limited, however. Under Article 9 ECHR states are allowed to make it a criminal offence to attempt to induce somebody to change his religion. In this regard the Court distinguishes between licit and improper proselytism, the latter of which is not protected by Article 9 ECRH and may thus be criminalised.[103] So, in the *Larissis* case the prosecution, conviction and punishment of air force officers for proselytising airmen was not held in violation of the right to freedom to manifest one's religion.[104] In general the Court appears to be critical of proselytising actions or effects of religions. In for example a (non-criminal) case concerning a prohibition of the headscarf it considered the proselytising effect that the headscarf might have as an argument that justified the ban.[105] In fact, the ECtHR is of the opinion that the right to freedom of religion necessitates protection of the state against attempts to influence a person's faith by immoral and deceitful means.[106] As regards for example education, the case law of the ECtHR emphasises that states have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded by misplaced proselytism by a given school or

[101] Cf. HRC, Summary Records, *Armenia*, CCPR/C/SR.1711 (1998), para 42.

[102] ECtHR, Judgment of 25 May 1993, Appl. 14307/88, para 31 (*Kokkinakis v. Greece*).

[103] ECtHR, Judgment of 24 February 1998, Appl. 23372/94, para 45 (*Larissis v. Greece*); ECtHR, Judgment of 25 May 1993, Appl. 14307/88, para 48 (*Kokkinakis v. Greece*).

[104] ECtHR, Judgment of 24 February 1998, Appl. 23372/94, para 47–55 (*Larissis v. Greece*).

[105] ECtHR, Judgment of 4 December 2008, Appl. 27058/05, para 64 (*Dogru v. France*).

[106] ECtHR, Judgment of 25 May 1993, Appl. 14307/88, para 42 (*Kokkinakis v. Greece*).

teacher.[107] In such a situation the state does not necessarily have to grab at criminal law, but in other – for example violent – situations it may have to.[108] And at any rate it has a certain margin of appreciation to decide whether or not the needed protection against illicit proselytism should be offered through criminal law. Again, a pluralist democratic society is the touchstone here:[109] a touchstone that may argue for or even require the state to take criminal law measures.

In the American Convention the right to manifest one's religion is concretised in Article 12 as the 'freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in pubic or in private.' This seems to imply a right to proselytise on the basis of one's religion and that is exactly what the Inter-American Commission has deduced from this provision. In *The Last Temptation of Christ* case it ascertains that 'the State must take and provide the necessary measures so that those who publicly profess their beliefs, may conduct their rites and proselytise within the limits that may reasonably be imposed in a democratic society'.[110] Although this appears to entail a positive obligation on the state, the considerations in the decision read as a whole strongly suggest that this is not what the Commission intends to formulate.[111] Rather it stresses that this "norm requires that the State abstain from interfering in any way in the adoption, maintenance or change in their personal convictions of a religious or other nature. The State may not use its authority to protect the conscience of certain individuals". Nevertheless, within the framework of the restriction conditions of Article 12 § 3 ACHR states are allowed to limit the right to manifest religion and belief. The Inter-American case law does to my knowledge not suggest that this does not apply insofar as the manifestation concerns proselytism.

As for the case law of the supervisory bodies on the AfChHPR, it does not contain anything at all on proselytism prohibitions and the right to freedom of religion.

[107] ECtHR, Judgment of 29 June 2007, Appl. 15472/02, para 84 (*Folgerø v. Norway*); ECtHR, Judgment of 9 October 2007, Appl. 1448/04, para 52 (*Hasan and Eylem Zengin v. Turkey*). See also ECtHR (GC), Judgment of 18 March 2011, Appl. 30814/06, para 62; but see also para 63–77 (*Lautsi v. Italy*).

[108] Cf. for example ECtHR, Judgment of 3 May 2007, Appl. 71156/01, para 96–97 and 114 (*Gldani Congregation of Jehovah's Witnesses v. Georgia*).

[109] ECtHR, Judgment of 9 October 2007, Appl. 1448/04, para 48, 52, 54 (*Hasan and Eylem Zengin v. Turkey*).

[110] See the Commission's grounds in I-ACtHR, Judgement of 5 February 2001, para 74(c) (*'The Last Temptation of Christ' (Olmedo-Bustos et al.) v. Chile*).

[111] See particularly para 74(c).

c. *Conclusion on Proselytism*

Proselytism is regarded as a manifestation of the right to freedom of religion. Restrictions on proselytism are therefore permitted if they comply with the three conditions under which the right to manifest one's religion may be limited.[112] Only under the ECHR is it apparent that criminal law prohibitions of improper proselytism are acceptable. The European approach is not without objection from the viewpoint of the separation of church and state principle. As Judge Martens voiced it in his partly dissenting opinion in the in the case of *Kokkinakis*: 'Whether or not somebody intends to change religion is no concern of the State's and, consequently, neither in principle should it be the State's concern if somebody attempts to induce another to change his religion.'[113] Indeed, a criminal law prohibition must therefore be regarded as contravening strict separation. Such prohibition might, furthermore, easily be problematic in relation to the separation concept of neutrality, for similar reasons as prohibitions of apostasy detract from the neutrality of the state.[114] Besides, it might imply that individuals have a more limited margin to persuade someone to change his religion or belief than to persuade another person to change his opinion with regard to politics or other aspects of life. So criminal law prohibitions seem at best be permissible only under the separation concept of accommodation.

Meanwhile, criminal law prohibitions of improper proselytism hardly appear to serve pluralist society either. Not only may they have a chilling effect on the exchange of religious thought, they also all too easily hamper the possibility for people to live their lives according to the core of their belief (as for, example, Jehovah's Witnesses may be concerned). Quite unnecessarily so too, since often criminal law is not at all required to offer protection against improper proselytism. In situations in which protection against proselytism is needed, in the army for example (cf. the *Larrissis* case), the public service, or the school system, public service law and disciplinary measures are sufficient to offer the necessary protection. Moreover, if proselytism assumes a genuinely improper appearance, it always seems possible to repress it by applying religiously-neutral offences, such as disturbing public order, stalking, harassment, or in case of violent

[112] See *supra* subsection 4.3.

[113] See section 14 of the opinion annexed to ECtHR, Judgment of 25 May 1993, Appl. 14307/88 (*Kokkinakis v. Greece*).

[114] See *supra* subsection 5.2 (under: Conclusion on apostasy).

proselytism, offences against the person. In not taking this into consideration the European approach clearly shows disregard for the principle that criminal law is or at least should be *ultimum remedium*, even more so when freedom of religion and belief is involved.

Of course the ECtHR does so with a view to protecting the rights of others. Indeed, criminal law prohibitions of improper proselytism do protect the right of others to enjoy their freedom of religion in the way they prefer. With that those prohibitions protect – albeit in a superfluous manner – religious individuals against other religious individuals. But as has already been mentioned, the separation principle does not concern the relationship between private individuals and groups. Furthermore, nor do proselytism prohibitions in principle protect institutions of belief against the state, nor the other way around, and in addition they do not protect individuals against these institutions or against the state. On the contrary: often these prohibitions signify cooperation between the state and a certain religion with an aim of repressing the freedom of religion enjoyed by a minority group. I therefore come to conclude that criminal law prohibitions of proselytism are on balance never necessary nor desirable from the perspective of the right to freedom of religion, the separation of church and state principle, and the principle of pluralist democracy.

6. Conclusion

The involvement of criminal law with religion as well as the other way around is a precarious matter. In this contribution global and regional human rights conventions – particularly the ICCPR, the ECHR, the ACHR and the AfChHPR – are used as a basis to elaborate on that issue. The examination particularly concerns the relations between the right to freedom of expression, the principle of separation of church and state as well as the principle of pluralist democracy, and criminal law.

From the perspective of the nature of criminal law and from the point of view of liberty and human rights, criminal law must be regarded as a means of last resort, as a so-called *ultimum remedium*. Considering that the right to freedom of religion is one of the foundations of a democratic society, this principle of subsidiarity applies even more when religion is involved. That not only means that criminal law should interfere as little as possible with matters of religion. It also implies that if it is really necessary to protect or restrict religion by applying criminal law, this should be

done as much as possible on the basis of religiously-neutral offences. That seems to offer the best guarantee that the state operates in a neutral and impartial manner and in agreement with the principle of equality, and thus regardless of whether the person protected is religious or fundamental non-religious or that the adverse behaviour that needs to be repressed is religion based or not. Besides that, in case of religiously-neutral offences there will be less of a requirement on the Courts to form their own interpretations of religions in order to decide whether or not the conduct under review is a manifestation of religion (if the suspect is prosecuted for an offence aimed at repressing religion-based conduct – such as the offence of proselytism), or the conduct offends a fundamental aspect of religion (if the suspect is prosecuted for an offence that aims to protect religious values – such as the offence of blasphemy). Religiously-neutral protection and repression is the more so called for when criminal law at a fundamental level is already inevitably intertwined with a certain religion or belief. This implies that a criminal law system cannot be strictly neutral towards religion or belief anyway, since every society is made up of different kinds of religions, beliefs and the non-concerned. Moreover, since religions differ widely, most criminalisations that directly or indirectly affect religion or belief will limit one faith more than the other. The utmost caution is therefore especially indicated when enacting criminal law that expressly involves religion or belief.

This approach is best guaranteed by taking the concept of strict separation between church (religion) and state as the basic principle. This concept in particular leaves no room for the state to endorse criminal law measures that expressly aim to protect or repress religion or belief. This is not so under the separation concept of neutrality, which leaves the state to apply criminal law measures that are explicitly concerned with matters of religion or belief, provided these measures do not benefit or burden any of the religions and beliefs over any other. Although in this concept the state will act in a neutral and impartial manner, it will appear to do so less than under the strict separation concept, since it then expressly involves itself with religious matters. The least demanding concept of separation, i.e. accommodation, allows criminal law to be applied to specially protect a particular religion or belief. This is not compatible with *ultimum remedium* principle or subsidiarity requirement.

On the level of general principles the case law of the UN, Inter-American and European human rights supervisory bodies seems to assert that the right to freedom of religion calls for the application of at least the

separation concept of neutrality and maybe even that of strict separation. As primary touchstone, however, those bodies and especially the European Court of Human Rights apply the principle of pluralist democracy. However, when it comes to reviewing specific criminal law criminalisations that are expressly concerned with religion or belief, the bodies are not always faithful to these principles. For example, the European Court allows criminal law prohibitions of blasphemy and proselytism. In case of blasphemy prohibitions (but would it be any different with proselytism prohibitions?) that even applies when they only protect a certain religion instead of all religions and beliefs alike. Moreover, when reviewing these specific criminalisations, the bodies hardly if at all emphasise the principle that criminal law, particularly with regard to religion, is or at least should be *ultimum remedium*. The bodies do not problematise the relationship between criminal law and religion or belief. Although some criminalisations that concern religion are considered to be in violation of the right to freedom of religion, at the same time they impose positive obligations on states to protect or restrict manifestations of religion through criminal law.

This finally brings me to consider the question whether the principle of pluralist democracy is better suited to regulate the relation between the state and religion when it comes to criminal law than the separation principle. My answer is no.

It seems to me that an important feature of the pluralism principle is that its accomplishment will require the state to actively influence society by protecting forces that are valuable for pluralism and restricting forces that threaten pluralism in society. Eventually, the pluralism principle will then be the basis to formulate positive obligations on states to take criminal law measures in order to protect specific manifestations of religion or belief and to restrict certain others. This is a development that is already showing itself in international human rights case law. Augmentation of positive human rights obligations to apply criminal law in order to expressly restrict or protect the right to freedom of religion will increasingly suppress the separation between church and state. The basis of the separation principle is that the state should not involve itself with the religion or the beliefs of individuals and institutions of faith. That basis is difficult to reconcile with such positive obligations, especially because interference by the state with religion cannot be more intrusive in a democratic state than through criminal law. It will therefore be endangered when the separation of religion and state is no longer used as the primary

guiding principle in the application and interpretation of the right to freedom of religion, but instead the principle of pluralist democracy is chosen for that.

So, in my view such shift is quite unwelcome. First because the principle of pluralist democracy has to a large extent more of a political nature than the separation principle. If human rights were able to secure the wellbeing of people at any time in any place, they should be distanced from politics as far as possible. Second, the separation principle (at least in the concepts of strict separation and of neutrality) is much more in conformity with the *ultimum remedium* principle than the pluralism principle. Third, the substance of the principle of pluralist democracy is not nearly as clear as that of the separation principle. That alone should be reason enough to stick with the separation principle, considering that the freedom of religion and belief may easily be threatened if the state is too much involved with religion. By requiring positive criminal law obligations with regard to religion, the principle of pluralist democracy may on the other hand – in a worst case scenario – even prove itself to be a Trojan Horse that threatens the right to freedom of religion. I conclude therefore that the separation principle should not be (further) exchanged for the principle of pluralist democracy. However, the latter principle could be applied as a supplementary principle, albeit within the framework of the separation of church and state. This approach means that there is a somewhat limited margin within which to interpret the right to freedom of religion in such a way that it requires protecting the individual's freedom of religion and belief from the intrusions of other individuals and institutions of belief.[115] The approach moreover implies that there is in principle no room for criminal law offences that expressly concern religion or belief.

[115] This is one side of separation interest III; see subsections 2.1 and 3.4.

[13]

THE HUMAN RIGHTS IMPLICATIONS OF A "CULTURAL DEFENSE"

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I. INTRODUCTION[1]

On February 2nd of 1996, the Ninth Circuit Court of Appeals decided *United States v. Bauer*, a well-publicized case involving a group of defendants each charged, among other things, with marijuana possession.[2] After extended deliberations, the appellate body threw out the district court's guilty verdicts and remanded the case for a new trial. Interestingly, however, there was never an issue of whether the defendants had, in fact, possessed marijuana. Nor did the court waver on marijuana's general illegality or believe that there were any improprieties surrounding the group's arrests or pretrial proceedings. Instead, the circuit court ruled that the trial judge had erred in denying the defendants an opportunity to present evidence of the key role that marijuana plays in their religious culture, Rastafari.[3]

The *Bauer* decision had been foreshadowed five years earlier by another criminal case featuring culture as the main actor. In that case, a California State Court of Appeal reversed Helen Wu's murder conviction and ordered that a new trial be held so that the jury could be read the instructions that Wu had requested but the trial court had denied.[4] Wu had strangled her young son and tried to kill herself upon discovering that the man who had courted her and helped conceive her child was reneging on his repeated promise to marry her.

1. I express thanks to Professor Ronald R. Garet, University of Southern California Law School, for his guidance and thoughtful critique; to Professors Gordon Nakagawa, Naomi Bishop, and Judith Marti, California State University Northridge, for the insights that inspired this article; and to Jennifer, Hebes, and Zeus for their unwavering support and encouragement.

2. United States v. Bauer, Nos. 94-30073, 94-30074, 94-30075, 94-30076, 94-30084, 94-30094, 94-30171, and 94-30178 (9th Cir. Feb. 2, 1996).

3. Specifically, the court found that the Religious Freedom Restoration Act of 1993 mandated that the defendants be allowed to introduce evidence of Rastafarian beliefs in order to explain the circumstances surrounding their alleged crime.

4. People v. Wu, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991).

The jury instructions which Wu had requested focused on the traditional Chinese view of marriage and family. Specifically, they explained that in Wu's native culture, an unwed mother brings great shame onto herself, her child, and her family and that, as a result, a woman in such a position often feels her only choice is to leave this world with her child so that she may care for him free of scorn in the afterlife.[5]

These cases are recent manifestations of an old and unresolved dilemma. Is evidence of a defendant's cultural background relevant in explaining the circumstances of an alleged crime? And, if so, to what extent, if any, should a host country's criminal justice system make allowances for the cultural practices of its immigrant populations? Should the law show flexibility in regards to immigrants who are destitute refugees, seekers of political asylum, or members of groups who did not choose to immigrate out of convenience or economic gain? Should these groups be given a period of "legal acculturation"? And, separately, should newly-arrived immigrants be held to know every law which governs the country's citizens?[6]

Historically, courts have refused to allow any cultural evidence into criminal proceedings.[7] They have stood by the proposition that all who reside in a country regardless of their nationality, length of residence, or cultural indoctrination, are subject to the exact same laws.[8] This position was first echoed in the United States before the turn of the century when the highest court in the land announced that an alien who comes to a foreign shore immediately adopts all of the rules of the nation.[9]

Today, while most courts still do not allow cultural evidence of a defendant's beliefs, norms, or knowledge into the courtroom, some

5. *See id.*

6. This last question is a highly controversial one which will be addressed *infra* Section III B. At this point, it is only important to know that it represents the specific instances of the cultural defense—those that will be described as "cognitive"—that refer to situations in which the defendant argues that she did not know that her actions constituted a crime in the host country. In contrast, the cultural defense in its "volitional" form is used by the defendant who leaves uncontested the fact that she knew her conduct was a crime, preferring instead to argue that certain cultural characteristics either prompted, or at least influenced, her actions. Much misunderstanding results from those who, blind to this distinction, believe that the defense always involves a defendant claiming that she simply did not know the law of the host country and, therefore, should be shown some leniency.

7. Regardless whether the evidence goes to a cognitive or volitional case.

8. *See, e.g.*, Rex v. Esop, 173 Eng. Rep. 203 (Cent. Crim. Ct. 1836).

9. Carlisle v. United States, 83 U.S. 147, 155 (1873).

United States jurisdictions have progressively demonstrated leniency in admitting proof of immigrant defendants' cultural practices in certain situations. Specifically, courts have begun allowing defendants to present evidence of their culture in order to demonstrate the motives for their criminal acts.[10]

These decisions have spurred some observers to call for the establishment of a formal cultural defense that would not only allow a defendant's cultural background in evidence, but furthermore serve to mitigate the charges against that defendant, reduce her sentence, or exonerate her entirely.[11] In support of this position, they draw on arguments ranging from the need for cultural diversity,[12] to the importance of individualized justice.[13]

While these courts and commentators present many sound arguments, their proposals for a cultural defense need to be tempered by fundamental considerations of human rights. Human rights, a progeny of natural law, presents the claim that certain rights are inherent to us as people through no other reason than merely being born. Such rights include, for example, freedom of bodily sanctity and freedom from persecution based on beliefs. These rights are not subject to governmental regulation; they are above all political or societal manipulations.

As this Note will make clear, cultural evidence is not a uniform class. Some evidence concerns customs, norms, mores, and worldviews that violate basic notions of human rights; other evidence

10. *See, e.g.*, People v. Chen, No. 87-774 (N.Y. Sup. Ct. Mar. 21, 1989): Chinese culture; People v. Moua, No. 315972-0 (Fresno County Super. Ct. Feb. 7, 1985), U.S. v. Blong Her, No. CRF-84-73-EDP, (E.D. Cal. 1984): Hmong culture; People v. Croy, No. 52587 (Placer County Super. Ct. Apr. 1990), State v. Butler, No. 44496 (Lincoln County Cir. Ct. Mar. 11, 1981): Native American culture; People v. Gebreamlak, No. 80276 (Alameda County Super Ct. 1985): Ethiopian culture; State v. Curbello-Rodriguez, 351 N.W. 2d 758, 770 (Wis. 1984) (Boblitch, J., concurring): Cuban culture; People v. Metallides, No. 73-5270, slip op. (1984): Greek culture.

11. *See, e.g.*, Alison D. Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993); Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. ISLANDS L.J. 49 (1993); Malek-Mitthra Sheybani, Comment, *Cultural Defense: One Person's Culture is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751 (1987). While this not focuses primarily on the initial question of whether to allow cultural evidence into the courtroom, it is worthwhile to remember that a secondary query becomes, as some of these advocates have argued, whether the evidence should form a defense in itself. Helpfully enough, the arguments are basically the same for either inquiry.

12. *See, e.g.*, Dana C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) [hereinafter *Cultural Defense in the Criminal Law*].

13. Renteln, *supra* note 11.

does not. This distinction is well illustrated in the examples that headed this discussion. There are no human rights implications in allowing Bauer to present evidence of his cultural beliefs in order to defend his possession of marijuana. While it is true that marijuana has self-destructive properties, the defendant voluntarily chose to engage in these properties. His decision was guided by self-determination; it was not forced upon him by an outside agent. In *Wu*, by contrast, the mother killed her son. She violated his bodily integrity and extinguished his most precious possession. The very cornerstone of human rights, the right to life, was thus violated.[14] To accept all cultural evidence with no discrimination as to its adherence to human rights, as the previously cited courts and commentators have done, obfuscates the distinction which must necessarily be drawn. The proposed cultural defense must be restrained from allowing violations of human rights to serve as legal aids to those who commit them. Just as human rights violations cannot be given justification through politics, they cannot be given justification through our legal system.

This Note challenges courts to look to human rights in deciding what cultural evidence should be introduced into the courtroom. Section II will define the cultural defense and demark the instances when it has been applied in the past. Care will be taken to distinguish between the defense's applications in affirmative and derivative forms as well as in mitigative and complete forms. Section III will then provide an overview of the major arguments made by proponents and detractors of the cultural defense to date. Throughout this discussion, critical analysis of the debate will be presented from a human rights perspective. A qualified endorsement of the cultural defense will result. Having so explored the past lines of argument, Section IV will concentrate entirely on human rights and their application to the cultural defense. The background principles of human rights and natural law will first briefly be discussed. Thereafter, the fashion in which these principles can successfully delineate the cultural defense's parameters will be demonstrated. Lastly, the repercussions of limiting the cultural defense through human rights will be analyzed in terms of

14. An argument can reasonably be made that the right to life is not, in fact, the most fundamental of all human rights principles. Maybe a right to a life free of torture and arbitrary persecution is more accurate. Maybe a right to education. Maybe yet another construct. This Note presents the right to life as the cornerstone to human rights because of its prominence in many human rights documents, its special treatment in many philosophers' works, and the ease with which it can be severed and defined away from the other, more malleable, human rights. More details are provided on this subject *infra* Section IV A.

the implications for United States culture. More simply put, the question will be asked: do some of our own cultural acts defy the most treasured of human rights?

As a caveat, it should be added here that at no point does this Note claim to present a comprehensive overview of the pros and cons of the cultural defense or to serve as a "primer" on it. The arguments surrounding the defense are too numerous and complex to be dealt with adequately in a single, relatively cursory, work. Furthermore, most of these arguments have already been issued by a multitude of sources.[15] Therefore, any attempt to present them here would be a mere compilation of finished products, not a novel endeavor which will add to the field. Instead, this Note seeks to present the cultural defense in a new context, one of basic rights.

II. THE CULTURAL DEFENSE

A. Defining Culture

A helpful starting point in understanding the cultural defense is to delineate the parameters of its core feature: culture. Culture was first clearly and comprehensively defined by the British anthropologist Sir Edward Burnett Tylor. Writing in 1871, Tylor defined it as, "that complex whole which includes knowledge, belief, art, law, morals, custom and any other capabilities and habits acquired by man as a member of society."[16] Since Tylor's time, definitions of culture have proliferated to reflect the emphasis which subsequent generations of sociologists, psychologists, and anthropologists have thought most important. So varied have been these definitions that, in the 1950s, A.L. Kroeber and Clyde Kluckhohn, after combing the academic literature, collected over a hundred separate definitions of culture.[17]

Recent definitions tend to distinguish more clearly between actual behavior on the one hand and the mental processes that lie behind that behavior on the other. Stated another way, culture is presently acknowledged not as observable behavior, but rather as "the

15. *See, e.g.*, Renteln, *supra* note 11; *Cultural Defense in the Criminal Law*, *supra* note 12.

16. Sir Edward B. Tylor, Animism in The Making of Man: An Outline of Anthropology (V.F. Calverton ed., 1931).

17. *See* A.L. Kroeber & Clyde Kluckhohn, Culture: A Critical Review of Concepts and Definitions (1952).

values and beliefs that people use to interpret experience and generate behavior, and which that behavior reflects."[18] Following this trend, the definition of culture which will be adopted for the purposes of this Note will be a well-accepted one proposed by Professor William Haviland. It defines culture as: "[a] set of rules or standards shared by members of a society which, when acted upon by the members, produce behavior that falls within a range of variance the members consider proper and acceptable."[19] Haviland further specifies: "[c]ulture consists of the abstract values, beliefs, and perceptions of the world that lie behind people's behavior, and which that behavior reflects."[20] Such a broad definition encompasses all of society's primary institutions: for example, kinship, education, and religion.[21] As a result, the extent of evidence that could potentially be admitted under the banner of the cultural defense is vast.

B. Defining the Cultural Defense

The formal cultural defense is one "asserted by immigrants, refugees, and indigenous people based on their customs or customary law."[22] It stands for the proposition that these groups should be permitted to introduce evidence of their culturally defined norms, mores, and worldviews in all judicial proceedings in order to explain the circumstances regarding their alleged criminal activities.[23] As Alison Dundes Renteln, a major proponent of the cultural defense, has explained, two varieties of the cultural defense exist. Each is best understood in terms of the situation in which it applies. The first, called the "cognitive" cultural defense, applies in instances where, due to the culture of the defendant, she did not realize that her actions

18. William A. Haviland, Anthropology (5th ed. 1989).

19. *Id.* at 278.

20. *Id.* at 277.

21. As was illustrated by the *Bauer* example, it is important to see that a cultural defendant's native religion is included in this definition. Many of the cases featured in this Note address religious practices or beliefs. This Note adopts the position that the umbrella of the cultural defense amply covers cases both concerning religious cultural evidence and those that do not. Furthermore, it is argued that the cultural defense does not in any way supplant or restrict otherwise existing religiously-based claims. For example, a claim made under the Religious Freedom Restoration Act of 1993 is only altered by the cultural defense in the respect that the defense argues that the defendants must be allowed to present evidence of their religious beliefs at trial *if those beliefs are based on aspects of their foreign culture* (if the claim is based on a domestic religion, the cultural defense has no applications at all). In this fashion, the cultural defense can only *enhance* a free-standing religious claim.

22. Renteln, *supra* note 11, at 439.

23. *See id.*

constituted a crime.[24] That is, the defendant did not realize that her actions contravened any laws in the host country. The second, called the "volitional" cultural defense, is demonstrated in cases where, although the defendant knew that her conduct amounted to a crime, she was so overborne by the force of her enculturation that she chose not to conform to the "acceptable" conduct.[25]

C. Applications of the Cultural Defense

With this common understanding of culture (and, of course, the inevitable recognition that different individuals will have somewhat varying notions of it), we are prepared to analyze the cultural defense's applications in criminal proceedings. The defense, whether cognitive or volitional, may fulfill one of two primary functions and one of two secondary functions. First, it may serve either as an affirmative or a derivative defense. Second, within those categories, it may serve either as a complete or a mitigative defense. It must be understood that these categories of what the cultural defense *does* should not be confused with the earlier cognitive/volitional distinction of what the cultural defense *is*. Table 1 on the following page illustrates this admittedly complex analysis by laying out all of the possible conjurations of the cultural defense. The text that will follow will, one category at a time, explain the terminology.

Table 1

Forms of the Cultural Defense		
Cognitive		Volitional
Functions of these Forms		
Affirmative		Derivative
Mitigative	Mitigative Affirmative	Mitigative Derivative
Complete	Complete Affirmative	Complete Derivative
Possible Permeations of the Cultural Defense		
(1) Mitigative Affirmative Cognitive		(5) Complete Affirmative Cognitive
(2) Mitigative Affirmative Volitional		(6) Complete Affirmative Volitional
(3) Mitigative Derivative Cognitive		(7) Complete Derivative Cognitive
(4) Mitigative Derivative Volitional		(8) Complete Derivative Volitional

24. *See id.*
25. *See id.*

1. *The Cultural Defense as an Affirmative Defense*

An affirmative defense does not contest the presence of the elements of the offense—the actus reus and the mens rea.[26] Rather, it states that other circumstances temper the otherwise criminal act.[27] Self-defense is a classic example. In a murder trial where the defendant claims self-defense, she is not denying that she killed her attacker (actus reus). Nor is she contesting that she meant to kill the attacker (mens rea). Instead, the defendant is arguing that since she felt her life was in imminent jeopardy, she was justified in using any means available to protect herself.

Another example is afforded by the defense of necessity. When this defense is asserted, the defendant claims that she reasonably believed that she had to take an otherwise criminal action in order to avoid an even greater harm. For example, she may have felt obligated to drive recklessly in order to deliver a critically injured person to a hospital. Once again, the defendant neither denies that the actus reus was committed (driving recklessly) nor that the mens rea was present (intending to drive recklessly). Instead, she claims that the punishable quality of the act was absolved by the situation which prompted it.

The key to understanding affirmative defenses is to see that they implicitly recognize that motive is sometimes a consideration in liability determination. As has been documented, the role of motive is a long standing problem in criminal jurisprudence.[28] As a general rule, motive is not germane. That is, why a criminal commits a crime is irrelevant so long as it is established that the criminal intended the act. The standard example is that the thief is culpable even if she steals from the rich to give to the poor; her motive for theft is not to be considered.

Yet, motive seems critical in establishing blameworthiness. There is certainly a moral difference between the thief who steals for her own personal gain and the thief who steals to feed her children. "Whereas both are guilty legally, the latter is in some sense less guilty morally."[29] In recognition of this distinction and "insofar as the law derives its legitimacy from morality,"[30] some exceptions to the general

26. *See* Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 51 (2d ed. 1986).
27. *See id.*
28. *See* Renteln, *supra* note 11, at 443-44.
29. *Id.* at 443.
30. *Id.*

stance have been officially created. The examples of self-defense and necessity are, again, of use.

When the law uses the doctrine of self-defense to find no liability in the person who killed her attacker, it is looking at the objective motive of the victim of the attack. It is recognizing that this motive (or, at least, the motive of a reasonable person in the defendant's position) was not to kill out of hate or desire for gain, but to keep herself from suffering serious bodily harm or death. Likewise, when the law absolves of liability the reckless driver under the aegis of necessity, it is understanding that the driver's conduct was not motivated by a need to fulfill a craving for thrills (for example), but by the desire to save the life of an injured person.

The cultural defense, at least in its volitional incarnation,[31] can work as an affirmative defense in the same fashion as self-defense and necessity do. It does not deny that the mens rea and the actus reus were present. Instead, it recognizes an exception in circumstances when the motive for otherwise criminal conduct is relevant. The case of *People v. Kimura* illustrates this application.[32]

Fumiko Kimura lived in a fairly isolated Japanese immigrant enclave in Los Angeles, California. Upon learning of her husband's adulterous conduct, she attempted to drown herself and her two children in Santa Monica bay. While both children died, she was rescued by onlookers. At trial, Kimura contended that she was attempting a traditional Japanese ritual, oyako-shinju, parent-child suicide.[33] According to this ancient custom, it is believed that when a woman has been wronged by her husband, she may choose to remove herself from this world rather than to live (as is perceived) as a source of shame to her family and community.[34] Taking her children with her into the afterlife is encouraged as leaving them behind with no one to attend to them would be a sign of poor motherhood. Oyako-shinju, although not officially condoned, is rarely prosecuted in Japan.[35]

31. Schematic examples (2) and (6).

32. People v. Kimura, No. A-091133 (Santa Monica Super. Ct. Nov. 21, 1985).

33. The truthfulness of this statement was the focus of much controversy at trial. The prosecutor believed that Kimura had ulterior motives for killing the children and only claimed to be practicing oyako-shinju to extricate herself from the prosecution. For an in-depth analysis of the case, see Michael Reese, *A Tragedy in Santa Monica*, NEWSWEEK, May 6, 1985, at 10.

34. *See* Renteln, *supra* note 11, at 463.

35. *See id.* at 463 n.91 (citing Maura Dolan, *Two Culture Collide Over Act of Despair; Mother Facing Charges in Ceremonial Drowning*, L.A. TIMES, Feb. 24, 1985, at 3).

The Los Angeles district attorney, confronted with over 25,000 signatures gathered by the Japanese community requesting clemency for Kimura and explaining the role of oyako-shinju in Japanese culture, negotiated a plea bargain with her in which she agreed to plead to reduced charges of voluntary manslaughter.[36] At sentencing, she was given one year in prison (which she had already served) and five years probation; she walked out of the courtroom a free woman.

Observers have unanimously explained that this lenient sentence was the direct result of considerations of Kimura's cultural background.[37] Kimura never denied that she committed the act of drowning her two children. Nor did she argue that she intended to commit this act. Rather, she sought admitted into evidence the Japanese custom of oyako-shinju in an effort to demonstrate that the prevailing forces of her enculturation reasonably swayed her decision to act. In other words, she claimed that her motive should be considered in assessing her liability. She contended that her actions were not those of a woman who killed out of hatred or desire for gain, but rather those of a compassionate and caring mother. Therefore, the argument continues, she should not be affixed the same moral blame as would be placed on one who killed out of spite and desire. Just as the law has, in the cases of necessity and self- defense, forged exceptions to its general rule that motive is irrelevant, it should make a similar exception in cases where the cultural background of the defendant is a key consideration in determining the defendant's moral blameworthiness.

By way of contrast and in an effort to help the reader attain greater understanding, we may consider the possibility that the affirmative cultural defense could also be used when it is in its cognitive form.[38] This would result if Kimura had committed the act not knowing that oyako-shinju was a crime in the United States.[39]

36. *See id.* at 463.

37. *See, e.g.*, Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 147-48 (1994); John C. Lyman, *Cultural Defense: Viable Doctrine or Wishful Thinking?* 9 CRIM. JUST. J. 87 (1986).

38. Schematic examples (1) and (5).

39. For a real example of a cognitive affirmative cultural defense case, see *Regina v. Adesanya*, in Jill E. Korbin, *The Cross-Cultural Context of Child Abuse and Neglect*, *in* THE BATTERED CHILD 21, 24 (C. Henry Kempe & Ray E. Helfer eds., 3d ed. 1980). This case is also examined *infra* Section III.B.1.

2. *The Cultural Defense as a Derivative Defense*

The cultural defense may also be used by criminal defendants as a derivative defense. In contrast to an affirmative defense, this defense contests that the necessary elements of the offense, either the actus reus or the mens rea, have been proven.[40] We may understand how the cultural defense functions in this respect through a few examples of traditional derivative defenses.

A classic example of a derivative defense is the insanity claim. When a defendant asserts the insanity defense, she argues that she was not capable of forming the necessary mental state (intent, knowledge, recklessness, negligence) to commit the crime alleged. Because the law believes that the principle of mens rea requires the voluntary commission of a harm forbidden by penal law, it does not punish an individual who suffers from a cognitive or volitional impairment which renders her act in some substantial way involuntary.[41]

Another example of a derivative defense is mistake of fact. In this defense, the defendant claims that she reasonably did not know a material fact which was integral to the offense. For example, charged with knowingly selling alcohol to a minor, a defendant may explain that she was not aware of the minor's age and that her belief was reasonable upon the circumstances of her interactions with the minor (i.e., the minor presented convincing false identification and appeared well over drinking age). The defendant is, essentially, arguing that she never formed the specific intent to commit the crime.

A qualitatively different example of a derivative defense is offered by the common situation where the defendant argues that she simply did not commit the physical act of the crime. This, for example, can be seen in the common situation where the defendant argues that she was elsewhere at the time of the theft and, therefore, could not possibly have committed it. In this instance, the defendant is not attacking the mens rea, but the actus reus of the crime. Either way, it is a derivative defense.

The cultural defense is well-adapted to being a derivative defense when it negates the mens rea of the crime.[42] To illustrate, we may discuss the Hmong villagers of the mountains of Laos. Because of an agreement with the Central Intelligence Agency during the Vietnam

40. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 308 (2d ed. 1960).
41. *See id.*
42. Schematic examples (3), (4), (7), and (8).

War, thirty thousand of these villagers have emigrated from Southeast Asia to an enclave in Fresno, California.[43] As may be expected of such a large and comparatively distinct group, the Hmong immigrants have continued to practice much of their culture in their new home. Some of these practices, however, have led to well-documented clashes with the laws of the United States.[44]

Let us imagine that a California statute exists which forbids the intentional receipt of stolen property. Furthermore, let us imagine that because traditional Hmong culture has a communal philosophy, no thieving ever occurs. In a case where a Hmong defendant is charged with intentionally receiving stolen goods, she may use the cultural defense to explain the reasons why she believed the property was not stolen. She, in fact, is employing the cultural defense to support an argument that she did not possess the necessary mens rea (intent) necessary to commit the crime.

The derivative cultural defense may also, at least theoretically, be argued to deny the actus reus of a crime. To explain this claim, we must first understand that all acts are social constructs. No act, of its own, means anything to us. What we interpret from that act is merely the meaning which we have agreed to place upon it. Thus, in the United States when a mother waves to her son as he is looking back at her through the window of a departing schoolbus, her action is understood by the child, through custom, to mean "goodbye." Such an interpretation, however, is not mandatory. Anthropology has demonstrated that gestures will vary tremendously cross- culturally. Hence, the mother's wave may have no meaning, or a completely different one, in a foreign culture.

Crimes are not immune to this analysis. Acts which are interpreted as crimes in one culture may not exist as such in others. For example, we can imagine that a particular culture believes that the most profane and offensive act which a person may do is to trace with her finger a circle on another's forehead. Let us further assume that such an act is so taboo that it is deemed a crime. Now, let us conjure a situation where a man from another culture was under the employment of a woman from the culture in question as a hairstylist when, in an effort to remove some curls out of the woman's bangs, the man makes the shape of a circle on the woman's forehead. When brought

43. *See* Mark Thompson, *The Cultural Defense*, STUDENT LAWYER Sept. 1985, at 25.
44. *See* Lyman, *supra* note 37.

to trial for the offense, the man would be justified to present the cultural defense to deny the actus reus of the crime. Particularly, the man would seek to introduce evidence which demonstrates that since such an act was not in his "cultural repertoire," he did not commit it. Since the act, interpreted by the woman's culture as a crime, was not given any significance by *his* culture and since all acts are social constructs, the man, in a very real sense, simply did not commit the act.

3. *The Cultural Defense as a Mitigating Defense*

Thus far, the function of the cultural defense has only been discussed in affirmative or derivative terms. At this point, it is instructive to make one final distinction depending on whether the defense is sought to be a full defense to the crime charged (a "complete" defense) or a partial one (a "mitigative" defense). As the earlier schematic suggests, the distinction between complete and mitigative defenses is an overlay on the earlier affirmative/derivative and cognitive/volitional distinctions. To elucidate, we should begin by looking to the cultural defense in its mitigative function.

a. Mitigating Defenses that Reduce Charges

A mitigating defense relies on the contextual circumstances of the crime alleged to either reduce the charges against the accused or to lessen the sentence imposed.[45] The law recognizes many mitigating defenses that serve to reduce the charges against a defendant. A classic example is the provocation defense in regards to homicide. The premise behind this defense is that although the defendant killed someone unreasonably, she was somehow incited to do so.[46] Thus, her culpability is less and her charge is reduced accordingly (in this case, to manslaughter).

Another mitigating defense is diminished capacity. This defense contends that something about the defendant made her judgment less reliable than under more normal conditions.[47] As with provocation, while the defendant admits to committing the crime, she points to circumstances surrounding the act in an attempt to lessen the charges against her. For example, in a case where the defendant is charged with manslaughter in connection with a car accident, evidence that the

45. Renteln, *supra* note 11, at 488.
46. *See* Martin Wasik, *Partial Excuses in the Criminal Law*, 45 MOD. L. REV. 516, 519 (1982).
47. *See id.* at 522.

defendant was under the influence of a strong prescription drug may reduce the charge to reckless endangerment.

b. Mitigating Defenses that Lessen Sentences

A mitigating defense can also result in a more lenient sentence. For instance, in either of the two examples presented above, a judge may find the defendant guilty of the crime charged, but sentence her to either no or minimal prison time (as was the case in *Kimura*).[48] Another clear illustration is provided by the Federal Sentencing Guidelines which incorporate this concept into their directives by subtracting time on a felon's sentence for such things as "substantial cooperation" and "first offense."[49] Less formally, every time a plea bargain is reached in which the accused agrees to plead guilty in return for a lower sentence, we see a form of a mitigation defense.

c. Applications to the Cultural Defense

The cultural defense has many applications as a mitigative defense because it can be used in all instances in which the affirmative defense applies. Furthermore, the use of the cultural defense in this fashion provides a substantial benefit. As Alison Dundes Renteln has commented, a cultural defense which mitigates a charge or a sentence provides an alternative to the "simplistic" binary system of guilty or not guilty which predominates today.[50] By providing options, mitigating defenses grant flexibility. More importantly, they allow the jury and then the judge to craft a punishment which matches the culpability of the offense.[51]

An example of a case where the cultural defense was used to mitigate damages, unofficially of course, is *People v. Moua*.[52] In that case, the introduction of cultural evidence led to a reduction of charges—from kidnapping to false imprisonment—against a young Hmong man who abducted a woman in accord with the traditional Hmong "marriage by capture" custom. Likewise, in the case of *State v. Curbello-Rodriguez*,[53] the sexual mores of Cubans were deemed

48. People v. Kimura, No. A-09113 (Santa Monica Super. Ct., Nov. 21, 1985).
49. Sentencing Guidelines Act of 1986, Pub. L. No. 99-363, § 1 & § 994, 100 Stat. 700 (1986).
50. *See* Renteln, *supra* note 11, at 489.
51. *See id.*
52. No. 315972-0 (Fresno County Super. Ct. Feb. 7, 1985).
53. 351 N.W.2d 758, 770 (Wis. 1984) (Bablitch, J., concurring).

relevant to reduce the sentence of a man convicted of rape in the United States.

4. *The Cultural Defense as a Complete Defense*

Whenever the cultural defense, through either its derivative or affirmative functions, serves not to reduce charges or to lessen sentences, but instead to completely acquit the defendant, it is a complete defense. While this may at first blush seem like a best-case scenario for the defendant, complete defenses are double-edged swords because if the finders of facts do not see sufficient grounds for full exoneration, they must entirely reject the defendant's defense. There is no middle ground.

Since the cultural defense is not officially recognized, examples of instances when the cultural defense has served as a complete defense are difficult to produce. However, it is likely that the court in *Regina v. Adesanya* implicitly used the defense in this function.[54] Adesanya was a Nigerian immigrant who, in accordance with the customs of her native Yorumba tribe, made small slashes on her two young sons' cheeks in order to initiate them into the tribe. According to Yorumba culture, the marks, made with a razor blade and no more than three-fourths of an inch long, serve to identify as well as to beautify.[55] Adesanya was charged with assault, although she did not know that scarification was a form of assault in the host country.[56] At trial, the judge allowed Adesanya to explain the role of the marks in her culture and, based on this evidence, dismissed the charges against her with only a stern warning that this custom may not repeat itself in the host country.

III. THE DEBATE

The cultural defense has been the subject of much controversy over the past twenty years.[57] As greater and greater numbers of immigrants settle within the United States, the need to address their cultural rights has grown. This need has been recognized by an

54. *See* Korbin, *supra* note 39.

55. *See id.* at 24.

56. *Regina v. Adesanya* is an example of the complete cognitive affirmative cultural defense; schematic example (5).

57. *See* Henry J. Reske, *Judges Debate Cultural Defense: Should Crimes Acceptable in an Immigrant Homeland Be Punished?*, A.B.A. J. Dec. 1992, at 28 (1992).

increasing number of courts who, although not adopting a formal cultural defense, have admitted cultural evidence into their courtrooms in order to explain the circumstances of alleged crimes. This trend has sparked much controversy in the academic community. With most commentators arguing against the establishment of the defense, proponents of it have sought recourse to a variety of rationales why cultural evidence should be allowed. While this Note lends support to the thrust of the latter group's arguments, it posits that they have overlooked a necessary limiting factor to the establishment of a cultural defense. Specifically, they have not recognized that fundamental human rights considerations preclude the use of cultural evidence, at a minimum, in cases where it is used to explain the taking of life or the violation of bodily sanctity. This fact is best illustrated in an analysis of the arguments both for and against the establishment of the cultural defense.

A. Arguments in Favor of Establishing the Cultural Defense

Any discussion of a proposed change in criminal jurisprudence should focus on the system's goals. The three central objectives of the United States' criminal justice system are retribution, deterrence, and rehabilitation. Each of these goals has a different emphasis. Retribution theory is interested in punishing the offender to his level of moral culpability.[58] This may be referred to as the "just desserts" doctrine. Deterrence stresses that the primary reason for punishment is to prevent other crimes.[59] This goal is divided into two subsections, specific and general deterrence. Specific deterrence is interested in punishment's influence on the particular criminal who has been found guilty of a crime.[60] General deterrence, for its part, focuses on punishment's effect on other people's future actions.[61] Lastly, rehabilitation looks at punishment as a tool to reform the criminal into a more law-abiding member of society.[62] We may examine how the cultural defense serves each of these three objectives.

58. *See* Martin R. Gardner, *The Renaissance of Retribution: An Examination of Doing Justice*, 1976 Wis. L. Rev. 781 (1976).

59. *See* Johannes Andenaes, *General Prevention: Illusion or Reality?*, 43 J. Crim. L., Criminology, & Police Sci. 176 (1952).

60. *See id.*

61. *See id.*

62. *See* Francis A. Allen *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. Crim. L., Criminology, & Police Sci. 226 (1959).

1. *The Goal of Retribution*

When someone has done an act which we, as a society, have declared as a wrong, we punish them in order that they may feel the same measure of harm that they have inflicted on others. This is retribution. Fundamental to this concept is the notion that the punishment must fit the crime.[63] There is no denying that it would be ludicrous to send shoplifters to the gas chamber. We, therefore, attempt to proportionalize the punishment to the moral blameworthiness of the offense. Inasmuch as law derives its legitimacy from underpinnings in morality, we use morality as the guiding principle in setting the quantum of punishment.

Proponents of the cultural defense argue that it can, in some instances, help measure this level of blameworthiness. In cases of the cognitive cultural defense (where the defendant did not know that she was committing a crime), it is argued that prosecution without regrards to cultural factors is unfair to the immigrant who was not given an opportunity to conform her conduct to the law.[64] Similarly, in cases involving the volitional cultural defense, it is claimed that it would be disingenuous to punish someone who was merely acting under the forces of her *enculturation* with the same severity as someone who had an objectively malicious motive.[65] Some examples should suffice to elucidate these commentators' points.

In the case of *State v. Butler*,[66] members of the Native American Siletz tribe were convicted of cutting off the fingers and slashing the throat of a white man who was discovered pillaging and scavenging their tribal burial site for valuable artifacts. Most cultural defense advocates argue that the defense must be allowed in this instance to present evidence of the meaning which Native Americans place upon their deceased ancestors and tribal gravesites. Only when these facts are known to the trier of facts, they claim, can we truly affix the proper level of blame and, hence, punishment.

For another example, we may look to *People v. Aphaylath*.[67] In that case, a Laotian man stabbed his wife when she received a telephone call from another man. Cultural defense advocates admit that

63. *See* Renteln, *supra* note 11, at 442.

64. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968).

65. *See Cultural Defense in the Criminal Law*, *supra* note 12.

66. No. 44496 (Lincoln County Cir. Ct., Mar. 11, 1981).

67. 502 N.E.2d 998 (N.Y. 1986).

this, at first glance, appears highly blameworthy. However, they argue the blame is reduced somewhat when it is learned that in Laotian culture a man's wife who is called upon by another man has committed a sin akin to adultery and, as a result, has brought great dishonor to her husband.[68] The cultural defense, thus, is necessary if we are to know all of the information required to place the correct amount of punishment on the man at trial.

A critical examination of the arguments put forth above reveals some merits. Primarily, the cultural defense, by allowing a sharper focus on moral blameworthiness, is assisting each defendant to be judged according to her own level of guilt. In this fashion, it is promoting individualized justice. Moreover, by looking at the entire context of the situation instead of to the formalistic details,[69] it provides the jury with a middle ground between full punishment and full acquittal.[70]

While these are strong arguments, it must be recognized that there are some instances where the blameworthiness of the conduct is categorically too strong to be mitigated by cultural circumstances. Such instances include, but are not limited to, murder. In the two examples above, the defendants killed a human being out of anger. They violated the first principle of human rights, the right to live.[71] Once such an action is taken, the presentation of cultural factors is irrelevant inasmuch as we all must abide by a code of human rights over all other rules and duties, cultural or otherwise. One's cultural beliefs, norms, and mores must yield to considerations of basic ethics. To allow the cultural defense in these situations would put the cart before the horse.

As a point of contrast, we may look to *United States v. Bauer*, the recent case that introduced this Note. In that case, cultural evidence would be helpful in assessing the defendants' proper level of blameworthiness. The defendants' moral blame, viewed from behind a veil of ignorance, changes when it is revealed that marijuana is part of

68. *See Cultural Defense in the Criminal Law*, *supra* note 12.

69. *See* Gardner, *supra* note 58.

70. A similar approach is already reflected in the criminal law's acceptance of other defenses such as, for example, the battered wife defense which seeks to bring in evidence of the husband's previous abuses in order to paint a more accurate picture of the motivations behind the wife's actions. For more insights into this connection, see Joseph Goldstein & Kay Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963).

71. This right and its predominance over the other rights will be discussed in greater detail in Section IV.

their religion. Since the defendants are not violating any human rights, there is no barrier to preclude them from presenting this evidence.[72]

2. *The Goal of Deterrence*

A major criticism advanced by those opposed to the cultural defense is that it would not serve the criminal law's objective of deterring others or the same individual of committing a similar crime. Proponents of the cultural defense argue in return that this criticism is not well founded for several reasons.

First, the proponents argue that the cultural defense in immigrant communities would be allowed to adjust faster to the host culture's laws by sending them the message that their customs, while deemed criminal, would be accorded some respect.[73] Lesser friction and backlash in the immigrant community would result and, hence, faster adaptation.[74]

Second, the cultural defense would draw attention to the cultural aspects of a particular immigrant group which are at odds with the laws of the United States. As a result, the word would spread throughout the immigrant community that such conduct is not acceptable.[75]

Third, neither specific nor general deterrence would be well-served by disallowing the cultural defense. Specific deterrence is needless in these sorts of crimes. In the case of cognitive cases, the individual in question will certainly learn of the impropriety of her conduct through the trial procedure.[76] In the volitional case, the offense is usually so rare and deeply personalized that there should be few concerns of an individual committing the crime again.[77] In terms

72. At least no human rights are being violated *directly*. This Note does not consider indirect violations that may occur, such as, in this instance, the possibility that lives were imperiled or injured in keeping Bauer's activities secret from the authorities.

73. *See* Chiu, *supra* note 12.

74. *See* M. GORDON, ASSIMILATION IN AMERICAN LIFE 85, 136-137 (1964). This is a controversial hypothesis which has not been subjected to extensive scientific test.

75. *See Cultural Defense in the Criminal Law*, *supra* note 12, at 1303-04.

76. *See id.* at 1303.

77. *See id.* This is not always the case, however. For example, the Fresno Hmong have continued their cultural practice of slaughtering pigs in their backyards in violation of several city and county ordinances. *See* Thompson, *The Cultural Defense*, *supra* note 43, at 27. This practice can neither be termed deeply personal nor rare.

of general deterrence, the same kinds of arguments may be considered. It has been demonstrated that when an immigrant community member is charged with an offense which is not criminal in her country, the illegality of the practice quickly becomes known within the community.[78] This will serve to inform community members and greatly reduce the number of cognitive cases in the future.

From a natural law perspective, these arguments, while probably valid in cases of no human rights infringements, miss their target when infringements are present. Human rights violations must be firmly deterred. Allowing cultural evidence into the courtroom to assist an offender does not send a message out to the community as clearly as if the defendant were denied such aid. Instead, it puts the United States' stamp of approval on violence. It proclaims to immigrants within this country as well as to people living in other countries that the U.S. is willing to tolerate killings and maimings so long as they are committed in the name of culture.[79] Moreover, while it is a noble aim to wish to communicate to immigrant communities that the legal system wishes to respect their customs, it must be recognized that not all customs will be afforded the same amount of respect.

3. *The Goal of Rehabilitation*

The criminal justice system is interested in seeing that punishment serves to reform criminals into positively- contributing members of society. It desires that the judicial and penal processes alter the criminal's personality in such a way that a new and more acceptable person will result. Anti- cultural defense commentators claim that allowing a cultural defense would defeat this purpose by not making immigrant offenders subject to change.[80] Advocates of the defense counter that this argument is flawed as it fails to realize that rehabilitation, in this instance, would mean assimilation, and assimilation is not a worthy goal in a pluralistic society.[81]

Cultural pluralism, it has been declared, is a "bulwark against despotism."[82] It maintains society' s vigor.[83] It reflects how much a

78. *See* Chiu, *supra* note 12.

79. Not only does a rejection of the cultural defense when human rights infringements are found serve to discourage the cultural practice in question within this country, it may even have some small and distant effects in discouraging the practices in their countries of origin.

80. *See* Goldstein, *supra* note 37, at 141.

81. *See, e.g.*, Chiu, *supra* note 12, at 1104-12.

82. *Cultural Defense in the Criminal Law*, *supra* note 12, at 1301.

society values liberty.[84] But are we only pretending to be committed to cultural diversity if we reject it when it really counts?[85] One monolithic standard of justice is too rigid to accommodate the generations upon generations of immigrants who have grown up in the United States as well as the more recent arrivals.[86] The cultural defense, by looking at relevant cultural factors, maintains and promotes cultural diversity.[87] It acknowledges our heterogeneous nature as a country and declares it a worthy characteristic.

Rehabilitation, it is argued, if it were interpreted to deny the cultural defense, would send the message to immigrant communities that they must trade in their cultures for that of the host[88] and that their cultures were inferior to that of "Americans."[89] In this fashion, denial of the cultural defense would reveal an underlying fear of beliefs different from our own, a national ethnocentrism not consonant with the traditional American values of tolerance, curiosity for the unknown, and willingness to experiment with new ideas.[90] Such a stance would strike a severe blow to cultural diversity.

A human rights perspective on these arguments begins by recognizing that cultural diversity is indeed a worthy goal.[91] In fact, some, but not all, human rights documents have recognized the need to preserve cultural diversity as a right.[92] However, when two rights clash, one must give way to the other in order for coherence to be attained. In the scope of the instant discussion, it seems likely that the right to life and bodily sanctity predominates in importance over the right to maintain one's cultural integrity. To put it succinctly, the preservation of a cultural belief in killing may not stand.

Rehabilitation, therefore, must be achieved through the denial of the cultural defense when human rights are violated. And if this is to

83. *See* HORACE M. KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES 209-10 (1924).

84. *See* JEROME HALL, LAW, SOCIAL SCIENCE, AND CRIMINAL THEORY 76 (1982).

85. *See* Alison Dundes Renteln, *found in*, Don J. DeBenedictis, *Judges Debate Cultural Defense*, A.B.A. J., Dec. 1992, at 28, 28.

86. *See* Susan N. Herman, *About Crime: Should Culture be a Defense?*, NEWSDAY, Apr. 20, 1989, at 80.

87. *See Cultural Defense in the Criminal Law*, *supra* note 12, at 1300.

88. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 28, 57 (1985).

89. Chiu, *supra* note 12, at 1098-1104.

90. *See Cultural Defense in the Criminal Law*, *supra* note 12, at 1311.

91. On the subject, John Stuart Mill wrote "what the improvement of mankind and of all their works most imperatively demands is variety, not uniformity." J. Mill, *Endowments*, *In* ESSAYS ON ECONOMICS AND SOCIETY 617 (J.M. Robson ed., 1967).

92. See Section IV for an elaboration on this subject.

be termed assimilation by proponents of the defense, then we should consider it not assimilation into the host's culture, but assimilation into natural law's culture. Furthermore, there is another reason to trust that no homogenizing process will result. Complete assimilation can never be a consequence when only a single cultural attribute is sought to be changed. In terms of our discussion, only those few aspects of an immigrant defendant's behavior that relate to violent criminal conduct are targeted for change. The remaining gamut of her cultural identity will be left intact.

B. ARGUMENTS AGAINST THE ESTABLISHMENT OF THE CULTURAL DEFENSE

A number of commentators have written extensively in opposition to the cultural defense.[93] Their strongest arguments can be grouped into three basic categories. First, they point out that a cultural defense would defy the long-honored maxim: *ignorantia legis neminem excusat*, ignorance of the law is no excuse.[94] Second, they advance that the implementation of the cultural defense would be so problematic as to render any effort to do so futile.[95] Lastly, they claim that the cultural defense promotes violence towards women.[96] If even a limited cultural defense is to be endorsed by this Note, each of these claims deserves examination.

1. *Ignorance of the Law is No Excuse*

Many commentators erroneously believe that defendants in cultural defense cases are always trying to argue that ignorance of the law should be an excuse.[97] From this mistaken assumption, they assert that defendants should never be allowed to place their knowledge of the law above the law itself.[98] Such a position, their analysis goes, defies the pillar of Western law that ignorance of the law cannot

93. *See, e.g.*, Herman, *supra* note 86; Lyman, *supra* note 37; Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986); Melissa Spatz, *Project, A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597 (1991); Young, *Equal Cultures—or Equality?: There's a Choice to Make Between Feminism and Multiculturalism*, WASH. POST, Mar. 29, 1992, at C5.

94. *See, e.g.*, Sams, *supra* note 93, at 335.

95. *See, e.g.*, Lyman, *supra* note 37, at 109.

96. *See, e.g.*, Spatz, *supra* note 93, at 597.

97. *See, e.g.*, Sams, *supra* note 93, at 335; Lyman, *supra* note 37, at 109.

98. *See* Sams, *supra* note 93, at 335.

be an excuse. We may not, they continue, craft different laws for different people;[99] inherent to the concept of an ordered society is one standard of justice for all. Anarchy, it is warned, would result otherwise.[100]

Two responses can be made to these critics based upon whether the volitional or cognitive defense is concerned. First, when the criticism is applied to the volitional cultural defense, it is off the mark entirely. The volitional cultural defense does not argue that the defendant did not know the law, but rather that certain cultural factors were of such force that the defendant felt compelled to act in conformity with them.

For an example, we may turn to a different aspect of the earlier case of *People v. Moua.*[101] After carrying off his bride-to-be, Kong Moua engaged in sexual intercourse with her as the consummating part of the Hmong "marriage by capture" ritual.[102] The custom requires that the woman, even if she is willing to marry the man, must protest in order to show her purity.[103] The man, for his part, is required to force her to cooperate in order to prove his braveness and readiness to be a providing husband.[104] In the rape trial that ensued, Moua did not argue that he was not aware of the American laws involved, but rather that he believed that the woman was participating in the ritual. In this fashion, he sought to introduce evidence of the ritual into court so as to explain the background circumstances of the alleged crime. Thus, this cultural defense case cannot justly be criticized as defying the ancient maxim.

When commentators apply the same argument to the cognitive cultural defense cases, their claim is better received, but subject to disagreement nonetheless. In these situations, it is true that the defendant is arguing that she did not know of the law. The maxim, however, shows anachronistic features in its applications here. Specifically, there is a serious problem with notice when we convict a brand-new immigrant to a harsh penalty for doing something which she felt

99. *See* Goldstein, *supra* note 37, at 158.

100. *See* Herman, *supra* note 86, at 80.

101. *See supra* text at page 19.

102. *See* Deidre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California,* 4 S. CAL. INTERDISC. L.J. 1, 11.

103. *See* Evans-Pritchard & Renteln, *supra* note 102.

104. *See id.*

was perfectly acceptable.[105] As has been noted earlier, people must be given an opportunity to adapt their conduct to the laws of the host country.[106] Thus, while the doctrine may be of considerable value in situations where the defendant is a native of the country or has lived in the country a sufficient time to be expected to have learned its laws, it is of no value in the cases of new immigrants.

As an illustration, we may look again at *Regina v. Adesanya.*[107] To keep Adesanya from presenting evidence of her Yorumba culture and resulting reasonable lack of notice would seem an injustice. While the criminality of her act may seem fairly obvious to many Westerners, it may not be so obvious to a Nigerian woman. It is questionable whether we, as a society, may expect a new immigrant from a substantially different culture to understand why tribal markings are criminalized in a society which encourages male circumcision and ear-piercing. Although she is, in fact, arguing ignorance of the law, there must be occasions when the maxim should show flexibility for reasonable mistakes.[108]

The ignorance of the law argument, therefore, is generally misapplied in volitional cultural defense cases and potentially too rigid in cognitive ones. A more convincing argument would be to claim that the cultural defense is not a viable tool in either the volitional or cognitive case when human rights are violated.

In the cognitive case, while it is reasonable in some cases to show some leniency towards the defendant who did not know the law because her homeland's laws differed significantly, there can be no excuse for violating a human rights law. Human rights must be thought of as universal if they are to mean anything at all. They must unite us into a single entity willing to stand for the essential entitlements of mankind. To accept an exception for certain instances defies this purpose.

In the volitional case, the justification for disallowing cultural evidence where an infringement on human rights exists is even stronger. A blatant disregard for human integrity can never be tolerated. We may not choose what fundamental rights are to be observed and which

105. *See* Renteln, *supra* note 11, at 483.

106. *See* Hart, *supra* note 64.

107. *See* Jill E. Korbin, *The Cross-Cultural Context of Child Abuse and Neglect, in* THE BATTERED CHILD 21, 24 (C. Henry Kempe & Ray E. Helfer eds., 3d ed., 1980).

108. As mentioned prior, the judge agreed and dismissed the charges against Adesanya with only a warning that such practices will not be allowed thereafter.

are to be discarded. Respecting human rights is not a selective endeavor.

2. *Practical Considerations*

A number of critics have argued that even if the cultural defense had substantive merit, it would be a nightmare to implement.[109] They cite various logistical difficulties which they feel would make the adoption of the cultural defense an impossible task. A brief glance at these arguments should suffice to understand their point.

A frequent argument made against the adoption of the cultural defense questions who would be eligible for it. How would we delineate the "covered" people from those who should be expected to conform their actions to the laws of the host country? If we were to limit the defense to new immigrants, should we not also extend it to American subgroups such as, for example, the Amish[110] or the Utah Mormons[111] who, it may be argued, have developed significantly different cultures from those of the majority in the host country. And, if these groups are also to be afforded the protection of the defense, should we not also allow it to other groups of more distant immigration such as African-Americans[112] whose experience in the United States has been substantially different from that of the majority culture? Would we, thus, not end up catering the defense to a plethora of subgroups?[113] Such a result, obviously, would be unworkable.

A similar problem is drawing the line between the acculturated and the non-acculturated immigrants.[114] At what point in time do we rule that a person is so "Americanized" as to no longer be eligible for the cultural defense? Does it matter whether the defendant has lived outside of an immigrant enclave? Does it matter that the defendant has attended school in the United States? Does it matter that the defendant is known to watch much American television?

A third claim along these lines is that it may be very difficult to ascertain the motive behind the defendant's actions. While we may,

109. *See* Chiu, *supra* note 12; Lyman, *supra* note 37; Sams, *supra* note 93.

110. For a case on the subject, see Wisconsin v. Yoder, 406 U.S. 205 (1972).

111. For a case on this possibility, see Reynolds v. United States, 98 U.S. 145 (1878).

112. *See* People v. Rhines, 131 Cal. App. 3d 498 (1982).

113. Take, for example, Timothy Leary's unsuccessful attempt to frame members of the "drug culture" as a group in need of special recognition. *See* Leary v. United States, 383 F.2d 851 (5th Cir. 1967).

114. For a strong argument pointing out the slippery slope of the cultural defense in this regard, see Goldstein, *supra* note 37, at 160.

for instance, want to mitigate the charges against a defendant whose actions were culturally-motivated, how do we assure ourselves that this is in fact the case rather than a situation where the defendant is merely using the defense as a way to escape a more severe punishment?[115]

Lastly, how can we determine what the defendant's culture is anyway? Because cultures are constantly in flux, determining what is acceptable at various times may prove exceedingly difficult.[116] As we have seen in Section II, there has been considerable debate over what culture is. If defining culture in and of itself is such a difficult task, what makes us believe that courts will be able to, under the constraints of time and cost, ascertain the elements of the defendant's culture?

Essentially, the concerns of all of these commentators is that the cultural defense would result in tangential evidence, time delays, and unrealistic expectations of the powers of our judges. Such concerns may well be unfounded. Judges are well- equipped to decide complex issues and should be trusted to preside competently over such matters.[117] They already, as a matter of fact, encounter many scenarios where they must sift through intangible factors similar in perplexity to culture. For instance, the battered wife defense has been allowed in United States courts to permit women to present proof of their husbands' acts of brutality in order to mitigate the charges or sentence which they face.[118] Such a defense certainly places a judge in a position of having to determine the woman's true motivations, her psychological reactions to various situations, and the reasonableness of her acts. Although this may seem like a complicated task, judges have seemed to accomplish it quite competently. Aided by such helpful guides as Federal Rule of Evidence 403,[119] for instance, which allows a court to disallow any evidence which would either be prejudicial or result in a waste of time, courts are afforded the discretion and flexibility to address these issues with confidence. Furthermore, expert evidence from anthropologists as well as from other scientists will clarify the aspects of the cases with which the judges are not familiar.

115. *See* Alec Samuels, *Legal Recognition and Protection of Minority Customs in a Plural Society in England*, 10 ANGLO-AM. L. REV. 241, 254 (1981).

116. *See* Goldstein, *supra* note 37, at 166.

117. *See Cultural Defense in the Criminal Law*, *supra* note 12, at n.52.

118. *See id.*

119. FED. R. EVID. 403.

In terms of delineating the eligible parties for the cultural defense, such a task is easily accomplished by a declaration that only Native Americans and immigrants are eligible. Although this definition does not include everyone who may possibly benefit from the cultural defense, it has the merit of being an easy delineation which will reduce judges' efforts considerably.

It seems odd that among all of the literature dealing with the problems of implementing the cultural defense, no attention has been given to what actions are to be covered and what excluded. The commentators of the defense seem to think that the issue is black or white. Either the cultural defense must be adopted and will cover all of the defendants' acts or the cultural defense should be disallowed and will cover nothing. A third thesis must be forwarded that allows the cultural defense to be adopted but limited to certain situations. A clear demarcation would hinge on the severity of the acts involved. For instance, if the defendant killed, maimed, or in any other way violated another person's bodily integrity, the cultural defense should not be permitted. This, of course, is the thesis of this Note.

3. *Encouragement of Violence Towards Women*

As a third line of argument, critics of the cultural defense charge that it encourages violence towards women.[120] By giving a legal tool to men who abuse their wives, the argument posits, the criminal justice system is placing the United States stamp of approval on such behavior.[121] Therefore, the cultural defense is harming the very people (immigrants) which it seeks to protect.[122] If the intended beneficiaries are thus harmed, does the cultural defense do nothing more than protect abusive men? Such a consequence could not be tolerated.

This is the soundest argument for the opposition of the cultural defense yet to be advanced. Yet, it is under-inclusive in two respects. First, it assumes that the cultural defense would be the near-exclusive domain of the men who harm women. While some cases show this pattern (*People v. Moua*, *People v. Aphaylath*, *People v. Chen*), many do not. As the cases of *Adesanya*, *Wu*, and *Kimura*, just to name a

120. *See, e.g.*, Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991); Spatz, *supra* note 93, at 597; Young, *supra* note 93, at C5.

121. *See* Goldstein, *supra* note 37, at 162.

122. *Id.* at 164.

few, attest to, women are very much capable of committing culturally related crimes.

More significantly, the argument misses an opportunity to protect not just women, but all people. Why should the cultural defense only be criticized for condoning harm to women if it also permits harm to others? Is the argument intimating that harm to young boys, for example, is less blameworthy? That it may be alright to tolerate violence against men generally? While the reason for the argument's focus is probably that women have suffered considerable bias and abuse throughout our history, it does not go far enough. It should, rather, state that violence of any kind is impermissible and that we will not furnish armament to those who have disrespected the sanctity of life and body.

IV. HUMAN RIGHTS AND THE CULTURAL DEFENSE

Thus far, this Note has presented various arguments both for and against the cultural defense with a slant towards the human rights interpretation of these arguments. At this juncture, it is beneficial to shift the focus directly onto human rights themselves. This section will begin by briefly outlining the key propositions of human rights and their origins. An explanation of their exact application to the establishment of a cultural defense will then follow. Finally, the conclusion will be advanced that the cultural defense, while it ought to be adopted in limited cases, is not deserving of recognition in cases where bodily harm has resulted.

A. ROOTS AND DOCTRINES

Scientists have found that some human values are universals. For example, all cultures show a concern for human life, have prohibitions against incest, place importance on the truth, and engage in special treatment of the dead.[123] These values, thus, may be thought of as inherent to humankind. But, if it is thus recognized that some values are part-and-parcel of being a member of our specie, can we logically say that there must also exist a list of universal rights which act to protect these values? That there *should* be such a list? These are questions sought to be answered by the doctrine of human rights.

The term "human rights" is a modern name for the natural rights or natural law philosophies that were postulated by such thinkers as

123. *See* John Finnis, Natural Law and Natural Rights 83 (1980).

Locke, Mill, and Jefferson in the seventeenth and eighteenth centuries.[124] These philosophers based their ideas on the general notion that all people, through nothing more than being a member of the human family, have certain universal rights to decent treatment. These rights, furthermore, exist independently of recognition or implementation in the customs or legal systems of particular countries.[125] Based on notions of dignity and innate worth, they are inherent to us and may never be withdrawn. Rules promulgated by governments, religions, customs, or other institutions which would abrogate these fundamental rights, therefore, cannot be respected as they are not based in morality. Only those rules which observe the fundamental rights of man and woman are worthy of recognition.[126]

A presupposition to the concept of human rights is the ability to define the rights in question. Natural law claims to be able to identify conditions and principles of good and proper order among men and in individual conduct.[127] It seeks to identify the basic values of human nature, of human well-being.[128] Although critics have often charged that such a demarcation is impossible as we are all too bound by our respective perceptions of right and wrong to be able to come to a consensus,[129] the reality is that, over temporal and spatial distance, the efforts to present the fundamental rights of people have, in fact, yielded remarkably similar results. A possible explanation for this phenomenon is that a similar approach has been taken by most of the philosophers. As James Nickel explains, the approach to defining a moral right, consists of two simple steps.

> [There must first] be a justifiable entitlement to a freedom or benefit; it must be possible to make a strong moral case for making that freedom or benefit available to all. Second, it must be possible to justify the duties or other burdens involved in making this freedom or benefit available to all.[130]

124. *See* JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 6 (1987).

125. *See id.* at 3.

126. The concept of rights, in this context, is a formidable and unsurpassed one. It should be contrasted with other commentators' views of rights in general. See, for an instance of this contrast, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 92 (1977) ("Rights are 'trumps.' [They] do not always prevail over all other considerations . . . but rather are strong considerations that *generally* prevail in competition with other concerns such as national prosperity or administrative convenience.").

127. *See* FINNIS, *supra* note 123, at 18.

128. *See id.* at 81.

129. This is the position of the "skeptical relativists" who argue that since there is no rational method for choosing or justifying moral norms, the norms cannot be shown to be true or false. Hence, there is no "justified morality." For more on this position, see Kai Nielson, *Skepticism and Human Rights*, MONIST 52 (1968) at 573-94.

The result of this fairly common approach is agreement that the list of human rights should, first and foremost, include the right to life and bodily sanctity. Undoubtedly, all natural law scholars agree that a person has an inalienable right to physical integrity. As John Stuart Mill explains:

> All other earthly benefits are needed by one person, not needed by the another; and many of them can, if necessary, be cheerfully foregone or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil and for the whole value of all and every good, beyond the passing moment, since nothing but the gratification of the instant could be of any worth to us if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves.[131]

In accord with this position, Thomas Aquinas, the divine law scholar, identified life as the primary good in all of the universals which he ranked.[132]

The modern thinking concerning the importance of bodily sanctity seems to echo the sentiments of the past. John Finnis has written that the basic forms of good include life, knowledge, aesthetic experience, sociability, practical reasonableness, religion, and play.[133] He elaborates that life, in this respect, includes "bodily . . . health and freedom from pain that betokens organic malfunctioning or injury."[134]

Similarly, international bodies which have studied basic human rights have recognized the paramount importance of bodily sanctity.[135] The United Nations' Human Rights Commission, for example, which was created, *inter alia*, to draft a human rights document,

130. NICKEL, *supra* note 124, at 40.

131. J. MILL, UTILITARIANISM 50 (Samuel Gorovitz ed., 1971).

132. *See* FINNIS, *supra* note 123, at 94.

133. *See* FINNIS, *supra* note 123, at 86. Finnis, however, does not rank these seven forms of goods. Rather, he presents each as equal in worth.

134. *Id.*

135. Interestingly, the United States' Bill of Rights does not place the right to life and bodily sanctity in a predominant position in its text. Rather, it begins by assuring the citizenry of their rights to free speech and religion. It is not until the Fourth Amendment that the right to be "secure in body" is discussed. It is quite possible that this juxtaposition, however, is not so much a repudiation of bodily integrity's standing as the preeminent human right, as it is a reflection of the political climate which prevailed circa the drafting of the Bill of Rights.

defined the basic human rights as "the right to life, liberty, and security of person."[136] Likewise, the Council of Europe, in 1950, drafted the European Convention for the Protection of Human Rights and Fundamental Freedoms which, much like the United Nations' Universal Declaration of Human Rights, stressed the importance of the right to life, free of torture and inhumane treatment.[137] Additionally, the American Declaration of the Rights and Duties of Man lists twenty-seven human rights which must be protected. Heading the list as "preferred rights" are the rights to life, liberty, and security of the person.[138] As a final example, the African Charter on Human and People's Rights makes protection of life and bodily sanctity a primary goal.[139]

B. Applications to Cultures Generally and to the Cultural Defense in Particular

The cultural defense must be tempered by considerations of human rights. We must ensure that the moral underpinnings of law are not infringed by the establishment of a new defense no matter how advantageous that new defense seems in other respects.

The problem at this point, it might be suggested, is that any selective process involved in deciding what cultural features ought to be barred and which ought to be accepted is bound to be a highly biased endeavor. What right do we have, it would be asked, to judge the cultural adaptations and permeations of another group? Is this not a major failure of past researchers which we have strived to recognize and rectify?

1. *Ethnocentrism, Cultural Relativism, and "Goldschmidtism"*

Throughout the nineteenth century, as Western peoples became aware of the vast array of contrasting cultures around them, no doubts existed in the great majority's minds that Western civilization was

136. *The Universal Declaration of Human Rights,* G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. Doc. A/810 (1948).

137. The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

138. The American Declaration of the Rights and Duties of Man, Res. XXX, *adopted by* the Ninth International Conference of American States, reprinted in Inter-American Commission on Human Rights, *Handbook of Duties Pertaining to Human Rights*, OEA/Sess. L/V/II.50, Doc. 6 at 17 (1980).

139. The African Charter on Human and People's Rights, June 27, 1981, 21 I.L.M. 58.

"best."[140] There were, though, some scientists who were intrigued to discover that all cultures with which they had any familiarity also saw themselves as the best of all possible worlds. This phenomenon came to be known as ethnocentrism and was studied extensively in the hopes of countering it.

In reaction to ethnocentrism, scientists began to examine each culture on its own terms, asking only whether or not the culture satisfied the needs and expectations of its members.[141] If the people were cannibals, for instance, they asked whether the eating of human flesh was acceptable according to native values. This mode of analysis, the idea that a culture must be evaluated according to its own standards and those alone, is cultural relativism.

Over the past thirty years, a new wave of anthropologists and sociologists have sought to refine the now traditional relativistic approach. They posit that while cultural relativism is vastly preferable to the ethnocentric approach of the past, both positions represent extreme viewpoints. On the one hand, ethnocentrism's "we are right and everyone else is wrong" approach is a myopic indulgence. On the other, however, the relativistic "anything goes" ideology fails to address situations when cultural traits are dysfunctional or harmful to its members. No sane person, for example, would convincingly argue that the Nazi atrocities committed during the Third Reich were not "bad" in the common use of the word.

Walter Goldschmidt, one of the first anthropologists to recognize the flaw in cultural relativism, devised a formula for evaluating cultures that avoids the use of ethnocentric criteria while retaining the crux of cultural relativism.[142] In his approach, the paramount question to ask is: how well does a given culture satisfy the physical and psychological needs of its members? Specific indicators, he continued, are to be found in the nutritional status and general physical and mental health of its population, the incidents of crime, the demographic structure, family stability, and the group's relationship to its resource base.

140. For an example of this view, see the work of Lamarck (1744-1829), the famous French naturalist who arranged all living creatures into a "great chain of being" from inanimate beings at the bottom to humans at the top. Among humans, the chain placed Asians and Blacks at a lower echelon than Caucasians, only somewhat above monkeys.

141. *See* Haviland, Anthropology, *supra* note 18, at 296.

142. *See id.* at 297.

While Goldschmidt's formula may, conceivably, be attacked for incorporating some notions of ethnocentrism (what is the "right" family stability, what is the "right" demographic structure?), he was instrumental in bringing awareness to the scientific community that cultures can—and, in some circumstances, should—be evaluated.

If this wave of anthropologists and sociologists is right, and it is now generally recognized that it is, we should be able to utilize these tools effectively in our analysis of the cultural defense.

2. *Unallowable Practices, Unallowable Evidence*

Human rights considerations are a very effective method of evaluating cultures. Certainly, some cultures adhere to human rights and seek to advance them while others do not. Therefore, if it is possible to evaluate cultures on the basis of their observance of human rights, we may also evaluate specific cultural actions on the same basis. This latter claim does not postulate that the entire cultures in question are "bad", but that specific acts which are associated with the cultures (rapes, genocides, tortures) are bad. Therefore, regardless of how we feel about the Huns of yesteryear overall, we can safely pass judgment on the fairly gruesome fashion in which they dealt with adversity.

With this approach in mind, we are ready to formulate the basic rule that evidence of cultural factors should not be introduced in cases where it is used to explain the taking of life or the causation of severe bodily injury. Any other stance would defy the very first principle of human rights as explained previously.

A few cultural defense cases serve to illustrate this proposition. As a preliminary note, however, it should be understood that no argument is made here which would portend to bar admission of cultural acts which are done by consenting adults as part of their culture. The only argument made relates to events in which the victim did not consent to the act or was not competent to consent to the act.[143]

Through the very virtue of being born, Kimura's children had an undeniable right to life free from torture and injury. When Kimura withdrew their lives on a cultural impulse, she violated these rights. To allow her to bring into court evidence of her culture as the impetus

143. On the topic of tolerance for victimless crimes, see JAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 152 (R.J. White ed., 1967). Additionally, for a persuasive argument that society only has an indirect interest in regulating self-regarding or consensual acts, see JOHN S. MILL, ON LIBERTY 13 (David Spitz ed., 1975) (1859).

for her acts is not ethically justifiable. We must recognize that the killing of children (or anyone else for that matter) is not permissible in any culture. Therefore, introduction of her cultural background should be barred.

A similar situation evinces itself in the case of *Moua*. Rape is not a condonable act in any culture according to human rights. It deprives a person of dignity, confidence, and power. Furthermore, it is an attack on the body. As such, it violates the first principle of human rights. Moua's victim, regardless that she too was a member of the culture which featured the marriage-by-capture ritual, did not consent to the act in question.[144] Therefore, Moua should not be allowed to bring his cultural evidence into the courtroom.

As another interesting example, we may look to *People v. Gebreambak*.[145] In that case, an Ethiopian man killed his wife in their California home upon the belief that the woman was practicing witchcraft on him. The man, at trial, was allowed to bring in evidence of his culture's belief in witchcraft and the need to kill witches when they are discovered. From a human rights perspective, such evidence should not have been allowed as the practice in question was not tolerable.

3. *Allowable Practices, Allowable Evidence*

The cultural defense should not be barred from application in cases in which no human rights are violated (at the very minimum, where the single fundamental principle of human rights is not violated). In these instances, the cultural defense is necessary to provide the obligatory background circumstances from which we may determine moral culpability. As has been discussed previously, the criminal system's goals of retribution, deterrence, and rehabilitation vie for this position.

A few cases may, once again, be helpful in understanding the distinction which is made here between acts that infringe upon human rights and those that are tolerable.

United States v. Blong Her deals, once again, with the Hmong of Fresno.[146] The Hmong reside within the "Golden Triangle," where a

144. There does seem to be a dispute on this matter though. For a thorough discussion of the case, see Evans-Pritchard & Renteln, *supra* note 102.

145. No. 80276 (Alameda County Super. Ct. 1985).

146. *See* No. CR F-84-73-EDP (E.D. Cal. 1984).

large quantity of the world's opium is grown.[147] As a result, the Hmong have historically supplemented their income by selling the drug. While there is a taboo against opium use by the young in Hmong culture, the elderly customarily use it to mask the pain of injuries and aches of old age. In 1984, an elderly Hmong man and his wife were charged with possession of opium with intent to distribute when postal inspectors discovered nineteen ounces of the drug in a package sent to them from their homeland. Although it appears unclear whether the couple was in fact going to sell the drug or use it themselves, we should, for the sake of this argument, assume that it was going to be used for personal consumption.

This is a case where human rights would not bar the defendants from presenting cultural evidence. No one was harmed who did not consent to the harm. Both defendants were willing adults participating in a cultural tradition. The defendants, therefore, should be allowed the use of the cultural defense in order to illuminate the circumstances around their actions.

Similar examples can easily be conjured. For example, anthropology tells us that historically polygamy, not monogamy, has been the rule of marriage. Moreover, some cultures have retained a polygamous institution to the current date. When such a family unit migrates to the United States, should they be charged with a crime? And, if so, should evidence of their cultural background be considered by the jury? Since no human rights implications are manifest here—at least no violation of life or bodily sanctity—there should be no bar to the cultural defense's application in this situation.

While other examples of "consensual" crimes may be examined to further illustrate the concept (homosexual marriages, prostitution), the parameters of the human rights objection to the cultural defense should now be evident. Where the crime involves some sort of life or bodily infringement, no cultural defense ought to be allowed.

4. *Negotiating the Remaining Problems*

The argument that has been set forth in this Note has been one of support for the cultural defense so long as no human rights are infringed. There will certainly be many who disagree with this argument wholeheartedly. More importantly, there will be some who will find objections to some parts of the argument but not to others. In

147. Spencer Sherman, *When Cultures Collide*, CAL. LAW. 33, 35 (Jan. 1986).

recognition of the latter group and in spite of the former group, two interesting objections will presently be explored. The first deals with the fact that more than one human right exists. The second focuses on the ramifications that the argument put forth has on some of our own cultural practices.

a. A Clash of Human Rights?

Earlier in this Note, it was explained that a multitude of human rights exist. John Finnis, it should be recalled, has delineated seven human "goods."[148] The American Declaration of the Rights and Duties of Man lists twenty-seven. The Universal Declaration of Human Rights lists even more. Yet, this Note has narrowed its analysis to the right of life and freedom from bodily sanctity. What happens, it could be asked, when a cultural case manifests itself which, although not violating the principle of bodily sanctity, infringes upon a different human right?

As an example, the Universal Declaration of Human Rights lists as one of its protected rights the freedom of expression and of cultural preservation.[149] Other documents share this same concept. Should this right supersede the right to bodily sanctity? As a case in point, we may look once again at *Regina v. Adesanya*.[150] In that case, Adesanya was only expressing the family's tribal identity and only preserving the life of her culture and passing it on to her sons. This is precisely what the Declaration discusses. So why should she be barred from using the cultural defense?

While this is a valid argument, it is probable that most human rights theorists would counter that the interest and right in life and bodily sanctity must be the very first right to be observed. John Stuart Mill's eloquent quote certainly suggests as much. The observation of the right to live must be a necessary precursor to all other rights, for what good would those rights serve the dead or injured? If we are, therefore, to concede that a hierarchy of sorts must be present in the human rights pyramid, then we should permit the right to life and bodily sanctity to "trump" the rights to expression and cultural preservation when the two are clearly at odds with each other as they are in this case.

148. *See* FINNIS, *supra* note 123.

149. *The Universal Declaration of Human Rights*, *supra* note 136, at 71.

150. *See supra* note 39 and accompanying text.

b. Implications for United States Culture

The human rights considerations discussed in this Note must bring into question some of our own practices that seem to stand in direct contradiction to these noble considerations. As a result, we are faced with conflicting and mutually exclusive beliefs. In such a position, one must forgo one belief or the other or at least rationalize one so that it does not seem to conflict with the other. The web of beliefs necessitates congruence.[151]

To illustrate, we may look to the Western tradition of piercing children's ears. This can legitimately be deemed a cultural practice, and one which is not universal. Is such a practice tolerable? When plugged into the definition of human rights which has been presented above, the answer is that it is not. A violation of bodily sanctity, it must be acknowledged, is evident. Furthermore, the injury is to a child who, even if she consents, may not be in a position to do so with the level of reasoned reflection with which we could feel confident. The procedure has no value to the child beyond aesthetics. Is this, therefore, a clear violation of human rights? If so, does that practice have merit to be effaced? If it is not a violation of human rights, does that mean that our definition of the main principle of human rights needs to be revised? Or should we create an exception from the definition for such "trivial" infringements? But then, how are Adesanya's tribal markings to be differentiated? By the fact that she is in the situation of the immigrant while we are in the position of the host culture? Can we, thus, say that only those actions which non-Westerners undertake as part of their culture may violate human rights? That there should be a sort of blanket exception to all right-infringing cultural acts done by Westerners? The traditional Chinese practice of foot-binding of young women is deplorable, but piercing of children is tolerable?

A similar act is male circumcision. This practice, concentrated in the United States and Judaic countries, creates injury. Furthermore, the injury is to an inevitably, non- consenting boy. Can we, then, say that the practice violates the right to be free of bodily harm? While it will be countered that there is a difference here from the ear-piercing example as male circumcision serves a health benefit—protection from infections- -mounting evidence now shows us that there is very little difference in this area between those who are and those who are

151. *See* W.V.O. QUINE & J.S. ULLIAN, THE WEB OF BELIEF (2d ed. 19__).

not circumcised (so long as proper hygiene is practiced). How can we then rationalize the pain which we inflict on male infants? Can we, again, excuse this violation of human rights because it is *our* violation? Is it acceptable as our cultural beliefs tell us that it is not an important issue? Would we feel the same way toward the African tribal immigrants who, in accord with generations of tradition, circumcise their female infant by removing the clitoral prepuce (clitoridectomy)?[152] Or the one that removes the clitoris and labia minora of their daughter before sewing the sides of the labia majora together (pharonic circumcision)?[153]

Regardless of our stance on the cultural defense in general, if we can be in agreement that any cultural defense must be limited by human rights concerns, we might also require ourselves to look into our own basket of norms and mores in order to throw out the bad apples. Human rights dictate universal compliance.

V. CONCLUSION

The need to address the issue of the cultural defense will not subside. The ongoing process of mutual accommodation between United States law and immigrant cultures is bound to continue for years.[154] Asian immigrants, the group most often involved in legal cultural clashes, represent the largest group of legal immigrants and refugees to arrive in the United States in the last twenty years.[155] According to data published by the State Department, Asians have comprised forty percent of all immigration during that period.[156] Moreover, the flow of Asian immigrants is not likely to stop any time soon. More than 336,000 Filipinos are currently awaiting to emigrate to the United States, 185,000 Thai refugees, 123,500 Koreans, and 107,400 mainland Chinese.[157]

This Note has investigated the possibility of establishing a cultural defense in affirmative, derivative, complete, and mitigative functions. Arguments were discussed regarding the goals of the criminal justice system, especially retributionist principles. Using human rights as a backdrop, an analysis of the major claims for and against the

152. *See What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946 (1993).
153. *See id.* at 1947.
154. *See* Sherman, *supra* note 147, at 36.
155. *See id.*
156. *See id.*
157. *See id.*

defense was presented. The result is a conditional endorsement. The cultural defense should be adopted so long as it respects the international laws of people. Human rights are, after all, the cornerstone of our legal system. They lend legitimacy to our laws and a moral sheen to the legal decisions under those laws. When a law, or a proposed law, conflicts with the very first maxim of human rights, we must doubt that law's legitimacy. *Lex injusta non est lex.*

Part III
Sentencing

[14]

Life imprisonment: Recent issues in national and international law

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Abstract

This article notes that, because understandings of what life imprisonment means are often ambiguous, the life sentence is sometimes perceived to be relatively uncontroversial. Life imprisonment without the prospect of parole for children under the age of 18 years is the most extreme form of this sentence that can be imposed. However, in the United States of America even such sentences have only recently become the subject of public debate. In contrast, in a small but growing number of jurisdictions all life sentences are regarded as constitutionally suspect and contrary to human rights, whilst in the majority of jurisdictions the imposition of life imprisonment is strictly limited.

The article traces recent developments in the imposition and implementation of life imprisonment that have evoked some controversy. It pays particular attention to attempts that have been made in practice to ensure that life imprisonment produces punishment that is proportionate to the crime. It points out, however, that a renewed focus on combating dangerous offenders through indeterminate preventive sentences has blunted even this modest safeguard. It warns that this tendency increases the risk of life imprisonment being an unfairly harsh penalty.

1. Introduction

Unlike the death penalty, which is always hugely controversial, life imprisonment only occasionally surfaces as a headline-making issue of criminal policy. A primary reason for this is that not only in the public mind, but also in the specialist understanding of penologists, there is often considerable ambiguity about what life imprisonment means. This ambiguity was well captured in *Doody's* case by Lord Mustil in the context of the mandatory life sentence for murder in England:

> The sentence of life imprisonment is also unique in that the words, which the judge is required to pronounce, do not mean what they say. Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his natural life, this is not the usual or intended effect of a sentence of life imprisonment, ... But although everyone knows what the words do not mean, nobody knows what they do mean, since the duration of the prisoner's detention depends on a series of recommendations ... and executive decisions ....
>
> (R v Home Secretary, Ex parte Doody, 1994: 549H–550B).

Lord Mustil's words may well be an accurate reflection of both public and specialist opinion on the subject, but if they are to be applied internationally they need two major qualifications: first, it is by no means true everywhere that life sentences, even those imposed on children, will lead to eventual release. Secondly, even where there are procedures for considering the release of prisoners sentenced to life imprisonment, not everyone will accept that they are sufficient, either in theory or in practice, to make life sentences a form of punishment that meets the requirements of human rights standards as developed by international law and national constitutions.

In order to reflect the complexity of life sentence this article will consider, in the light of these two qualifications, various controversies that have emerged surrounding life imprisonment in recent years. It is not an exhaustive survey but rather gives illustrative examples of recent arguments and trends. The focus is on formal sentences of life imprisonment, although some attention is paid to other forms of indefinite detention that might amount to life sentences in practice. The article does not consider the issue of offenders who are mentally ill and are detained indefinitely in mental institutions.

2. The extreme case: life imprisonment without the prospect of release for children

In the United States of America the sentence of life imprisonment without the prospect of release, life without parole, has long been used on a large scale: in 2003 there were 33 633 persons serving such sentences, slightly more than a quarter of the 127 677 persons serving sentences of life imprisonment of all kinds (Mauer, King, & Young, 2004: 11). This figure has grown rapidly. In 1992 there were 'only' 12 453 prisoners serving life without parole sentences (Mauer et al., 2004: 11). Criticism of life without parole sentences has been surprisingly muted. The primary reason, I suspect, is that surveys show that public opinion was more likely to sway to opposition to the death penalty if life without parole sentences are the alternative (Gallup News Service, 2004).[1] This has made liberals extremely reluctant to criticise life without parole as a sentencing option.

This reluctance to criticise life without parole sentences has changed recently as their imposition on children under the age of eighteen years[2] has become controversial. To some extent the controversy was evoked by a decision of the US Supreme Court early in 2005. In the case of *Roper v Simmons* (2005) the Court finally held that the death penalty for juveniles under the age of eighteen years was unconstitutional, as it infringed against the evolving standards of decency that allow the Court to give meaning to the prohibition on cruel and unusual punishment in the Eight Amendment of the US Constitution. The judgment of the majority of the Court was remarkable for the extent to which it relied for "respected and significant" (2005: 1199) confirmation of its views both on international law that prohibits capital punishment for juveniles and on the universal practice of outlawing such use of capital punishment. The Court emphasised article 37 of the United Nations Convention on the Rights of the Child for its express prohibition of capital punishment for juveniles.

Initial comment ignored the fact that the sentence that was imposed on young Simmons in lieu of death was life imprisonment without parole. The majority accepted the appropriateness of this punishment without demur, even with approval. Thus, when it dismissed deterrence-based arguments for imposing the death penalty on juveniles the Court simply concluded:

> To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.
>
> (Roper v Simmons 2005: 1196).

The majority of the court did not mention that article 37 of the United Nations Convention on the Rights of the Child not only outlaws capital punishment but also life imprisonment without the prospect of release. However, this oversight, if that is what it was, was not lost on the dissenting judges. Justice Scalia, who wrote for himself and two of his dissenting colleagues, expressed his concern sarcastically:

[1] About half of all Americans choose the death penalty [as the appropriate punishment for murder], while just under half opt for life without the possibility of parole. When Americans are not presented with life imprisonment as an alternative, about 7 in 10 support the death penalty.(Gallup News Service, 2004). See also Schabas (2004).

[2] The term 'child' is used here, following the Convention on the Rights of the Child, to refer to a person under the age of eighteen years. 'Juvenile' is used in the same sense.

> It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since 'the punishment of life imprisonment without the possibility of parole is itself a severe sanction,' gives little comfort.
>
> (Roper v Simmons 2005: 1226. Internal reference omitted).

Justice Scalia's criticism was part of a vigorous and fundamental denial of the idea that American law should look for guidance to the laws of other countries or to international law. His position is categorically rejected by all who recognise the universality of human rights and the related 'evolving standards of decency' test that underpins claims to a right to human dignity (Van Zyl Smit, 2005). However, Justice Scalia was correct to challenge the majority, who hoisted their standard on international law territory, to at least engage with the challenge inherent in the fact that the international instrument to which they refer lays down further restrictions than they themselves do.

The majority did not attempt to advance positive justifications beyond what I have quoted for the life without parole sentence. In trying to explain the sentence that they upheld in lieu of the death penalty, the majority may well have reasoned that the crime for which it was being imposed was particularly heinous and demanded a severe sanction. There is no doubt that the crime was a premeditated killing and that it was compounded in a sense by the young murderer's cold-blooded assertion to his friends at the time of its commission that he would not be subject to the death penalty because he was a juvenile! However, in arguing against the death penalty for Simmons, the majority made the point that the personalities of juvenile offenders are not fully formed. Their culpability was reduced and they might still have the capacity to reform. In its words, they still had the "potential to attain a mature understanding of [their] own humanity" (2005: 1196).

In early October 2005 the *New York Times* ran a story in which it reported that children in forty eight of the fifty states of the Union were serving life sentences and that 2000 of them had been sentenced to life without parole for crimes committed before they turned 18. More than 350 were 15 years old or younger when they committed their crimes (The New York Times, 2005). This press report was followed by a major joint report of Amnesty International and Human Rights Watch (2005), *The Rest of their Lives: Life without Parole for Child Offenders in the United States*. This report, released on 13 October 2005, provided further factual detail on the life imprisonment of children and referred to the malleability of their personalities, their reduced culpability and their capacity for reform. It pointed out that the same arguments had been advanced convincingly in *Roper v Simmons* (2005) against the death penalty for juveniles. The report emphasised, however, that if, as an alternative, juveniles were imprisoned on the basis that they were never to be released, they would not have the prospect of ever living in a free society and therefore of fulfilling their potential. The Amnesty International/ Human Rights Watch report received wide publicity both in the United States (Washington Post, 2005; Los Angeles Times, 2005) and abroad (The Independent, 2005; The New Zealand Herald, 2005).

Life without parole sentences for juveniles seem to be limited almost exclusively to the United States of America.[3] Certainly in Europe the principle is firmly established that the inherent openness of children to change is sufficient ground to entitle them to be considered for release well before they die.[4] The specific American problem in this area is that most children who are subject to severe sentences are sent to adult courts where they are tried and sentenced according to the law applicable to adults. Such referrals or 'waivers' are done on the basis that the crime is serious and that the child has the capacity to be tried in an adult court. In the early 1990s forty States made it easier for such waivers to be granted by a judge, by a prosecutor or by a provision specifying that certain serious offences committed by a juvenile above a certain age may automatically be tried in adult courts (Logan, 1998: 690–691). Although they cannot now be sentenced to death any more, the fact that they are being

[3] The Amnesty International and Human Rights Watch Report (2005: 106) suggests that there are "about a dozen" children serving life without parole sentences in countries other than the United States of America. Of these four are said to be in South Africa. However, that is incorrect. The South African Report to the Committee on the Rights of the Child to which the Amnesty International and Human Rights Watch Report refers (2005: 106 footnote 320) speaks only of children serving life sentences, not that they do not qualify for parole. All prisoners sentenced to life imprisonment in South Africa qualify for consideration for release: Persons sentenced prior to 1 October 2004 are considered for release after they have served twenty years, if not before, while those who are sentenced after that date are to have their cases referred back to the trial court after they have served twenty-five years for the consideration of their release (Correctional Services Act 111 of 1998 as amended). It is obvious that juveniles too have a prospect of release, although arguably these periods are far too long for them. However, these are maximum periods. They may be considered earlier.

[4] The leading case is the decision of the European Court of Human Rights involving the killers of Jamie Bulger, *V v United Kingdom* (2000). In fact the dispute was about the minimum period that the very young offenders should serve, and not about whether there should be such a period. See also *Weeks v United Kingdom* (1988); *Hussein v United Kingdom* (1996).

treated as adults has meant up to now that very little attention, if any, has been paid to their reduced culpability. If the crime they committed was serous enough for an adult to get a life without parole sentence it has been imposed on them. Where such a sentence is mandatory, for, say, an adult committing first degree murder, children tried in adult courts for the same crime have not even been able to argue that their youth should be a mitigating factor. Challenges to such laws at the Federal level have hitherto been unsuccessful (Harvard Law Review Note, 1997). In *Harris v Wright* (1996) the Ninth Circuit of the Federal Court of Appeals upheld the constitutionality of a Washington statute in terms of which a fifteen-year-old had been sentenced to life without parole for murder (Harvard Law Review Note, 1997). The Court explained:

> Youth has no obvious bearing on this problem: If we can discern no clear line for adults, neither can we for youths. Accordingly, while capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences. Like any other prison sentence, it raises no inference of disproportionality when imposed on a murderer.
>
> (Harris v Wright, 1996: 585).

It may be argued that the newly highlighted American problem of life without parole sentences for juveniles is open to a specific solution: cease treating children as adults but recognise instead that the malleability of their personalities should always be born in mind when sentencing them. If this is done for all children, including those sentenced by adult courts, then it follows logically that the life without parole sentence, which denies them the possibility of ever living in a free society will always be inapplicable to them.

3. Is a life without parole sentence acceptable under any circumstances?

The questions newly raised in the USA in respect of juveniles, however, have wider ramifications, for is it possible to deny adults the possibility of eventual reformation? If not, what are the implications of this for the death penalty? This issue was at the core of a fascinating debate about life imprisonment that played itself out in the German Federal Constitutional Court in the 1970s and which is of general interest at the European level where the issue of whether a whole life sentence is acceptable for an adult who has committed a truly heinous offence is still unresolved.

The matter arose in the famous life imprisonment case of the German Federal Constitutional Court of 21 June 1977.[5] In that case the Court was asked to rule on the fundamental question, namely whether a life sentence *per se* was constitutional. The bald conclusion to which the Federal Constitutional Court came was that the sentence of life imprisonment for murder was not inherently unconstitutional (*BVerfGE*, 45, 187, 188). However, its wide-ranging judgment covered most of the debate about life imprisonment and its recommendations had an important impact on subsequent practical developments in Germany. The key to its reasoning was its acceptance of the notion of the *Behandlungsvollzug*, that is of the treatment-orientated implementation of the sentence of imprisonment, and its enthusiastic endorsement of the then new Prison Act as the legal vehicle for this policy. As the Court expressed it:

> The threat of life imprisonment is complemented, as is constitutionally required, by meaningful treatment of the prisoner. The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes that go with it. The task that is involved here is based on the constitution and can be deduced from the guarantee of the inviolability of human dignity contained in article 1(1) of the *Grundgesetz*.
>
> (BVerfGE, 45, 187, 238. Own translation).

This understanding of the function of the prison system assisted the court in rejecting the submission that life imprisonment necessarily leads to prisoners suffering permanent psychological damage.

The Federal Constitutional Court trod carefully around the wide question of the inherent constitutionality of life imprisonment. It argued that there could be no constitutional[6] objection to the so-called *Vereinigungstheorie*, which was dominant in German criminal law and which sought to combine the various purposes of punishment, albeit with different emphases, depending on the offence and the circumstances of the case. Applied to murder this meant that the legislature

[5] For a fuller discussion of the context of this decision and the response to it, see Van Zyl Smit (1992).

[6] The Court held that theories of punishment were not primarily of constitutional concern: *BVerfGE*, 45, 187, 253.

was entitled to prescribe the heaviest penalty at its disposal, for the offence infringed upon a citizen's right to life, the highest legal interest of all. Even if it could not be demonstrated empirically that life imprisonment served a general preventive function, the constitutional duty of the state to protect human life meant that there could be no objection in principle to it prescribing the penalty of life imprisonment as a general indication of the value it attached to human life.[7] The imposition of a life sentence could also be justified as serving as a form of expiation by the offender without, in the view of the court, excluding his eventual resocialization (*BVerfGE*, 45, 187, 254–256).

At the same time, the positive attitude adopted by the Federal Constitutional Court towards reformation, what it called resocialization, made it more sympathetic to the view that the manner in which prisoners serving life sentences should be released should be reconsidered. The court held that life imprisonment could only be regarded as compatible with human dignity and the requirements of the *Sozialstaat* if the prisoner retained a concrete and fundamentally realisable expectation of eventually being released:

> The essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom.
>
> (BVerfGE, 45, 187, 245).

Simply stated, the German Court recognised that this fundamental principle applied to all human beings. This logic was not limited only to juveniles but, of course, it applies to them with particular force as they have the greatest prospects of further development. In German law there could be no life sentences without the prospect of eventual release. Moreover, the Federal Constitutional Court accepted that the vagaries of the system of executive pardons were such that the *spes* of a pardon was insufficient to meet this expectation. The Constitutional Court explained what had to be done to ensure that the implementation of life imprisonment remained constitutional:

> In a case like the one before the Court, in which the weighty decisions to be made involve questions which are of essential significance to the persons concerned, the principle of legal certainty as well as the demands of natural justice require that conditions, in terms of which a prisoner serving a life sentence is released and the procedure to be followed in securing his release, should be determined by legislation. The form that such legislation should take, should be determined by the legislature, but within the framework laid down by the constitution.
>
> (BVerfGE, 45, 187, 246).

This last issue of appropriate release procedures for prisoners who have been sentenced to life imprisonment but who do have a prospect of release is one to which I will return. For the moment though one may simply note that the ambiguity created by having a life sentence but allowing for release deflected much of the criticism against life imprisonment and rendered largely ineffective the campaign for its total abolition that had been mounted in Germany.[8]

The question of whether a life without parole sentence meets human rights norms has not been finally settled in Europe. Constitutional courts in France (Cour de Cassation (1994)) and Italy (Corte costituzionale della Repubblica Italiana (1983)) have adopted the same view as their German counterpart and ruled that whole life sentences are fundamentally unacceptable. On the other hand, the House of Lords in England has held that such a sentence would be acceptable in principle. It stated explicitly that "there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence". (*R v Home Secretary, Ex parte Hindley*, 2001: 417H). Accordingly, although in most cases prisoners serving life sentences in England and Wales have their cases reconsidered by the parole board after they have served a minimum period, the so-called "tariff" (which is now set by the sentencing court), there could be no objection to a "whole life tariff" in these extreme cases. Myra Hindley and others like her, therefore, were not entitled to a review after a fixed period after which they would be released automatically if they ceased to be dangerous. At best they could hope that the Home Secretary would review their cases, but release in this way would be akin to a pardon rather than a legislatively guided process.

[7] Similar arguments were applied by the Federal Constitutional Court in its far briefer judgment of April 24, 1978, where it upheld the constitutionality of the discretionary imposition of the sentence of life imprisonment "in particularly grave cases" of manslaughter (as provided for by § 212(2) of the Penal Code): see Bruns (1979).

[8] For a compendious discussion of the abolition of life imprisonment in Germany, see Weber (1999).

It is clear that a sentence in which the "minimum period" is a whole life would not pass constitutional muster in Germany. Certainly the faint possibility of release that remains for such prisoners would not meet the standards of legal certainty and natural justice to which German lifers are entitled. More fundamentally though, it could be argued that a whole life tariff is contrary to human dignity as it removes the realistic prospect of release from these prisoners. At some stage the European Court of Human Rights (ECtHR) will have to decide this issue. While questions may arise at the European level about the adequacy of the envisaged release procedures for these prisoners, the crucial question will be whether a sentence that denies prisoners a formal prospect of release is fundamentally an inhuman or degrading punishment and thus contrary to Article 3 of the European Convention on Human Rights. Hitherto the ECtHR has simply noted the issue. In *Einhorn v France* (2001) the ECtHR remarked that it did not

> rule out the possibility that the imposition of an irreducible life sentence may raise an issue under Art. 3 of the Convention. In this connection, the Council of Europe documents to which the applicant referred (the general report on the treatment of long-term prisoners ... and Resolution (76)2 on the treatment of long-term prisoners...) are not without relevance. Consequently, it is likewise not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention.
>
> (para. 27).

Doubts have been expressed about the compatibility of whole life sentences with article 3 of the European Convention on Human Rights in other European cases too (*Nivette v France* (2001); *Weeks v United Kingdom* (1988)) but in no instance has it been necessary to make a final decision, as it has been found on the facts that the prisoner had a prospect of release.[9]

It is clear, however, that at the European level this uncertainty does not currently extend to life imprisonment where the offender will be considered for early release. In *Sawoniuk v United Kingdom* (2001) the ECtHR noted

> that matters of appropriate sentencing largely fall outside the scope of the Convention, it not being its role to decide, for example, what is the appropriate term of detention applicable to a particular offence. Nonetheless it has not excluded that an arbitrary or disproportionately lengthy sentence might in some circumstances raise issues under the Convention ....In the circumstances, the Court sees no basis for finding that the imposition of a sentence of imprisonment on the applicant infringes the prohibition contained in Article 3. Nor, given the seriousness of the offences for which the applicant was convicted, can a sentence of life imprisonment be regarded as arbitrary or disproportionate in the context of Article 5 of the Convention.
>
> (para. 3).

The distinction between whole life sentences that may infringe fundamental human rights and life sentences for serious offences where there is a procedure for release that do not, once again highlights the ambiguity about what is really meant by life sentences. It points to the need for exploring whether such procedures can meet the requirement of due process and can give lifers a realistic prospect of regaining their freedom.

Before doing so it is necessary, however, to consider a more radical critique of life imprisonment in a number of jurisdictions. This approach has resulted in their jurisprudence fundamentally opposing life imprisonment in all its forms.

4. Is life imprisonment acceptable at all?

There are several countries in the world in which no form of life imprisonment is a sentencing option. In some of them – Portugal, Brazil, Costa Rica, Columbia, El Salvador are examples[10] – the national constitution explicitly outlaws its imposition. In others the Constitutional Court has declared life imprisonment to be unconstitutional: in both Mexico (*SCJN*, 2001; *SCJN*, 2004) and Peru (*STC*, 2003) there have recently been such decisions. Finally, in a third

[9] Of some concern is that even where the prospect of release was very remote and the procedure to be followed left an almost unfettered discretion in the hands of the authorities (cf. *Einhorn v France* (2001)), the court has been reluctant to find that the sentence was unacceptable. However, the Court has not made a clear finding about the procedure that would be minimally acceptable in this context.

[10] See art. 30.1 of the Constitution of Portugal; art. 5 of the Constitution of Brazil; art. 40 of the Constitution of Costa Rica; art. 34.1 of the Constitution of Colombia; and art. 27.2 of the Constitution of El Salvador (constitutions translated in Blaustein & Flanz (Eds.), 1971–).

group, the legislature has chosen without direct constitutional compulsion not to provide for life imprisonment in the criminal code. Spain, Norway and latterly Slovenia are examples of this last group (Albrecht, 2001).

The historical roots of this prohibition can be traced to a humanitarian view of punishment that has its roots in 19th century Portuguese criminal law theory in particular: Portugal outlawed life imprisonment as early as 1884, although its constitutional prohibition is more modern. This humanitarian approach is often combined with a specific injunction found in the constitutions of many of these states, that imprisonment should have a 're-educative' function (Bardou, 2004). Spanish scholars in particular have argued that this constitutional requirement means that life imprisonment is unacceptable, for the sentence raises the possibility, at very least, that the offender will never be returned to society and therefore there is the risk that the success of the reduction that is supposed to happen in prison will never be put to the test (Mir, 1996; Santos, 1978). It is this argument that appears to have persuaded the constitutional courts of Mexico and Peru to declare life imprisonment unconstitutional.

The logic of the argument is substantially the same as the one that was advanced against life imprisonment in Germany. However, the difference in outcome is significant: while in Germany the Constitutional Court upheld life imprisonment as a form of punishment subject to adequate release procedures being put in place, in these countries the constitutional courts outlawed the penalty in it is entirety. The reason for the different outcome is not apparent. It can possibly be found in the pre-existing scepticism in the Spanish- and Portuguese-speaking world towards life imprisonment on the libertarian grounds that it gave the state too much power over the individual. A further reason may be the fact that sentences of life imprisonment are not imposed in these countries at all.

A particularly interesting aspect of the principled opposition to life imprisonment is the lack of success that states that adopt this position have had in maintaining it when other states are involved. One example is in the debate about what form the ultimate penalty that could be imposed by the new international criminal court should take. Although South American members of the International Law Commission in particular had raised principled objections to life imprisonment in the debate about ultimate penalties that arose when the draft Code of Crimes against the Peace and Security of Mankind was begin considered in the 1990s (Van Zyl Smit, 1999), and although similar concerns were expressed by national representatives of Portugal and Brazil when the Statute of the International Criminal Court was being finalised in Rome in 1998 (Fife, 1999; Schabas, 2002), life imprisonment duly became the ultimate penalty that the International Criminal Court could impose.

It appears that at the discussions in Rome life imprisonment with a minimum period of twenty-five years, after which the further implementation of the sentence would be reconsidered automatically, was adopted as a compromise between those countries who favoured the death penalty (or possibly whole life sentences), on the one hand, and those who had principled objections to life imprisonment, on the other (Fife, 1999: 990). The question remained whether countries that had constitutional prohibitions on life imprisonment, legally could, or morally should, ratify the Rome Statute setting up the International Criminal Court. In the event both Brazil and Portugal, the two most prominent such countries, did ratify, but not without some anxious internal debate (Bardou, 2004). In both countries principled objections to life imprisonment as an infringement of human rights were articulated publicly and the incompatibility of the treaty with their national constitutions was stressed. In the end *Realpolitik* prevailed. They feared being lumped with states that were opposing the introduction of the International Criminal Court on grounds that had nothing to do with upholding human rights. Brazil ratified without modifying its Constitution, while in Portugal a technical constitutional amendment allowed it to ratify without directly addressing the principled objections to adhering to a treaty that allows a form of punishment that its constitution outlaws (Bardou, 2004).

A second example of the relative powerlessness of states that prohibit life imprisonment occurs in the areas of extradition. On the face of it this should not be a difficulty. Some treaties allow extradition to be refused if the person to be extradited may be punished not only by the death penalty but also by life imprisonment.[11] Most prominently article 9 of the Inter-American Convention on Extradition provides in peremptory terms:

> The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of

[11] The United Nations Model Treaty on Extradition notes that States may choose to add a further restriction to the standard extradition treaties, namely one that would allow extradition to be refused if the State requesting extradition does not give an assurance that a "life, or indeterminate sentence" will not be imposed: *United Nations Model Treaty on Extradition*, G.A. Res. 45/116, 14 December 1990, 45 U.N. GAOR Supp (No. 49) U.N. 211, U.N. Doc. A/RES/45/116, art. 4.

the above mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.

Even where there is no specific reference to life imprisonment in an extradition treaty between two countries, the requested state ought still to be able to stipulate that it will only allow extradition if the persons to be extradited will not face a penalty that would be unconstitutional in the state from which his extradition is being sought. A wide-ranging recent study of extradition practice between the United States of America, as a country seeking extradition, and Mexico and other South and Central American states whose constitutions prohibit life imprisonment, shows that this is often not the case (Labardini, 2005). What happens in practice is that in some instances conditions that life imprisonment should not be imposed are not set, even where the constitution of the extraditing state would appear to require such a condition. In other instances such conditions are set but simply ignored by United States courts. More subtly, the conditions may be ambiguous, or be interpreted as such. For example, the condition may be only that the State will not seek a life sentence but will deliberately omit to mention that an independent court may still impose such a sentence. On other occasions the problem is simply avoided by imposing a very long fixed term sentence which is a life sentence in all but name (Labardini, 2005). Once again *Realpolitik* has much to do with the downplaying of principled objections to life imprisonment. In the United States there have been various attempts to pressure countries to ignore their own constitutional rejection of life imprisonment, and on pain of having aid budgets and other forms of interstate co-operation threatened, to grant extradition without a condition that a life sentence may not be imposed (Labardini, 2005). However, the ambiguity of the life sentence plays a part too. While a condition that the death penalty must not be imposed is usually honoured, in the case of the life sentence argument about what 'life' really means allows the issue of principle to be fudged.

5. Proportionality and (mandatory) life sentences

A different question that might also have been raised by the US Supreme Court in *Roper v Simmons* (2005), but was not, was whether a life sentence, in this instance without the prospect of parole, was proportionate to the crime. To answer this question one must step back and ask a slightly wider question, namely, is there a constitutional test which requires that a sentence must be proportionate, or at least not grossly disproportionate to the crime committed and the culpability of the offender? Ironically, US death penalty jurisprudence provides part of the answer. At least since the mid 1970s the US Supreme Court has recognised that certain crimes are not serious enough ever to justify the imposition of the ultimate penalty of death,[12] thus in practice leaving the death penalty only for first degree murder. But even in murder cases it is not allowed to be mandatory. *Gregg v Georgia* (1976) in 1976 laid down that before the death penalty could be imposed there had to be a structured process in which agreed aggravating factors were identified and all mitigating factors were considered in order to ensure that the crime and the culpability of the offender were proportionate to the severity of the penalty of death.

Unfortunately the US jurisprudence on proportionality in life cases is not as clear as that on the death penalty. In an early series of cases culminating in the judgment in *Solem v Helm* in 1983 developments had been promising. In that case the Court adopted a tripartite test for establishing whether a life sentence was disproportionate: viz. (i) the nature of the offence, (ii) the sentence imposed for the commission of the same crime in other jurisdictions and (iii) the sentence imposed for other crimes in the same jurisdiction. By applying this test it was able to conclude that a (discretionary) life without parole sentence imposed on a petty and alcoholic fraudster for repeated offences was unconstitutionally disproportionate. However, *Solem v Helm* (1983) did not settle the constitutional law on life imprisonment.

In 1991 in *Harmelin v Michigan* the Supreme Court was again called upon to decide whether a life sentence, this time a mandatory sentence of life imprisonment without parole imposed on a first offender for possession of a relatively large quantity of a dangerous drug,[13] was constitutional. Once again split by five votes to four, the Court decided that the sentence was not cruel and unusual in terms of the Eighth Amendment.

The minority judgment of Justice White, with whom three judges concurred, in essence simply applied the tripartite test for constitutional disproportionality that had been accepted in *Solem v Helm* (1983: 1009–1027) and concluded that the sentence failed this test. Had it been followed by the Court, one might have interpreted it as a further step in the

[12] *Coker v Georgia* (1977) rape of an adult woman; *Enmund v Florida* (1982) mere participation in a felony murder.

[13] 672g of cocaine.

'evolving standards of decency', for it held that the legislation providing for the mandatory life sentence for possession of a large quantity of dangerous drugs was unconstitutional because not all persons who possessed such quantities of the drugs deserved life imprisonment. In this respect the minority judgment was an elaboration on *Solem v Helm*, which had dealt only with the appropriateness of the life sentence that the sentencing court in its discretion imposed on the individual offender in the light of the particular circumstances of that case.

An interesting judicial critique of the "life without parole" aspect of the mandatory sentence is contained in the concurring minority opinion of Justice Stevens (joined by Justice Blackmun). Justice Stevens noted that, while the sentence was not in the same category as the death penalty,

> a mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on the rational determination that the punished [and here Justice Stevens quoted the words of Justice Stewart about the death penalty from *Furman v Georgia*] 'criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.' Serious as this defendant's crime was, I believe it is irrational to conclude that every similar offender is wholly incorrigible.
>
> (Solem v Helm, 1983: 1028. Internal references omitted).

The majority not only found that Harmelin's sentence did not infringe the Eighth Amendment but argued for reduced judicial scrutiny of the proportionality of prison sentences. Most extreme in this regard was again Justice Scalia, with whom Chief Justice Rehnquist joined. Justice Scalia re-examined the history of the Eighth Amendment and concluded flatly that it contained no general constitutional proportionality guarantee. Repeating the mantra that 'death is different', Justice Scalia refused to consider at all whether a life sentence (with or without parole) for Harmelin was proportional and argued that sentences other than death did not necessarily have to be individualised.

This proposition about individualisation of life sentences not being a constitutional requirement is particularly important, for, other than the result, it was only in this part of the judgment of Justice Scalia in which the other three judges who made up the majority concurred. Justice Kennedy, who wrote for this group, accepted that the Eighth Amendment encompassed a narrow proportionality test that in principle could apply to the proportional severity of life sentences. However, he held that the sentence imposed on Harmelin was not so disproportionate as to constitute cruel and unusual punishment.

This conclusion was achieved in the first instance by emphasising a number of general principles that restrict proportionality analysis: "the primacy of the legislature, the variety of legitimate penological schemes, the nature of [the] federal system and the requirement that proportionality review be guided by objective factors" (*Solem v Helm*, 1983: 1001). These principles were then used to inform a "final one":

> The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.
>
> (Solem v Helm, 1983: 1001).

This restricted standard was then applied narrowly: the tripartite test recognised in *Solem v Helm* was not fully invoked. Justice Kennedy simply postulated that drugs presented such a severe threat of harm to society that life without parole, the heaviest sentence available in Michigan, could be imposed for possession of a large quantity. There was no clear analysis of precisely what the major threat that drugs posed to society (Husak & Peele, 1998) was or of to what extent a possession offence, of which Harmelin was convicted, contributed to that threat. Moreover, the conclusion was reached without the enquiry demanded by the other two legs of the tripartite test, viz. sentences imposed for the commission of the same crime in other jurisdictions, and sentences imposed for other crimes in the same jurisdiction. Such an inquiry would have shown that the penalty was uniquely heavy in the US and that only first-degree murder and dealing in the same drugs were punished with life without parole in Michigan (Grossman, 1995–96).

Justice Kennedy also attempted to play down the injustice (possibly even gross disproportionality?) that could result from the mandatory sentencing law by claiming that the Michigan scheme possessed mechanisms for consideration of individual circumstances. "Prosecutorial discretion before sentence and executive or legislative clemency afterwards provide means for the State to avert or correct unjust sentences", he noted (*Harmelin v Michigan*, 1991: 1008).

What this last proposition cynically ignored was that the Supreme Court itself had already largely removed these elements of the criminal justice system from judicial supervision.[14] To depend on these forms of intervention to somehow introduce proportionality into the system meant that the Court was relying on processes where an offender would not be able to appeal effectively to the courts to ensure that an unjust sentence would be 'corrected'. In other words the Constitution would not protect them. The contrast with the requirement set by the German Constitutional Court of strict due process in the release procedure could not be clearer.

The wider upshot of the judgment in *Harmelin* was to undermine all effective examination of proportionality in life sentence cases. This was seen most dramatically in the decisions in 2003 of the Supreme Court in two cases where life sentences imposed as a result of the state of California's 'three strikes and you're out' laws were regarded as acceptable (*Ewing v California,* 2003; *Lockyer v Andrade*, 2003), even although in one instance, the case of *Lockyer v Andrade*, an offender with a prior record was given two life sentences with a minimum term of fifty years for stealing a total of eleven blank video tapes on two separate occasions. The justification provided by the judges who supported a limited proportionality test was that the state of California might regard incapacitation as the primary purpose of punishment in which case this sentence was not obviously disproportionate! As Justice Souter writing for a four-judge minority exclaimed: "If Andrade's sentence is not grossly disproportionate, the principle has no meaning." (*Lockyer v Andrade*, 2003: 83).[15]

The relative eclipse of proportionality testing in American life imprisonment cases does not mean that it has been rejected in other jurisdictions. As Judge Ackerman explained in the South African Constitutional Court in the case of *S v Dodo* (2001: 404 para. 38):

> To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence... the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.

6. Making life imprisonment a proportionate sentence

While American life imprisonment jurisprudence has paid scant attention to how long prisoners sentenced to life imprisonment really serve, in other jurisdictions the reality that most such prisoners are eventually released has sometimes been seen as an opportunity for making a life sentence proportionate to the offence for which it was imposed. Different legal systems have used the flexibility of release procedures to ameliorate the harshness of life sentences, particularly when they are mandatory.

Most systems have done so by setting a fixed period after which the release of the person sentenced to life imprisonment must be considered. These vary from ten years in Belgium, fifteen years in Germany and twenty-five years in the case of the new International Criminal Court, to thirty years in Estonia (Van Zyl Smit & Dünkel, 2001). The obvious disadvantage of such an approach is that the minimum period, particularly if it is long, may itself be disproportionate to the crime. The problem arises also if the minimum period is relatively short and the crime very serious. In such cases the body responsible for making release decisions has to consider the initial offence again, as well as deciding whether the prisoner may safely be released. In Germany the mixed nature of this decision has been widely criticised, as has the fact that for very serious crimes the courts that consider release after fifteen years again attempt to take into account the heinousness of the original offence, thus effectively resentencing the offender (Stark, 1994).

[14] See *Bodenkircher v Hayes* (1978) where the US Supreme Court accepted prosecutorial discretion to reindict an offender under a law that required a life sentence where the accused had refused to plead guilty to a lesser charge, which would have resulted in a sentence of five years.
[15] For a wider discussion of these judgments, see Van Zyl Smit and Ashworth (2004).

The problem is less acute in the case of the International Criminal Court. Its Statute, unlike the national law of Germany and England in respect of murder, and the United States of America for a range of offences, has no provision for mandatory life sentences, even for genocide. The Statute of the International Criminal Court lays down instead that fixed-term sentences should be the norm and that life sentences should only be used "when justified by the extreme gravity of the crime and individual circumstances of the convicted person" (Article 77). It may plausibly be inferred that the extremely grave instances of the very serious crimes that are within the jurisdiction of the International Criminal Court for which a life sentence is imposed will always justify a minimum term of twenty-five years. On the other hand, a twenty-five year minimum period is so long that it could be argued that, after that period has been served, the traditional sentencing functions of deterrence and retribution would have been met.

The test in the Statute of the International Criminal Court for deciding when life imprisonment should be imposed is very similar to that developed by the US Supreme Court to limit the imposition of the death penalty to a relatively small number of the most serious murders. Although, as countless critics of American death penalty jurisprudence have pointed out, it is not without flaw, it remains a more rational way of determining who should be sentenced to life imprisonment than making the penalty mandatory and then attempting to modify its implementation.

Nevertheless, it must be recognised that techniques for adjusting the implementation of life sentences to make them better fit the crime vary in their efficacy. The English system of attempting to adjust the sentence of life imprisonment to the heinousness of the crime is perhaps the most subtle currently available. In the form in which it has now evolved, it is a two-stage process in which a court imposes a life sentence and at the same time sets a minimum period[16] that the offender has to serve to meet the requirements of desert and deterrence (Amos, 2004). This minimum period is cleverly defined as half the term that would have been imposed had there been a fixed term sentence (See *R (Anderson) v the Home Secretary* (2003). As parole for fixed-term sentences is normally considered at the half way stage, theoretically a person sentenced to life imprisonment is entitled to be considered for conditional release at the same stage as a person sentenced to such a fixed term, unless he or she is still dangerous.[17]

Some anomalies remain, however, in the way life imprisonment is imposed and implemented. These are clearly highlighted in the English case of *R v Lichniak and Pyrah* (2003) in which the appellants were sentenced to mandatory terms of life imprisonment even though the sentencing courts had found that they were not dangerous and their offences required only relatively short minimum periods to meet the requirements of retribution and deterrence. Why then impose a life sentence at all? The House of Lords could not explain the anomaly. It was reduced to saying that the mandatory sentence could not be challenged because it reflected the settled will of Parliament and that, in any event, the accused were not really disadvantaged as they were likely to be released at the end of their minimum periods. However, this is fundamentally unsatisfactory, for even in the evolved English way of dealing with release of lifers there is the risk that administrative delays may lead to individuals serving longer than they deserve (Padfield, 2002).

The implementation of life sentences generally poses massive challenges, particularly in countries in which life imprisonment has been introduced suddenly as an alternative to the death penalty (Coyle, 2003). A recent recommendation of the Committee of Ministers of the Council of Europe on the management by prison administrations of life-sentence and other long-term prisoners (Council of Europe, 2003) emphasises the need for careful planning of life sentences leading to the managed reintegration into society of the prisoners serving them. It must be recognised that the many decisions taken by the prison authorities at every step in this process may have a bearing on when the prisoner is eventually released. For example, an administrative decision not to transfer a prisoner to an open facility may lead to a parole board deciding not to release a lifer conditionally. Courts have been slow in recognising the liberty interests involved in such decisions.

7. Dangerous dangerousness

Thus far the discussion of life imprisonment has focused on the need to make life sentences proportionate to the crime, as well as on ways of making the sentences more humane by giving offenders the possibility of being released. Another key factor that plays a part in all life sentences is the idea that life sentences can be used to deal with offenders who are dangerous.

[16] As we have seen above, in rare instances the "minimum period" can be a whole life.
[17] The practical application of the most recent legislative developments on the setting of minimum periods for mandatory terms in life imprisonment are examined in *R v Sullivan* (2005).

This is potentially problematic, as there are concerns of principle about using predictions of future dangerousness as a factor in imposing and implementing punishment generally. As life sentences are open-ended they are particularly attractive as a means of restraining offenders who are regarded as dangerous, but this very open-endedness makes it possible that they may be abused to incarcerate offenders whose danger is not demonstrable. The question is whether a limited concept of dangerousness can be developed that allows it to be considered in dealing with offenders, including those sentenced to life terms, but which does not present a direct affront to the human rights principles that limit permissible punishments.[18] Anthony Bottoms and Roger Brownsword have applied Ronald Dworkin's rights-based philosophy to this issue (Bottoms & Brownsword, 1989: 9).[19] They note that the key Dworkinian idea is that human dignity requires that the right of all people to equal concern and respect be recognised. This right must be enforced by the courts, which need to balance rights and, more importantly, protect individuals against the preferences of the majority, which may conflict with their right to equal concern and respect. Limitation through the criminal law on permissible punishment is one of the ways in which such protection is achieved. Any detention, criminal or civil, beyond that justified by the offence involves a denial of the rights of the individual. In Dworkin's words, we "should treat a man against his will only when the danger he presents is vivid, not whenever we calculate that it would probably reduce crime if we did" (Dworkin, 1978: 11).

Bottoms and Brownsword develop this concept of 'vivid danger'. They suggest that it be broken down into components by posing further questions about how serious the potential injury is, how soon and how often the injurious acts are expected to happen, and how certain it is that the person will act as predicted. Of these, the certainty factor is pivotal. As it increases, the danger becomes more 'vivid' and thus the seriousness and the immediacy of the danger must be evaluated too. Only if, on a combination of these factors, an offender presents a substantial threat to the rights of others should the danger be described as 'vivid' and the offender detained.

Bottoms and Brownsword make it clear that on their test a sentenced offender should not be treated any differently when it comes to the evaluation of dangerousness:

> During his prison term the prisoner is not treated on the same basis as an ordinary citizen. There are chronic disabilities: loss of liberty, restricted communications with outsiders, and so on. Whatever justification there is for such treatment, it terminates at the end of the normal term of imprisonment. At the end of the normal term the offender is entitled to be viewed as a full member of the human community, that is, treated again as an ordinary citizen. It is therefore surely beyond dispute that the right to equal concern and respect generates directly in the dangerous offender the right to release at normal term. For, if he is denied this right the dangerous offender is treated as less than a full citizen.
>
> (Bottoms & Brownsword, 1989: 18).

Bottoms and Brownsword emphasise that this does not mean that in the evaluation of dangerousness the seriousness and the immediacy of the further danger presented by a convicted offender can be ignored. On the contrary, only in the case of convicted offenders is there likely to be enough evidence of 'vivid danger' to justify detaining them. A mere threat is unlikely to be evaluated as meeting the criteria. However, they point out that, because dangerousness is so hard to identify, there is a real risk that, if the law allows the consideration of dangerousness too freely, the rights of the individual, particularly one convicted of a crime, are likely not to receive proper consideration as against the external preferences of the larger society. In their view, the 'vivid danger' requirement is so strict that only in some instances of murder or attempted murder is it likely to be met. Only in these very limited cases therefore, should the law provide for the extended detention of dangerous offenders.

The arguments developed by Bottoms and Brownsword can be used to advance the analysis of life imprisonment in various ways. First, the developed concept of 'vivid danger' is a useful tool, both for psychiatrists who are asked to express opinions and for courts which must make binding decisions, on whether an extended period of detention in the form of a life sentence, or otherwise, should be imposed at all. Put slightly differently: it provides a powerful argument for the proposition that only a 'vivid danger', in the sense that that concept has been expanded by Bottoms and

[18] The discussion that follows relies heavily on Van Zyl Smit (2002). For a recent, more philosophical treatment of the same issue and an attempt to narrow the use of dangerousness as a ground for extended sentences even further, see von Hirsch and Ashworth (2005: 75–91).

[19] For useful critique of their analysis, see Walker (1996:1).

Brownsword, justifies departure from the proportionality principle. This would mean that individual cases, where a finding of dangerousness is required before a discretionary life sentence may be imposed, would have to be subject to perhaps a more careful analysis than is currently the case in England.[20] It would almost certainly mean that far more of the life sentences currently imposed in the United States of America would be open to proportionality challenges.

Secondly, the strong case, recognised by Bottoms and Brownsword, for legislative restrictions on the consideration of dangerousness as a factor in the imposition of extended sentences raises questions about the category of offences for which courts have the discretion to impose life sentences. The current English list of offences for which such sentences may be considered is wider than is justifiable according to their theory. However, its recent restriction, albeit not quite watertight, to serious violent and sexual offences (Sections 224 and 225 of the Criminal Justice Act 2003) can be debated rationally in Bottoms and Brownsword's terms. The German restriction of discretionary life imprisonment effectively to homicide-related offences (Morgenstern, 2004) is obviously closer to their thinking.

Thirdly, Bottoms and Brownsword provide support for questioning the combination of two distinct elements, viz. the punitive and the preventive, that are now formally recognised, at least in all English life sentences, except for the few where a minimum period is not set. If convicted prisoners are really to be treated with equal concern and respect once they have served the penal part of their terms, there is a strong case for assessing their dangerousness completely separately, lest punitive concerns cloud the assessment of risk and the need for preventive detention. This would clarify the difference between proportionality of sentence, based on the seriousness of the offence and the degree of blameworthiness of the offender, on the one hand, and a wider standard of proportionality that should apply to all State actions that impinge on individual rights, on the other.

8. Life imprisonment and preventive detention

Once one begins to think along these lines one cannot avoid considering whether it is not desirable to have a separate track to deal with those offenders who present a demonstrable danger of committing further serious offences. The German preventive detention measures are an example of such a second track (Kinzig, 1996). In the form that they existed prior to 1998 at least, they were strictly limited, in that they could not be invoked unless the offender was a recidivist convicted of serious crimes. They were also limited substantively, in that it had to be demonstrated that such an offender had a tendency towards engaging in a relatively narrowly defined form of socially dangerous conduct in the future. Even then the problem remained that determining the existence of such a tendency in an individual offender was a problematic enterprise.

Amendments in 1998 watered down the tight safeguards by making both the formal and substantive limits less restrictive and thereby increasing the risk that indefinite detention could be imposed too easily (Kinzig, 2000; Rzepka, 2003; Albrecht, 2004). The Federal Constitutional Court upheld these amendments in early 2004 (*BVerfGE* 109, 133). However, a few days later it struck down attempts by individual states to provide that a preventive detention measure could be ordered when someone was first deemed to be dangerous while serving a sentence (*BVerfGE* 109, 190; Dünkel & Van Zyl Smit, 2004; Frommel, 2004). Later in the same year similar legislation was enacted at the Federal level (Jacobsen, 2005). The new legislation is controversial. There is now a real risk that the danger to be avoided by the detention measure would not necessarily be sufficiently 'vivid' to meet Bottoms and Brownsword's criteria. There is also the risk that they will be used as indirect life terms for offenders who do not meet the strict criteria for the imposition of the sentence of life imprisonment.

The recent German developments do not mean, of course, that a dual track cannot be constructed that offers greater protections to the rights of the individual offender. A general proportionality principle that would constantly reconsider the increasing burden being placed by continued imprisonment on an individual offender subject to preventive detention against the common good served by it, is one way of doing it. This should ensure that preventive detention is not carried out for a whole life. A better solution is to have an upper limit. What this limit should be, is inevitably somewhat arbitrary, in the same way as deciding what offences should trigger an inquiry into dangerousness is arbitrary, but at least it provides a safeguard for an evaluation process that is notoriously hard to conduct with any degree of certainty. The initial German limit of ten years on a first term of preventive detention and the absolute upper limit on preventive detention under the English system that existed at the beginning of the twentieth century (Garland, 1987) are examples of such thinking. The fact that legislatures have been prepared to

[20] In English law the initial requirement of "unstable character" set in *R v Hodgson* (1968) seems now to be more loosely interpreted (Van Zyl Smit, 2002: 108).

contemplate such limits, even where theoretically the danger presented by the offender might not by assuaged, is an indication that the harshness of fully indefinite detention as effectively a form of life imprisonment has been recognised at various times. It is of concern that the new English Criminal Justice Act 2003 may have opened the way for a wider category of offenders to be detained indefinitely under the new sentence of "imprisonment for public protection" (Thomas, 2004: 707; Ashworth, 2005: 212).[21]

Widely framed provisions for the detention of offenders who are deemed to be dangerous threaten civil liberties, not only because the criteria for deciding who is to be regarded as dangerous are not strict enough, but because they may lead to a punitive element being smuggled into the sentencing decision. In systems with fixed minima for life sentences the dangerousness of an offender could be abused to impose a heavier, deliberately punitive sentence than would otherwise be justified. Courts need to be vigilant that this is not done by an indirect route. An example of a sentencing court attempting to do so is the South African case of *S v Bull* (2001). In that case the sentencing court, confronted by a particularly vicious murder, decided not to impose a life sentence but instead to declare the offender a "dangerous criminal". In terms of South African legislation an offender so identified is to be detained indefinitely but is to be brought back to court at intervals set by the court to determine whether he is still dangerous. The sentencing court set the first interval at fifty years, thus effectively ensuring a life without parole sentence, which is not provided for by South African law. The South African Supreme Court of Appeal upset the sentence and replaced it with one of life imprisonment, remarking that the will of the legislature could not be avoided in this way. In South Africa at the time all life sentences were subject to administrative review after twenty years. What the sentencing court ought to have done was to have drawn its concerns about the exceptional heinousness of the offence to the attention of the reviewing body and left it at that.[22] Ironically, a life sentence in this instance offered more due process protection to an offender than had the provision for detaining dangerous criminals as it had been interpreted by the sentencing court.

9. Conclusion

Life imprisonment in its most extreme form of a life sentence with no prospect of release imposed on a child has provided a rare focus for criticism in the USA, a country where life sentences are imposed on a very large scale, yet have been largely immune to disapproval. Analysis of this criticism has shown that the questions that it raised may be applicable also to adults sentenced to life imprisonment without parole. Indeed, similar questions about the humanity of life sentences have led to life imprisonment in all its forms being outlawed entirely in a small but significant number of countries.

Even in countries that have not gone as far as abolishing the life sentence, troubling questions have arisen about whether life imprisonment is a sentence that is proportionate to the crime for which it is imposed. Attempts have been made to address this problem by developing rules about when to impose it. These in turn have led to consideration of whether life sentences can be modified by setting a minimum period that will meet concerns of proportionality with the seriousness of the crime, while the remainder of the term to be served will be determined by the continued dangerousness of the offender. This solution however, raises questions about how dangerousness is best established. It also raises further questions about how life sentences relate to other forms of preventive detention, which may well end up being life imprisonment under another name.

It is clear that engagement with the challenges that life imprisonment poses requires intervention at different levels. It must be emphasised that life sentences are always very harsh penalties because of their potential to deny liberty indefinitely. Where they are imposed as whole life sentences, this is clear and they can be debated in those terms. Where, however, they are ostensibly limited by procedural reviews of various kinds, their harshness may not be equally apparent, but it nevertheless remains in the background. Having said that, careful consideration of when they are imposed can limit their use to the most serious cases. Although there are no perfect procedural solutions to establishing for how long they should be implemented, it is nevertheless clear that some procedural guarantees can be built into the process to ensure that prisoners serving life sentences are protected against the excesses of arbitrary decisions. This is particularly true where judgments about dangerousness, which are notoriously hard to make, will determine the fate of persons who have already served many years in prisons. Where careful controls are developed to ensure that life sentences are implemented relatively fairly, it is important to ensure that they are not side-stepped by preventive detention measures not subject to the same safeguards.

[21] The primary difference between this sentence and a life sentence is that the parole board may extinguish a prisoner's licence under the new sentence.

[22] The issue raised in the context of the similar German provision for a minimum period, about whether another body should consider the heinousness of the offence many years later, comes in to play here too.

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