Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse

Luís Roberto Barroso

Abstract: Over the past several decades, human dignity has become an omnipresent idea in contemporary law. This Article surveys the use of human dignity by domestic and international courts and describes the concept’s growing role in the transnational discourse, with special attention paid to the case law of the U.S. Supreme Court. The Article examines the legal nature of human dignity, finding it to be a constitutional principle rather than a freestanding fundamental right, and develops a unifying and universal identity for the concept. At its core, human dignity contains three elements—intrinsic value, autonomy, and community value—and each element has unique legal implications. The Article considers how this elemental approach to the analysis of human dignity can assist in structuring legal reasoning and justifying judicial choices in hard cases, such as abortion, same-sex marriage, and assisted suicide.

Anchoring the Law in a Bed of Principle: A Critique of, and Proposal to Improve, Canadian and American Hearsay and Confrontation Law

Mike Madden

Abstract: As recent case law demonstrates, both American Sixth Amendment Confrontation Clause jurisprudence and Canadian common law relating to hearsay evidence are conceptually problematic. The laws are, at times, internally incoherent and are difficult to justify on the basis of legal
principles. This Article critiques confrontation and hearsay law in the United States and Canada, respectively, by exposing the lack of principle underlying each body of law. The Article develops a principled basis for evidence law in general, and hearsay and confrontation law in particular, providing a more stable foundation for hearsay and confrontation frameworks. Ultimately, the Article argues that the epistemic, truth-seeking goal of criminal evidence law is best served by the broad admission, rather than exclusion, of all hearsay evidence. Furthermore, while fairness concerns are relevant to some rules of evidence, there are no valid fairness concerns operating in the context of hearsay and confrontation law that should displace the primary principle of facilitating and promoting epistemically accurate fact-finding in criminal trials. Finally, this Article suggests that any dangers associated with the broad admission of hearsay evidence can be mitigated through effective argument by counsel and appropriate cautions to the trier of fact regarding any weaknesses inherent in the evidence.

NOTES

Multikulti Ist Doch ’Ne Erfolgreiche Realität: Why Tolerance Is Vital for German Economic Growth

Lauren E. Campbell

[pages 449–480]

Abstract: In October 2010, German politicians declared that multiculturalism in Germany was no longer viable. That controversial declaration ignited a heated debate, and Germans were forced to address the fact that national immigration policies since World War II had produced one of the largest immigrant populations in Western Europe. Indeed, despite the purported failure of multiculturalism, highly qualified immigrants from non-European Union (EU) countries may be the key to securing German economic growth amidst a global race for talent. Accordingly, this Note explores the intricacies of German and EU policies on economic immigration and integration, which are aimed at attracting these highly qualified immigrants. It argues that, although German immigration legislation targets the right population, its integration procedures may not suffice to attract and retain immigrants. Faced with an aging population, Germany should utilize EU guidelines for integration to establish concrete measures to secure a workable multicultural society.
SHORT-TIME COMPENSATION: IS GERMANY’S SUCCESS WITH 
KURZARBEIT AN ANSWER TO U.S. UNEMPLOYMENT?

Megan Felter

[pages 481–510]

Abstract: The recent financial crisis caused a global recession that affected the economies of both the United States and Germany. While the ranks of jobless workers expanded in the U.S. and unemployment remain high, Germany’s labor market was less affected by the recession because of its success with Kurzarbeit, a work sharing program. Germany’s experience with Kurzarbeit can provide the United States with useful insights to improve its own version of work sharing—short-time compensation—to better combat unemployment.

HACTIVISM: A NEW BREED OF PROTEST IN A NETWORKED WORLD

Noah C.N. Hampson

[pages 511–542]

Abstract: After WikiLeaks released hundreds of thousands of classified U.S. government documents in 2010, the ensuing cyber-attacks waged by all sides in the controversy brought the phenomenon of hacktivism into popular focus. Many forms of hacktivism exploit illegal access to networks for financial gain, and cause expensive damage. Other forms are used primarily to advocate for political or social change. Applicable law in most developed countries, including the United States and the United Kingdom, generally prohibits hacktivism. However, these countries also protect the right to protest as an essential element of free speech. This Note argues that forms of hacktivism that are primarily expressive, that do not cause serious damage, and that do not exploit illegal access to networks or computers, sufficiently resemble traditional forms of protest to warrant protection from the application of anti-hacking laws under widely accepted principles of free speech.
Constitutionalizing an Enforceable Right to Food: A New Tool for Combating Hunger

Michael J. McDermott

Abstract: Although international treaties recognize a right to food, few nations have established a domestic, legally enforceable right to food. A justiciable national right to food can provide a basis for legal redress, national food policies, and state aid programs. India, South Africa, and Brazil provide insight and lessons that can be applied to other nations, like Mexico, to identify effective means for creating a national right to food. This Note compares effective national right to food efforts and identifies essential elements underlying a justiciable national right to food. By evaluating the development of a right to food within in the international and national systems it is clear that the right to food is most effective when national constitutions provide justiciable means for legal redress and enforcement of that right.

Comments

Uncle Sven Knows Best: The ECJ Swedish Gambling Restrictions, and Outmoded Proportionality Analysis

Paul Caligiuri

Abstract: The free movement of services is a fundamental tenet of the European Union’s Common Market. Gambling services’ free movement, however, has long been obstructed by municipal gambling restrictions. One such restriction in place in Sweden authorized the prosecution of two newspaper editors for publishing advertisements of foreign-based online gambling operators. In the course of the editors’ appeal from their conviction, the Swedish courts referred questions to the European Court of Justice regarding the compliance of Sweden’s domestic restriction with European treaty provisions enshrining the free movement of services. The Court of Justice provided little guidance, however, when it addressed the dispositive question of proportionality; that is, whether Sweden’s law went beyond the point needed to affect Sweden’s legitimate underlying policy objectives. The court, in its deferent and cursory proportionality analysis, employed a standard ill-equipped to account for the effects national gambling restrictions have on the Common Market in the online age.
Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes

John J. Liolos

Abstract: The Arab Spring was a period of great transition in the Middle East and North Africa, when people in many nations united in protest against their oppressive and tyrannical governments. In February 2011, the Libyan people filled their city streets in peaceful demonstrations against Muammar Gaddafi’s regime. Attempting to quell the dissent, the Gaddafi regime allegedly engaged in a systematic campaign of violence against the dissidents. These attacks escalated into a full-fledged civil war, triggering United Nations intervention to protect civilians. In response to the Gaddafi regime’s attacks on civilians, the UN Security Council passed a resolution referring the alleged human rights abuses to the International Criminal Court (ICC) for prosecution. This Comment explores the effect of the warrant, the ICC’s complementary jurisdiction over the matter, and argues that both Libyan and ICC officials should be instrumental in trying the accused members of the Gaddafi regime.

Left Hanging: The Crucifix in the Classroom and the Continuing Need for Reform in Italy

Rebecca E. Maret

Abstract: Increased immigration throughout Europe and expanding religious pluralism have exerted pressure on European States to make further accommodation for minority religious populations. This poses a challenge for Italy and other European States whose national identities are informed, at least in part, by a single religion. A recent decision by the European Court of Human Rights, holding that Italy could refuse parents’ requests to remove crucifixes from the walls of public school classrooms, has reinvigorated debate throughout Europe on the appropriate place of religion in the public arena. This Comment posits that in issuing this opinion, the Grand Chamber of the European Court of Human Rights has missed an opportunity to provide meaningful insight into the debate on how European States may confront the challenges posed by an increasingly religiously diverse society. As such, European States are left to determine the policies and parameters of religious accommodation individually.
HERE, THERE, AND EVERYWHERE: HUMAN DIGNITY IN CONTEMPORARY LAW AND IN THE TRANSNATIONAL DISCOURSE

LUÍS ROBERTO BARROSO*

Abstract: Over the past several decades, human dignity has become an omnipresent idea in contemporary law. This Article surveys the use of human dignity by domestic and international courts and describes the concept’s growing role in the transnational discourse, with special attention paid to the case law of the U.S. Supreme Court. The Article examines the legal nature of human dignity, finding it to be a constitutional principle rather than a freestanding fundamental right, and develops a unifying and universal identity for the concept. At its core, human dignity contains three elements—intrinsic value, autonomy, and community value—and each element has unique legal implications. The Article considers how this elemental approach to the analysis of human dignity can assist in structuring legal reasoning and justifying judicial choices in hard cases, such as abortion, same-sex marriage, and assisted suicide.

INTRODUCTION

In France, Mr. Wackeneim wanted to participate in a show known as “dwarf tossing,” in which nightclub patrons would try to heave a dwarf the furthest distance possible. In the United Kingdom, Mrs. Evans, after losing her ovaries, wanted to insert into her uterus embryos fertilized with her eggs and semen from her ex-husband. In Italy, the family of Mrs. Englaro wanted to suspend medical treatment and let her die peacefully after seventeen years in a vegetative coma. In Brazil, Mr. Ellwanger wanted to publish books denying the existence of the Holocaust. In the United States, Mr. Lawrence wanted to have intimate relations with a same-sex partner without being considered a criminal.

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In Colombia, Mrs. Lais wanted official recognition of her right to work as a sex professional. In Germany, Mr. Gründgens wanted to prevent the republication of a book based on the life of his father because he considered it offensive to his father’s honor. In South Africa, Mrs. Grootboom, living in extremely miserable conditions, wanted the state to provide shelter for her and her family. In France, the young Mr. Perruche wanted compensation for being born, or rather, for not being aborted, because a prenatal diagnostic error left unforeseen the severe risk of physical and mental lesions with which he was born.¹

Each of these scenarios represents real cases decided by high courts throughout the world and share one common trait: the meaning and scope of the idea of human dignity. In recent decades, human dignity has become one of the Western world’s greatest examples of ethical consensus, mentioned in countless international documents, national constitutions, legal statutes, and judicial decisions.² In theory at least, few ideas garner such spirited and unanimous concurrence. In practice, however, dignity as a legal concept frequently functions merely as a mirror onto which each person projects his or her own values. It is not by chance that human dignity is invoked throughout the world by opposing sides in such matters as abortion, euthanasia, assisted suicide, same-sex marriage, hate speech, cloning, genetic engineering, sex-change operations, prostitution, the decriminalization of drugs, the shooting down of hijacked aircrafts, protection against self-incrimination, the death penalty, life imprisonment, the use of lie detectors, hunger strikes, and the enforcement of social rights. The list is endless.

In the United States, references to human dignity by the Supreme Court trace back to the 1940s.³ The use of the concept in American law, however, is episodic and underdeveloped,⁴ relatively incoherent and inconsistent,⁵ and lacking in sufficient specificity and clarity.⁶ De-

¹ Each of these cases is discussed in turn below. See infra text accompanying notes 44, 58–59, 323, 356–357, 368, 422–429.
² See sources cited infra note 74.
⁴ Id. at 17.
spite this history, in recent years a clear and noticeable trend emerged in which courts employ human dignity in cases involving fundamental rights, such as the rights to privacy and equal protection, the prevention of unconstitutional searches and seizures, the prevention of cruel and unusual punishment, and the “right to die.”

Although an array of distinguished authors embrace as a qualitative leap the expanded idea of human dignity as the foundation for the U.S. Bill of Rights, this view is not unanimous. In the courts and the Academy, voices such as those of Justice Antonin Scalia and Professor James Whitman fiercely dispute the role of human dignity in constitutional interpretation and in legal reasoning generally, challenging its necessity, convenience, and constitutionality. Moreover, some look with distaste, and even horror, at the mere possibility of resorting to foreign materials on human dignity to establish a shared view of its meaning.

The ideas that follow are based on the assumption that human dignity is a valuable concept with growing importance in constitutional interpretation, and that it can play a central role in the justification of decisions involving morally complex issues. It is past time to consider dignity to be a more substantive concept in legal discourse; too often, it serves merely as a rhetorical ornament, a vessel of convenience for unrelated cargo. With that in mind, this Article sets out to accomplish three main objectives. Part I discusses the importance of the notion of human dignity in domestic and international case law, and in the transnational discourse. I argue that the United States has joined this trend, albeit timidly, and that there is no reason why it should not. Part


8 See, e.g., Larry Tribe, Larry Tribe on Liberty and Equality, Balkinization (May 28, 2008), http://balkin.blogspot.com/2008/05/larry-tribe-on-liberty-and-equality.html (“The strategy that for me promises the greatest glimpse of the infinite is a strategy that resists rigid compartmentalization and that reaches across the liberty/equality boundary to recognize the ultimate grounding of both in an expanding idea of human dignity.”); see also Izhak Englard, Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework, 21 Cardozo L. Rev. 1903, 1917–18 n.74 (2000); Jeremy M. Miller, Dignity as a New Framework, Replacing the Right to Privacy, 30 T. Jefferson L. Rev. 1, 3 (2007).


10 See, e.g., Richard Posner, No Thanks, We Already Have Our Own Laws, Legal Aff., July/Aug. 2004, at 38, 40–42 (claiming that using foreign decisions even in a limited way undermines the court system and reduces judicial influence).

11 By transnational discourse, I mean courts from one country making reference to decisions of courts of a different country.
II identifies the legal nature of human dignity—as a fundamental right, absolute value, or legal principle—and establishes its minimum content. This, I argue, is comprised of three elements: the intrinsic value of every human being, individual autonomy, and community value. My purpose is to determine the legal implications associated with each element; for example, the fundamental rights, responsibilities, and duties that they entail. Part III shows how establishing human dignity’s legal nature and minimum content can be useful in structuring legal reasoning in difficult cases. To confirm my central argument, I use as examples the issues of abortion, same-sex marriage, and assisted suicide.

I. HUMAN DIGNITY IN CONTEMPORARY LAW

A. Origin and Evolution

In one line of development stretching from classical Rome through the Middle Ages and into the advent of the liberal state, dignity—dignitas—was a concept associated with either the personal status of some individuals or the prominence of certain institutions.12 As for personal status, dignity represented the political or social rank derived primarily from holding certain public offices, as well as from general recognition of personal achievements or moral integrity.13 The term was also used to qualify prominent institutions, such as the sovereign, the crown, or the state, in reference to the supremacy of their powers.14 In either case, dignity entailed a general duty of honor, respect, and deference owed to those individuals and institutions worthy of it; it was an obligation whose infringement could be sanctioned with criminal and civil remedies.15 Thus, in Western culture, the first meaning attributed to dignity, as used to categorize individuals, presupposed a hierarchical society and was linked to a superior status, a higher rank, or position.16 In many ways,

13 Englard, supra note 8, at 1904.
16 Englard, supra note 8, at 1904; McCrudden, supra note 12, at 657.
dignity equaled nobility, implying special treatment and distinct rights and privileges. Based on these premises, it is erroneous to understand the contemporary idea of human dignity as a historical development of the Roman concept of dignitas hominis. The current notion of human dignity did not supersede the old one; rather, it is the product of a different history that ran parallel to the origins discussed above.

As currently understood, human dignity relies on the assumption that every human being has intrinsic worth. Multiple religious and philosophical theories and conceptions seek to justify this metaphysical view. Beginning with classical thought, the long development of the contemporary view of human dignity is anchored in the Judeo-Christian tradition, the Age of Enlightenment, and the aftermath of World War II. From a religious perspective, the core ideas of human dignity are found in the Hebrew Bible: God created mankind in his own image and likeness and imposed on each person the duty to love his neighbor as himself. Such concepts are repeated in the Christian New Testament. As for the philosophical origins of human dignity, Roman statesman Marcus Tullius Cicero was the first author to associate the expression “dignity of man” with reason and the capacity for free moral decision. By 1486, led in part by Pico della Mirandola, the ratio philosophica started to depart from its subordination to the ratio theologic.


18 See id.


20 See McCrudden, supra note 12, at 658–63.

21 See Genesis 1:26–27.

22 See Leviticus 19:18.

23 See, e.g., Matthew 22:39; Ephesians 4:24. Due to its major influence in Western Civilization, many authors emphasize the role of Christianity in shaping what came to be identified as human dignity. See, e.g., Christian Starck, The Religious and Philosophical Background of Human Dignity and Its Place in Modern Constitutions, in The Concept of Human Dignity in Human Rights Discourse, supra note 17, at 179, 180–81.


25 Mirandola’s famous speech Oratio de Hominis Dignitate (Oration on the Dignity of Man) is considered to be the founding manifesto of the humanist Renaissance. See generally Giovanni Pico della Mirandola, Oratio de Homnis Digantate (Eugenio Garin ed., Edizioni Studio Tesi 1994) (1486).
pher Samuel Pufendorf27 made further significant contributions to the subject. It was the Enlightenment, however, that brought about the centrality of man, along with individualism, liberalism, the development of science, religious tolerance, and the advent of a culture of individual rights.28 Only then was the quest for reason, knowledge, and freedom able to break through the thick wall of authoritarianism, superstition, and ignorance that the manipulation of faith and religion had built around medieval societies.29 Immanuel Kant, one of the Enlightenment’s foremost representatives, defined this as “mankind’s exit from its self-imposed immaturity.”30

In addition to these religious and philosophical landmarks, a striking historical landmark contributed to the current notion of human dignity: the reaction to the horrors of National Socialism and fascism in the aftermath of World War II. In the reconstruction of a world morally devastated by totalitarianism and genocide, human dignity was incorporated into the political discourse of the winners as the grounds for a long-awaited era of peace, democracy, and the protection of human rights.31 Two main factors imported human dignity into the legal discourse. First, express language referring to human dignity was included in several international treaties and documents, as well as several national constitutions.32 Second, a more subtle phenomenon became increasingly visible over time: the rise of a post-positivist legal culture that re-approximated law with moral and political philosophy, attenuating

26 Francisco de Vitoria (1492–1546) was known for his fierce defense of the rights of Indians against the colonists in the New World. See Edwin Williamson, The Penguin History of Latin America 64–65 (rev. ed. 2009).


28 See McCrudden, supra note 12, at 659–60.


31 See, e.g., U.N. Charter pmbl.

32 See, e.g., Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I art. 1(1) (Ger.); sources cited infra note 74.
the radical separation imposed by pre-World War II legal positivism. Human dignity plays a prominent role in this renovated jurisprudence, where social facts and ethical values strongly influence the interpretation of legal norms. The following is a brief sketch of the religious, philosophical, political, and legal trajectory of human dignity toward its contemporary meaning.

B. Comparative Law, International Law, and the Transnational Discourse

1. Human Dignity in the Constitutions and Judicial Decisions of Different Countries

The concept of human dignity is found in most constitutions written after World War II. It is generally recognized that the rise of human dignity as a legal concept owes its origins most directly to German constitutional law. In fact, based on provisions of the German Basic Law of 1949, which declare that human dignity shall be “inviolable” and establish a right to the “free development of one’s personality,” the German Constitutional Court (German Court) developed a body of law and doctrine that has influenced case law and scholarship through-

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33 In Europe, and particularly in Germany, the reaction against positivism started with Gustav Radbruch’s article *Fünf Minuten Rechtsphilosophie* [Five Minutes of Legal Philosophy], Rhein-Neckar-Zeitung (Heidelberg, Ger.), Sept. 12, 1945, available at http://www.humanistische-union.de/wir_ueber_uns/geschichte/geschichtedetail/back/geschichte/article/gustav-radbruch-fuenf-minuten-rechtsphilosophie/. The article was very influential in shaping the jurisprudence of values that enjoyed prestige in the aftermath of the War. In the Anglo-Saxon tradition, John Rawls’s *A Theory of Justice* (1971) has been regarded as a milestone in bringing elements of ethics and political philosophy into jurisprudence. Ronald Dworkin’s “general attack on positivism” in his article *The Model of Rules*, 35 U. Chicago L. Rev. 14 (1967), is another powerful example of this trend. In Latin America, Carlos Santiago Nino’s book *The Ethics and Human Rights* (1991) is also very representative of the post-positivist culture.

34 This includes, among others, the constitutions of Germany, Italy, Japan, Portugal, Spain, South Africa, Brazil, Israel, Hungary and Sweden. Some countries, such as Ireland, India, and Canada, reference human dignity in the preambles of their constitutions. See, e.g., Neomi Rao, *American Dignity and Healthcare Reform*, 35 Harv. J.L. & Pub. Pol’y 171, 171 n.1 (2012).


36 *Grundgesetz*, BGBl. I art. 1(1) (“Die Würde des Menschen ist unantastbar.”).

37 *Id.* art. 2(1) (“Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit . . . .”).
out the world.\textsuperscript{38} According to the German Court, human dignity is at the very top of the constitutional system, representing a supreme value, an absolute good in light of which every provision must be interpreted.\textsuperscript{39} Regarded as the foundation for all basic rights,\textsuperscript{40} the dignity clause has both subjective and objective dimensions, empowering individuals with certain rights and imposing affirmative obligations on the state.\textsuperscript{41} On various occasions, the German Court emphasizes that the image of man in the Basic Law involves a balance between the individual and the community.\textsuperscript{42} Based on this understanding of human dignity, the German Court developed a broad and varied case law on many difficult subjects, such as: defining the scope of the right of privacy to include protection from both state\textsuperscript{43} and private\textsuperscript{44} interference; prohibiting Holocaust denial;\textsuperscript{45} prohibiting shooting down aircrafts seized by terrorists;\textsuperscript{46} and declaring it unconstitutional for the state to decriminalize abortion,\textsuperscript{47} a decision that was subsequently revised to allow for more flexibility in the regulation of abortion.\textsuperscript{48}

\textsuperscript{38} See Grimm, supra note 35, Part II (discussing the German Constitutional Court’s role in shaping the concept of human dignity.).

\textsuperscript{39} See Bundesverfassungsgericht [BGer] [Federal Constitutional Court] July 16, 1969, 27 BVerfGE 1 (6) (Ger.) [hereinafter Micro-Census Case]; see also Bundesverfassungsgericht [BGer] [Federal Constitutional Court] Feb. 24, 1971, 30 BVerfGE 173 (195–200) (Ger.) [hereinafter Mephisto Case] (holding that the human dignity clause in Article 1 of the Basic Law trumps Article 5, clause 3, which establishes the freedom of art). This “absolute” character of human dignity has been object of growing dispute, but is still the dominant view in the Court. See Grimm, supra note 35, at 12.

\textsuperscript{40} See Mephisto Case, 30 BVerfGE 173 (197).


\textsuperscript{42} See, e.g., Bundesverfassungsgericht [BGer] [Federal Constitutional Court] July 20, 1954, 4 BVerfGE 7 (15–16) (Ger.); see also Kommers, supra note 41, at 304–05 (providing an English translation of the Court’s statements regarding the interaction between the individual and the community).

\textsuperscript{43} Micro-Census Case, 27 BVerfGE 1 (4).

\textsuperscript{44} Mephisto Case, 30 BVerfGE 173 (195–96).

\textsuperscript{45} See Bundesverfassungsgericht [BGer] [Federal Constitutional Court] Apr. 13, 1994, 90 BVerfGE 241 (246) (Ger.); see also Winfried Brugger, Ban on or Protection of Hate Speech? Some Observations Based on German and American Law, 17 Tul. Eur. & Civ. L.F. 1, 5–7 (2002).

\textsuperscript{46} Bundesverfassungsgericht [BGer] [Federal Constitutional Court] Feb. 15, 2006, 15 BVerfGE 118 (Ger.).

\textsuperscript{47} See Bundesverfassungsgericht [BGer] [Federal Constitutional Court] Feb. 25, 1975, 39 BVerfGE 1 (2) (Ger.). In this decision, the Court ruled that the right to life and the duty of the state to protect that right require the criminalization of abortion. Consequently, the Court declared unconstitutional a law decriminalizing first-trimester abortion. For an abridged English translation of this case, see Kommers, supra note 41, at 336–46.

\textsuperscript{48} See Bundesverfassungsgericht [BGer] [Federal Constitutional Court] May 28, 1993, 88 BVerfGE 203 (208–13) (Ger.). In this decision, the Court reiterated the state’s duty to protect the unborn, but admitted that some restrictions on abortion could violate a
In France, it was not until 1994 that the Constitutional Council, combining different passages of the Preamble to the 1946 Constitution, proclaimed that dignity was a principle of constitutional status.\textsuperscript{49} French commentators, more or less enthusiastically, refer to human dignity as a necessary underlying element to all of French positive law,\textsuperscript{50} as both a founding and normative concept,\textsuperscript{51} and as the philosopher’s stone of fundamental rights.\textsuperscript{52} The principle of human dignity has been invoked in a variety of contexts, from the declaration that decent housing for everyone is a constitutional value,\textsuperscript{53} to the validation of statutes permitting abortion until the twelfth week of pregnancy.\textsuperscript{54} More recently, the Constitutional Council upheld two controversial laws enacted by the Parliament: one making it illegal to wear full face veils in public, including the Islamic burqa,\textsuperscript{55} and the other banning same-sex marriage.\textsuperscript{56} Although human dignity is not explicitly referenced in either of these decisions, it is clearly implicated to the extent that both matters concern religious freedom, equality, and personal existential choices. The State Council, in turn, ruled that the bar spectacle known as “dwarf tossing” should be prohibited, a decision discussed in Part II of this Article.\textsuperscript{57} In 2000, the Court of Appeals issued an extremely controversial decision in the Perruche Case, recognizing a “right not to be

\textsuperscript{49} Conseil constitutionnel [CC][Constitutional Court] decision No. 94–343/344DC, July 27, 1994, J.O. 11024 (Fr.).


\textsuperscript{51} Girard & Hennette-Vauchez, supra note 15, at 17.


\textsuperscript{53} Conseil constitutionnel [CC][Constitutional Court] decision No. 94–359DC, Jan. 19, 1995, J.O. 1166 (Fr.).


\textsuperscript{55} Conseil constitutionnel [CC][Constitutional Court] decision No. 2010–613DC, Oct. 7, 2010, J.O. 18345 (Fr.).


born,” and granting a child, represented by his parents, compensation for the fact that he was born deaf, dumb, partially blind, and with severe mental deficiencies. In another case that gained notoriety, the Court of Grand Instance of Créteil recognized Corinne Parpalaix’s right to undergo artificial insemination using the sperm of her late husband, who had deposited the sperm at a sperm bank prior to undergoing a high-risk surgical procedure.

The Supreme Court of Canada has recognized human dignity as a fundamental value underlying both the common law and the 1982 Charter of Rights and Freedoms, a value that has a communitarian dimension and is accompanied by a number of responsibilities. For example, the meaning and scope of human dignity was directly or indirectly involved in the opinions that struck down legislation against abortion, the denial of a right to assisted suicide, the validity of same-sex marriage, and the decriminalization of the use of marijuana. In Israel, human dignity became an express constitutional concept in 1992. Respect for human dignity is at the center of several morally charged cases decided by the Israeli Supreme Court, including one decision in which the court ruled that it was unacceptable to use the prolonged detention of Lebanese prisoners as a bargaining chip to obtain the return of Israeli soldiers, and another decision that reinstated Israel’s absolute prohibition of torture, with no exceptions and no room for balancing, even for interrogations of suspected terrorists.

In South Africa, the Constitutional Court utilized human dignity...
to hold the death penalty unconstitutional,\(^{69}\) to permit abortion during the first trimester of a pregnancy,\(^{70}\) and to protect homosexual relations.\(^{71}\) The Constitutional Court of Colombia, diverging from its counterparts in other countries, held that voluntary prostitution is legitimate work.\(^{72}\) There is no need to go on reciting examples, for the point is clear: Human dignity has become a central and recurrent concept in the reasoning of supreme courts and constitutional courts throughout the world.\(^{73}\)

2. Human Dignity in International Documents and Case Law

Human dignity has also become an ubiquitous idea in international law. Indeed, the term is featured prominently in a wide range of declarations and treaties, several of which are enforced by international courts.\(^{74}\) In fact, the European Court of Justice (ECJ) used the concept of human dignity to support its decisions in a variety of cases, holding, for example, that neither the human body nor any of its elements constitute patentable inventions,\(^{75}\) and that an employer fails to respect human dignity by terminating an employee because of gender reassignment surgery.\(^{76}\) A complex discussion of human dignity occurred in the *Omega Spielhallen* case, in which the ECJ decided that human

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\(^{69}\) See *S. v. Makwanyane* 1995 (3) SA 391 (CC) at 451 para. 145 (S. Afr.).

\(^{70}\) See *Christian Lawyers Ass’n v. Minister of Health* 1998 (4) SA 1113 (CC) at 1123 (S. Afr.).

\(^{71}\) See *Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at 64 paras. 124–26, 69 para. 135 (S. Afr.).


\(^{73}\) The United States is discussed separately in Part I.C.


dignity may have different meanings and scopes within the domestic jurisdictions of the European Union.\textsuperscript{77} Likewise, the European Court of Human Rights (ECtHR) often employs human dignity as an important element in its interpretation of the 1950 European Convention on Human Rights.\textsuperscript{78} In \textit{Tymer v. United Kingdom}, the ECtHR held that subjecting a fifteen-year-old to corporal punishment (“three strokes of the birch”) was an assault on his dignity and constituted impermissible treatment of the boy as an object in the power of authorities.\textsuperscript{79} The ECtHR also found dignity to be implicated in cases involving the abandonment of spousal immunity to the charge of rape,\textsuperscript{80} the criminal prosecution of private homosexual behavior among consenting adults,\textsuperscript{81} and the refusal to allow legal gender reassignment.\textsuperscript{82} The Inter-American Court on Human Rights (IACHR) also cites human dignity in cases involving physical, sexual, and psychological violence against inmates in a prison,\textsuperscript{83} solitary confinement or otherwise inhumane incarceration conditions,\textsuperscript{84} forced disappearances,\textsuperscript{85} and extra-

\textsuperscript{77} Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundeshauptstadt Bonn, 2004 E.C.R. I-9641. The dispute involved the prohibition of a game supplied by a British company, a “laserdrome” used for simulating acts of homicide. \textit{Id.} at I-9644. A German Court had upheld the decision on grounds that the “killing game” was an affront to human dignity. \textit{Id.} at I-9646.


\textsuperscript{79} \textit{See} \textit{Tymer}, 2 Eur. H.R. Rep. at 11–12.

\textsuperscript{80} \textit{See} S.W., 21 Eur. H.R. Rep. at 402.


judicial executions. At the end of 2010, the IACHR decided against granting amnesty for crimes perpetrated by state agents (murder, torture, and forced disappearances of persons) during the military dictatorship in Brazil.

3. Human Dignity in the Transnational Discourse

In recent years, constitutional and supreme courts all over the world have begun engaging in a growing constitutional dialogue involving mutual citation and academic interchange in public forums like the Venice Commission. Two factors contribute to the deepening of this dialogue. First, countries that are newcomers to the rule of law often draw upon the experience of more seasoned democracies. In the past several decades, waves of democratization have spread across the world, including Europe in the 1970s (Greece, Portugal, and Spain), Latin America in the 1980s (Brazil, Chile, and Argentina), and Eastern and Central Europe in the 1990s. The U.S. Supreme Court, the German Constitutional Court, and other similar national courts serve as significant role models for these new democracies. Even though the flow of ideas is primarily one directional, it is, as with any other exchange, a two-way street.

88 Anne-Marie Slaughter, A New World Order 70 (2004).  
89 Former foreign court justices, such as Aaron Barak from the Supreme Court of Israel and Dieter Grimm from the Constitutional Court of Germany, are frequent visitors at American law schools, including Yale and Harvard. See Mark Tushnet, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 176 (2005). At Yale Law School, the Global Constitutionalism Seminar, directed by Robert Post, brings together a group of about fifteen Supreme Court and Constitutional Court judges from around the world. See Global Constitutionalism Seminar, Yale L. Sch., http://www.law.yale.edu/intellectuallife/globalconstitutionalismseminar.htm (last visited May 15, 2012).  
90 According to its website, the European Commission for Democracy Through Law, known as the Venice Commission, is an advisory body to the Council of Europe and a think-tank on constitutional law. See Venice Commission, Council of Eur., http://www.venice.coe.int/site/main/Presentation_E.asp (last visited May 15, 2012).  
The second factor involves the sharing of experiences among more mature and traditional democracies. Highly complex and plural societies face common challenges in areas ranging from national security to racial, religious, and sexual matters. Foreign decisions may offer new information and perspectives, and can help build consensus. This appears to be the case with the death penalty—with the exception of the United States—and, to some extent, abortion—similar laws exist in the United States, Germany, France, and Canada, among others. It goes without saying that foreign and international decisions are persuasive, but not binding, authorities. This fact alone should be sufficient to set aside any parochial fears.

It is not difficult to find examples of this dialogue between the courts of different countries. The Supreme Court of Canada, for example, frequently cites foreign and international courts’ conceptions of dignity. In *Kindler v. Canada*, the dissenting justices cited abolition of the death penalty in the United Kingdom, France, Australia, New Zealand, Czechoslovakia, Hungary, and Romania. In *R. v. Morgentaler*, the court referenced decisions of the German Constitutional Court and the U.S. Supreme Court on abortion. In *R. v. Smith*, the dissent cited a number of U.S. Supreme Court cases on cruel and unusual punishment. In *R. v. Keegstra*, a case upholding the prohibition of hate speech, the Supreme Court of Canada cited several related pronouncements by the European Commission of Human Rights. The Canadian Supreme Court’s decision in *Rodriguez v. British Columbia*, in which it failed to recognize a right to assisted suicide, was cited by the ECtHR in *Pretty v. United Kingdom*, which addressed the same issue. The Supreme Court of India often cites U.S. Supreme Court decisions in a variety of contexts. In one case, the American doctrine of prospective overruling was

94 Id. at 77, 78.
95 See id. at 66.
100 See [1990] 3 S.C.R. 697, 753–54, 820 (Can.).
101 See generally [1993] 3 S.C.R. 519 (Can.).
the object of intense debate. In another judgment, the Indian Court applied the American standard of heightened scrutiny for gender discrimination and included a lengthy quote from an opinion authored by Justice Ruth Bader Ginsburg. In South Africa, the Constitutional Court cited decisions from the Supreme Court of Canada in cases involving women’s rights to equality, as well as cases involving capital punishment. In an abortion opinion by the Polish Supreme Court, Judge Lech Garlicki, writing in dissent, cited opinions by the Spanish and German Constitutional Courts.

In the United States, however, references to foreign law and foreign decisions are relatively scarce. By the end of the twentieth century, observers diagnosed a certain isolation and parochialism in the lawyers and courts of the United States. At the turn of the century, however, a new wind started to blow, with foreign precedents cited in opinions by the U.S. Supreme Court in cases such as *Knight v. Florida*, *Atkins v. Virginia*, and *Grutter v. Bollinger*. The landmark decision, however, came in 2003 with *Lawrence v. Texas*, in which Justice Anthony Kennedy,

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105 See S. v. Jordan 2002 (6) SA 642 (CC) at 41 para. 68 (S. Afr.).

106 Makwanyane 1995 (3) SA at 423 para. 60.

107 Trybunal Konstytucyjny 28.5.1997 [Decision of the Constitutional Tribunal of May 28, 1997], K 26/96 (Pol.).


109 See Bruce Ackerman, The Rise of World Constitutionalism, 83 Va. L. Rev. 771, 772–73 (“[T]he global transformation has not yet had the slightest impact on American constitutional thought. The typical American judge would not think of learning from an opinion by the German or French constitutional court. Nor would the typical scholar—assuming, contrary to fact, that she could follow the natives’ reasoning in their alien tongues. If anything, American practice and theory have moved in the direction of emphatic provincialism.” (footnote omitted)).

110 528 U.S. 990 (1999). In a dissent from the denial of certiorari, Justice Breyer cited cases from India, Zimbabwe, Canada, South Africa, and the European Court of Human Rights. See id. at 995–96 (Breyer, J., dissenting).

111 536 U.S. 304 (2002). Justice Stevens, writing for the majority, asserted that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” Id. at 316 n.21.

112 539 U.S. 306 (2003). In her separate opinion, Justice Ginsburg cited two international conventions on discrimination. See id. at 344 (Ginsburg, J., concurring).
writing for the majority, cited a decision of the ECtHR.\textsuperscript{113} This reference prompted a harsh dissent by Justice Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas.\textsuperscript{114} In 2005, in \textit{Roper v. Simmons}, Justice Kennedy, writing for the majority, once again cited international and foreign law as it pertained to the “international opinion against the juvenile death penalty,” adding that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”\textsuperscript{115} In their confirmation hearings, Chief Justice John Roberts and Justice Samuel Alito expressed disapproval of such references.\textsuperscript{116} Legislative threats to ban the use of foreign legal authorities and even to make it an impeachable offense did not gain momentum.\textsuperscript{117} It is therefore clear that two different approaches “uncomfortably coexist”\textsuperscript{118} within the U.S. Supreme Court: the “nationalist jurisprudence” view that rejects any reference to foreign and international precedents, and the “transnationalist jurisprudence” view that allows such references.\textsuperscript{119} The latter approach, which is more cosmopolitan, progressive, and “venerable,”\textsuperscript{120} should prevail.

C. Human Dignity in the United States

Although there is no express reference to human dignity in the text of the U.S. Constitution,\textsuperscript{121} the Supreme Court has long employed

\textsuperscript{114} See id. at 598 (Scalia, J., dissenting) (“The Court’s discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”” (quoting \textit{Foster v. Florida}, 537 US. 990, 990 n. (2002) (Thomas, J., concurring in denial of certiorari))).
\textsuperscript{115} 543 U.S. 551, 578 (2005).
\textsuperscript{119} Id. at 52.
\textsuperscript{120} Id.
\textsuperscript{121} Cf. U.S. Const. Among the states, the Montana Constitution has an explicit human dignity clause. Article II, section 4 provides: “Individual Dignity. The dignity of the human being is inviolable . . . .” Mont. Const. art. II, § 4; see Jackson, supra note 3, at 28 (noting
the idea. It was not until the 1940s, however, and particularly after 1950, that the concept began to gain traction in American constitutional jurisprudence. Some authors associate this with the presence on the Court of Justice William Brennan and his view of human dignity as a basic value, a constitutional principle, and a source of individual rights and liberties. As seen in the case law discussed below, the Justices have never considered human dignity to be a stand-alone or autonomous fundamental right, but rather a value underlying express and unenumerated rights—such as the rights to privacy, equal protection, economic assistance from the government, dignity at the end of life, as well as protection from self-incrimination, cruel and unusual punishment, and unreasonable searches and seizures. Human dignity concerns also surface when freedom of expression clashes with reputational issues. Thus, the role of human dignity has mostly been to inform the interpretation of particular constitutional rights.

It is within the context of the right to privacy that human dignity arguably plays its most prominent role. It is true that dignity was not expressly invoked in the early landmark cases, such as Griswold v. Connecticut and Roe v. Wade. Yet, the core ideas underlying human dign-

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123 Justice Murphy used the term “dignity” in his dissents in the following cases: In re Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting); Screws v. United States, 325 U.S. 91, 135 (1945) (Murphy, J., dissenting); Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

124 The first appearance of the expression “human dignity” in a majority opinion of the Supreme Court was in Rochin v. California, 342 U.S. 165, 174 (1952). Jackson, supra note 3, at 16 n.7.


126 See infra text accompanying notes 130–156.

127 See Goodman, supra note 7, at 757 (identifying eight categories of cases in which the Supreme Court has expressly related human dignity to specific constitutional claims, sometimes grounding its decisions in the need to advance human dignity, and sometimes rejecting it as a prevailing argument).

128 Neuman, supra note 6, at 271.

129 Cf. 381 U.S. 479 (1965) (striking down a law that prohibited the use of contraceptives by married couples). This decision created a new fundamental right—the right of privacy—emanating from the “penumbras” of the Bill of Rights that protect marital rela-
nity—autonomy and the freedom to make personal choices—were central to these decisions. In a subsequent abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, human dignity was explicitly mentioned in both the plurality opinion and the dissent. The same occurred in *Stenberg v. Carhart*, another abortion decision. In *Lawrence*, however, human dignity played its most important role in a ruling in which the Court held that the right to privacy prohibits the criminalization of consensual intimate relations among same-sex partners.

In the equal protection context, with regard to women’s rights, landmark cases such as *Reed v. Reed* and *Frontiero v. Richardson* did not mention human dignity in their rationales, but other opinions dealing with sex discrimination expressly reference the concept. The...
idea of human dignity, however, became more important in the context of racial discrimination. In *Brown v. Board of Education*, although the Court’s opinion did not expressly refer to human dignity, it is properly recognized that the concept clearly underlies the unanimous opinion against school segregation.\(^{140}\) In subsequent cases, majority opinions expressly reference dignity in relation to racial discrimination.\(^{141}\)

In cases involving the privilege against self-incrimination, the Supreme Court held, in *Miranda v. Arizona* for example, that the interrogation environment, even absent physical intimidation, is “destructive of human dignity.”\(^{142}\) Despite this holding, human dignity gradually lost its thrust in Fifth Amendment cases.\(^{143}\) With regard to protection against unreasonable searches and seizures, *Rochin v. California* established a direct connection between human dignity and the procedure by which evidence is obtained.\(^{144}\) Following the commencement of the “war on drugs” in the 1980s, however, human dignity’s fate in Fourth Amendment jurisprudence became gloomier.\(^{145}\) In relation to protec-
tion against cruel and unusual punishment, and particularly regarding the death penalty, the Court declared in *Furman v. Georgia* that capital punishment, as applied in some states—randomly, with unguided discretion for juries and, as noted in a concurrence by Justice William Douglas, with disproportionate impact on minorities—was cruel and unusual punishment. Four years later, however, in *Gregg v. Georgia*, the Court upheld Georgia’s redesigned death penalty statute.

That said, dignity was expressly invoked in *Atkins* and *Roper*, in which the Court struck down as unconstitutional the execution of mentally retarded individuals and offenders under the age of eighteen, respectively.

In death with dignity cases, Justice Brennan referred to human dignity in his dissent in *Cruzan v. Director, Missouri Department of Health*, in which the Court affirmed a decision that refused to allow the withdrawal of life-sustaining treatment for a woman who had been in a vegetative coma for many years. In the years that followed, the Court denied the existence of a right to physician-assisted suicide in *Washington v. Glucksberg* and *Vacco v. Quill*. As for claims involving social and welfare rights, the closest the Court has come to understanding the Constitution as creating positive entitlements is arguably *Goldberg v. Kelly*, in which the Court held that welfare recipients could not have their benefits terminated without fair hearings. Finally, in the Court’s case law, reputational interests are traditionally outweighed by First Amendment protection in conflicts between the freedom of expression and the opposing right of an individual to protect his image, the latter of which the Court does not recognize as constitutionally protected.

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147 See id. at 239–40 (per curiam).
149 *Atkins*, 536 U.S. 304.
150 *Roper*, 543 U.S. 551.
151 See id. at 560; *Atkins*, 536 U.S. at 311.
156 See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (noting that a tension exists between reputational interests and First Amendment rights); see also *Paul v. Davis*, 424 U.S.
D. Arguments Against the Use of Human Dignity as a Legal Concept

Opponents of the use of human dignity in law, if not its use altogether, utilize three basic arguments. The first argument is formal in nature: When human dignity is not in the text of a state’s constitution—as is the case in the United States and France—it cannot be used in legal reasoning.157 Faithful to textualism as his philosophy of constitutional interpretation,158 this is the point of view advocated by Justice Scalia.159 The second argument is more ideological: Human dignity should not be used in legal discourse in countries where it is not rooted in the legal tradition.160 This is the view, for example, of Neomi Rao, for whom human dignity is linked to European communitarian values that could weaken American constitutionalism, which is based on individual rights.161 Likewise, James Whitman argues that privacy law in America is linked to the value of liberty, while in Europe it is oriented toward dignity, understood as personal honor.162 Whitman makes two highly controversial assertions in connection with his argument. First, he links the idea of dignity in Europe with “the star of fascism”163 and “Nazi history.”164 Then, in his conclusion, he declares that “[t]he prospects for the kind of dignitary protections embodied in a law of gay marriage, we could say, are remote” and that “protecting people’s dignity is quite alien to the American tradition.”165 The third argument against the use of dignity as a legal concept is that human dignity lacks specific and substantive meaning.166 In a frequently cited editorial, Ruth Macklin writes that dignity is a “useless concept” and a “vague restatement” of existing notions.167 Along the same lines, Steven Pinker

693, 712–14 (1976) (denying petitioner the right to keep a criminal arrest from being publicized).


158 See id.

159 In a debate with the author of this Article at the University of Brasilia in 2009, Justice Antonin Scalia affirmed that there is no human dignity clause in the U.S. Constitution, and that for this reason it cannot be invoked by judges and the courts. Antonin Scalia, Address at the University of Brasilia School of Law: Judges as Moral Arbiters (May 14, 2009).

160 See Rao, supra note 5, at 244.

161 Id. at 204.

162 See Whitman, supra note 9, at 1161.

163 Id. at 1166.

164 Id. at 1169.

165 Id. at 1121.


167 Id. at 1419–20.
claims that the concept of dignity “remains a mess” and serves a Catholic agenda of “obstructionist ethics.”

While these three arguments have merit, each argument can be countered and overcome. As for the textualist objection, it suffices to remember that all constitutions bear values and ideas that inspire and underlie their provisions without express textual inclusion. In the U.S. Constitution, for example, there is no mention of democracy, the rule of law, or judicial review; nevertheless, these are omnipresent concepts in American jurisprudence and case law. The same holds true for human dignity, which is a fundamental value that nourishes the content of different written norms, while simultaneously informing the interpretation of the Constitution generally, especially when fundamental rights are involved. Significant evidence of this argument lies within the European Convention on Human Rights, the first binding international treaty approved after the Universal Declaration of Human Rights. Despite the fact that it does not explicitly reference “human dignity,” the treaty’s organs, notably the ECtHR, utilize the concept in many decisions, as described above.

The political and philosophical objections to the use of human dignity are also rebuttable. Constitutional democracies everywhere strive to achieve a balance between individual rights and communitarian values. Even though the political process must set the boundaries of these (sometimes) competing spheres—that is, the weight of one or the other may vary to some extent—concerns about human dignity exist on both sides of the scale. For example, human dignity implicates both freedom of expression and compulsory vaccination. Further, there is a fundamental problem with Whitman’s views. He does not make a clear and proper distinction between dignity’s ancient connotation—rank, status, and personal honor—and its contemporary meaning which is based on the objective intrinsic value of the individual, as well as subjective elements such as personal autonomy. This might

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169 See Neuman, supra note 6, at 251–57.

170 ECHR, supra note 78.

171 See supra text accompanying notes 78–82.


173 Compare Whitman, supra note 9, at 1164 (“[In Europe, political and social ideals] revolve unmistakably around one’s position in society, one’s ‘dignity’ and ‘honor’.”), with Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* 11 (2006) [hereinafter Dworkin, Democracy] (“The first principle of human...
explain why he links dignity to fascism and National Socialism—and their notions of personal honor—rather than the broad and generous conception of human rights that developed after the end of the World War II as a reaction to the abuses perpetrated by the Axis powers.\footnote{Compare Whitman, \textit{supra} note 9, at 1166 ("[S]ome of the fundamental institutions of the continental law of dignity experienced significant development under the star of fascism.")} Another consequence of disregarding the necessary distinction between human dignity’s ancient and current meanings is apparent in the opposition Whitman sees between privacy as liberty and privacy as dignity (that is, as “personal honor”).\footnote{See Whitman, \textit{supra} note 9, at 1161.} As I set out to demonstrate, dignity is part of the core content of both liberty and privacy, not a concept (much less a right) that can be contradictory to either. Lastly, prospects for same-sex marriage seem at this point less dim than Whitman anticipated.\footnote{See \textit{id.} at 1221.}

Finally, dignity has been condemned as a vague slogan, which can be co-opted by authoritarianism and paternalism.\footnote{Cf. Goodman, \textit{supra} note 7, at 746–47 (questioning what, exactly, can be protected when invoking human dignity).} As with any other high-profile, abstract term—such as the right to the free development of one’s personality in German constitutional law\footnote{\textit{Grundgesetz}, BGBl. I art. 2(1).} or the Due Process and Equal Protection clauses in the American constitution\footnote{U.S. Const. amend. V (due process clause); U.S. Const. amend. XIV, § 1 (equal protection clause).}—there are risks involved in the construction of a definition of human dignity. Any complex idea, in fact, is subject to abuse or misuse: Democracy can be manipulated by populists, federalism can degenerate into hegemony of the central government, and judicial review can be contaminated by politics. As Ronald Dworkin writes, “[I]t would be a shame to surrender an important idea or even a familiar name to this corruption.”\footnote{See \textit{Ronald Dworkin, Justice for Hedgehogs} 204 (2011) [hereinafter \textit{Dworkin, Hedgehogs}].} Thus, human dignity, no less than numerous other crucial concepts, needs high quality scholarship, public debate, overlapping consensus, accountable governments, and prudent courts. The task is to find a minimum content for human dignity that warrants its use as a meaningful
and consequential concept, compatible with free will, democracy, and secular values.

II. THE LEGAL NATURE AND MINIMUM CONTENT OF HUMAN DIGNITY

A. Human Dignity as a Legal Principle

Human dignity is a multi-faceted concept utilized in religion, philosophy, politics, and law. There is a reasonable consensus that it constitutes a fundamental value that underlies constitutional democracies generally, even when not expressly written in constitutions.\(^\text{181}\) In Germany, the dominant view is that human dignity is an absolute value that prevails in any circumstance.\(^\text{182}\) This assertion, however, has been pertinently challenged over the years.\(^\text{183}\) As a general rule, law is not a space for absolutes. Even if it is reasonable to assert that human dignity usually prevails, there are unavoidable situations in which it will be at least partially defeated.\(^\text{184}\) An obvious example is the case of an individual who, after due process of law, is convicted and sent to prison: An important part of his or her dignity—entrenched in the freedom of movement—is affected. There is a clear sacrifice of one aspect of dignity in favor of another value. Human dignity, then, is a fundamental value, but it should not be regarded as an absolute. Values, either moral or political, enter the world of law commonly assuming the form of a principle.\(^\text{185}\) Although constitutional principles and rights frequently overlap, this is not the case here. As demonstrated below, the best way of categorizing human dignity is not as an autonomous right, but instead as a legal principle with constitutional status.

As a fundamental value and a constitutional principle, human dignity serves both as a moral justification for and a normative foundation


\(^\text{183}\) See Grimm, supra note 35, at 12.

\(^\text{184}\) See Habermas, supra note 181, at 476–77.

\(^\text{185}\) See Humberto Ávila, Theory of Legal Principles 29–30 (Jorge Todeschini trans., 2007). Values, of course, also underlie rules. But in that case, the value judgment has already been made by the legislature when enacting the rule, regarded as an objective norm that prescribes certain behavior. Principles, on the other hand, are more abstract norms that state reasons, leaving courts more leeway to determine their meaning in concrete cases. See id. at 67–68, 93.
of fundamental rights.\textsuperscript{186} It is not necessary to elaborate in more depth and detail on the qualitative distinction between principles and rules. The conception adopted here is the dominant one in legal theory, based on Ronald Dworkin’s seminal writings on the subject\textsuperscript{187} and further developed by the German legal philosopher Robert Alexy.\textsuperscript{188} According to Dworkin, principles are standards that contain “requirement[s] of justice or fairness or some other dimension of morality.”\textsuperscript{189} Unlike rules, they are not applicable in “an all-or-nothing fashion,”\textsuperscript{190} and in certain circumstances they may not prevail due to the existence of other reasons or principles that argue in a different direction.\textsuperscript{191} Principles have a “dimension of weight,” and when they intersect, it will be necessary to consider the specific importance of each principle in the specific context.\textsuperscript{192} For Alexy, principles are “optimization requirements”\textsuperscript{193} whose enforcement will vary in degree according to what is factually and legally possible.\textsuperscript{194} Thus, under Alexy’s theory, principles are subject to balancing and to proportionality, and, depending on context, they may give way to opposing elements.\textsuperscript{195} These views are not immune to controversies,\textsuperscript{196} but such a discussion is outside the scope of this Article. My predicament is that legal principles are norms that have more or less weight in different circumstances. In any case, principles provide arguments that must be considered by courts, and each principle requires a good faith commitment to its realization, to the extent such realization is possible.\textsuperscript{197}

\begin{itemize}
\item \textsuperscript{186} See Habermas, \textit{supra} note 181, at 470.
\item \textsuperscript{188} See Robert Alexy, \textit{A Theory of Constitutional Rights} 44–69, 87 (Julian Rivers, trans., 2004).
\item \textsuperscript{189} Dworkin, Rights, \textit{supra} note 187, at 22.
\item \textsuperscript{190} \textit{Id.} at 24.
\item \textsuperscript{191} \textit{Id.} at 26.
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} Alexy, \textit{supra} note 188, at 47.
\item \textsuperscript{194} \textit{Id.} at 47–48.
\item \textsuperscript{197} See Patricia Birnie et al., \textit{International Law & the Environment} 34 (2009) (discussing the need for a “good faith commitment” to non-binding documents in international environmental law).
\end{itemize}
Constitutional principles have different roles in the legal system, and at the moment of their concrete application they always generate rules that will govern specific situations. To distinguish the two main roles, one should think of a principle as two concentric circles. The inner circle, closer to the center, bears the principle’s core meaning and is a direct source of rights and duties. For example, the core meaning of human dignity requires a ban on torture, even in a legal system with no particular rules prohibiting such conduct. Of course, when a more specific rule already exists—meaning that the framers or the legislature detailed the principle in a more concrete fashion—there is no need to resort to the more abstract principle of human dignity. To take another example, consider countries where the right to privacy is not expressly stated in the constitution—as in the United States—or the general right against self-incrimination is not explicit—as in Brazil—where these rights can be harvested from the core meaning of dignity. This is the first role of a principle like human dignity: to be a source of rights—and, consequently, duties—including non-enumerated rights that are recognized as part of a mature democratic society.

The other major role played by the principle of human dignity is interpretive. Human dignity is part of the core content of fundamental rights, such as equality, freedom, or privacy. Therefore, it necessarily informs the interpretation of such constitutional rights, helping to define their meaning in particular cases. Furthermore, in cases involving gaps in the legal system, ambiguities in the law, the intersection between constitutional rights, and tensions between rights and collective goals, human dignity can be a good compass in the search for the best solution. Moreover, in its most basic application, any statute found to violate human dignity, on its face or as applied, would be void.


199 See id. at 69–72.

200 See id.

201 Cf. U.S. Const.; Constituição Federal [C.F.] [Constitution] (Braz.).

202 See, e.g., Habermas, supra note 181, at 464–65 (noting that in 2006 the German Constitutional Court invalidated a statute on constitutional grounds, emphasizing human dignity in its reasoning).


204 A statute is unconstitutional on its face when it is contrary to the constitution in the abstract—that is, in any circumstance—and is thus void. A statute is unconstitutional as
Consistent with my assertion that human dignity is not an absolute value, it is also true that human dignity is not an absolute principle either. Indeed, if a constitutional principle underlies both a fundamental right and a collective goal, and if rights collide against themselves or with collective goals, a logical deadlock occurs. A shock of absolutes is insolvable. What can be said is that human dignity, as a fundamental value and principle, should take precedence in most, but not all, situations. Furthermore, when true (not just rhetorical) aspects of human dignity are present on both sides of the argument, the discussion becomes more complex. In such circumstances, cultural and political background may affect a court’s choice of reasoning—a good example being the clash between privacy (in the sense of reputation) and freedom of the press.

Finally, a few words on why human dignity should not be characterized as a freestanding constitutional right. It is true that principles and rights are closely linked concepts. Both constitutional principles and constitutional rights represent an opening of the legal system to the system of morality. It would be contradictory to make human dignity a right in its own, however, because it is regarded as the foundation for all truly fundamental rights and the source of at least part of their core content. Furthermore, if human dignity were to be considered a constitutional right in itself, it would need to be balanced against other constitutional rights, placing it in a weaker position than if it were to be used as an external parameter for permissible solutions when rights clash. As a constitutional principle, however, human dignity may need to be balanced against other principles or collective applied when it is consistent with the constitution generally, but produces an unacceptable consequence in a particular circumstance. See Marc E. Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 360–61 (1998).

See Alexy, supra note 188, at 65 (“Principles can be related both to individual rights and to collective interests.”).

See id. at 101–06.

See Dworkin, Rights, supra note 187, at 90 (“Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals.”).

Alexy, supra note 188, at 4.

See Habermas, supra note 181, at 473–76 (describing the evolution of human dignity from a vertical concept to a horizontal, universalistic, and individualistic concept, from which human rights derive their moral content as spelled out in the language of positive laws); Jackson, supra note 3, at 15–16 (explaining that although the U.S. Constitution does not enshrine human dignity expressly, several constitutional protections—including due process protections and the ban on cruel and unusual punishment—are “cognate concepts”).
goals. Again, it should usually prevail, but that will not always be the case. It is better to recognize this fact than attempt to deny it with circular arguments.

B. The Influence of Kantian Thought

Immanuel Kant, one of the most influential philosophers of the Enlightenment, is a central figure in contemporary Western moral and legal philosophy. Many of his reflections are directly connected with the idea of human dignity, and it is not surprising that he is one of the most frequently cited authors in works on the subject. Notwithstanding the occasional challenges to his system of morality, Kantian ethics have become a crucial part of the grammar and semantics of the study of human dignity. For this reason, though at the risk of oversimplification, I sketch below three of his central concepts: the categorical imperative, autonomy, and dignity.

According to Kant, ethics is the realm of moral law, comprised of commands that govern the will in conformity with reason. Such commands are called imperatives, which are either hypothetical or

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210 On the tension between individual rights and collective goals, Ronald Dworkin has coined a phrase that has become emblematic in the eternal clash between the individual and the reasons of state: “Individual rights are political trumps held by individuals.” See Dworkin, Rights, supra note 187, at xi. He added, as a possible mode of organizing rights in a political hierarchy: “[I]t follows from the definition of a right that it cannot be . . . defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency.” See id., at 92.

211 This seems to be the case with Alexy’s theory that the human dignity principle can be balanced and not take preference, but that there is a human dignity rule that is the product of such balancing that will always prevail. See Alexy, supra note 188, at 64.

212 See McCrudden, supra note 12, at 659.


214 Some authors have used the expression Kantische Wende (“Kantian revival”) to refer to the renewed influence of Kant in contemporary legal debate. See, e.g., Otfried Höffe, Kategorische Rechtsprinzipien: Ein Kontrapunkt der Moderne [Categorical Principles of Law: A Counterpoint to Modernity] 351 (1990).


216 See Kant, supra note 215, at 1–5.
categorical. A *hypothetical* imperative identifies the action that is good as the means to achieve an end.\textsuperscript{217} The *categorical* imperative corresponds to an action that is good in itself, regardless of whether it serves a determinate end.\textsuperscript{218} It is a standard of rationality and represents what is objectively necessary in a will that conforms itself to reason.\textsuperscript{219} Kant enunciated this categorical imperative, or imperative of morality, in a synthetic and famous proposition: "[A]ct only in accordance with that maxim through which you can at the same time will that it become a universal law."\textsuperscript{220} Note that instead of presenting a catalogue of specific virtues, a list of "do’s and don’ts," Kant conceived a formula of determining ethical action.\textsuperscript{221} Another formulation of the categorical imperative is the following: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."\textsuperscript{222} 

Autonomy is the property of a will that is free.\textsuperscript{223} It identifies the individual’s capacity for self-determination, in accordance with the representation of certain laws, and it is a self-governing reason.\textsuperscript{224} The core idea is that individuals are subject only to the laws they give themselves.\textsuperscript{225} An autonomous person is one bound by his or her own will and not by the will of someone else.\textsuperscript{226} According to Kant, free will is governed by reason, and reason is the proper representation of moral laws.\textsuperscript{227}

\begin{itemize}
\item \textsuperscript{217} Id. at 25.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} See id.
\item \textsuperscript{220} Id. at 31 (emphasis omitted).
\item \textsuperscript{221} See Marilena Chauí, Convite à Filosofia [*Invitation to Philosophy*] 346 (2000).
\item \textsuperscript{222} KANT, supra note 215, at 38 (emphasis omitted). Although Kant affirms that there is just a single categorical imperative, he presents three different formulations of it. See id. at 43. The first one, reproduced above, is referred to as the *formula of nature*, the second, as the *formula of humanity*. See id. at 37–38. The third, the *formula of autonomy*, states: "[A]nd this is done in the present third formula of the principle, namely the idea of the will of every rational being as a *will giving universal law*." See id. at 40.
\item \textsuperscript{223} See id. at 52.
\item \textsuperscript{224} See id. at 40–41, 47, 62.
\item \textsuperscript{225} See id. at 47.
\item \textsuperscript{226} See id. at 40–41.
\item \textsuperscript{227} See id. at 19, 24, 53. These ideas become more complex and somewhat counterfactual when we add other elements of Kant’s moral theory. For him, the supreme principle of morality consists of individuals giving themselves laws that they could will to become universal law, an objective law of reason with no concessions to subjective motivations. See id. at 24, 31.
\end{itemize}
Dignity, in the Kantian view, is grounded in autonomy. Where all rational beings act according to the categorical imperative, for example as lawgivers in the “kingdom of ends” whose maxims could become universal law, “everything has either a price or a dignity.” Things that have a price can be replaced by other equivalent things. Something that is priceless, and that cannot be replaced by another equivalent item, however, has dignity. Such is the unique nature of the human being. Condensed into a set of propositions, the essence of Kantian thought regarding our subject is as follows: Moral conduct consists of acting according to a maxim that one could will to become universal law; every person is an end in him- or herself and shall not be instrumentalized by other people’s will; human beings have no price and cannot be replaced because they are endowed with an absolute inner worth called dignity.

C. The Minimum Content of the Idea of Human Dignity

It is not easy to elaborate a transnational concept of human dignity that properly takes into account the varied political, historical, and religious circumstances that are present in different countries. For this purpose, one must settle for an open-ended, plastic, and plural notion of human dignity. Roughly stated, human dignity, in my minimalist conception, identifies (1) the intrinsic value of all human beings, as well as (2) the autonomy of every individual, (3) limited by some legitimate constraints imposed upon such autonomy on behalf of social values or state interests (community value). I analyze these three elements based on a philosophical perspective that is secular, neutral, and universalist. Secularism means that church and state must be separate, that religion is a matter private to each individual, and that a humanist rational view must prevail over religious conceptions in political and public affairs. Neutrality is a central concept in contemporary liberal thought, commanding that the state must not take sides when different

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228 Kant, supra note 215, at 43.
229 Id. at 42.
230 Id.
231 Id.
232 George Holyoake was the first to use the term secularism. See George Jacob Holyoake, The Origin and Nature of Secularism 50 (London, Watts & Co. 1896).
233 This view, of course, does not affect freedom of religion, and religious belief is indeed a legitimate option for millions of people. See Charles Taylor, A Secular Age 3 (2007). Regarding the desirable balance and mutual tolerance between secularists and those whose religious values shape their political beliefs, see Noah Feldman, Divided by God: America’s Church-State Problem—And What We Should Do About It 251 (2005).
reasonable conceptions of the good life are in question. These notions of secularism and neutrality represent an effort to free human dignity from any comprehensive religious or political doctrine, incorporating it into the idea of *public reason*, insightfully developed by John Rawls.\(^{235}\)

Finally, a few words on *universalism* and its companion idea, multiculturalism. Multiculturalism denotes respect and appreciation for ethnic, religious, or cultural diversity.\(^{236}\) Since the late twentieth century, it has become widely accepted that multiculturalism is based on values that are not only consistent with but also required by liberal democracies.\(^{237}\) Minorities have a right to their identities and differences, as well as the right to be recognized.\(^{238}\) Further, human dignity no doubt supports such views. Human dignity, at its core, however, also possesses a universalist ambition, representing the fabric that binds together the human family.\(^{239}\) Some degree of enlightened idealism is necessary in this domain in order to confront entrenched practices and customs of violence, sexual oppression, and tyranny. To be sure, this is a battle of


\(^{235}\) *See* Rawls, *supra* note 234, at 547–83. Kant first used the term *public reason* in **What Is Enlightenment?**, originally published in 1784; the idea was further developed by John Rawls. *See generally* Immanuel Kant, **Foundations of the Metaphysics of Morals and What Is Enlightenment?** (Lewis White Beck trans., MacMillan Publ’g Co. 2d ed. 1990) (1784); **John Rawls, A Theory of Justice** (1971); **John Rawls, Political Liberalism** (1993) [hereinafter Rawls, *Political Liberalism*]. Public reason is an essential notion in a pluralist liberal democracy, in which people are free to adhere to conflicting reasonable comprehensive doctrines. *See* Rawls, *Political Liberalism, supra*, at 217. In such a scenario, discussions, and deliberations in the *public political forum* by judges, government officials, and even candidates for public office must be based on political conceptions that can be shared by free and equal citizens. *See* John Rawls, **Law of Peoples** 131–80 (1999). I should add that Rawls distinguishes public reason from secular reason, since he sees the latter as a comprehensive nonreligious doctrine. *Id.* at 143.

\(^{236}\) *See generally* Will Kymlicka, **Multicultural Citizenship: A Liberal Theory of Minority Rights** (1995) (presenting a discussion of multiculturalism and arguing that certain collective rights of minority cultures are consistent with liberal democratic principles).

\(^{237}\) *See* id. at 11–26 (discussing the politics of multiculturalism in multinational states).

\(^{238}\) *See* id. at 15.

\(^{239}\) *See* Habermas, *supra* note 181, at 469–70.
ideas to be won with patience and perseverance. Troops will not do it.\textsuperscript{240}

Before moving on, I will restate a previous comment in a slightly more analytic fashion. Human dignity and human (or fundamental) rights are closely connected, like the two sides of a coin—or to use a common image, the two faces of Janus.\textsuperscript{241} One is turned toward philosophy, reflecting the moral values by which every person is unique and deserves equal respect and concern;\textsuperscript{242} the other is turned toward law, reflecting individual rights.\textsuperscript{243} This represents morality in the form of law or, as Jürgen Habermas states, a “fusion of moral contents with coercive law.”\textsuperscript{244} For this reason, in the following sections I will break down each element within the core meaning of human dignity, identifying its moral content and legal implications with respect to individual rights.

1. Intrinsic Value

Intrinsic value is, on a philosophical level, the ontological element of human dignity linked to the nature of being.\textsuperscript{245} The uniqueness of human kind is the product of a combination of inherent traits and features—including intelligence, sensibility, and the ability to communicate—that give humans a special status in the world, distinct from other species.\textsuperscript{246} Intrinsic value is the opposite of attributed or instrumental value,\textsuperscript{247} because it is value that is good in itself and has no price.\textsuperscript{248} There is a growing awareness, however, that humankind’s special position does not warrant arrogance and indifference toward nature in general, including non-rational animals that have their own kind of

\textsuperscript{240} In a inspired passage in which he cites Holmes, Louis Mendand writes: “Of course civilizations are aggressive, Holmes says, but when they take up arms in order to impose their conception of civility on others, they sacrifice their moral advantage.” LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 45 (2002).

\textsuperscript{241} See Habermas, \textit{supra} note 181, at 470.

\textsuperscript{242} See id. at 471.

\textsuperscript{243} See id.

\textsuperscript{244} Id. at 479.

\textsuperscript{245} Ontology is a branch of metaphysics that studies the fundamental characteristics of all things and subjects, including what every human being has and cannot fail to have. It includes questions such as the nature of the existence and structure of reality. \textit{See Nicola Abbagnano, Dicionário de filosofia [Dictionary of Philosophy] 661–62 (1988); Ted Honderich, The Oxford Companion to Philosophy 634 (1995).}

\textsuperscript{246} \textit{See George Kateb, Human Dignity} 5 (2011) (“[W]e can distinguish between the dignity of every human individual and the dignity of the human species as a whole.”).

\textsuperscript{247} \textit{See Daniel P. Sulmasy, Human Dignity and Human Worth, in Perspectives on Human Dignity: A Conversation} 9, 15 (Jeff Malpas & Norelle Lickiss eds., 2007).

\textsuperscript{248} \textit{See Kant, \textit{supra} note 215, at 42.}
dignity.\textsuperscript{249} The intrinsic value of all individuals results in two basic postulates: anti-utilitarian and anti-authoritarian. The former consists of the formulation of Kant’s categorical imperative that every individual is an end in him- or herself, not a means for collective goals or the purposes of others.\textsuperscript{250} The latter is synthesized in the idea that the state exists for the individual, not the other way around.\textsuperscript{251} Because it has the intrinsic value of every person at its core, human dignity is, in the first place, an objective value\textsuperscript{252} that does not depend on any event or experience, and thus need not be granted and cannot be lost, even in the face of the most reprehensible behavior.\textsuperscript{253} Consequently, human dignity does not depend on reason itself, as it is present in newborns, the senile people, and the incompetent.\textsuperscript{254}

As for its legal implications, intrinsic value is the origin of a set of fundamental rights.\textsuperscript{255} The first of these rights is the \textit{right to life}, a basic pre-condition for the enjoyment of any other right.\textsuperscript{256} Human dignity fulfills almost entirely the content of the right to life, leaving space for only a few specific controversial situations, such as abortion, assisted suicide, and the death penalty.\textsuperscript{257} A second right directly related to the intrinsic value of each and every individual is \textit{equality before and under the}


\textsuperscript{250} See \textit{Kant}, supra note 215, at 37.

\textsuperscript{251} The \textit{dignity of the state} was part of the National Socialist propaganda to discredit democratic institutions in Germany. See Jochen Abr. Frowein, \textit{Human Dignity in International Law, in The Concept of Human Dignity in Human Rights Discourse}, supra note 17, at 121, 123. The former Soviet Union also developed this concept by referring to the “dignity of Soviet citizenship” and “national dignity” in its 1977 Constitution. \textit{Konstitutsiya SSSR} (1977) [Konst. SSSR] [USSR Constitution] arts. 59, 67. As another example, the Constitution of the People’s Republic of China establishes that the state shall uphold the “dignity of the socialist legal system.” \textit{Xianfa} art. 5 (1982) (China).

\textsuperscript{252} See Dworkin, \textit{Democracy}, supra note 173, at 9–10 (“[E]ach human life has a special kind of objective value . . . . The success or failure of any human life is important in itself . . . . [W]e should all regret a wasted life as something bad in itself, whether the life in question is our own or someone else’s.”).

\textsuperscript{253} See id. at 16.

\textsuperscript{254} See id. This point of view departs from Kant’s assertion that human dignity is grounded in reason. See \textit{Kant}, supra note 215, at 43.

\textsuperscript{255} See Dworkin, \textit{Democracy}, supra note 173, at 35.

\textsuperscript{256} See id.

\textsuperscript{257} See discussion \textit{infra} Part III.
law. All individuals are of equal value and, therefore, deserve equal respect and concern. This means not being discriminated against due to race, color, ethnic or national origin, sex, age, or mental capacity (the right to non-discrimination), as well as respect for cultural, religious, or linguistic diversity (the right to recognition). Human dignity fulfills only part of the content of the idea of equality, and in many situations it may be acceptable to differentiate among people. In the contemporary world, this is particularly at issue in cases involving affirmative action and the rights of religious minorities.

Intrinsic value also leads to another fundamental right, the right to integrity, both physical and mental. The right to physical integrity includes the prohibition of torture, slave labor, and degrading treatment or punishment. Discussions on life imprisonment, interrogation techniques, and prison conditions take place within the scope of this right. Finally, the right to mental integrity, which in Europe and

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258 See Charter of Fundamental Rights of the European Union, supra note 74, arts. 20–23; African Charter on Human and Peoples’ Rights, supra note 74, art. 3; American Convention on Human Rights, supra note 74, art. 24; International Covenant on Civil and Political Rights, supra note 74, arts. 26–27; Universal Declaration of Human Rights, supra note 74, arts. 2, 7. In the U.S. Constitution, the Equal Protection Clause is in the Fourteenth Amendment. See U.S. Const. amend. XIV, § 1.


261 See Dworkin, supra note 259, at 121, 415.

262 See Charter of Fundamental Rights of the European Union, supra note 74, arts. 3–5; African Charter on Human and People’s Rights, supra note 74, arts. 4–5; American Convention on Human Rights, supra note 74, arts. 5–6; International Covenant on Civil and Political Rights, supra note 74, arts. 7–8; Universal Declaration of Human Rights, supra note 74, arts. 4–5.

263 See, e.g., African Charter on Human and Peoples’ Rights, supra note 74, art. 5 (“All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment shall be prohibited.”) In the U.S. Constitution, most of these matters are dealt with under the Eighth Amendment ban on “cruel and unusual punishments.” See U.S. Const. amend. VIII.


265 See Charter of Fundamental Rights of the European Union, supra note 74, art. 3; African Charter on Human and Peoples’ Rights, supra note 74, art. 4; American Convention on Human Rights, supra note 74, arts. 11, 18; International Covenant on Civil and
many civil law countries comprises the right to personal honor and image, includes the right to privacy.\textsuperscript{266} The idea of privacy in the United States, however, is somewhat unique.\textsuperscript{267}

Throughout the world, there is a fair amount of case law involving fundamental rights that stem from human dignity as an intrinsic value. Regarding the \textit{right to life}, abortion is permitted in the early stages of pregnancy by most democracies in the North Atlantic world, including the United States, Canada, France, the United Kingdom and Germany.\textsuperscript{268} Human dignity, in these countries, is not interpreted to reinforce the right to life of the fetus against the will of its mother.\textsuperscript{269} Assisted suicide is illegal in most countries, with the exception of Holland, Belgium, Colombia, Luxembourg, and just a few others.\textsuperscript{270} In the United States, assisted suicide is permitted in Oregon, Washington, and Montana.\textsuperscript{271} The main concern with respect to assisted suicide is not the termination of life by the will of patients who are terminally ill, in persistent vegetative states, or under unbearable and insurmountable pain, but the fear of abuse of vulnerable people.\textsuperscript{272} Capital punishment

\textsuperscript{266} See, e.g., International Covenant on Civil and Political Rights, supra note 74, art. 17, para. 1 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation.”).

\textsuperscript{267} In the U.S. Constitution, there is no express reference to privacy. In one sense, aspects of privacy are protected by the Fourth Amendment ban on unreasonable searches and seizures. See U.S. Const. amend. IV. In another sense, personal honor and image rights do not have the status of constitutional rights, as in many countries and in the European Charter of Fundamental Rights. See Charter of Fundamental Rights of the European Union, supra note 74, arts. 1, 7, 8. Finally, U.S. case law treats as privacy those rights that in other countries fall under the category of freedom or equality under the law, such as the right to use contraception and the right to intimate acts between adults. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (noting that other nations consider the right to intimate acts between adults to be part of “human freedom”); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).


\textsuperscript{269} See Giovanni Bognetti, The Concept of Human Dignity in European and US Constitutionalism, in European and U.S. Constitutionalism 85, 99 (Georg Nolte ed., 2005). I will return to the discussion of abortion in Part III.A. of this Article.

\textsuperscript{270} For a survey of world laws on the matter, see World Laws on Assisted Suicide, Euthanasia Res. & Guidance Org., http://www.finalexit.org/assisted_suicide_world_laws.html (last updated Aug. 28, 2010).


\textsuperscript{272} See, e.g., Nussbaum, Human Dignity, supra note 249, at 373.
has been banned in Europe and most countries in the world; the United States is a striking exception among democracies.\footnote{273} Although grounded in American historical tradition, it is difficult to argue that the death penalty is compatible with respect for human dignity, as it is a complete objectification of the individual, whose life and humanity succumb to the highly questionable public interest in retribution.

As for equality, the practice of affirmative action, for example, has been upheld in countries such as the United States,\footnote{274} Canada,\footnote{275} and Brazil,\footnote{276} and it is expressly permitted by the International Convention on the Elimination of All Forms of Racial Discrimination.\footnote{277} On the other hand, the rights of religious minorities suffered a setback, especially in Europe, where the full Islamic veil is either banned in public\footnote{278} or is the subject of serious discussions by various member states.\footnote{279} In such countries, courts and legislators failed to uphold dignitarian concerns involving minority groups’ right to identity by finding this right outweighed by alleged public interest concerns relating to security, cultural preservation, and women’s rights.\footnote{280} With regard to physical integrity—or, using American terminology, cruel and unusual punishment—courts and authors repeatedly proclaim torture to be unacceptable.\footnote{281} More recently, the U.S. Supreme Court held that prison overcrowding in the state of California violated the Eighth Amendment.\footnote{282}

\footnote{273} According to Amnesty International, more than two-thirds of the world’s countries have abolished the death penalty in law or in practice, and 96 have abolished it for all crimes. See Figures on the Death Penalty, AMNESTY INT’L, http://www.amnesty.org/en/death-penalty/numbers (last visited May 15, 2012).


\footnote{275} See R. v. Kapp, [2008] 2 S.C.R. 483, para. 3 (Can.).

\footnote{276} In Brazil, some public universities have created a quota for racial minorities in their admissions processes. Even though the Supreme Court has not issued its final decision, a preliminary injunction against the norms that permitted such practice was not granted. The case is pending. See Arguição de Descumprimento de Preceito Fundamental [Claim of Breach of Fundamental Precept], S.T.F. No. 186-2, 31.07.2009 (Braz.), available at http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStfArquivo/anexo/ADPF186.pdf.

\footnote{277} See International Convention on the Elimination of All Forms of Racial Discrimination, supra note 74, art. 2.2.

\footnote{278} This is the situation in France, for example, where the Constitutional Council validated the law that established the ban. See Conseil constitutionnel [CC][Constitutional Court] decision No. 2010–613DC, Oct. 7, 2010, J.O. 18345 (Fr.).


\footnote{280} See id.

\footnote{281} See S. v. Makwanyane, 1995 (3) SA 391 (CC) at 434 para. 97 (S. Afr.); see also Grimm, supra note 35, at 20 (“A society committed to human dignity could never defend itself through the denial of other people’s dignity.”).

ity opinion, written by Justice Kennedy, references “dignity,” the “dignity of man,” and “human dignity.”

Finally, concerning mental integrity, the typical challenge in the contemporary world involves the conflict between the right to privacy (as personal honor or image) and freedom of expression, particularly for the press. Aspects of human dignity are present on both sides—dignity as intrinsic value versus dignity as autonomy—and the outcomes in such cases are influenced by different cultural perceptions. A recent example of this clash of legal cultures occurred when New York police officers arrested a French public figure, who was then exposed to the press in handcuffs and required to make a “perp walk.”

2. Autonomy

Autonomy is the ethical element of human dignity. It is the foundation of the free will of individuals, which entitles them to pursue

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283 Id.
285 See id.
286 See Sam Roberts, An American Rite: Suspects on Parade (Bring a Raincoat), N.Y. Times, May 20, 2011, at A17 (“After Mr. Strauss-Kahn was paraded before a crowd of photographers . . . a former French justice minister expressed outrage at ‘a brutality, a violence, of an incredible cruelty.’”).
287 See id.
288 The concept of autonomy in democracies is widely discussed in scholarly writings. See, e.g., Robert C. Post, Constitutional Domains: Democracy, Community, Management 1–10 (1995) [hereinafter Post, Domains] (stating that the law must consider the importance of autonomy (democracy) when establishing legal social order); Raz, supra note 234, at 155–56, 204–05, 369–81, 400–15 (arguing that an autonomous person is a part author of his own life, but that autonomy is a matter of degree subject to societal constraints and options available to the person); John Christman & Joel Anderson, Introduction to Autonomy and the Challenges to Liberalism 1, 1–19 (John Christman & Joel Anderson eds., 2005) (discussing the role autonomy plays in debates about political liberalism); Jack Crittenden, The Social Nature of Autonomy, 55 Rev. Pol. 35, 36 (1993) (stating that autonomy captures the aspects of living considered essential to a good life); Richard H. Fallon, Jr., Two Senses of Autonomy, 46 Stan. L. Rev. 875, 876–78 (1994) (identifying autonomy as both descriptive—referring to the extent to which a person is self-governing—and ascriptive—reflecting what is morally troubling about paternalism); Beate Rössler, Problems with Autonomy, 17 Hypatia 143, 144 (2002) (explaining that the concept of autonomy is based on the idea that people are independently free and able to choose a life that would be good for them); Robert Post, Dignity, Autonomy, and Democracy (Inst. of Governmental Studies, Working Paper No. 2000–11) [hereinafter Post, Dignity], available at
the ideals of living well and having a good life in their own ways. The central notion is that of self-determination: An autonomous person establishes the rules that will govern his or her life. We have previously discussed the Kantian conception of autonomy, which is the will governed by the moral law (moral autonomy). We are now concerned with personal autonomy, which is value neutral and means the free exercise of the will according to one’s own values, interests, and desires. Autonomy requires the fulfillment of certain conditions, such as reason (the mental capacity to make informed decisions), independence (the absence of coercion, manipulation, and severe want), and choice (the actual existence of alternatives). Note that in the Kantian moral system, autonomy is the will that suffers no heteronomous influence and corresponds to the idea of freedom. In practical political and social life, however, individual will is constrained by the law and by social mores and norms. Thus, distinct from moral autonomy, personal autonomy, although at the origin of freedom, only corresponds with its core content. Freedom has a larger scope that can be limited by legitimate external forces. Autonomy, however, is the part of freedom that cannot be suppressed by state or social interference, involving basic personal decisions, such as choices related to religion, personal relationships, and political beliefs.

Autonomy, thus, is the ability to make personal decisions and choices in life based on one’s conception of the good, without undue external influences. As for its legal implications, autonomy underlies a set of fundamental rights associated with democratic constitutionalism, including basic freedoms (private autonomy) and the right of political


289 Raz, supra note 234, at 204–05; Crittenden, supra note 288, at 36.
290 Post, Dignity, supra note 288, at 6–8.
293 See Kant, supra note 215, at 52 (“[W]hat, then, can freedom of the will be other than autonomy . . . ?”).
294 See Post, Domains, supra note 288, at 1.
295 See Raz, supra note 234, at 1.
296 See id.
participation (public autonomy). With the rise of the welfare state, many countries in the world also consider a fundamental social right to minimum living conditions (the existential minimum) in the balancing that results in true and effective autonomy. We will thus discuss, briefly, each of these three ideas: private autonomy, public autonomy, and the existential minimum.

Private autonomy is the key concept behind individual freedom, including that which in the United States is usually protected under the label of privacy. Therefore, the freedoms of religion, speech, and association, as well as of sexual and reproductive rights, are important expressions of private autonomy. Of course, private autonomy does not entail absolute rights. It is worth re-emphasizing that autonomy exists only at the core of different freedoms and rights; it does not occupy the entire range. For example, as a result of freedom of movement, a free individual can choose where she is going to establish her home, a major personal choice; similarly, she will usually decide where to spend her next vacation. If a valid law or regulation, however, prohibits her from visiting a particular country, perhaps North Korea or Afghanistan, no one would think, at least in principle, that the restriction is a violation of her human dignity. Finally, there can be clashes between the autonomy of different individuals, as well as between autonomy, on the one hand, and intrinsic value or community value, on the other. Thus, private autonomy, as an essential element of human dignity, offers a good standard for defining the content and scope of freedom and rights, but does not free legal reasoning from weighing complex facts and taking into account apparently contrasting norms in order to strike a proper balance under the circumstances.

297 This distinction is the cornerstone of the “reconstructive approach to law” of Jürgen Habermas, Germany’s most prominent contemporary philosopher. See Habermas Supreme Court, supra note 196, at 84-104.
298 See International Convention on Economic, Social, and Cultural Rights, supra note 74, art. 11.
299 See Habermas, supra note 196, at 122-26.
300 See id. at 125-26.
301 Indeed, freedom of religion may be limited in the public sphere. See Reynolds v. United States, 98 U.S. 145, 166-67 (1878). Freedom of speech may also be regulated when the target is commercial speech. See Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 455-56 (1978). Likewise, freedom to terminate pregnancy may be restricted after a certain point in the development of the fetus. See Roe v. Wade, 410 U.S. 113, 162-64 (1973).
302 An example: the right to consume a legal product, such as cigarettes, versus someone else’s right not to become an involuntary secondhand smoker.
303 As when, for example, the will of the patient to terminate his own life is thwarted by the duty of the physician to protect life or by the social/legal perception that this is an unacceptable decision.
Private autonomy, as we have seen, stands for individualized self-government.\textsuperscript{304} This is what Benjamin Constant called the “liberty of the moderns,” based on civil liberties, the rule of the law, and freedom from abusive state interference.\textsuperscript{305} Public autonomy, on the other hand, concerns the “liberty of the ancients,” a republican liberty associated with citizenship and participation in political life.\textsuperscript{306} Ancient Greeks felt a moral obligation toward citizenship and invested substantial time and energy in public affairs, which was facilitated by the fact that slaves did most of the work.\textsuperscript{307} As democracy is a partnership in self-government,\textsuperscript{308} it requires an interrelation between individual citizens and the collective will.\textsuperscript{309} This means that every citizen has the right to participate directly or indirectly in government.\textsuperscript{310} Along these lines, public autonomy entails the right to vote, to run for office, to be a member of political organizations, to be active in social movements, and, particularly, the right and the conditions to participate in public discourse. Ideally, the law to which every individual needs to abide would be created with his participation, assuring him the status of an autonomous citizen, and not a heteronomous subject.\textsuperscript{311} Regarding public autonomy, an important decision by the ECtHR held that the United Kingdom’s law denying prisoners the right to vote was in violation of the European Convention on Human Rights.\textsuperscript{312} Although the decision has been strongly questioned by Members of the British Parliament,\textsuperscript{313} the ECtHR properly established that “prisoners in general continue to enjoy all the funda-

\textsuperscript{304} Christman & Anderson, supra note 288, at 14 (“Many of the alleged tensions between liberalism and traditional republican conceptions of justice also turn on the contested meaning of political freedom or liberty and its relationship to an understanding of citizen autonomy, especially insofar as that understanding assumes a division (and political opposition) between autonomy as individualized self-government and autonomy as collective, socially instituted self-legislation.”).

\textsuperscript{305} See Benjamin Constant, The Liberty of the Ancients Compared with That of the Moderns, in Political Writings 307, 310–11 (Biancamaria Fontana ed. & trans., Cambridge Univ. Press 1988) (1819).

\textsuperscript{306} Id. at 311.

\textsuperscript{307} Id. at 314.

\textsuperscript{308} Dworkin, supra note 173, at 5.

\textsuperscript{309} Post, Dignity, supra note 288, at 8.

\textsuperscript{310} See id.

\textsuperscript{311} Id. at 9.


mental rights and freedoms guaranteed under the Convention [including the right to vote] save for the right to liberty . . . .” 314

Finally, attached to the idea of human dignity is the concept of existential minimum, 315 also referred to as social minimum 316 or the basic right to the provision of adequate living conditions. 317 Equality, in a substantive sense, and especially autonomy (both private and public), are dependent on the fact that individuals are “free[] from want,” 318 meaning that their essential needs are satisfied. To be free, equal, and capable of exercising responsible citizenship, individuals must pass minimum thresholds of well-being, without which autonomy is a mere fiction. 319 This requires access to some essential utilities, such as basic education and health care services, as well as some elementary necessities, such as food, water, clothing, and shelter. The existential minimum, therefore, is the core content of social and economic rights, whose existence as actual fundamental rights—not mere privileges dependent on the political process—is rather controversial in some countries. 320 Its enforceability is complex and cumbersome everywhere. 321 Notwithstanding these challenges, the concept of minimum social rights that can be protected by courts, and that are not entirely dependent on legislative action, has been accepted by case law in several countries, including Germany, 322 South Africa, 323 and Brazil. 324

315 This is the literal translation of the term used by German authors and courts, Existenzminimum. See Alexy, supra note 188, at 290 (“[T]here can hardly be any doubt that the Federal Constitutional Court presupposes the existence of a constitutional right to an existential minimum.”).
316 See Rawls, Political Liberalism, supra note 235, at 228–29 (“[A] social minimum providing for the basic needs of all citizens is also an essential . . . .”).
317 Habermas, supra note 196, at 123 (“Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded . . . .”).
318 In his State of the Union address, now known as the Four Freedoms Speech, given on January 6, 1941, President Franklin D. Roosevelt proposed four freedoms that people “everywhere in the world” should enjoy, which included freedom of speech, freedom of worship, freedom from want and freedom from fear. See Franklin Delano Roosevelt, U.S. President, Message to Congress (Jan. 6, 1941), available at http://americanrhetoric.com/speeches/PDFFiles/FDR%20-%20Four%20Freedoms.pdf.
320 See Alexy, supra note 188, at 284–85.
321 See id. at 290–92.
322 See, e.g., Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] June 21, 1977, 45 BVerfGE 184 (229); Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] June 18, 1975, 40 BVerfGE 121 (134–36); Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Dec. 19, 1951, 1 BVerfGE 97 (104–05); Bundes-
In the United States, President Franklin Delano Roosevelt raised the issue for the first time in a famous speech and subsequently proposed legislation for “The Second Bill of Rights,” presented on January 11, 1944, with express references to the rights to adequate food, clothing, a decent home, medical care, and education. Although Roosevelt thought that the implementation of these second generation rights was a duty of Congress, but not of the courts, Cass Sunstein convincingly argues that a string of Supreme Court decisions decided between the early 1940s and early 1970s came very close to acknowledging certain social and economic rights as true constitutional rights. According to Sunstein, a counterrevolution occurred after Richard Nixon was elected president in 1968, particularly through his appointees to the Supreme Court. Consequently, the Court’s case law became more aligned with the traditional and dominant view in American law that fundamental rights do not entitle individuals to positive state action. More recently, the 2010 health reform law reignited this debate.


323 See Mazibuko v. Johannesburg 2010 (4) SA 1 (CC) at 16–17 (involving access to sufficient water); South Africa v. Grootboom 2001 (1) SA 46 (CC) at 60–61 para. 20 (involving access to adequate housing).


325 See Roosevelt, supra note 318.

326 See Franklin D. Roosevelt, U.S. President, State of the Union Address to Congress (Jan. 11, 1944), available at http://fdrlibrary.marist.edu/archives/address_text.html (announcing a plan for a bill of social and economic rights).

327 See Cass Sunstein, The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever 154–68 (2004) (citing Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that the termination of welfare benefits without a hearing violated the due process clause); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down a state law that imposed a one-year waiting period before a new arrival to the state could apply for welfare benefits); Douglas v. California, 372 U.S. 353 (1963) (holding that an indigent must be provided with counsel on his first appeal of a criminal conviction); Gideon v. Wainright, 372 U.S. 355 (1963) (holding that states are required to provide defense lawyers in criminal cases for defendants who cannot afford one); and Griffin v. Illinois, 351 U.S. 12 (1956) (holding that the equal protection clause requires states to provide trial transcripts at no cost to poor people appealing their criminal convictions)).

328 See Sunstein, supra note 327, at 163.

329 Id. at 165–67.

argument here is that the existential minimum is at the core of human dignity, and that autonomy cannot exist where choices are dictated solely by personal needs. Accordingly, the very poor must be granted constitutional protection.

3. Community Value

The third and final element, human dignity as community value, also referred to as dignity as constraint or dignity as heteronomy, relates to the social dimension of dignity. The contours of human dignity are shaped by the relationship of the individual with others, as well as with the world around him. Autonomy protects the person from becoming merely a gear in the engine of society. Despite this, in the words of English poet John Donne, “[n]o man is an island, entire of itself.”

The term community value, which is quite ambiguous, is used here, by convention, to identify two different external forces that act on the individual: (1) the “shared beliefs, interests, and commitments” of the social group and (2) state-imposed norms. The individual, thus, lives within himself, within a community, and within a state. His personal autonomy is constrained by the values, rights, and mores of people who are just as free and equal as him, as well as by coercive regulation. In an insightful book, Robert Post similarly identified three distinct forms of social order: community (a “shared world of common faith and fate”), management (the instrumental organization of social life through law to achieve specific objectives), and democracy (an arrangement that embodies the purpose of individual and collective self-determina-

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331 Raz, supra note 234, at 155 (“[The agents’] choices must not be dictated by personal needs.”).

332 See Dworkin, Democracy, supra note 173, at 8 (“[T]he very poor should be regarded, like a minority and disadvantaged race, as a class entitled to special constitutional protection.”).

333 See Post, Domains, supra note 288, at 182.

334 Id.

335 See John Donne, XVII. Meditation, in Devotions upon Emergent Occasions 107, 108–09 (Univ. of Mich. Press 1959) (1624), available at http://www.ccel.org/ccel/donne/devotions.iviii.xvii.i.html (“No man is an island, entire of itself; every man is a piece of the continent, a part of the main. . . . [A]ny man’s death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bells tolls; it tolls for thee.”).

tion). These three forms of social order presuppose and depend on each other, but are also in constant tension. Dignity as a community value, therefore, emphasizes the role of the state and community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of the good life. The relevant question here is in what circumstances and to what degree should these actions be regarded as legitimate in a constitutional democracy? The liberal predicament that the state must be neutral with regard to different conceptions of the good in a plural society is not incompatible, of course, with limitations resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however, must be justified on grounds of a legitimate idea of justice, an “overlapping consensus” that can be shared by most individuals and groups. Community value, as a constraint on personal autonomy, seeks legitimacy through the pursuit of three goals: (1) the protection of the rights and dignity of others, (2) the protection of the rights and dignity of oneself, and (3) the protection of shared social values. In their studies on bioethics and biolaw, Deryck Beyleveld and Roger Brownsword explored in depth this conception of “human dignity as constraint,” centered around the ideas of duties and responsibilities, as opposed to “human dignity as empowerment,” which is essentially concerned with rights.

It is not difficult to understand and justify the existence of a concept of community value giving content to and shaping the contours of human dignity, alongside intrinsic value and autonomy. If the lines are properly drawn, its goals are legitimate and desirable. The critical problem here is the risk involved. Regarding the first goal—protection of the rights and dignity of others—any civilized society imposes criminal

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337 See Post, Domains, supra note 288, at 3, 5, 15.
338 Id. at 2.
339 Id. at 128.
342 “Overlapping consensus” is a term coined by John Rawls that identifies basic ideas of justice that can be shared by supporters of different religious, political, and moral comprehensive doctrines. See id. at 1.
343 See id. at 24.
and civil sanctions to safeguard values and interests relating to life, physical and emotional integrity, and property, among others. It is thus beyond doubt that personal autonomy can be restricted to prevent wrongful behavior, be it based on the harm principle developed by John Stuart Mill or on the broader concept of the offense principle defended by Joel Feinberg. To be sure, the power to punish can be, and often is, employed in an abusive or disproportional way. Its necessity, however, even in the most liberal societies, is not contested. On the other hand, the additional goals—protection of both individual and shared social values—run the severe risk of paternalism and moralism. It is largely recognized that some degree of paternalism is acceptable, but in order for such interference to be legitimate, its boundaries must be established with great restraint. As for moralism, it is also acceptable that a democratic society may employ its coercive power to enforce some moral values and collective goals. Here again, however, and for stronger reasons, the boundaries must be tightly maintained in order to protect against the grave risk of moral majoritarianism, or the tyranny of the majority.

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346 See infra text accompanying notes 347–348.
347 See John Stuart Mill, On Liberty 21–22 (Elizabeth Rapaport ed. 1978) (1874) (expressing the classical liberal view and finding the limit of the state’s legitimate authority on the notion of harm).
348 See Joel Feinberg, Offense to Others 1 (1985). Feinberg argues that the harm principle is not sufficient to protect individuals against the wrongful behaviors of others, and has developed a more comprehensive concept of “the offense principle,” maintaining that preventing shock, disgust, embarrassment and other unpleasant mental states is also a relevant reason for legal prohibition. Id.
349 See, e.g., id.; see also Mill, supra note 347, at 21–22.
350 Gerald Dworkin defines paternalism as “the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm.” Gerald Dworkin, Paternalism, STAN. ENCYCLOPEDIA PHIL. (Nov. 6, 2002), http://plato.stanford.edu/archives/sum2010/entries/paternalism/ (revised June 1, 2010).
351 The most well-known defense of legal moralism was made by Patrick Devlin. See Patrick Devlin, The Enforcement of Morals 10 (1965).
352 Examples often cited are compulsory education for children and requiring the use of seatbelts and motorcycle helmets. See Dworkin, Hedgehogs, supra note 180, at 336.
associated with protection of “shared morality” are the object of an important exchange between Patrick Devlin and H.L.A. Hart.\footnote{See Devlin, supra note 351, at 10; H.L.A. Hart, Law, Liberty and Morality 5, 50 (1963).}

Dignity as community value, often inspired by paternalistic or moralistic motivations, underlies judicial decisions throughout the world. One of the most famous of such decisions is the holding in the “dwarf-tossing” case. The mayor of a town near Paris banned the bar spectacle \textit{lancer de nain}, in which a dwarf, wearing protective gear, was thrown short distances by customers. The case reached the Council of the State, which held the prohibition to be legitimate, based on defense of the public order and protection of human dignity.\footnote{Conseil d’État Assemblee [CE Ass.][Administrative Court Assembly] decision No. 136727, Oct. 27, 1995, Rec. Lebon (Fr.), available at \url{http://www.juricaf.org/arret/FRANCE-CONSEILDETAT-19951027-136727}; see also Marceau Long et al., Les grands arrêts de la jurisprudence administrative [The Great Decisions of Administrative Case Law] 790 (1996).} The dwarf opposed the ban on all instances and took the case to the United Nations Human Rights Committee, which did not find the measure to be abusive.\footnote{Human Rights Comm., Communication No. 854/1999: France, CCPR/C/75/D/854/1999 (July 26, 2002). The decision has been criticized worldwide with the argument that dignity as autonomy should have prevailed. See Rousseau, supra note 52, at 66–68; Stéphanie Hennette-Vaucher, When Ambivalent Principles Prevail: Leads for Explaining Western Legal Orders’ Infatuation with the Human Dignity Principle, 10 Legal Ethics 193, 206 (2007).} A second well-known decision involves the Peep Show Case, handed down by the German Federal Administrative Court.\footnote{Bundesverwaltungsgericht [BVerwG][Federal Administrative Court] Dec. 15, 1981, 4 BVerwGE 274 (Ger.).} The court upheld the denial of a license to conduct an attraction in which a woman performs a striptease for an individual in a small booth.\footnote{Id.} With payment, the stage would become visible to the patron, but the woman could not see him.\footnote{Id.} The license was refused on the ground that it violated good morals because such a performance violated the human dignity of the women displayed, who would be degraded to the level of an object.\footnote{In an outright rejection of the argument of autonomy, the Court stated that the fact that the women acted voluntarily did not excuse the violation. Id.} A third case involved the prosecution of a group of people in the United Kingdom accused of assault and wounding during sadomasochistic encounters.\footnote{Laskey v. United Kingdom, App. No. 21627/93, 24 Eur. H.R. Rep. 39, 39 (1997). The dissent countered that the “adults were able to consent to acts done in private which did not result in serious bodily harm” and criticized the Court’s “paternalism.” Id. at 45, 54–56 (Loncaides, J., dissenting).} Although the activities were consensual and
conducted in private, the House of Lords held that the existence of consent was not a satisfactory defense where actual bodily harm occurred. The ECtHR found no violation of the European Convention on Human Rights.

There are several morally and legally controversial issues relating to community values. One of them is prostitution. In South Africa, a divided Constitutional Court upheld the constitutionality of a law that made “carnal intercourse . . . for reward” a crime. The Supreme Court of Canada upheld a provision of the Criminal Code that prohibited communications in public for the purpose of prostitution, a distinct but related issue. Both courts have upheld bans on brothels and bawdy houses. Taking a different perspective, the Constitutional Court of Colombia held that prostitution is a tolerated social phenomenon, that prostitutes are a historically discriminated-against group deserving of special protection, and that voluntary sex work, under subordination to and payment from a bar owner, constitutes a de facto labor contract. Another polemical matter that challenges the proper boundaries between dignity as autonomy and dignity as shaped by heteronomous forces is the decriminalization of drugs. The Supreme Court of Canada discussed the matter extensively in a 2003 divided decision which held that Parliament could validly criminalize the possession of marijuana and punish offenders with imprisonment. A number of countries have adopted, and several world leaders have

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363 Id. at 43.
364 Id. at 52.
365 Jordan v. State 2002 (11) BCLR 1117 (CC) (S. Afr.). The minority pointed out, however, that the law constituted unfair discrimination against women by making the prostitute the primary offender and the patron at most as an accomplice.
368 Corte Constitucional [C.C.] [Constitutional Court], agosto 13, 2010, Sentencia T-629/10 (Colom.), available at http://www.corteconstitucional.gov.co/RELATORIA/2010/T-629–10.htm. At bottom, the main discussion is whether individual prostitution is a matter of personal autonomy, and thus constitutionally protected, or whether, on the other hand, it is a matter that is primarily to be governed by the legislature.
369 See R. v. Malmo-Levine, [2003] 3 S.C.R. 571, paras. 86–87 (Can.). Three justices dissented, stressing that the harm posed to others by marijuana consumption is not significant and does not justify imprisonment, see id. paras. 244, 276 (Arbour, J., dissenting), that harm to self should not be criminally punished, see id. para. 280 (LeBel, J., dissenting), and that the harm of prohibiting marijuana far outweighed its benefits, see id. para. 283 (Deschamps, J., dissenting).
370 For example, the Netherlands, Portugal, and Australia have all adopted laws decriminalizing certain drugs. See, e.g., Caitlin Elizabeth Hughes & Alex Stevens, What Can We
advocated for, the decriminalization of drugs, particularly so-called “light” drugs.\textsuperscript{371} Another complex and sensitive issue involves hate speech. In most democratic countries, speech aimed at the depreciation of vulnerable groups or individuals, based on ethnicity, race, color, religion, gender, or sexual orientation, among other characteristics, is not acceptable and is not within the range of protection for freedom of expression.\textsuperscript{372} The United States, in this particular instance, is a solitary exception.\textsuperscript{373}

The coercive imposition of external values, with the exception of the plain exercise of autonomy in the name of a communitarian dimension of human dignity, is never trivial. It requires adequate justification, which must take into account three elements: (1) the existence of a fundamental right that is affected, (2) the potential harm to oneself and to others, and (3) the level of societal consensus on the matter.\textsuperscript{374} As for the verification of the presence of a fundamental right, it is appropriate to make a distinction between two different views and respective terminology. Some authors acknowledge the existence of a “general right to liberty” (or freedom), along with specific and express freedoms, such as freedom of expression, religion, and others.\textsuperscript{375} The general right to liberty means a general freedom of action that can, however, be limited by any legal norm that is compatible with the constitution.\textsuperscript{376} Restrictions on such a general right require only a rational
basis and a legitimate state interest or collective goal.\footnote{377}{See id.} Other authors, particularly Ronald Dworkin, employ a narrower concept of “basic liberties,” as opposed to general liberty, that correspond with “moral right[s]”—they are the true, substantive fundamental rights.\footnote{378}{See Dworkin, Rights, supra note 187, at 217–18, 271–74.} Basic freedoms are to be treated as “trumps” against majority rule,\footnote{379}{Ronald Dworkin, Rights as Trumps, in Theories of Rights 153, 153–54 (Jeremy Waldron ed., 1985).} and restrictions on them must pass strict scrutiny.\footnote{380}{See Dworkin, Rights, supra note 187, at 274.} Thus, general freedom may be broadly limited, but basic freedoms should usually prevail over collective goals in all but exceptional circumstances.\footnote{381}{See id. at 92–93. For an insightful discussion on the views of general right to liberty and basic freedoms, see—sorry, it is in Portuguese—Letícia de Campos Velho Martel, Direitos Fundamentais Indisponíveis [Indisposable Fundamental Rights] (forthcoming) (manuscript at 94–109) (on file with author).}

The risk of harm to others is usually a reasonable ground to limit personal autonomy. It is broadly accepted today that Mill’s formulation of the harm principle as the only justification for state interference with individual freedom “may well be too simple” and that “multiple criteria” will determine when liberty can be restricted.\footnote{382}{H.L.A. Hart, Immortality and Treason, in Morality and the Law, 49, 51 (Richard A. Wasserstrom ed., 1971).} Harm to others, however, enjoys a fair presumption as to the legitimacy of the restriction.\footnote{383}{See Mill, supra note 347, at 77–78.} Harm to oneself may also be an acceptable ground for limiting personal autonomy, as mentioned before, but in this case the burden of demonstrating its legitimacy will usually be on the state, since paternalism should raise suspicion.\footnote{384}{See id. at 76–77.} Finally, the limitation of personal autonomy on grounds of public morals requires strong societal consensus.\footnote{385}{See Hart, supra note 382, at 52.} The ban on child pornography—even in cases of graphic depiction, without an actual child involved—or the prohibition of incest, are serious candidates for this consensus. In a plural and democratic society, however, there will always be moral disagreements. Issues of capital punishment, abortion, and same-sex marriage will always be disputed. A brief reflection on this subject is called for before closing this Part.\footnote{386}{For discussions of moral realism and moral disagreement, see generally Folke Tersman, Moral Disagreement (2006); David Enoch, How Is Moral Disagreement a Problem for Realism?, 13 J. Ethics 15 (2009); Arthur Kuflik, Liberalism, Legal Moralism and Moral Disagreement, 22 J. Applied Phil. 185 (2005).}
Even moral realists who believe that moral claims can be true or false—a highly contested issue in philosophical debate—acknowledge that their belief is not applicable to all moral truths.\(^{387}\) There will always be moral disagreement, and thus in many situations no objective moral truth.\(^{388}\) Despite their different conceptions, citizens must coexist and cooperate, bound together by a framework of basic freedoms and rights. The role of the state when interpreting community values is to uphold those values that are genuinely shared by the people and to avoid, whenever possible, choosing sides in morally divisive disputes.\(^{389}\) One good reason for this abstention is that allowing one group to impose its moral view over others poses a challenge to the ideal that all individuals are equal and free. There are certainly disputed political issues that will have to be settled by the majority, such as choices involving environmental protection, economic development, the use of nuclear energy, or limits on affirmative action. Truly moral issues, however, should not be decided by majorities. The majority, for example, has no right to say that homosexual sex is a crime, as the Supreme Court held in *Bowers v. Hardwick*.\(^{390}\) Of course, there will be cases in which it is difficult to draw the line between the political and the truly moral; indeed, the two domains often overlap.\(^{391}\) Whenever a significant moral issue can be identified, however, the best thing for the state to do is to lay out a framework that allows individuals on both sides of the issue to exercise personal autonomy. The battlefield in such cases should remain within the realm of ideas and rational persuasion. In the next Part, I will apply these ideas to a set of controversial cases.

### III. Using Human Dignity to Structure Legal Reasoning in Hard Cases

#### A. Abortion

The voluntary termination of a pregnancy is a highly controversial moral issue throughout the world. In different countries, legislation

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\(^{387}\) See Enoch, *supra* note 386, at 16.

\(^{388}\) *Id.* at 22.

\(^{389}\) See Post, *Domains*, *supra* note 288, at 4.


\(^{391}\) See *Introduction to Morality and the Law*, *supra* note 382, at 1.
ranges from total prohibition and criminalization to practically unrestricted access to abortion.\textsuperscript{392} Strikingly, abortion rates in countries where the procedure is legal are very similar to the rates in countries where it is illegal.\textsuperscript{393} Indeed, the main difference between countries that criminalize abortion and those that decriminalize it is the incidence of unsafe abortion.\textsuperscript{394} Criminalization also can result in \textit{de facto} discrimination against poor women, who must resort to primitive methods of ending pregnancy due to lack of access to either private or public medical assistance.\textsuperscript{395} Starting with Canada in 1969,\textsuperscript{396} the United States in 1973,\textsuperscript{397} and France in 1975,\textsuperscript{398} abortion, usually in the first trimester, was broadly removed from criminal codes. Several other countries followed this trend, including Austria (1975), New Zealand (1977), Italy (1978), the Netherlands (1980), and Belgium (1990).\textsuperscript{399} In Germany, a rather ambiguous judicial decision in 1993 led to the non-punishment of abortion in the first trimester provided that certain conditions are met.\textsuperscript{400} In fact, almost all countries in the richer North Atlantic world decriminalize abortion in the early stages of pregnancy, thus rendering the total prohibition of abortion a policy that prevails only in the developing world.\textsuperscript{401} The Catholic Church and many evangelical churches strongly oppose abortion based on the belief that life


\textsuperscript{393} See \textit{id.} at 2.

\textsuperscript{394} See \textit{id.} at 3–4.

\textsuperscript{395} See \textit{id.}

\textsuperscript{396} Criminal Law Amendment Act, S.C. 1968–1969, c. 38 (creating an exception for abortions performed in a hospital where, in the opinion of a three-doctor hospital committee, the life or death of the mother is in danger).

\textsuperscript{397} In the United States, the plurality decision in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, 505 U.S. 833 (1992), revised the \textit{Roe v. Wade}, 410 U.S. 113 (1973), rule of priority for the woman’s interest during the first trimester and replaced the strict scrutiny test, which was the standard in matters of fundamental rights, with the less rigorous “undue burden” test. See \textit{Casey}, 505 U.S. at 869–79.


\textsuperscript{399} For an overview of abortion policies in countries throughout the world, see UN Population Div., \textit{Abortion Policies}, Dep’t Econ. & Soc. Aff., http://www.un.org/esa/population/publications/abortion/ (click on “Country Profiles” to view individual countries’ policies) (last visited May 15, 2012).

\textsuperscript{400} See Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] May 28, 1993, 88 BVerfGE 203 (Ger.).

\textsuperscript{401} See Cohen, \textit{supra} note 392, at 2–3.
begins at conception and is inviolable at that point. Yet, many who personally believe that abortion is morally wrong still favor its decriminalization for philosophical or pragmatic reasons. The next paragraphs discuss the relationship between abortion and human dignity, taking into account intrinsic value, autonomy, and community value, as well as the rights and duties associated with each of these elements.

At the intrinsic value level, the abortion debate represents a clash between fundamental values and rights. For those who believe that a fetus should be treated as human life beginning at fertilization—and this premise must be assumed here for the sake of argument—abortion clearly is a violation of the fetus’ right to live. This is the foundation underlying the pro-life movement, supporting its conclusion that abortion is morally wrong. On the other hand, pregnancy and the right to terminate it implicate the physical and mental integrity of the woman, her power to control her own body. Moreover, abortion must also be considered an equal protection issue, because only women bear the full burden of pregnancy and the right to terminate it puts them on a level playing field with men. Therefore, with regard to human dignity viewed as intrinsic value, there is one fundamental right favoring the anti-abortion position—the right to life—countered by two fundamental rights favoring the position of the woman’s right of choice—physical and mental integrity, and equal protection of the law.

As for autonomy, we must consider what role self-determination plays in the context of abortion. Individuals must be free to make

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402 See generally Brenda D. Hofman, Political Theology: The Role of Organized Religion in the Anti-Abortion Movement, 28 J. Church & St. 225 (1986) (discussing the theological underpinnings of Catholic and evangelical opposition to abortion).

403 See Adam Sonfield, Delineating the Obligations That Come with Conscientious Refusal: A Question of Balance, Guttmacher Pol’y Rev., Summer 2009, at 6, 6.

404 Cf. discussion supra Part II.B.1.


406 See Robin West, From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights, 118 Yale L.J. 1394, 1401–02. As West wrote, “[t]he preferred moral foundations of the abortion right . . . continue to shift, from marital and medical privacy, to women’s equality, to individual liberty or dignity, and back . . . .” Id. at 1396.

407 For a thoughtful analysis of the use of dignity in the context of abortion, see Siegel, supra note 405, at 1736–45. Siegel compares the decision in Casey, 505 U.S. 833, in which dignity was invoked as a reason for protecting women’s right to choose an abortion, and the decision in Stenberg v. Carhart, 530 U.S. 914 (2000), in which dignity was invoked as a reason for woman-protective abortion restrictions. Siegel criticizes the latter for “gender-paternalist” and “unconstitutional stereotypes about women’s roles and capacities.” See Siegel, supra note 405, at 1773, 1796.

408 Cf. discussion supra Part II.B.2.
basic personal choices regarding their lives. Reproductive rights and child rearing are certainly among these decisions and choices. The right to privacy, as established by U.S. Supreme Court decisions regarding abortion, is described as “the principle of public toleration of autonomous, self-regarding choice.” It is within the autonomy of a woman and, therefore, at the core of her basic freedoms, to decide for herself whether or not to have an abortion. The will of the mother to terminate her pregnancy could be countered by a hypothetical will of the fetus to be born. One could speculate then that there would be a clash of autonomies between the woman and the fetus. Two objections can be made to this line of reasoning. The first objection is that, although the intrinsic value of the fetus has been assumed in the previous paragraph, it might be more difficult to acknowledge its autonomy due to the fact that it does not have any degree of self-consciousness. Further, even if this argument could be overcome, there remains another argument. Because the fetus depends on the woman, but not the other way around, if the “will” of the fetus prevailed, the woman would be completely instrumentalized by its project. In other words, if a woman were to be forced to keep a fetus she did not want, she would be transformed into a means for the satisfaction of someone else’s will, and not treated as an end in herself.

Finally, at the community value level, it is necessary to determine whether autonomy can be curtailed either by values shared by the social group or state interests imposed by legal norms. Abortion is arguably the most divisive moral issue in public life today. As mentioned above, most countries in North America and in Europe have decriminalized early stage abortion. On the other hand, most countries in Africa (excluding South Africa) and Latin America impose dramatic restrictions on abortions at any stage of pregnancy. The fact that important and respectable religious groups oppose abortion on the basis of their faith and dogmas does not overcome the objection that such arguments do not fall within the realm of public reason. Such being the case, one cannot find a significant societal consensus on the matter.

410 Id. at 690.
411 Cf. discussion supra Part II.B.3.
412 See supra text accompanying notes 392–401.
414 Cf. supra text accompanying note 235.
In fact, the only clearly perceivable conclusion is that abortion is a point of major moral disagreement in contemporary society. In such circumstances, the proper role for the state is not to take sides and impose one view, but instead to allow individuals to make autonomous choices. In other words, the state must value individual autonomy, not legal moralism. As the U.S. Supreme Court stated in *Roe v. Wade*, the state’s interest in protecting prenatal life and the mother’s health does not outweigh the fundamental right of a woman to have an abortion.\textsuperscript{415} There are two other strong arguments in favor of legalization. The first, as statistics show, is the difficulty of enforcing the prohibition.\textsuperscript{416} The second is the discriminatory impact that a ban on abortion has on poor women.\textsuperscript{417} Decriminalization does not preclude those who oppose abortion from advocating their views. In fact, many communities in countries with legalized abortion treat it as a social taboo and use strong social pressure to discourage women from terminating their pregnancies.\textsuperscript{418}

\textbf{B. Same-Sex Marriage}

Legal recognition of same-sex marriage is another highly controversial moral issue throughout the world. Notwithstanding this controversy, the evolution of public opinion on the matter is evolving rapidly and resistance to change is less effective in comparison to the relatively static stalemate on abortion.\textsuperscript{419} To be sure, discrimination against homosexual conduct and homosexual partners clearly existed in legal and social practices until the beginning of the twenty-first century.\textsuperscript{420} In the United States, for example, prior to the 1970s, the American Psychiatric Association categorized homosexuality as a mental disorder.\textsuperscript{421} In 1971,  

\textsuperscript{415} See 410 U.S. at 154.  
\textsuperscript{416} See WHO, *supra* note 413, at 1 & fig.1, 5 & fig.2 (showing that approximately 21.6 million unsafe abortions took place in 2008, almost all in developing countries where the practice is illegal).  
\textsuperscript{417} See id. at 9, 10. Indeed, even in countries where abortion is legal, politicians who oppose it have enacted laws that restrict public funding, as has occurred in the United States and Canada. See, e.g., Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 Emory L.J. 1093, 1097 (2007); Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, Guttmacher Pol’y Rev., Winter 2007, at 12, 12.  
\textsuperscript{418} See Erdman, *supra* note 417, at 1097; Boonstra, *supra* note 417, at 12.  
\textsuperscript{419} See Michael J. Rosenfeld, *The Age of Independence: Interracial Unions, Same-Sex Unions, and the Changing American Family* 143 (2007).  
\textsuperscript{420} See infra text accompanying notes 421–424.  
\textsuperscript{421} See Rosenfeld, *supra* note 419, at 176. (“Until the 1950s, the consensus of psychiatrists and psychologists was that homosexuals were deeply disturbed people.”).
all but two American states criminalized homosexual sodomy. As late as 1986, the Supreme Court upheld state laws criminalizing intimate homosexual sexual behavior, a decision ultimately overruled in 2003. In 1993, a major development occurred when the Supreme Court of Hawaii ruled that a statute limiting marriage to opposite-sex couples constituted sex discrimination. As a reaction to the court’s ruling, from 1995 to 2005, forty-three states adopted legislation prohibiting same-sex marriage. Ironically, this backlash unified the Lesbian, Gay, Bisexual, and Transgender community in favor of same-sex marriage, which was opposed by radical militants who considered it a concession by sexual minorities to conventional rites. In 2004, in response to a decision by its highest court, Massachusetts became the first state to legalize same-sex marriage. In recent years, homosexuality has increasingly become an accepted lifestyle and there is a growing belief that its causes are predominantly biological. If this is indeed the case, discriminating on the basis of sexual orientation is the same as discriminating against Asians for their eyes, Africans for their color, or Latin Americans for being the product of miscegenation.

In this evolving context, it is no surprise that a number of countries have legalized same-sex marriage, including Argentina, Belgium, Brazil, Canada, Iceland, the Netherlands, Norway, Portugal, South Af-

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422 The two states that had not criminalized sodomy were Illinois and Connecticut. William N. Eskridge, Jr. & Darren R. Spedale, Gay Marriage: For Better or for Worse: What We’ve Learned from the Evidence 23 (2006).


424 See Lawrence, 539 U.S. 558. Prior to Lawrence, in Romer v. Evans, 517 U.S. 620 (1996), the Supreme Court struck down Amendment 2 to the Constitution of Colorado, which precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”


426 See Eskridge & Spedale, supra note 422, at 20.


429 See, e.g., Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009) (finding same-sex marriage legal and reasoning in part that sexual orientation is defined at birth and is thus immutable).
rica, and Sweden.\textsuperscript{430} In several other countries, similar legislation has been proposed and discussions are underway.\textsuperscript{431} It is true that some countries, including (surprisingly) France, prohibit same-sex marriage.\textsuperscript{432} In the United States as well, a 1996 federal statute known as the Defense of Marriage Act (DOMA) defines marriage as “a legal union between one man and one woman as husband and wife.”\textsuperscript{433} The administration of President Barack Obama, however, announced that it will no longer defend the constitutionality of DOMA, which has been challenged in several different lawsuits.\textsuperscript{434} Moreover, several states have passed legislation recognizing same-sex marriage, including Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and New York, as well as the District of Columbia.\textsuperscript{435} As with abortion, there is fierce religious opposition to homosexual conduct and same-sex marriage.\textsuperscript{436} Based on biblical passages read as condemnations of homosexual conduct,\textsuperscript{437} many evangelical groups have expressed strong disapproval; within the Catholic Church, Popes John Paul II and Benedict XVI have criticized countries for passing legislation protective of homosexuality.\textsuperscript{438}

Analyzing same-sex marriage in light of the idea of human dignity presented in this Article is much less complicated than analyzing abortion under the same rubric. Indeed, at the \textit{intrinsic value} level, there is a fundamental right in favor of legalizing same-sex marriage: \textit{equality under the law}.\textsuperscript{439} To deny same-sex couples access to marriage—and all the social and legal consequences that it entails—represents a form of discrimination based on sexual orientation. There is no other argument stemming from intrinsic value that could reasonably be employed to

\textsuperscript{431} See id.
\textsuperscript{432} Le Conseil Constitutionnel dit non au Mariage Homosexuel, supra note 56.
\textsuperscript{435} See, e.g., Timeline: Same-Sex Marriage Around the World, supra note 430.
\textsuperscript{437} See Leviticus 18:22; Romans 1:26–27.
\textsuperscript{439} See discussion supra Part II.B.1.
counter the right of equal protection and respect to which homosexuals are entitled. As for *autonomy*, same-sex marriage involves two consenting adults who choose, without coercion or manipulation, how to exercise their affection and sexuality.\textsuperscript{440} There is neither violation of another’s autonomy nor harm to another that could justify a prohibition. Finally, at the level of *community value*, one must acknowledge that numerous segments of civil society, particularly religious groups, disapprove of homosexual behavior and same-sex marriage.\textsuperscript{441} To deny the right of same-sex couples to get married, however, would be an unwarranted restriction of their autonomy on behalf of either improper moralism or the tyranny of the majority. First, there is a fundamental right involved, whether it is the right to equality or to privacy (freedom of choice). Even if this were not the case, the undeniable fact is that no risk of harm to third parties or to oneself is presented here. Finally, one can no longer find a strong level of societal consensus against same-sex marriage in a world where, at least in most Western societies, homosexuality is largely accepted.\textsuperscript{442} Of course, anyone has the right to advocate against same-sex marriage and to try to convince people to abstain from participation.\textsuperscript{443} This is different, however, than asking the state not to recognize a legitimate exercise of personal autonomy by free and equal citizens.

C. Assisted Suicide

Assisted suicide is the act by which an individual brings about his or her own death with the assistance of someone else.\textsuperscript{444} As a general rule, the debate on this matter involves physician-assisted suicide, which occurs when a doctor provides the necessary information and means, such as drugs or equipment, but the patient performs the act.\textsuperscript{445} Discussion of assisted suicide usually assumes—as will be assumed here—that the relevant individuals are terminally ill and enduring great pain and suffering.\textsuperscript{446} There is strong opposition to assisted suicide by most religions, particularly the Catholic Church, which considers suicide to

\textsuperscript{440} Cf. discussion supra Part II.B.2.
\textsuperscript{441} Cf. discussion supra Part II.B.3.
\textsuperscript{442} See supra text accompanying notes 424–435.
\textsuperscript{443} The fact that there is not a prohibition or a potential use of state coercion does not oblige people with a moral divergence to remain silent. See HART, supra note 355, at 76.
\textsuperscript{445} See Vacco v. Quill, 521 U.S. 793, 797 (1997); Glucksberg, 521 U.S. at 707.
\textsuperscript{446} See Vacco, 521 U.S. at 797; Glucksberg, 521 U.S. at 707.
be morally wrong.⁴⁴⁷ Although the typical conflict between secular humanists and religious believers is also present here, there are some subtleties that provide unusual nuance to this debate. For one, the Hippocratic Oath, still taken by doctors in many countries, directly addresses the matter by stating unambiguously: “I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan . . . .”⁴⁴⁸ Furthermore, there is always the concern that pressure from family or health plans could compromise the free and informed consent of the patient.⁴⁴⁹ Thus, unlike abortion and same-sex marriage (or some recognized form of same-sex partnership) which are allowed in most developed countries, physician-assisted suicide is still generally illegal.⁴⁵⁰ In Europe, as mentioned earlier, the ECtHR decided in Pretty v. United Kingdom that there is no fundamental right to assisted suicide.⁴⁵¹

The Supreme Court of Canada adopted the same outcome when it declared Section 241(b) of the Criminal Code, which criminalized the assistance of suicide, constitutional.⁴⁵² In a 5-to-4 decision, the court held: (1) the state interest in protecting life and the vulnerable should prevail over claims of personal autonomy, physical and psychological integrity, and human dignity; (2) the cruel and unusual punishment clause did not apply; and (3) the prohibition of assisted suicide, even if an infringement of equality rights, was justified by substantial legislative objective and met the proportionality test.⁴⁵³ In addition, the majority asserted that it was the role of Parliament—and not of the court—to deal with the question of assisted suicide.⁴⁵⁴ The dissenting justices strongly argued that forcing an incapacitated terminally ill patient to have a “dreadful, painful death” was “an affront to human dignity” and, further, that there was no difference between refusing treatment and assisted suicide,⁴⁵⁵ that there was an infringement of the right to equality in preventing persons physically unable to end their lives,⁴⁵⁶ and that

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⁴⁵⁰ See Glucksberg, 521 U.S. at 774–75.
⁴⁵¹ See Pretty, 35 Eur. H.R. rep. at 41.
⁴⁵³ See id. at 522–23.
⁴⁵⁴ See id. at 523.
⁴⁵⁵ See id. at 526 (Cory, J., dissenting).
⁴⁵⁶ See id. at 524–25 (Lamer, C.J., dissenting).
fear of abuse was not sufficient to override the appellant’s entitlement to end her life.\textsuperscript{457}

A handful of countries legalize physician-assisted suicide, including Belgium, Colombia, Luxembourg, the Netherlands, and Switzerland.\textsuperscript{458} In the United States, where the Supreme Court upheld state bans on physician-assisted suicide,\textsuperscript{459} three states legalized assisted suicide for people who have a very limited amount of time to live. Oregon’s Death with Dignity Act requires the diagnosis of a terminal illness that will, “within reasonable medical judgment, produce death within six months.”\textsuperscript{460} The Washington Death with Dignity Act, enacted in 2009, mirrors this language by requiring a diagnosis of an illness that will “within reasonable medical judgment, produce death within six months.”\textsuperscript{461} The most recent state to adopt an assisted suicide regime is Montana, which acted through its state supreme court to find immunity from prosecution for doctors who assisted in the deaths of terminally ill patients.\textsuperscript{462} The state legislature, however, declined to pass a bill that fully describes the limits of any right to die and instead left the issue in “legal limbo.”\textsuperscript{463} The rules of these American states are stricter than those of other countries. In the Netherlands, for example, the standard is more relaxed, and people facing the prospect of “unbearable suffering with no prospect of improvement” may perform assisted suicide, regardless of the exact time of diagnosis.\textsuperscript{464} Similarly, under Belgian law, patients suffering from “constant and unbearable physical or psychological pain resulting from an accident or incurable illness” are legally allowed to request assisted suicide from their physicians.\textsuperscript{465}

\textsuperscript{457} See id. at 523 (L’Herieux & McLachlin, JJ., dissenting).
\textsuperscript{459} See Vacco, 521 U.S. at 797; Glucksberg, 521 U.S. at 705–06.
\textsuperscript{460} See OR. REV. STAT. § 127.800 (2008).
\textsuperscript{461} See WASH. REV. CODE § 70.245.010 (2009).
\textsuperscript{462} See Kirk Johnson, Ruling by Montana Supreme Court Bolsters Physician-Assisted Suicide, N.Y. TIMES, Jan 1, 2010, at A17.
\textsuperscript{465} Belgium Legalizes Euthanasia, BBC NEWS (May 16, 2002), http://news.bbc.co.uk/2/hi/europe/1992018.stm (internal quotations omitted).
Finally, it is necessary to examine the relationship between assisted suicide and each of the components of the concept of human dignity described in this Article.\textsuperscript{466} As for intrinsic value, the fundamental right to life would naturally be an obstacle to legalizing assisted suicide.\textsuperscript{467} It is difficult to find a right to die that could be invoked to counter the right to life. Death is inevitable and not a choice. There certainly is a right to physical and mental integrity, however, which is also associated with the inherent value of every human being. The fact is that contemporary medical technology has the capacity to transform the process of dying into a journey that can last longer than would otherwise occur and be more painful than necessary.\textsuperscript{468} Each individual, thus, should have the right to die with dignity, and should not be compelled to suffer for an extended period of time without the ability to function normally. In a rather paradoxical way, at the level of intrinsic value, the right to life and the right to integrity can oppose each other.

Preserving autonomy is one of the “integral values” in the debate over physician-assisted suicide, along with alleviating suffering and maintaining community.\textsuperscript{469} Autonomy generally supports the idea that a competent person has the right to choose to die, under certain circumstances, if after thoughtful reflection she finds that “unrelieved suffering outweighs the value of continued life.”\textsuperscript{470} In addition, provided the physician agrees to do the procedure, no one else’s autonomy is in question. Community value, however, is the most complex discussion in this analysis.\textsuperscript{471} To be clear, I do not think the community and state should have the right to impose their moralist or paternalist conceptions on someone who is hopelessly suffering and close to the end of life. They do, however, have the authority and the duty to establish some safeguards in order to make sure that each patient’s autonomy is properly exercised. In fact, there is a real risk that legalization of assisted suicide could put pressure on the elderly and those with terminal illness to choose death in order to reduce the burden on their families. In such scenarios, instead of the choice to die being an embodiment of

\textsuperscript{466} Since I do not think equal protection plays a role in this scenario, it will not be addressed here.

\textsuperscript{467} Cf. discussion supra Part II.B.1.

\textsuperscript{468} See generally DeWitt C. Baldwin, Jr., The Role of the Physician in End of Life Care: What More Can We Do?, 2 J. HEALTH CARE L. & POL’y 258 (1999) (discussing use of advanced medical technologies during end-of-life care and their impact on patients).


\textsuperscript{470} See Rogatz, supra note 469, at 31.

\textsuperscript{471} Cf. discussion supra Part II.B.3.
autonomy, it becomes a product of the coercion of vulnerable and marginalized individuals, reducing the value of their lives and dignity.\footnote{The same concerns are present in Nussbaum, Human Dignity, supra note 249, at 373. See also Ronald Dworkin, Life’s Dominion 190 (1994) [hereinafter Dworkin, Dominion].} For these reasons, individuals who are terminally ill and enduring great suffering, as well as those who are in persistent vegetative states,\footnote{See Dworkin, Dominion, supra note 472, at 239 (advocating an attitude of restraint from the state and community).} should have the right to assisted suicide, but legislation must be cautiously crafted to ensure that the morally acceptable idea of dying with dignity does not become a “recipe for elder abuse.”\footnote{See Margaret K. Dore, Physician-Assisted Suicide: A Recipe for Elder Abuse and the Illusion of Personal Choice, 36 Vt. B. J. 53, 55 (2011).} These pertinent concerns regarding the protection of vulnerable people, however, do not affect the central idea defended here: When two fundamental rights of the same individual are in conflict, it is reasonable and desirable for the state to value personal autonomy.\footnote{See Lorenzo Zucca, Constitutional Dilemmas 169 (2007).} The bottom line is that the state should respect a person’s choices when it is her own tragedy that is at stake.\footnote{See 1 Copleston, supra note 215, at 76.}

**Conclusion**

*The One and the Many*

Early Greek philosophy centered on the quest for an ultimate principle—a common substratum to all things and a unity underlying diversity.\footnote{See 1 Copleston, supra note 215, at 76.} This problem is known as “the One and the Many.”\footnote{Id.} If such a concept were to be applied to democratic societies, human dignity would be a leading candidate for the greatest principle that is in the essence of all things. It is true, however, that historical and cultural circumstances in distinct parts of the world decisively affect the meaning and scope of human dignity. Intuitively, an idea that varies with pol-
itics and geography is too elusive to become a workable domestic and transnational legal concept. The ambitious and risky purpose of this Article is to identify the legal nature of the idea of human dignity and to give it a minimum content, from which predictable legal consequences can be deduced, applicable throughout the world. It is an effort to find common ground and, at the very least, common terminology. With that in mind, human dignity is characterized as a fundamental value that is at the foundation of human rights, as well as a legal principle that (1) provides part of the core meaning of fundamental rights and (2) functions as an interpretive principle, particularly when there are gaps, ambiguities, and clashes among rights—or among rights and collective goals—as well as moral disagreements. To be sure, the principle of human dignity, as elaborated here, attempts to supply a roadmap to structure legal reasoning in hard cases, but it does not, of course, solve or suppress moral disagreements. That is an impossible task.

After establishing that human dignity should be regarded as a legal principle—and not as a freestanding fundamental right—I propose three elements as its minimum content and derive a set of rights and implications from each. For legal purposes, human dignity can be divided into three components: intrinsic value, which identifies the special status of human beings in the world; autonomy, which expresses the right of every person, as a moral being and as a free and equal individual, to make decisions and pursue his own idea of the good life; and community value, conventionally defined as the legitimate state and social interference in the determination of the boundaries of personal autonomy. This communitarian dimension of human dignity must be under permanent and close scrutiny due to the risks of paternalism and moralism affecting legitimate personal choices and rights. In structuring legal reasoning in more complex, divisive cases, it is useful to identify and discuss the relevant questions that arise in each of the three levels of analysis, and therefore provide more transparency and accountability to the justification and choices made by courts or other interpreters.

Equals, Nobles, and Gods

As we have seen, dignity, in a line of development stretching far back in time, was a concept associated with rank: the personal status of certain political or social positions. Dignity, thus, was tied up with honor and entitled some individuals to special treatment and privileges. In this sense, dignity presupposed a hierarchical society and denoted nobility, aristocracy, and the superior condition of some persons over oth-
ers. Over the centuries, however, with the impulse of religion, philosophy, and sound politics, a different idea of dignity developed—human dignity—which protects the equal intrinsic worth of all human beings and the special place of humanity in the universe. Such is the concept explored in this Article; a concept that is at the foundation of human rights, particularly the rights of freedom and equal protection. These ideas are now consolidated in constitutional democracies, and some higher aspirations have been cultivated. In a time to come, with a few drops of idealism and political determination, human dignity may become the source of a high rank and distinction that is accorded to everyone: the maximum attainable level of rights, respect, and personal achievement. All persons will be nobles.\footnote{This idea is defended in Jeremy Waldron, \textit{Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkley} 28–29, 30 (N.Y. Univ. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 09–50, 2009) (crediting Gregory Vlastos, \textit{Justice and Equality, in Theories of Rights}, supra note 379, at 41, for the idea).} Or, better yet, as in the lyrics of \textit{Les Miserables}, “[e]v’ry man will be a king.”\footnote{See Alain Boublil and Herbert Kretzmer, \textit{One Day More}:}

\begin{verbatim}
One day to a new beginning
Raise the flag of freedom high!
Every man will be a king
Every man will be a king
There’s a new world for the winning
There’s a new world to be won
Do you hear the people sing?
\end{verbatim}

\textit{Les Misérables} (TriStar Pictures 1998).

\footnote{See Jean-Paul Sartre, \textit{Being and Nothingness} 566 (Hazel E. Barnes, trans., 1956) (“[T]he best way to conceive of the fundamental project of human reality is to say that man is the being whose project is to be God.”); Jean-Paul Sartre, \textit{Existentialism as Humanism} 56 (Philip Mairet trans., 1973); \textit{see also} Roberto Mangabeira Unger, \textit{The Self Awakened: Pragmatism Unbound} 256 (2007). For Unger, the divinization project is impossible, but there are ways by which “we can become more godlike.”}
ANCHORING THE LAW IN A BED OF PRINCIPLE: A CRITIQUE OF, AND PROPOSAL TO IMPROVE, CANADIAN AND AMERICAN HEARSAY AND CONFRONTATION LAW

MIKE MADDEN*

Abstract: As recent case law demonstrates, both American Sixth Amendment Confrontation Clause jurisprudence and Canadian common law relating to hearsay evidence are conceptually problematic. The laws are, at times, internally incoherent and are difficult to justify on the basis of legal principles. This Article critiques confrontation and hearsay law in the United States and Canada, respectively, by exposing the lack of principle underlying each body of law. The Article develops a principled basis for evidence law in general, and hearsay and confrontation law in particular, providing a more stable foundation for hearsay and confrontation frameworks. Ultimately, the Article argues that the epistemic, truth-seeking goal of criminal evidence law is best served by the broad admission, rather than exclusion, of all hearsay evidence. Furthermore, while fairness concerns are relevant to some rules of evidence, there are no valid fairness concerns operating in the context of hearsay and confrontation law that should displace the primary principle of facilitating and promoting epistemically accurate fact-finding in criminal trials. Finally, this Article suggests that any dangers associated with the broad admission of hearsay evidence can be mitigated through effective argument by counsel and appropriate cautions to the trier of fact regarding any weaknesses inherent in the evidence.

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INTRODUCTION

In many developed legal systems, the right of an accused person to confront witnesses against him in criminal proceedings arises out of either the system’s constitutional jurisprudence or explicit texts of rights instruments.\(^1\) The right also exists within various international human rights treaties.\(^2\) There is, however, no universal acceptance of the *content* of one’s right to confront witnesses.\(^3\) Accordingly, throughout the world, the rules governing the admissibility of hearsay evidence and the cross-examination of witnesses, the various rights to confront witnesses, and the broader rights of a criminal defendant to test the prosecution’s evidence and to benefit from a fair trial have become so conceptually entangled that it is difficult to discern a coherent unifying theory—or a principled basis—underlying the application frameworks for each of these doctrines.\(^4\) In other words, the laws relating to confrontation rights are an example of what Mirjan Damaška might call “evidence law adrift,”\(^5\) where the term “adrift” in nautical circles means a vessel that is neither deliberately making way through the water nor at anchor or made fast to the shore.\(^6\) As the laws of confrontation continue to develop on an arguably *ad hoc* basis, it is apparent that the law is neither at anchor (static), nor making way (progressing in a clearly articulated direction).\(^7\) The doctrinal confusion surrounding confrontation rights provides the backdrop to this Article and represents the key mischief that this Article endeavors to address.

In Parts I and II of the Article, I analyze the ways in which confrontation rights are described and protected in the United States and Canada in order to ascertain whether these doctrines are internally coherent, and whether they are convincingly justified on the basis of relevant legal principles. As the analysis in these sections will demonstrate, the law of confrontation in both Canada and the United States is problematic for a variety of reasons—in large measure because each body of law

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2 See, e.g., International Covenant on Civil and Political Rights art. 14(3)(e), Dec. 19, 1966, 999 U.N.T.S. 171 (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”).
3 See id. at 256, 263, 265.
4 See id. at 256–58, 263, 265.
7 See Dennis, supra note 1, at 270.
appears to have developed without faithful adherence to unifying principles. In Part III, I develop a theoretical basis of first principles that can be used to drive the evolution of evidence law, and I will suggest how these principles can be instructive in determining how hearsay evidence should be treated within a criminal trial. My goal in Part III is to propose a theoretically defensible and internally coherent framework for the application of evidence law to the “confrontation” rights of an accused person facing criminal charges in any developed legal system. Ultimately, I conclude that neither American nor Canadian law protects confrontation rights in theoretically defensible and internally coherent ways; thus, careful rethinking of the doctrines applicable to hearsay evidence is required in both jurisdictions in order to render them more principled, more coherent, and therefore more legitimate.

I. CONFRONTATION LAW IN THE UNITED STATES

A. The Source and Content of the American Right to Confront Witnesses

In the United States, the right to confront witnesses is enshrined within the Sixth Amendment to the U.S. Constitution, which provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.\(^8\)

This, the Confrontation Clause, is open to a variety of interpretations—a reality candidly acknowledged by Justice Antonin Scalia writing for the majority of the U.S. Supreme Court in *Crawford v. Washington*.\(^9\) Does it require that the accused be permitted to test all the evidence against him, and that he have a right to cross-examine all those who have made statements against him, or simply that the witnesses who actually testify in a criminal proceeding against the accused must do so in the presence of the accused? Not surprisingly, the Court has attempted to clarify the meaning of the somewhat ambiguous Confrontation Clause.\(^10\)

For the purposes of this Article, my intent is not to chronicle the evolution of American confrontation jurisprudence, but rather to focus on the current content of the law. The most recent changes to confron-

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\(^{8}\) U.S. Const. amend. VI (emphasis added).


\(^{10}\) See, e.g., id. at 43, 50–68.
tation law began with the 2004 decision in *Crawford*, wherein the Court dramatically reinterpreted the meaning of the Confrontation Clause and overruled its 1980 decision in *Ohio v. Roberts*.\(^\text{11}\) The *Roberts* decision held that out-of-court statements could be admissible in spite of the Confrontation Clause so long as they were reliable—that is, as long as they either fell within a “firmly rooted hearsay exception,” or bore “particularized guarantees of trustworthiness.”\(^\text{12}\) Since *Crawford* overruled *Roberts*, I will begin by discussing *Crawford*.

*Crawford* concerned the prosecution of Michael Crawford for assault and attempted murder. Crawford allegedly stabbed the victim, Kenneth Lee, because Lee had attempted to rape Crawford’s wife, Sylvia, on an earlier occasion.\(^\text{13}\) At Crawford’s trial, the prosecution sought, and was permitted, to introduce a taped statement that Sylvia provided to police in the immediate aftermath of the stabbing.\(^\text{14}\) The statement tended to show that Crawford did not act in self-defense when stabbing Lee, but Sylvia did not testify at the trial due to state evidence laws regarding “marital privilege,”\(^\text{15}\) which barred her testimony in this case.\(^\text{16}\) Crawford was convicted, presumably on the basis of Sylvia’s statement to the police (among other evidence), but the decision was ultimately appealed to the Court to determine whether the admission of Sylvia’s taped statement violated the Confrontation Clause.\(^\text{17}\)

After a lengthy survey of the history and origins of the Confrontation Clause,\(^\text{18}\) the majority, in an opinion written by Justice Scalia, made two inferences based on the historical background of the Sixth

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\(^{11}\) See id. at 60–69; see also *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), overruled by *Crawford*, 541 U.S. at 60–69. In *Roberts*, the Court articulated the “indicia of reliability” test, holding that “[r]eliability 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.” 448 U.S. at 66.

\(^{12}\) *Roberts*, 448 U.S. at 66.

\(^{13}\) *Crawford*, 541 U.S. at 38.

\(^{14}\) Id. at 40.

\(^{15}\) Id. Although Justice Scalia used the phrase “marital privilege” in the opinion, the real concern was whether Sylvia was competent to testify in the absence of Crawford’s consent, rather than whether any aspect of her evidence was privileged.

\(^{16}\) See *Wash. Rev. Code* § 5.60.060(1) (1994) (“A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner.”). In other words, under state evidence law, it falls to the accused to determine whether a spouse is competent to testify. See id.

\(^{17}\) See *Crawford*, 541 U.S. at 38–42.

\(^{18}\) See id. at 43–50.
Amendment. First, “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.” This inference led Justice Scalia to conclude that the Sixth Amendment primarily implicated “testimonial hearsay,” and not necessarily statements such as “a casual remark to an acquaintance.” Second, Justice Scalia inferred that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Justice Scalia rejected the interpretation previously espoused by the Court that evidence might be admissible under the Sixth Amendment if it fell within a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.” On this latter point, Justice Scalia observed that the Framers of the Constitution likely did not mean “to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” He further noted that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”

Although Chief Justice William Rehnquist, in a concurring opinion joined by Justice Sandra Day O’Connor, agreed that Sylvia’s statement should not have been admitted, he strongly disagreed with the majority’s decision to overrule Roberts. The Chief Justice expressed distaste for the majority’s “arbitrary” distinction between testimonial and non-testimonial hearsay, questioned the utility of departing from precedent, and referred four times in his brief concurrence to the truth-seeking function of criminal trials, all of which the majority’s new doc-

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19 Id. at 50. Justice Scalia wrote the majority opinion in Crawford, which five other Justices joined. Id. at 38. Chief Justice Rehnquist wrote a separate concurring opinion, which Justice O’Connor joined. Id. at 69.
20 Id. at 50.
21 See id. at 51, 53.
22 Id. at 53–54.
23 Crawford, 541 U.S. at 60 (quoting Roberts, 541 U.S. at 66).
24 Id. at 61.
25 Id. at 62.
26 See id. at 75–76 (Rehnquist, C.J., concurring in the judgment).
27 See id. at 71 (“[A]ny classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary . . . .”).
28 See id. at 72 (“I see little value in trading our precedent for an imprecise approximation at this late date.”).
29 See Crawford, 541 U.S. at 74, 75, 76 (Rehnquist, C.J., concurring in the judgment). In his concurrence, Chief Justice Rehnquist remarked:
trine would hinder. Additionally, Chief Justice Rehnquist presciently suggested that the majority’s opinion might be open to criticism for its lack of grounding in precedent and principle:

Stare decisis is not an inexorable command in the area of constitutional law, but by and large, it “is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”

Ultimately, however, Justice Scalia’s new Confrontation Clause doctrine prevailed, thus signaling the end of the reliability-based law for dealing with out-of-court statements articulated in Roberts.

In Crawford, one can see the skeleton of a new framework for applying the Confrontation Clause. The right to confrontation only exists in the context of testimonial statements. Additionally, a testimonial statement may be admissible even where contemporaneous cross-examination is not possible, so long as the declarant is unable to testify at trial, and the defendant has had a previous opportunity to cross-examine the declarant. Furthermore, Crawford affirms that in the United States, confrontation means only one thing—the opportunity to cross-examine a witness:

To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence

The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.” By creating an immutable category of excluded evidence, the Court adds little to a trial’s truth-finding function and ignores this longstanding guidance.

Id. at 75 (citations omitted) (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

30 See id. at 69–76.

31 Id. at 75 (emphasis added) (citations omitted) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

32 See id. at 68–69.

33 Id.

34 Crawford, 541 U.S. at 68.
(a point on which there could be little dissent), but about how reliability can best be determined.\textsuperscript{35} 

Even after \textit{Crawford}, however, some ambiguity regarding the scope of the Confrontation Clause remained.\textsuperscript{36} Accordingly, in subsequent decisions, the Court expanded upon the definition of “testimonial” evidence and other relevant confrontation issues.\textsuperscript{37} 

In \textit{Davis v. Washington}, the Court considered whether a statement made by a victim of assault to the 911 operator who received the victim’s call was a “testimonial” statement for the purposes of the Confrontation Clause.\textsuperscript{38} The victim, Michelle McCottry, called 911 after Adrian Davis punched her several times while at her residence to remove his belongings. Police officers arrived on the scene and saw clear signs of recent injuries on McCottry. They took a statement from McCottry, and charges were later filed against Davis.\textsuperscript{39} McCottry, however, did not testify at Davis’s trial\textsuperscript{40} and, accordingly, the prosecution sought, and was permitted, to introduce the 911 recording in order to prove the link between Davis and the injuries observed on McCottry.\textsuperscript{41} The Court decided \textit{Davis} together with \textit{Hammon v. Indiana},\textsuperscript{42} a similar case with a subtle distinction: In \textit{Hammon}, the police investigators took a statement from the victim of a domestic assault at her house shortly after the incident occurred, and, when the victim did not testify at Hammon’s trial,\textsuperscript{43} the prosecution sought, and was permitted, to introduce the victim’s statement through the police officer who received the statement.\textsuperscript{44} 

\textsuperscript{35} Id. at 61.  
\textsuperscript{36} Id. at 60–61.  
\textsuperscript{38} See 547 U.S. at 817–18.  
\textsuperscript{39} Id.  
\textsuperscript{40} Id. at 819. The reason why McCottry did not testify is unclear. See id. (“McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear.”).  
\textsuperscript{41} See id.  
\textsuperscript{42} Davis, 542 U.S. 813 (2006). The \textit{Hammon} opinion is included in the \textit{Davis} majority opinion. Id. at 819–21.  
\textsuperscript{43} Id. at 819–20. As in \textit{Davis}, it is unclear why the victim did not testify. See id. (“Amy was subpoenaed, but she did not appear at [Hammon’s] subsequent bench trial.”).  
\textsuperscript{44} Id. at 820.
The majority opinion in *Davis* and *Hammon*, written by Justice Scalia, distinguished between the two types of statements made to authorities in the following manner:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.\(^{45}\)

Whereas the Court in *Davis* held that the victim’s statement to a 911 operator was non-testimonial, and therefore not subject to exclusion under the Confrontation Clause, the Court in *Hammon* held that the victim’s statement to police investigators was clearly testimonial in nature; therefore, it should have been excluded at Hammon’s trial because the accused was not afforded an opportunity to cross-examine the declarant about her statement.\(^{46}\)

Justice Clarence Thomas dissented in part in *Davis* and *Hammon*. He suggested that the majority’s definition of testimonial evidence was overbroad,\(^{47}\) and argued that it would “yield[\] no predictable results to police officers and prosecutors attempting to comply with the law.”\(^{48}\) He also noted the difficulty of singling out the function of a police officer at the time a statement is taken:

In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.\(^{49}\)

Justice Thomas concluded that neither the statement to the 911 operator in *Davis*, nor the statement to police in *Hammon*, was sufficiently formalized to be a testimonial statement.\(^{50}\) Consequently, Justice Tho-

\(^{45}\) Id. at 822.

\(^{46}\) Id. at 834.

\(^{47}\) See id. at 835 (Thomas, J., concurring in part and dissenting in part).

\(^{48}\) *Davis*, 547 U.S. at 838 (Thomas, J., concurring in part and dissenting in part).

\(^{49}\) Id. at 839.

\(^{50}\) Id. at 840. Justice Thomas wrote:
mas agreed that the statement in *Davis* should be admitted, but disagreed that the statement in *Hammon* should have been excluded.\(^{51}\) Although Justice Thomas was alone in his partial dissent, many of his concerns about the distinction between the testimonial or non-testimonial nature of different types of statements received by police re-emerged in *Michigan v. Bryant*, discussed below.\(^{52}\)

In the meantime, however, another domestic violence case, *Giles v. California*, further refined American confrontation doctrine.\(^{53}\) Dwayne Giles was charged with murder after fatally shooting his ex-girlfriend Brenda Avie six times. Giles alleged that he fired in self-defense when Avie rushed at him, because he knew that Avie had previously killed a man and claimed that she was jealous and violent.\(^{54}\) The prosecution, however, sought, and was permitted, to introduce a statement that Avie made to police three weeks before her death when the police responded to a domestic violence call.\(^{55}\) At that time, Avie told police that Giles choked her, punched her in the face, and opened a folding knife in front of her while saying that he would kill her if he found out she was cheating on him.\(^{56}\) The jury convicted Giles of first-degree murder,\(^{57}\) presumably on the basis of the statement that the deceased victim previously made to police concerning Giles’s threats on her life.\(^{58}\)

In *Giles*, the Court expanded upon its statement in *Crawford* that “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds,”\(^{59}\) by deciding whether Giles forfeited his right to confrontation by killing Avie.\(^{60}\) A

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Id. Justice Thomas explained the “Marian” examinations, referred to by Justice Scalia in the majority opinion, in more detail; these examinations are essentially ex parte examinations of witnesses in the style of the civil law, authorized by bail and committal statutes passed in England during the reign of Queen Mary. *Id.* at 835.

\(^{51}\) *Id.* at 842.

\(^{52}\) *Id.* at 834; *see infra* text accompanying notes 80–97.

\(^{53}\) *See Giles*, 128 S. Ct. at 2681.

\(^{54}\) *Id.*

\(^{55}\) *Id.* at 2681–82.

\(^{56}\) *Id.*

\(^{57}\) *Id.* at 2682.

\(^{58}\) *See id.* at 2681–82.

\(^{59}\) *Crawford*, 541 U.S. at 62.

\(^{60}\) *Giles*, 128 S. Ct. at 2681.
majority of the Court agreed with Justice Scalia that an exception to the Confrontation Clause exists where an accused forfeits his right to confrontation as a result of his own wrongdoing, but that this exception would only apply in cases where it could be shown that the accused intended to make the witness unavailable for trial.\textsuperscript{61} Thus, the exception would cover obvious witness intimidation and witness tampering situations, but not murder, unless the specific intent of the accused to render the witness unavailable could be proven.\textsuperscript{62} The majority in \textit{Giles} also affirmed that an exception to the Confrontation Clause existed for “dying declarations,”\textsuperscript{63} but justified its recognition of both the forfeiture and the dying declarations exceptions on the ground that both exceptions clearly existed “at the time of the founding,”\textsuperscript{64} that is, at the time of the adoption of the Sixth Amendment.

The Justices authored five opinions in \textit{Giles}: Chief Justice John Roberts joined in the opinion by Justice Scalia;\textsuperscript{65} Justice Thomas reiterated that non-formalized statements to police are not subject to the Sixth Amendment, but, since the Court was not asked to rule on this question in \textit{Giles}, he agreed with the result;\textsuperscript{66} Justice Samuel Alito concurred in much the same manner as Justice Thomas;\textsuperscript{67} Justice David Souter, joined by Justice Ruth Bader Ginsburg, concurred in the result, but argued that the specific intent aspect of the forfeiture doctrine could be inferred in cases of domestic violence, or “classic” abusive relations where the abuser intends to “isolate the victim from outside help”;\textsuperscript{68} and, Justice Stephen Breyer, joined by Justices John Paul Stevens and Anthony Kennedy, dissented.\textsuperscript{69} The dissenting justices would not read a specific intent requirement into the forfeiture doctrine, preferring instead a lesser requirement of a general intent to do something that would make the witness unavailable.\textsuperscript{70} These justices would therefore have allowed the admission of hearsay statements in \textit{Giles}, because the defendant forfeited his confrontation rights when he killed the victim/witness.\textsuperscript{71}

\textsuperscript{61} \textit{Id.} at 2681, 2693.
\textsuperscript{62} \textit{Id.} at 2684, 2693.
\textsuperscript{63} See \textit{id.} at 2682–85.
\textsuperscript{64} See \textit{id.} at 2693.
\textsuperscript{65} \textit{Id.} at 2681.
\textsuperscript{66} \textit{Giles}, 128 S. Ct. at 2693–94 (Thomas, J., concurring).
\textsuperscript{67} \textit{Id.} at 2694 (Alito, J., concurring).
\textsuperscript{68} \textit{Id.} at 2694–95 (Souter, J., concurring in part).
\textsuperscript{69} \textit{Id.} at 2695 (Breyer, J., dissenting).
\textsuperscript{70} See \textit{id.} at 2698–99.
\textsuperscript{71} See \textit{id.} at 2695.
Ultimately, the admission at trial of Avie’s previous statement, without a determination as to whether Giles intended to make Avie unavailable to testify, violated Giles’s constitutional right to confront witnesses against him, thus invoking the forfeiture-by-wrongdoing exception to the Confrontation Clause. The case was “remanded for further proceedings not inconsistent with” the majority opinion.

American confrontation law continued to evolve as the Court faced a number of cases that required it to clarify and flesh out the Crawford doctrine. In Melendez-Diaz v. Massachusetts, decided in 2009, a bare majority of the Court—agreeing with an opinion that was again written by Justice Scalia—concluded that certificates of analysis from drug laboratories were “testimonial” evidence for the purpose of the Confrontation Clause because the sole purpose of the certificates under Massachusetts law was to provide evidence of the composition and weight of the drugs. The majority opinion in this case quickly established that lab certificates were testimonial, and proceeded, for the remainder of the opinion, to explain why “the sky will not fall after today’s decision,” in direct response to arguments by Massachusetts and the dissenting Justices suggesting that, for efficiency reasons, the nationwide volume of drug trials required the admission of certificates instead of live testimony. The majority was not persuaded by these arguments, and ultimately ruled that the certificates of analysis should not have been admitted at Melendez-Diaz’s trial for drug trafficking. The matter was

72 Giles, 128 S. Ct. at 2684 (Scalia, J., majority opinion).
73 Id. at 2693.
74 Melendez-Diaz, 129 S. Ct. at 2531–32.
75 See id. at 2540. The Court explained:

Perhaps the best indication that the sky will not fall after today’s decision is that it has not done so already. Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution’s intent to use a forensic analyst’s report. Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst’s appearance at trial.

Id. at 2540–41 (citations omitted).
76 It seems likely that the United States (as amicus curiae, by special leave of the Court, supporting Massachusetts) would echo the arguments raised by Massachusetts at the Court hearing, since the federal Drug Enforcement Agency would surely have been concerned about the impact of the decision in this case on their work.
77 See id., 129 S. Ct. at 2540.
78 See id. at 2540–42.
remanded for further proceedings not inconsistent with the majority’s opinion.\textsuperscript{79}

Another of the Court’s recent significant decisions on confrontation law, \textit{Michigan v. Bryant}, was decided on February 28, 2011.\textsuperscript{80} This case involved the alleged murder of Anthony Covington by Richard Bryant. Police responded to an emergency call indicating that someone had been shot, and found Covington at a gas station with a gunshot wound in his abdomen. Police immediately asked Covington who had shot him, and where the shooting occurred. Covington replied that “Rick” (Bryant) shot him at Bryant’s house. Police then proceeded to Bryant’s residence and found a gunshot hole through the back door, a bullet on the ground, and blood on the back porch. Covington subsequently died in the hospital.\textsuperscript{81} At trial, the police officer who received the statements made by Covington prior to his death testified as to the substance of those statements.\textsuperscript{82} A jury convicted Bryant of second-degree murder.\textsuperscript{83}

The Court was asked to decide whether Covington’s statements were properly admitted through the police officer.\textsuperscript{84} A majority opinion, written by Justice Sonia Sotomayor, held that the statements to the police officer were non-testimonial, and were therefore not capable of implicating the Confrontation Clause.\textsuperscript{85} The majority reiterated the distinction between testimonial and non-testimonial evidence as previously drawn in \textit{Davis},\textsuperscript{86} namely that statements to police in response to an ongoing emergency are non-testimonial, but statements to the police for the purpose of proving past events in contemplation of future criminal proceedings are testimonial.\textsuperscript{87} Furthermore, in delineating the line between an investigation and a response to an ongoing emergency, the majority observed that “[t]he circumstances in which an encounter occurs—e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact,”\textsuperscript{88} and “the duration and scope of an emer-

\textsuperscript{79} \textit{Id.} at 2542.
\textsuperscript{80} 131 S. Ct. at 1143.
\textsuperscript{81} \textit{Id.} at 1150.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 1152.
\textsuperscript{85} \textit{Id.} at 1166–67.
\textsuperscript{86} \textit{See} \textit{Bryant}, 131 S. Ct. at 1153–54; \textit{Davis}, 547 U.S. at 822.
\textsuperscript{87} \textit{See} \textit{Bryant}, 131 S. Ct. at 1153–54.
\textsuperscript{88} \textit{Id.} at 1156.
ergency may depend in part on the type of weapon employed.” Based on these observations, the majority held that the police faced an ongoing emergency when Convington made his statements, because they did not know whether the shooter was still a threat and because the case involved a gun. As the majority noted, “[i]f an out-of-sight sniper pauses between shots, no one would say that the emergency ceases during the pause.”

Interestingly, Justice Scalia wrote a lengthy and scathing dissent in Bryant, highlighting the fact that at least five different police officers interrogated Covington during the “ongoing emergency,” each interrogation occurred at least twenty-five minutes after Covington had been shot, and not one of these officers asked the most logical question in response to a true emergency (“Where is the shooter?”). Justice Scalia would have decided this “absurdly easy case” by characterizing Covington’s statement to the police as testimonial, thereby rendering it inadmissible due to the lack of opportunity for confrontation. Justice Scalia’s main thematic concern in his dissent was that the Court was creating “a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned,” and he argued that the Court was attempting “to fit its resurrected interest in reliability into the Crawford framework, but the result is incoherent.”

89 Id. at 1158.
90 Id. at 1163–64.
91 Id. at 1164.
92 Id. at 1168 (Scalia, J., dissenting). The opening lines of Justice Scalia’s dissent read as follows:

Today’s tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort.

Bryant, 131 S. Ct. at 1168.
93 See id. at 1170–72.
94 Id. at 1170, 1171 (Scalia, J., dissenting).
95 See id. at 1171.
96 See id. at 1174.
97 See id. at 1175.
In summary, it is clear that, beginning with *Crawford* in 2004, the Court created a categorical exclusionary rule for testimonial evidence when a declarant is unavailable to be contemporaneously cross-examined, and even for testimonial evidence where a prior opportunity for cross-examination existed, unless the declarant was truly unavailable to testify in person at the subsequent trial.\(^98\) Several cases since 2004, most authored by Justice Scalia, refined this rule by amplifying the distinction between testimonial and non-testimonial evidence and affirming the residual exceptions for dying declarations and forfeiture by wrongdoing.\(^99\) As *Bryant* indicates, however, the law in this area may continue to evolve, particularly if Justice Scalia’s dominant philosophy regarding confrontation jurisprudence loses favor with current members of the Court.\(^100\)

**B. Critiquing the Coherence of American Confrontation Doctrine**

The preceding overview of American case law was necessarily detailed due to the rapid recent development of the law. It is also important to note that the above discussion relates only to Sixth Amendment Confrontation Clause jurisprudence, and not to hearsay law more generally. It should be recalled that, in order for a statement to be admissible in a criminal trial, it is not sufficient for the statement to simply conform to the requirements of the Constitution; the statement must also be admissible under normal rules of evidence, including rules pertaining to hearsay statements.\(^101\) Thus, the concepts of hearsay and confrontation remain fundamentally associated, even in the post-*Crawford* era.\(^102\) That said, codified rules of evidence in the United States contain numerous exceptions to the general exclusionary rule applicable to hearsay.\(^103\) Commentators suggest that hearsay rules are mainly *enabling* rules: “Cumulatively, it is said, the exceptions have turned hearsay from a ‘rule of exclusion’ into a ‘rule of admission,’ a rule that allows the introduction of virtually any hearsay statement that has probative value.”\(^104\)

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\(^{98}\) See *Crawford*, 541 U.S. 68–69.

\(^{99}\) See *Bryant*, 131 S. Ct. at 1165; *Melendez-Diaz*, 129 S. Ct. at 2532; *Giles*, 128 S. Ct. at 2682–83; *Davis*, 547 U.S. at 813, 826–34.

\(^{100}\) See *Bryant*, 131 S. Ct. at 1164–65; see also id. at 1168 (Scalia, J., dissenting).


\(^{102}\) Id. at 54–55.

\(^{103}\) Id. at 13 (“The Federal Rules of Evidence codify some three dozen exceptions to the prohibition of hearsay.”).

\(^{104}\) Id. (footnote omitted).
Thus, with an appreciation for how the Confrontation Clause dominates, but does not fully occupy, the field of law relating to out-of-court statements in the United States, and with a solid understanding of the governing American confrontation doctrine, it is now possible to assess the internal coherence of the law and the attempts at justification.

1. “Confronted with the Witnesses Against Him”: A Textual Critique

From a grammatical and plain language perspective, it is not immediately apparent that the Sixth Amendment guarantees a criminal defendant any cross-examination right under any circumstances. As an illustration of this point, consider the difference between the following two sentences: 1) The accused shall enjoy the right to be confronted with the witnesses against him; and, 2) The accused shall enjoy the right to confront with the witnesses against him. In the first sentence, the action (confrontation) is carried out by the witnesses, and the accused is merely the object of the action—the one who will be confronted. In the second sentence, however, the accused is the subject of the sentence—the one who carries out the confrontation—and the witnesses are merely the object of the sentence upon whom the action is carried out. In the first sentence, the plain language tells us that any confrontation in a trial is actually done by the witnesses, who must come face-to-face with the defendant in order to accuse and bear witness against him. As a corollary to the preceding proposition, the first sentence also suggests that any reciprocal right of the accused to cross-examine the witnesses who confront him at trial cannot be sourced expressly from the text of the first sentence; if such a right exists, then it must be implied from some extra-textual source. In the second sentence, however, it is clear that the accused is granted a right to confront, accuse, and defy the witnesses against him in a trial, where cross-examination of the witnesses would logically be the vehicle through which this confrontation is achieved.

This subtle grammatical distinction can drastically alter the way in which one interprets a right to confrontation. For instance, if we put

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105 See U.S. Const. amend. VI.
106 See id. The Oxford English Dictionary defines “confront” in the following ways: “esp. To face in hostility or defiance; to present a bold front to, stand against, oppose,” and, “To face as an accuser or as a witness in a trial.” See 3 Oxford English Dictionary 719 (2d ed. 1989).
aside the issue of whether “originalism”\textsuperscript{107} is a valid and appropriate interpretive technique for expounding a constitution, then the above grammatical analysis—wherein the first sentence mirrors the text of the Confrontation Clause—should cause us to question whether the Framers of the Sixth Amendment intended to grant accused persons a right to cross-examine witnesses, or whether they simply intended to grant accused persons the right to be brought face-to-face with the trial witnesses who would actually confront the accused with their incriminating evidence. It is neither far-fetched nor redundant to suggest that the Framers intended the Confrontation Clause to provide an accused with the more limited right simply to be present at trial; after all, such a right is not provided for explicitly within any other part of the U.S. Constitution.\textsuperscript{108} Furthermore, as Justice Scalia noted in \textit{Crawford}, “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.”\textsuperscript{109} Justice Scalia, however, does not explain in any meaningful detail why the Framers intended to prevent ex parte examinations (for instance, to prevent

\textsuperscript{107} There is likely no single accepted understanding of what the term originalism means, but the general thrust of the idea in both its older and its more recent variants has been described by Peter J. Smith in \textit{How Different Are Originalism and Non-Originalism?:}

The “old originalism,” which tended to focus on the intent of the Framers and was largely a negative theory developed to criticize the decisions of the Warren and Burger Courts, has been mostly displaced by the “new originalism,” which tends to focus on the objective meaning of the constitutional text and seeks to provide a positive basis for constitutional decisionmaking.

\textsuperscript{108} Although the right to be present at one’s trial is constitutionally protected in the United States, this is because the right has been read into the due process clause of the Fifth Amendment to the U.S. Constitution, not because the text of the Constitution explicitly provides for such a right. \textit{See Hopt v. People of the Territory of Utah}, 10 U.S. 574, 579 (1884):

The legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.

\textit{Id.}

\textsuperscript{109} \textit{See Crawford}, 541 U.S. at 50.
unreliable evidence from reaching the trier of fact). Instead, it seems to satisfy the Crawford majority that the Framers did intend to prevent the admission of ex parte examinations, and this fact, alone, drives the majority’s reasoning. If the mischief to be avoided by the Confrontation Clause is ex parte examinations, simpliciter, then it would make sense for the Sixth Amendment to guarantee accused persons a right to have witnesses testify in their presence, and nothing more. In other words, on the basis of the historical facts accepted by the Crawford majority, and particularly on the basis of the text of the Confrontation Clause, it would have been plausible for the majority in that case to find that no right to cross-examine witnesses regarding testimonial or non-testimonial evidence is protected by the Sixth Amendment. Instead, the majority could reasonably have found that the Confrontation Clause only guarantees an accused the right to be present at her trial, face-to-face with the witnesses against her.

Even if one is not persuaded by this textual critique of American Confrontation Clause jurisprudence, there remains some ambiguity about the definition of the term “witnesses” within the context of the Sixth Amendment. As Justice Scalia observed in Crawford, “[o]ne could plausibly read ‘witnesses against’ a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between.” In order to resolve this ambiguity, Justice Scalia looked to “the historical background of the Clause to understand its meaning,” and concluded, as discussed above, that “witnesses” means anyone who gives “testimonial” evidence, either inside or outside of court. If Justice Scalia’s originalist approach in this case to expounding the American Constitution is not accepted as a valid inter-

110 Cf. id. at 42–50 (discussing historical denunciation of ex parte procedures without specifying why they are unjust).
111 See id. at 47–49.
112 See id. at 42–50.
113 Cf. id.
114 I would like to note that many others have offered textual critiques of various Confrontation Clause doctrines. However, most critiques appear to focus on the meaning of the word “witness,” one who gives in-court testimony versus anyone who offers evidence, rather than on the grammatical structure of the Clause and the meaning that can be inferred from this structure. See, e.g., Fred O. Smith, Jr., Crawford’s Aftershock: Aligning the Regulation of Non-Testimonial Hearsay with the History and Purpose of the Confrontation Clause, 60 STAN. L. REV. 1497, 1508–12 (2008) (challenging use of the Fifth Amendment definition of “testimony” in the Sixth Amendment context).
115 See Crawford, 541 U.S. at 42–43.
116 Id. (citations omitted).
117 See id. at 43.
118 See id. at 51–52.
pretive technique, or if he is incorrect in his assessment of relevant historical realities— which lead him to suggest that ex parte examinations, simpliciter, were the primary evil that the Confrontation Clause sought to address)—then one can see how the definition of “witnesses” for the purposes of the Confrontation Clause might mean something altogether different from, but just as legitimate as, that which Crawford tells us the term now means.

As the above textual critiques of American confrontation law demonstrate, the text of the Sixth Amendment is capable of supporting a variety of meanings. The Court, in its most recent line of Confrontation Clause cases, derived a meaning for the clause by hypothesizing about the original intent of the Framers. This meaning, when compared with various other textually plausible meanings, is not necessarily the most logical or persuasive meaning for the Clause, since, as I will explain below, it cannot be justified by legal principles.

2. Artificial Distinctions and Exceptions: A Principled Critique

One can easily claim that an originalist approach to constitutional interpretation, and specifically interpretation of the Confrontation Clause, is a principled approach—the relevant principle being that the Framers’ intent at the time of founding should determine the meaning of the clause. Even if this interpretive methodology reflects a “principled” approach, however, the approach is arguably based on political principles, not legal principles. For instance, if one were to defend

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119 See Sklansky, supra note 101, at 47 (“The originalist reasoning in Crawford, Davis, and Giles has been challenged on two main grounds. The first is that originalism is a mistaken approach to constitutional interpretation; the second is that the Court is wrong about what kind of evidence was commonly allowed by eighteenth-century common law.”).

120 See, e.g., Crawford 541 U.S. at 50–56.

121 Professor Richard Fallon has gone so far as to suggest that political principles and originalist interpretations may be inextricably linked. See Richard H. Fallon, Jr., Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?, 34 Harv. J.L. & Pub. Pol’y 5, 19 (2011). Fallon states:

[E]ven in the Founding generation ... reasonable people reasonably disagreed in light of their reasonable but divergent political outlooks. It is no small challenge to specify the rules by which to determine what a hypothetical reasonable observer would have concluded with regard to questions that were not clearly foreseen and that understandably provoke, or would historically have provoked, ideologically inflected disagreement. In addressing that challenge, a fully specified originalist theory might actually need to identify the political values or concerns to be attributed to the hypothetical reasonable observers whose views define the original public meaning.

Id.
an originalist approach to constitutional interpretation, one would likely argue that it is politically unacceptable for the courts to create new constitutional law in cases where such judicial activism is not necessary and where an existing answer to a legal question can be found by asking what the Framers of the Constitution intended the answer to be.\footnote{See Stephanos Bibas, Essay, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 Geo. L.J. 183, 188 (2005). Bibas asserts that originalists believe “the job of judges is archaeology, not architecture: they must discover meaning, not invent it.” Id.} The role of creating constitutional law, an originalist might say, should be reserved unto the polity as whole, and implemented through the actions of elected officials, not through the judiciary.\footnote{Id. at 186–88.} This type of response is concerned more with the political legitimacy of lawmaking than with the soundness of legal decisions, as assessed in reference to legal principles.\footnote{Id. at 188.} In other words, an originalist response to the question, “why does the Confrontation Clause only protect testimonial evidence?” (as demonstrated implicitly in the Crawford opinion) could simply be, “because the Framers wanted it that way.”

This answer—while it may or may not be historically accurate—does not allow for meaningful legal debate\footnote{See, e.g., Thomas Y. Davies, What Did the Framers Know and When Did They Know It? Fictional Originalism in Crawford v. Washington, 71 Brook. L. Rev. 105, 105 (2005). Davies claims that “[o]riginal meaning—the public meaning that a constitutional provision carried at the time the provision was framed—is a historical phenomenon. As such, it can be established only by valid historical evidence,” rather than by legal debate. Id.} through an ongoing process of justification, critique, and counter-justification, as to why the law is the way it is, whether the law does what it is supposed to do, and, if not, whether the law should be fine-tuned. In my view, a more useful answer to the same question (for instance, “because this type of evidence presents the greatest danger of unreliability, and reliable evidence is essential in order for a trial to achieve its truth-seeking purpose”) would refer to legal principles that can be debated in the interest of understanding, applying, and shaping the law. Thus, at the outset, one can critique the current state of American confrontation law—law that was created through originalist interpretation—by arguing that it is not a principled body of law because it does not draw upon legal principles as a source of justification for its content.

Even if one accepts, as Richard Fallon suggests, that originalism as a doctrine of constitutional interpretation has “the capacity for princi-
pled application,” it seems unlikely that such applications can be found in prevailing Confrontation Clause jurisprudence. As Fallon notes, generally, “more specified originalist theories are likely to be more principled than less specified theories,” but “many originalists’ working theories—as manifest by the judgments they reach about particular cases and the arguments they adduce to support their judgments—are poorly specified.” Fallon further suggests that Justice Scalia, the primary author of the recent authoritative string of Confrontation Clause decisions, is particularly notorious for being an unprincipled originalist: “[W]ell-developed literature supports the conclusion that Justices Scalia and Thomas are not consistent in the versions of originalism that they employ—presumably because their theories are not sufficiently specified to constrain them from varying.”

As evidence in support of this observation, Fallon notes that both Justices Scalia and Thomas routinely vote in ways that prioritize the value of precedent, even when these votes “seem impossible to justify by reference to originally understood meanings,” but that on other occasions, the two Justices “have voted to overrule longstanding precedents on the sole ground that they deviate from the original understanding.” The problematic element of this voting pattern, from Fallon’s perspective and from the perspective of any critic who espouses principled legal decision-making, is that there is no “well-developed, articulated theory of when and why non-originalist precedent should control.” In other words, originalist judges like Justice Scalia, who often make decisions on an ad hoc basis without reference to underlying legal principles, may be causing law (including evidence law) to continue “adrift” and directionless.

If one values principled judicial decision-making, therefore, it would seem that originalism in general, and Justice Scalia’s variant of originalism in particular, are poor interpretative tools for deciding constitutional cases. With respect to current American Confrontation Clause doctrine, the lack of underlying legal principles—and the prob-

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126 Fallon, supra note 121, at 15.
127 See Davies, supra note 125, at 192.
128 See Fallon, supra note 121, at 15.
129 Id. at 16.
130 Id. (footnote omitted).
131 Id. at 18.
132 Id.
133 Id.
134 Cf. Davies, supra note 125, at 213–15 (criticizing the tendency of originalists to revise history to fit predetermined outcomes).
lems that this absence creates—manifests itself in a variety of ways. For instance, the Court’s distinction between testimonial and non-testimonial evidence for the purposes of the Confrontation Clause appears arbitrary because there is no logical reason why one type of evidence should garner constitutional protection while the other does not.\(^{135}\) If the ultimate goal of the Confrontation Clause is to ensure that evidence is reliable, which it was for many pre-\textit{Crawford} decisions and which even Justice Scalia acknowledged in \textit{Crawford},\(^{136}\) then why should non-testimonial evidence be admitted without “testing in the crucible of cross-examination”\(^{137}\) as the Sixth Amendment seemingly requires?

This unprincipled development in the law that follows from \textit{Crawford} will likely reduce many opportunities for cross-examination, and incentivize police forces and lower courts to obtain and characterize statements as non-testimonial.\(^{138}\) In fact, one commentator suggests that the testimonial/non-testimonial distinction is already being manipulated to achieve desired results:

These distinctions have been seized on by lower courts, which have read expansively the \textit{Davis} criterion of emergency statements as non-testimonial and have emphasized any conceivable purpose for the interview as non-interrogation to remove hearsay declarations from \textit{Crawford’s} Confrontation strictures. Both the de-constitutionalizing of admissibility standards for non-testimonial hearsay and the expansive definition being applied to that category of out-of-court statements will permit trials to be conducted with significant testimony never subjected to the testing of cross-examination.\(^{139}\)

Jules Epstein’s comments in the above passage predate \textit{Bryant}, but the phenomenon that he describes is evidently not just occurring in lower courts.\(^{140}\) Notably, the majority in \textit{Bryant} went to great lengths to characterize the situation that the police officers faced as an “ongoing

\(^{135}\) See \textit{Crawford}, 541 U.S. at 61.

\(^{136}\) See id. (“To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”)

\(^{137}\) See id.


\(^{139}\) Id. (footnotes omitted).

\(^{140}\) See, e.g., \textit{Bryant}, 131 S. Ct. 1167.
emergency,” even though, as Justice Scalia pointed out in his dissent, the statements given to five different police officers were elicited between twenty-five and thirty-five minutes after the victim had been shot, they were made about six blocks away from the scene of the shooting, and none of the officers demonstrated any significant concern for their own safety or the safety of the public. Perhaps some unacknowledged principle motivated the majority to conclude that, notwithstanding the obviously testimonial nature of the victim’s statements in *Bryant* and the absence of any true ongoing emergency, there was nonetheless an important reason why the victim’s statements should be admitted without opportunity for cross-examination. Unless the principles that underpin these judicial decisions are explicitly acknowledged, however, the courts may appear, as the Supreme Court did in *Bryant*, to manipulate facts and law arbitrarily so as to achieve results that cannot be justified on a principled basis.

Further examples of the unprincipled nature of current American confrontation law are evident in the exceptions to the general exclusion of testimonial evidence for dying declarations and forfeiture by wrongdoing. The Court recognizes these exceptions not because they advance the goal of the Confrontation Clause in any independent way, but because “the Confrontation Clause is ‘most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.’” Can it really be principled to accept these exceptions to the general exclusionary rule simply because they existed when the Sixth Amendment was written, without first inquiring as to whether they support the right that the Confrontation Clause seeks to protect? It seems likely that the principle underlying the exception as it was originally understood may have changed over time; for example, the historic notion that dying declarations are inherently reliable because “no one would wish to meet his Maker with a lie on his lips” may no longer be persuasive in an era when a population is less religious and/or devout than in the past. If it is possible that the rationale underlying an exception at the

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141 See id.
142 See id. at 1170–72.
143 See id. at 1168.
144 See Giles, 128 S. Ct. at 2682–83.
145 Crawford, 541 U.S. at 54.
time of the founding is no longer applicable due to any one of a number of historical, social, political, or legal facts, then it would seem inherently unprincipled to incorporate such an exception into contemporary law without a proper assessment of the logical validity of the exception.

My point in drawing attention to the above examples, each of which lack an underlying legal principle, is not, at this point, to suggest what principle or principles should animate the development of American Confrontation Clause jurisprudence. Instead, I simply wish to point out the lack of internal coherence within the current doctrine, with its artificial distinctions between various types of testimony, its potential to encourage results-oriented analysis, and its bizarre recognition of exceptions that do not seem to advance the goal of the Sixth Amendment.

Where the law developed so clearly from originalist constitutional interpretations, and in the absence of governing legal principles, it becomes almost impossible to engage in reasoned legal debate about the law. We can certainly engage in an extensive historical debate about what the common law of confrontation looked like at the time of the founding, and many commentators have engaged in just such a debate, but within the current American confrontation landscape, we cannot really argue about whether or not the law should be a certain way on the basis of purely legal grounds. This reality should be seen as unfortunate and regrettable in a society that values the communication and free exchange of ideas within the public intellectual marketplace. Accordingly, Part III of this Article proposes a solution to the

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147 Part III of this paper will discuss more fully the types of principles that might prove instructive when considering any type of confrontation law analysis.

148 See supra text accompanying notes 105–146.

149 See, e.g., Thomas Y. Davies, Selective Originalism: Sorting Out Which Aspects of Giles’s Forfeiture Exception to Confrontation Were or Were Not “at the Time of the Founding,” 13 Lewis & Clark L. Rev. 605, 626–27 (2009) (noting, among other things, that only sworn and confronted prior testimony was admissible under the forfeiture doctrine over much of the last 200 years); Tom Harbinson, Crawford v. Washington and Davis v. Washington’s Originalism: Historical Arguments Showing Child Abuse Victims’ Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause, 58 Mercer L. Rev. 569, 572–79 (2007) (identifying contradictory precedent undermining Scalia’s justification for the Confrontation Clause); Ellen Liang Yee, Forfeiture of the Confrontation Right in Giles: Justice Scalia’s Faint-Hearted Fidelity to the Common Law, 100 J. Crim. L. & Criminology 1495, 1507–12 (2010) (arguing that a clear requirement of specific intent to make a witness unavailable for trial was not a historic requirement of the common law in invoking the forfeiture by wrongdoing exception to the hearsay rule).

150 See Red Lion Broad. Co. v. Fed. Commc’ns Comm’n, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in
current problem by suggesting appropriate principles for use in interpreting the Confrontation Clause and similar bodies of law.

II. CONFRONTATION LAW IN CANADA

A comparison between American and Canadian confrontation law may prove useful because both jurisdictions draw their legal origins from the English common law tradition and both are similarly situated globally in terms of democratic and socio-economic development. As I will explain below, however, Canada and the United States protect a criminal defendant’s ability to cross-examine witnesses in very different ways.

A. The Source and Content of the Law in Canada

1. Sourcing the Right to Cross-Examine Witnesses

The Canadian Charter of Rights and Freedoms (Charter), 151 which forms part of the Canadian Constitution, expressly guarantees that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” 152 More specifically, in the context of criminal law, section 11(d) of the Charter provides that “[a]ny person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” 153 The Canadian Constitution does not explicitly provide an accused with a right to confront witnesses, nor with a right to cross-examine witnesses. 154 The above two Charter sections provide, however, in a circuitous fashion, a quasi-constitutional right to confront and cross-examine witnesses. 155

The text of section 11(d) of the Charter expressly provides an accused with the right to a fair trial. 156 The Supreme Court of Canada (SCC), however, determined that all of the rights listed in sections 8 through 14 of the Charter are simply examples of the principles of

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152 Id. § 7.
153 Id. § 11(d).
154 Cf. id. (omitting mention of confrontation right as an enumerated legal right).
155 See infra text accompanying notes 165–181.
156 Canadian Charter, supra note 151, § 11(d).
fundamental justice that are referred to more generally in section 7: “The sections which follow § 7, like the right to a fair trial enshrined in § 11(d), reflect particular principles of fundamental justice. Thus the discussion of § 7 and § 11(d) is inextricably intertwined.”\textsuperscript{157} Elsewhere, the SCC noted that:

\begin{quote}
[T]he legal rights set out in §§ 8 through 14 of the Charter address, among other things, specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice, and that these provisions are therefore illustrative of the meaning of the principles of fundamental justice. Similarly, all of the legal rights provisions are to be informed in their interpretation and application by the principles of fundamental justice. In particular, §§ 7 through 14 are informed by the cardinal principles of the presumption of innocence and the right to a fair trial.\textsuperscript{158}
\end{quote}

As these passages demonstrate, a right to a fair trial is a primary right that is protected under both section 7 and section 11(d) of the Charter.\textsuperscript{159}

A closely related right determined by the SCC to exist under section 7 of the Charter is the right of an accused person to make a full answer and defense to any charges:

The right to make full answer and defence is protected under s. 7 of the Charter. It is one of the principles of fundamental justice . . . . The right to make full answer and defence manifests itself in several more specific rights and principles, such as the right to full and timely disclosure . . . as well as various rights of cross-examination, among others. The right is integrally linked to other principles of fundamental justice, such as the presumption of innocence, the right to a fair trial, and the principle against self-incrimination.\textsuperscript{160}

While there is a hint in the above passage that cross-examination is a part of the right to make a full answer and defense—which, in turn, is a principle of fundamental justice—this connection is stated more explic-
ity in other decisions.\textsuperscript{161} For instance, in \textit{R. v. Lyttle},\textsuperscript{162} the opening paragraphs of the unanimous SCC decision describe cross-examination in the following manner:

Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be \textit{no other way} to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed. That is why the right of an accused to cross-examine witnesses for the prosecution—without significant and unwarranted constraint—is an essential component of the right to make full answer and defence.\textsuperscript{163}

In \textit{Lyttle}, the SCC allowed the accused’s appeal and ordered a new trial because, on the facts of the case, the accused was unable to exercise his right to make a full answer and defense when the trial judge unnecessarily curtailed the scope of the defense’s cross-examination.\textsuperscript{164}

\textit{R. v. Khelawon} provided a further articulation of the relationship between cross-examination and constitutionally protected rights.\textsuperscript{165} In that case, the SCC noted the value of cross-examination in highlighting untrustworthiness and inaccuracy within witness testimony, but also observed that:

\begin{quote}
[T]he constitutional right guaranteed under § 7 of the \textit{Charter} is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved.\textsuperscript{166}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item [2004] 1 S.C.R. 193. This case involved review of a trial judge’s decision to curtail defense counsel’s right to cross-examine a Crown witness. The SCC found that the trial judge had placed too high a burden on the defense by requiring it to have “substantive evidence” of a defense theory upon which the Crown witness would be cross-examined. The SCC affirmed that only a “good faith basis” was required for a question put to a witness in cross-examination. \textit{See id.} paras. 68–75.
\item \textit{Id.} paras. 1–2.
\item \textit{Id.} paras. 68–75.
\item \textit{See [2006] 2 S.C.R. 787.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
As all of the above cases make clear, under the Canadian Constitution there is no primary right for an accused to confront or cross-examine witnesses, nor is there a clear explanation of the exact connection between cross-examination and the constitutional rights of an accused person.\textsuperscript{167} Cross-examination, however, has been held to be a vital part of the accused’s right to make a full answer and defense, which, in turn, is a principle of fundamental justice that must be respected under section 7 of the Charter if there is potential for someone to be deprived of life, liberty, or security of the person.\textsuperscript{168} Cross-examination is also an important means to ensure that an accused benefits from the ultimate right to a fair trial that is protected by sections 7 and 11(d) of the Charter.\textsuperscript{169}

These indirect means of protecting a defendant’s ability to cross-examine witnesses, in the context of a key hearsay law decision by the SCC, led the court to affirm that “the accused’s inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension.”\textsuperscript{170} Notwithstanding this “constitutional dimension” to the very simple rule that presumptively renders hearsay inadmissible,\textsuperscript{171} there are nonetheless broad exceptions to the hearsay rule that must be discussed in order to understand fully the scope of any right to confront witnesses available to an accused in Canada.

2. The Source and Content of Canadian Hearsay Law

In Canada, the contemporary hearsay exclusionary rule originates from the common law of evidence, rather than from any statute or constitutional provision.\textsuperscript{172} In \textit{R. v. Evans}, the SCC defined hearsay as “[a]n out-of-court statement which is admitted for the truth of its contents.”\textsuperscript{173} The SCC subsequently refined this definition to explain that “[t]he essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-

\textsuperscript{167} See supra text accompanying notes 166–176.
\textsuperscript{169} See id.
\textsuperscript{170} See Khelawan, [2006] 2 S.C.R. para. 3.
\textsuperscript{172} Cf. \textit{R. v. Starr}, [2000] 2 S.C.R. 144, para. 153 (“The law of hearsay in Canada and throughout the common law world has long been governed by a strict exclusionary rule relaxed by a complex array of exceptions.”).
\textsuperscript{173} [1993] 3 S.C.R. 653, 661.
examine the declarant.” In other words, under Canadian law, not every out-of-court statement offered to prove the truth of its content is hearsay because the opportunity for the cross-examination of the declarant at the time the statement is made will generally render the out-of-court statement admissible as something other than hearsay. As previously discussed, however, where a statement is caught by the hearsay definition, it is presumptively inadmissible: “[A]bsent an exception, hearsay evidence is not admissible.”

Historically, the common law in Canada recognized exceptions to the hearsay exclusionary rule for prior identifications, prior testimony, admissions by co-conspirators against one another, dying declarations, and spontaneous statements, among others. Each exception is qualified, however, and includes one or more preconditions which must be satisfied before the hearsay statement is admissible.

In addition to the historical exceptions to the hearsay exclusionary rule, Canadian common law, in R. v. Khan, recognized a residual exception for hearsay statements that were found to be both necessary and reliable. The Khan case involved charges filed against a doctor for sexual assault on a three-year-old child. The Crown sought to introduce, through the victim’s mother, statements that the victim made to

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175 See id. From the content of the hearsay definition, one might think that out-of-court statements that were made where an opportunity for cross-examination actually existed would be admissible, not as an “exception” to the hearsay rule, but simply as admissible evidence that does not amount to hearsay in the first place. This view, while logical, seems at odds with some SCC case law. See, e.g., R. v. Hawkins, [1996] 3 S.C.R. 1043, paras. 47–50. In Hawkins, the Crown had sought at trial to introduce previous testimony of a witness, who had been subject to cross-examination, in a subsequent proceeding. Id. para. 17. The SCC characterized this evidence in Hawkins, and later in Khelawon, as hearsay that could only be admitted under an exception to the exclusionary rule. See Khelawon, [2006] 2 S.C.R. para. 66; Hawkins, [1996] 3 S.C.R. paras. 47–50.
177 Id. para. 34.
182 See David M. Paciocco & Lee Stuesser, THE LAW OF EVIDENCE 174–82 (5th ed. 2008) (describing the various ways in which spontaneous utterances may be admissible under Canadian common law).
183 See sources cited supra notes 178–182.
185 Id. at 533–34.
her mother approximately fifteen minutes after the alleged assault occurred, namely that the doctor had put his penis in the child’s mouth.\textsuperscript{186} The trial judge, however, ruled that the hearsay statements were inadmissible.\textsuperscript{187} The SCC held that the trial judge correctly applied the law as it existed at the time, but questioned “the extent to which, if at all, the strictures of the hearsay rule should be relaxed in the case of children’s testimony.”\textsuperscript{188}

Ultimately, the SCC remanded the matter for a new trial after unanimously concluding that:

[H]earsay evidence of a child’s statement on crimes committed against the child should be received, provided that the guarantees of \textit{necessity} and \textit{reliability} are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.\textsuperscript{189}

The SCC elaborated on the concept of \textit{necessity}, noting:

Necessity for these purposes must be interpreted as “reasonably necessary.” The inadmissibility of the child’s evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.\textsuperscript{190}

Furthermore, the SCC suggested that assessments of the \textit{reliability} of the evidence would be extremely contextual:

Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encoun-

\textsuperscript{186} Id. at 534, 539.
\textsuperscript{187} Id. at 537. The child victim told her mother that the doctor had asked her if she wanted a candy; she said yes; the doctor told her to open her mouth, and then “put his birdie in [her] mouth, shook it and peed in [her] mouth . . . .” Id. at 534.
\textsuperscript{188} See id. at 540.
\textsuperscript{189} Id. at 548 (emphasis added).
\textsuperscript{190} Khan, [1990] 2 S.C.R. at 546 (emphasis added).
ters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.\textsuperscript{191}

The SCC subsequently heralded the \textit{Khan} decision “as the triumph of a principled analysis over a set of ossified judicially created categories.”\textsuperscript{192} The new principled analysis to hearsay exceptions created in \textit{Khan} was further developed in subsequent cases, including \textit{R. v. Starr},\textsuperscript{193} \textit{R. v. Mapara},\textsuperscript{194} and \textit{Khelawon}.\textsuperscript{195}

\textit{Starr} was the first case following \textit{Khan} wherein the SCC considered how the traditional exceptions to the hearsay exclusionary rule and the new principled approach should operate in tandem.\textsuperscript{196} The facts of the case are somewhat complicated, but can be summarized as follows. Robert Starr was acquainted with Bernard Cook and Darlene Weselowski, and was drinking with them on the night they were both shot to death. At some point after Starr left Cook and Weselowski, the two encountered Jodie Giesbrecht, Cook’s girlfriend. Cook told Giesbrecht that he could not stay with her, as he had to perpetrate an “Autopac scam” (an automobile insurance fraud) with Starr later in the night. After leaving Giesbrecht, both Cook and Weselowski were later found dead by the side of a road, each shot in the head.\textsuperscript{197} At trial, the Crown successfully introduced, through Giesbrecht, Cook’s statement that he intended to do an “Autopac scam” with Starr later in the night under the rubric of the “present intentions” traditional exception to the hearsay exclusionary rule.\textsuperscript{198} A jury convicted Starr of two counts of first degree murder.\textsuperscript{199}

On appeal to the SCC, where there was some indication that the reliability of Cook’s statement to Giesbrecht was in question,\textsuperscript{200} the SCC considered whether a traditional hearsay exception, present intentions, could operate to admit evidence even if one of the new principled cri-

\textsuperscript{191} \textit{Id.} at 547.
\textsuperscript{194} \textit{See} [2005] 1 S.C.R. paras. 12–16.
\textsuperscript{195} \textit{See} [2006] 2 S.C.R. paras. 42–45.
\textsuperscript{197} \textit{See id.} paras. 108–17.
\textsuperscript{198} \textit{Id.} paras. 111, 176.
\textsuperscript{199} \textit{Id.} para. 19 (L’Heureux-Dubé, J., dissenting).
\textsuperscript{200} \textit{Id.} paras. 178–79 (majority opinion).
teria of necessity and reliability was not met. Prior to *Starr*, the SCC’s “application of the principled approach to hearsay admissibility in practice [had] involved only expanding the scope of hearsay admissibility beyond the traditional exceptions.” The SCC majority in *Starr* agreed that necessity and reliability needed to be the dominant concerns of any court considering the admission of a hearsay statement, since “[i]t would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.” The majority, however, also explained that the existing categorical exceptions to the hearsay rule served useful functions by providing participants in the trial process with “certainty, efficiency, and guidance.” Thus, *Starr* demonstrates the primacy of the principled approach over the categorical exception approach to hearsay law in Canada:

In some rare cases, it may also be possible under the particular circumstances of a case for evidence clearly falling within an otherwise valid exception nonetheless not to meet the principled approach’s requirements of necessity and reliability. In such a case, the evidence would have to be excluded. However, I wish to emphasize that these cases will no doubt be unusual, and that the party challenging the admissibility of evidence falling within a traditional exception will bear the burden of showing that the evidence should nevertheless be inadmissible.

Ultimately, the SCC held that Cook’s statement to Giesbrecht was not admissible under either the “present intentions” traditional exception or the principled approach because it was made under circumstances of suspicion, and therefore did not possess threshold reliability.

The other important holding in *Starr* concerned the inquiry into threshold reliability, which was to be performed by a judge on a *voir dire*, required to determine whether a hearsay statement should be ad-
missible under the principled approach. On this point, the Starr majority distinguished between threshold reliability and ultimate reliability: “Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness.” The distinction is significant because the different reliability assessments are performed by different entities—a trial judge determines threshold reliability, and if it exists, then the hearsay statement is “passed on to be considered by the trier of fact.” The SCC, however, cautioned that “a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable.” In Starr, the majority also suggested that the trial judge should only look at factors surrounding the circumstances in which the hearsay statement was made when assessing threshold reliability, and not at other evidence, such as “the declarant’s general reputation for truthfulness, nor any prior or subsequent statements, consistent or not.” This restriction on the focus of the reliability inquiry proved to be problematic, and was subsequently overruled in Khela-won.

Mapara adequately summarizes the law relating to hearsay in Canada after Starr:

(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
(b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
(c) In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

207 See id. para. 214.
209 See id. para. 216.
210 Id. para. 217.
211 See id.
(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.\textsuperscript{213}

In \textit{Mapara}, the SCC applied this framework to the \textit{R. v. Carter}\textsuperscript{214} co-conspirator hearsay exception, and held that the facts of \textit{Mapara} met the traditional exception criteria from \textit{Carter}.\textsuperscript{215} Further, the SCC held that the co-conspirators exception remained valid because the hearsay in question was both necessary and reliable, as required by the principled approach.\textsuperscript{216}

Finally, as previously noted, in \textit{Khelawon}, the SCC revisited the question of what evidence should be considered by a trial judge when assessing threshold reliability under the principled approach.\textsuperscript{217} The case involved accusations of assault and abuse filed against Ramnarine Khelawon, the manager of a retirement home, by five its senior residents.\textsuperscript{218} By the time of the trial, however, four of the five complainants were deceased, and the fifth was no longer competent to testify.\textsuperscript{219} Thus, under the principled approach to hearsay, the Crown sought to introduce videotaped statements the complainants had provided to the police because, as the Crown argued, the videos were reliable and necessary.\textsuperscript{220} The trial judge admitted all the videos after a voir dire to determine threshold reliability, but ultimately found only two of the videos reliable enough to support a conviction.\textsuperscript{221} Khelawon was convicted of various charges related to two of the five complainants.\textsuperscript{222} A unanimous SCC unequivocally overturned the \textit{Starr} decision, which held that only circumstances surrounding the making of a hearsay statement should be considered when assessing threshold reliability.\textsuperscript{223} Rather, the SCC directed courts to adopt a more “functional approach”\textsuperscript{224} that considers all of the relevant evidence, including any corroborating evidence.\textsuperscript{225} After considering all of this evidence in \textit{Khelawon}, the SCC

\textsuperscript{213} \textit{Mapara}, [2005] 1 S.C.R. para. 15.
\textsuperscript{214} [1982] 1 S.C.R. 938.
\textsuperscript{216} See \textit{id}.
\textsuperscript{217} See \textit{[2006]} 2 S.C.R. para. 3.
\textsuperscript{218} \textit{Id}. para. 5.
\textsuperscript{219} \textit{Id}.
\textsuperscript{220} \textit{Id}. para. 9.
\textsuperscript{221} \textit{Id}. paras. 27–28.
\textsuperscript{222} \textit{Id}. para. 5.
\textsuperscript{224} \textit{Khelawen}, [2006] 2 S.C.R. para. 93.
\textsuperscript{225} \textit{Id}. paras. 94–100.
affirmed that the trial judge erred in admitting the videotaped statements of the complainants because there were significant indicators of their unreliability; for example, among other concerns, the statements were not under oath, one of the declarants was barely comprehensible, and one of the declarants’ mental capacity was an issue.226

The core of Canadian hearsay law has not changed significantly since Khelawon, and the Khan/Starr framework has been applied in a number of cases. For instance, in R. v. Couture, the SCC held that the principled approach to hearsay must be interpreted in a manner that preserves and reinforces the traditional rules of evidence.227 In that case, the SCC determined that hearsay should have been excluded, even if it was necessary and reliable, in order to preserve the integrity of the rule of spousal incompetence to testify.228 In R. v. Devine, the SCC deemed admissible a videotaped statement by a witness who recanted the statement at trial because the dual criteria of reliability and necessity were satisfied by the circumstances in which the statement was obtained and the witness’s recantation, respectively.229

Lastly, in R. v. Blackman, the SCC engaged in a fairly straightforward application of the principled approach to determine that a murder victim’s statements to his mother some time before his death should be admissible through the mother where they were necessary and reliable.230 The SCC further commented on the importance of distinguishing between an absence of evidence of motive to lie and evidence of an absence of motivation to lie; the former should be viewed as a neutral factor, while the latter may signal increased threshold reliability.231 In Blackman, the SCC held that circumstantial evidence of an absence of motive to lie supported a ruling in favor of admission under the principled approach.232 The SCC emphasized, again, that: “The admissibility voir dire must remain focused on the hearsay evidence in question. It is not intended, and cannot be allowed by trial judges, to become a full trial on the merits.”233

To summarize, Canadian hearsay law occupies a space that is close to constitutional law. Although the rule against hearsay has constitu-

228 See id. para. 63.
231 See id. para. 35.
232 See id. paras. 33–38.
233 Id. para. 57.
tional dimensions, and cross-examination plays a central role in pro-
tecting an accused’s rights to a fair trial and to make a full answer and
defense, there is no absolute right to cross-examine all witnesses.\textsuperscript{234} Hearsay is presumptively inadmissible, but exceptions to this rule exist for traditional categories of evidence and for any other evidence that is both necessary and reliable.\textsuperscript{235} The latest development in Canadian hearsay law purports to provide a “principled approach” to the application of hearsay exceptions and is being applied fairly consistently by the courts.\textsuperscript{236} Recent cautions by the SCC to trial courts emphasizing that they not usurp a trier of fact’s responsibility to determine ultimate reliability, however, signal that the law may be moving toward less rigorous scrutiny of the threshold reliability of hearsay statements, and consequently toward a more relaxed application of the exclusionary rule.

B. Critiquing the Coherence of Canadian Hearsay Law

Canadian hearsay law purports to rely upon a “principled approach” to the identification of exceptions to the presumptive exclusionary rule.\textsuperscript{237} In many ways, the framework established by the SCC in \textit{Khan} and subsequent decisions is in fact principled. In some essential ways, however, the doctrine is contradictory and unprincipled, which renders it vulnerable to criticism.

The two principles underlying the Canadian approach to hearsay law are necessity and reliability.\textsuperscript{238} Necessity explains the need for an exception to the hearsay exclusionary rule because relevant evidence will be unavailable to a court without the exception.\textsuperscript{239} Reliability imposes a safeguard upon potential evidence, thereby ensuring, at least in theory, that fact-finders are not led astray by the evidence.\textsuperscript{240} The hearsay rule and its exceptions are virtually always justified in Canada on epistemic, or truth-maximizing, grounds:

\begin{footnotes}
\item[235] See \textit{id.} para. 34; \textit{Khan}, [1990] 2 S.C.R. at 548.
\item[239] Cf. \textit{id.} at 542 (“Necessity was present, other evidence of the event . . . being inadmissible.”).
\item[240] See \textit{id.} at 547 (“Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability.”).
\end{footnotes}
The rule against hearsay is intended to enhance the accuracy of the court’s findings of fact, not impede its truth-seeking function. . . . [However, i]n some circumstances, the evidence presents minimal dangers and its exclusion, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts.241

Thus, one might argue on a broad level that hearsay law in Canada is principled because it seeks to ensure that factually accurate verdicts are produced, or that truth is found within a trial to the greatest extent possible.

Based on these principles of necessity and reliability, and the epistemic goals that they purport to serve, one must ask two important questions: 1) Is cross-examination actually the best way to produce reliable, and therefore more truthful, evidence?; and 2) If so, how can Canadian courts justify both the hearsay rule, which prevents the admission of evidence that cannot be cross-examined, and the numerous exceptions to the hearsay rule, which admit evidence even though it cannot be cross-examined? When Canadian hearsay law is probed in even the most cursory fashion in order to answer these questions, it is evident that the law is littered with incoherence and flawed justifications.

1. Questioning the SCC’s Dogmatic Acceptance of the Value of Cross-Examination

To answer the first question, it is instructive to look at explanations that the SCC has provided for why it places such a high value on cross-examination. In R. v. Osolin, for example, the SCC held that the importance of cross-examination “cannot be denied,” stating that “[i]t is the ultimate means of demonstrating truth and of testing veracity. . . . This is an old and well established principle.”242 Similarly, in Lyttle, the SCC claimed that, but for cross-examination, there was sometimes “no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.”243 It is telling, however, that these assertions by the SCC are not supported by empirical evidence, or even rational explanations about why cross-examination has such truth-maximizing tendencies.244 In-

244 Cf. cases cited supra notes 242–243.
stead, the SCC appears willing to simply accept, perhaps as common sense or as a form of “wisdom of the ages,” that cross-examination actually serves to elicit truth from, and expose the untruth of, witnesses.

As any epistemologist, or even an ordinary skeptic, will note, this substantiation of the value of cross-examination is extremely flimsy. It may be that the SCC is correct in its assumptions about cross-examination—but this would be an epistemic coincidence rather than the result of any careful consideration of the evidence in support of, or in contrast to, the theory that cross-examination produces truth, because no such evidence appears to ever have been canvassed by the SCC, or by courts in Canada more generally. My point at this stage is not to argue that the SCC is wrong about the value of cross-examination, but simply that the SCC’s theory about the value of cross-examination was not derived in an epistemologically, or logically, valid manner. The theory was assumed true, and has been accepted as such ever since the initial assumption was made.

Thus, if one begins to question whether cross-examination is actually the best tool, or even a useful tool, for eliciting truthful evidence, yet one clings to the idea that evidence law should incorporate principles that maximize a court’s ability to determine truth, then the coherence of Canadian hearsay law is seriously undermined. To begin with, the very definition of hearsay would likely need to change because it presumes a certain evidentiary weakness in out-of-court statements where there is no opportunity for contemporaneous cross-examination. Furthermore, there may not be a need for a strong exclusionary rule at all if such a rule only serves to protect opportunities for cross-examination, and cross-examination cannot convincingly be said to assist in producing truth. Basically, if it can be demonstrated that cross-examination does not assist in generating the truth at trial, the very idea of hearsay can largely be eliminated from Canadian law—which is why it is fascinating that the SCC never attempted to demonstrate exactly how and why cross-examination produces greater probabilities of arriving at the truth.

2. A Legal Paradox: Cross-Examination as Both Dispensable and Indispensable?

Even if one accepts that cross-examination tends to assist in eliciting the truth from witnesses, there is still an unavoidable flaw in the reasoning of the SCC that allows courts in Canada to admit or exclude

245 See supra text accompanying notes 172–191 (discussing the development of the relationship of hearsay and cross-examination in Canadian jurisprudence).
hearsay evidence depending on threshold reliability. Recall that, under the principled approach to identifying exceptions to the hearsay exclusionary rule in Khan, evidence can be admitted if it is necessary and reliable.\textsuperscript{246} Thus, a trial judge is forced to rule on the threshold reliability of a statement before it can be passed to a trier of fact, whether judge or jury, to assess ultimate reliability.\textsuperscript{247} Recall also that the trial judge is denied the benefit of the “ultimate means” of testing the reliability of the evidence—the tool of cross-examination that can often be the only way to properly probe the reliability of the evidence—in making her assessment of threshold reliability.\textsuperscript{248}

The trial judge is therefore forced to assume, without being able to test, that evidence is reliable in certain circumstances.\textsuperscript{249} Thus, for instance, the SCC concluded in Khan that the child victim’s hearsay statements to her mother were reliable because:

The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence.\textsuperscript{250}

This reasoning by the SCC leads to obvious questions. How does one know that the child had no motive to lie if the child cannot be questioned (perhaps the child was angry with the doctor for having administered a painful needle)? Would it not be preferable, from an epistemic perspective, to ascertain through cross-examination the child’s actual knowledge of sexual acts before accepting her statement, rather than inferring a lack of knowledge, and using that inference to suggest that the child’s statement was reliable? As these questions suggest, the SCC’s reasoning in Khan is problematic because it assumed a statement to be reliable so that it could dispense with the need to actually establish the reliability of a statement through cross-examination while at the same time noting that cross-examination is sometimes, by the SCC’s own admission, the only way to uncover the truth of a matter.\textsuperscript{251} It is a perfect example of the reasoning flaw acknowledged by Justice Scalia in Crawford v. Washington when he observed that “[d]ispens[ing] with con-

\textsuperscript{246} See Khan, [1990] 2 S.C.R. 546–47.
\textsuperscript{247} See id. at 547.
\textsuperscript{248} See Osolin, [1993] 4 S.C.R. at 663.
\textsuperscript{249} See Khan, [1990] 2 S.C.R. at 547.
\textsuperscript{250} Id. at 548.
\textsuperscript{251} See Khan, [1990] 2 S.C.R. at 548; see also Lyttle, [2004] 1 S.C.R. para. 1.
frontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”252 In both Khan and Justice Scalia’s example, the reasoning is tantamount to cheating the system by circumventing a process that is believed to produce the most truthful results in criminal trials.

Perhaps the only way to understand why the SCC accepts this faulty reasoning is to appreciate that the SCC may actually hold dissonant beliefs about cross-examination. As the principled approach suggests by its very design, cross-examination is not, in fact, the best way to test the veracity of a statement, because it is almost unthinkable that courts would allow accused persons to be convicted on the basis of statements exposed to anything less than the most rigorous scrutiny.253 Instead, perhaps the SCC believes, at least implicitly, that there are other equally effective ways to test the reliability of evidence, and that evidence should be admissible when it has been exposed to these equally effective substitutes for cross-examination. If this hypothesis is true, then it further demonstrates the internal incoherence in current Canadian hearsay doctrine, because cross-examination cannot logically and simultaneously be both “the best” and “not the best” means for testing evidence.

As the above critique of Canadian hearsay law makes apparent, the law is incoherent not because it lacks guiding principles, but because its content cannot be justified in terms of the principles of necessity and reliability that it purports to respect.254 If hearsay law were truly about the admission of only necessary and reliable evidence, then it would be hard to criticize the law as being unprincipled. In reality, however, there is no clear indication that the doctrine developed by the SCC in Khan, Starr, and Khelawon actually encourages the admission of such evidence. The basic belief in the tendency of cross-examination to produce truthful testimony is both unproven and uncritically accepted by the SCC, but it remains a foundational tenet of current hearsay law. Furthermore, the supposedly principled approach to exceptions to the exclusionary rule is itself unprincipled as a result of the flaws in reasoning that are incorporated into the threshold reliability assessment mandated by the approach. For these reasons, Canadian hearsay law, like American confrontation law, lacks principle.

254 See supra text accompanying notes 237–251.
III. Considering Confrontation Law from First Principles

Instead of considering confrontation and hearsay law from the perspective of one who is indoctrinated or locked into the Anglo-American legal tradition, it is useful to consider this body of law afresh and to ponder its model content in a way that can be justified through reference to acceptable legal principles.

A. Identifying Relevant Principles: A First Step

It is generally accepted that one objective of the rules of evidence applicable at criminal trials, and perhaps the most important objective, is the promotion of the ability of fact-finders to arrive at accurate, or truthful, conclusions and verdicts. I will refer to this as the “epistemic” objective of evidence law. That criminal evidence law should further this epistemic objective is not a new proposition: Over sixty years ago, Edmund Morgan noted that a trial must, among other things, lead to “as close an approximation of the truth as is possible in the circumstances in which the court has to function.” Of course, as any amateur epistemologist would likely point out, even if an objective “Truth” exists, it is unlikely that a fallible human trier of fact will be capable of realizing this “Truth.” Consequently, a realistic body of evidence law will not strive to produce objective “Truth,” because this is probably unattainable, but should nonetheless consist of rules that tend to assist triers of fact in finding something that approaches, as closely as humanly possible, this objective “Truth.”

There can be little argument that promotion of a fact-finder’s ability to determine truth is a valid and important principle of criminal

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255 See, e.g., Larry Laudan, Truth, Error, and Criminal Law: An Essay in Legal Epistemology 2 (2006) (“[W]hatever else it is, a criminal trial is first and foremost an epistemic engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators.”); see also Paciocco & Steusser, supra note 182, at 2 (“As a matter of principle, the rules of evidence should accommodate the presentation and consideration of any information that could help the trier of fact to come to an accurate factual determination.”); Michael S. Pardo, The Field of Evidence and the Field of Knowledge, 24 L. & Phil. 321, 321 (2005) (“The trial is fundamentally an epistemological event. We want jurors and judges to know.”).


257 I include myself in this category.

258 See Alex Stein, Foundations of Evidence Law 2 (2005) (“Because absolute certainties are presently unavailable—a proposition that both experience and philosophy of induction confirm—adjudicative fact-finding, as, indeed, any fact-finding, is bound to be conducted in conditions of uncertainty.”).
Evidence law: after all, a basic purpose of criminal law itself is to deter, punish, and rehabilitate those who commit crimes, and it would be nonsensical for such a system to operate arbitrarily against those who did not "truly" commit crimes. As the preceding statement implies, however, truth is important not only for the criminal law to convict and punish those guilty of crimes, but is equally important, if not more so, in order to ensure that the materially innocent are not convicted of crimes. Philosophers and theorists generally agree that it is preferable for several guilty persons to escape justice than for one innocent person to be punished by the criminal law. Although there is no consensus on the ratio of false acquittals to false convictions that would be acceptable in a liberal and democratic society, it is obvious that a truth-seeking trial is an essential means to ensure that the number of false convictions within a criminal justice system does not exceed morally and socially allowable limits.

If we accept that a criminal trial is largely about determining the truth of a matter, then how should evidence law function in order to assist this larger goal? The simple answer is that evidence law should ensure that all relevant evidence is admitted for consideration by the trier of fact:

One of the important and legitimate gate-keeping functions of a judge is to see to it that the jury hears all and only relevant evidence. If American judges stuck resolutely to this principle, they could not be faulted on epistemic grounds since virtually all forms of sophisticated hypothesis evaluation (in science, medicine, and technology, for instance) work with this same notion of relevance.

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259 See Criminal Code, R.S.C. 1985, c. C-46, § 718 (Can.) (articulating these purposes and objectives in the context of criminal sentencing law).

260 See Laudan, supra note 255, at 12. I use the word "materially" here, and throughout this Article, as Laudan uses it in his book—namely to distinguish between a factual result of a trial (guilty or not guilty), and the objectively true state of affairs that a trial seeks to ascertain. Id. In other words, one can be "factually" guilty of a crime in any case where a court makes a finding of guilt, but this does not necessarily mean that the offender is "materially" guilty, since the relevant fact-finder could have been wrong: the offender may not have truly committed the crime. Id.

261 See id. at 1–2.

262 See, e.g., id. at 1, 63.

263 See id. at 63–64 (sampling the various ratios of false acquittals to false convictions, ranging from 2:1 to 1000:1, that various thinkers have proffered as acceptable over the ages).

264 Id.
It is universally agreed, outside the law courts, that decision makers can make the best and most informed decisions only if they are made aware of as much relevant evidence as possible. Excluding relevant but non-redundant evidence, for whatever reasons, decreases the likelihood that rational decision makers will reach a correct conclusion.\textsuperscript{265}

In other words, a principled body of evidence law concerned only with determining the truth of a matter would have but a single rule: All relevant, non-redundant evidence is admissible.\textsuperscript{266} No evidence would be excluded on any other grounds.

It is probably not enough, however, for evidence law simply to maximize a fact-finder’s ability to arrive at truth in her conclusions, since there are, and should be, non-epistemic policy considerations that inform the law of evidence.\textsuperscript{267} In my view, the main non-epistemic value that should govern evidence law is fairness. For instance, even if we assumed that truthful and accurate confessions could be obtained through torture, it seems clear that a rule of evidence should nonetheless prevent a fact-finder from relying on such confessions because in liberal democratic societies (and most civilized societies of any kind), we abhor the very idea of torture.\textsuperscript{268} It would simply be unfair for the State to use a confession extracted through torture when society has unequivocally asserted that it does not condone torture. As this example demonstrates, the measures that can legitimately be authorized to further the search for truth within a trial are not unlimited.

The notion that laws of criminal evidence must be fair, and, in addition to assisting a court to arrive at a factually correct verdict, must also permit deliberation that shows appropriate “respect and concern

\textsuperscript{265} Id. at 18–19.

\textsuperscript{266} See Laudan, \textit{supra} note 253, at 18–19. This claim is not universally accepted. For instance, Stein argues that the “ostensibly appealing proposition” that more information yields better adjudicative accuracy is wrong, because “[t]here is no \textit{quantitative} parallel between complete and incomplete information.” \textit{Stein, supra} note 258, at 122. While I note Stein’s criticism, I maintain that, other things being equal, more information is better than less information when finding facts. See Laudan, \textit{supra} note 255, at 18–19.

\textsuperscript{267} \textit{Stein, supra} note 258, at 12 (“Generally, when the epistemological reasons for fact-finding no longer apply, adjudicators allocate the risk of error by applying the rules and the principles from the moral domain of evidence law. \textit{Morality picks up what the epistemology leaves off.”}).

\textsuperscript{268} See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (aspiring to prevent torture around the world).
for the person whose case is being judged,” is a central theme of Hock Lai Ho’s treatise on the philosophy of evidence law:

A party has not merely a right that the substantive law be correctly applied to objectively true findings of fact, and a right to procedure that is rationally structured to determine the truth; she has, more broadly, a right to a just verdict, where justice must be understood to impose ethical demands on the manner in which the court conducts the trial, and importantly, on how it deliberates on the verdict. Findings of fact must be reached by a form of inquiry and process of reasoning that are not only epistemically sound but also morally defensible.269

Thus, at least according to Ho, rules of evidence should encourage the conduct of both morally fair and epistemically effective trials.270

Other commentators make similar arguments using slight variances in terminology. For instance, Toni Massaro suggests that where a rule of evidence “jars some persons’ sense of fairness,” the rule should be reinterpreted in a manner that “corresponds with common notions of fairness to the accused,” specifically in a way that “rests on principles of human dignity.”271 Seizing on this concept of dignity, Ian Dennis recognizes that, in order to respect “the defendant’s dignity and autonomy,” a rule of evidence should “symbolically place[ the accused] on a footing of equality with the witness.”272 This, according to Dennis, “emphasises his entitlement to play a full role in the adjudicative process rather than being dealt with as an object for the application of the criminal law.”273

Finally, Eileen Scallen argues that a rule of evidence should have, in addition to an evidentiary and a procedural dimension, a “societal” dimension that “embodies communal values,” which would presumably include a value of fairness.274

Regardless of whether one labels an underlying objective of evidence law as the promotion of dignity, communal values, equality, or appropriate respect and concern for the accused, I argue that, on a

270 See id.
272 See Dennis, supra note 1, at 263–64.
273 See id. at 264.
broad level, the discussion centers upon a single concept of fairness. In each of the above passages, commentators express a desire to see rules of evidence shaped in a way that accords with common understandings of fairness.

While it is true that the ideals of truth and fairness inform the law of evidence, these two ideals should not necessarily have equal impact upon the law, especially if there is tension between them. In most cases, no such tension will exist because an epistemically sound trial will also be a fair trial; that is to say, an accused who is materially innocent has a particularly high interest in a factually correct verdict because it would be unfair to convict him for a crime that he did not commit, while a materially guilty accused may not have a particularly strong interest in seeing the truth emerge at his trial, but he certainly could not complain, under most circumstances, that a factually correct verdict is unfair.

In this sense, truth and fairness overlap substantially. I appreciate that there is potential for conflict between these ideals—such as a reliable torture confession, if such a confession even existed—but the magnitude of this potential for conflict depends on how broadly one construes the concept of fairness in the context of a criminal trial. If one views fairness as being a value that applies only to an accused, then there may be sizable scope for tension between truth and fairness; however, if one understands fairness as being applicable to an accused (who should be treated with appropriate respect and concern), to witnesses (who should also be treated with appropriate respect and concern), and to society as a whole (since the greater community’s claim to fairness might demand that effective measures be taken by the State to prevent and punish crimes), then one can see how epistemic and fairness concerns will tend to converge in almost all cases.

275 See Laudan, supra note 255, at 144 (“[I]t cannot be hostile to the innocent defendant to propose that the rules governing a trial should be those most likely to lead to a true verdict. Above all else, the innocent defendant seeks a true verdict.”).
276 Cf. id. at 145 (stating that evidentiary practice generally tends to, if anything, over-acquit guilty defendants).
277 See, e.g., R. v. Harrer, [1995] 3 S.C.R. 562, 587 (Can.) (McLachlin, J., concurring). This broader conception of fairness is a reasonable one, I think, and has been espoused by the SCC on several occasions. For example, the Court has stated:

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused’s point of view. Nor must it be conflated with the perfect trial; in the real world, perfec-
Thus, since the value of truth in shaping rules of evidence almost always subsumes, rather than overrides, the value of fairness, it stands to reason that evidence law should be driven, first and foremost, by epistemic concerns. To be sure, the value of truth will, in certain cases, need to be sacrificed in order to advance some non-epistemic, fairness-related goals; however, this “dominant value” substitution should occur only in the exceptional cases where truth and fairness ideals diverge, and lawmakers, whether judicial or legislative, should be clear about the deliberate purpose and effect of any evidence rule that subordinates epistemic concerns to fairness concerns in these rare cases.

Notwithstanding the above analysis, some Anglo-American legal commentators suggest that many rules of evidence, and most exclusionary rules of evidence, are actually not epistemically sound, and that the law of evidence is disproportionately influenced by misplaced fairness concerns.\textsuperscript{278} Perhaps this emphasis on fairness at the expense of truth flows from an overly restrictive understanding on the part of lawmakers that trial fairness is a concept that only pertains to an accused. In any event, as I will explain below, Canadian hearsay rules and American confrontation law might look remarkably different if they were focused exclusively on generating epistemically accurate results, with only limited exceptions to account for independent trial fairness concerns.

**B. Applying the Ideals of Truth and Fairness to Hearsay and Confrontation Law**

For the sake of argument, let us accept that criminal evidence law is primarily concerned with facilitating epistemically correct conclusions within trials, and that the law leaves some room, under exceptional circumstances, for the displacement of truth as an ultimate goal in favor of another fairness-related goal. This proposition would certainly allow for the development of principled rules of evidence, and particularly, of a

\textsuperscript{278} See, e.g., Laudan, supra note 255, at 10. Laudan states:

Because current American jurisprudence tends to the view that rights almost invariably trump questions of finding out the truth (when those two concerns are in conflict), there has been far less discussion than is healthy about whether certain common legal practices—whether mandated by common law traditions or by the U.S. Constitution or devised as court-designed remedies for police abuses—are intrinsically truth thwarting.
principled body of hearsay and confrontation law. Under this proposition, there is room to argue about whether the underlying principle is good or bad for the law, but no one can say that the law is unprincipled if it were justified by reference to predominantly epistemic concerns.

1. Justifying Admission of Hearsay on Epistemic Grounds

Would relevant, non-redundant hearsay be presumptively excluded under such a principled form of evidence law? In order to answer this question, one must first know whether there is a valid epistemic reason for excluding such evidence. Historically, hearsay was considered a danger because it was presented to juries without an opportunity for the trier of fact to see a party testing the declarant’s perception, memory, sincerity, and communication skills under cross-examination, which, in turn, might cause the trier of fact to place undue weight on the hearsay evidence. The historically accepted dangers of hearsay, however, and the actual dangers of hearsay, if any, are not necessarily identical. In other words, if the exclusionary rule is to be justified on epistemic grounds, there needs to be some indication, preferably empirical, that admitting hearsay evidence leads triers of fact away from, rather than closer to, the truth—even though courts claim that rules of evidence such as the hearsay exclusionary rule “reflect considerable wisdom and judicial experience.”

Although it is beyond the scope of this Article to canvass the full spectrum of studies examining the effect of the hearsay exclusionary rule on jurors, there is certainly a wealth of data and opinion tending to suggest that hearsay evidence is not likely to have an adverse impact on a fact-finder’s ability to reach accurate conclusions. Mock

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279 See Morgan, supra note 256, at 179–88.
280 See Laudan, supra note 255, at 10.
283 See, e.g., Choo, supra note 282, at 42–43 (“We have seen that the extent to which observation of demeanour and cross-examination can actually expose unreliability is, at best, uncertain, and it is also questionable whether the oath discourages untruthfulness to the extent to which it has been traditionally assumed to do.”); Park & Saks, supra note 282, at 975 (“The circumstances of some studies revealed jurors to be quite capable of heavily discounting hearsay testimony as compared to firsthand witness testimony.”). Also, Freidman maintains:
jurors have rated the usefulness of a hearsay witness’s testimony as being less than that of an eyewitness,\textsuperscript{284} which tends to demonstrate that jurors are cognizant of the inherent weaknesses of hearsay evidence and that they will not put undue weight on such testimony. In fact, as one study found, jurors tend to assess the potential weaknesses of hearsay evidence more carefully than they assess eyewitness testimony:

[I]t is conceivable that jurors scrutinize hearsay testimony more rigorously than eyewitness testimony because they distrust hearsay testimony inherently. The findings that jurors are insensitive to the quality of eyewitness testimony, yet are sensitive to the relative accuracy of hearsay evidence, challenge the legal assumption that jurors can accurately judge the validity of eyewitness testimony but are incapable of judging the reliability of hearsay testimony.\textsuperscript{285}

If these studies are to be believed, it is clear that the hearsay exclusionary rule operates at cross-purposes with the general epistemic goal of criminal evidence law, because the rule requires relevant evidence to be excluded even though the perceived dangers of the testimony are fully understood and accounted for by the triers of fact.\textsuperscript{286}

Even if the above studies, and other similar studies, do not provide conclusive proof that hearsay evidence is either a) helpful or b) not harmful to a jury, there is still no valid epistemic reason for excluding the evidence until we can say with an acceptable degree of certainty that hearsay evidence is harmful to a jury, or that it will tend to hinder a fact-finder in his efforts to arrive at the truth.\textsuperscript{287} If relevant hearsay evidence is helpful, or not harmful, then it should be admissible based on

\begin{quote}
[T]here is no good basis for believing that as a presumptive matter the introduction of hearsay evidence relevant to a material proposition will lead a jury away from rather than closer to the truth; on the contrary, it appears that the exclusionary rule, shutting the eyes and ears of the trier of fact to evidence that is often highly probative, impairs, slows, and adds unnecessary expense to the truth-determining process.
\end{quote}

Friedman, supra note 146, at 264.

\textsuperscript{284} Margaret Bull Kovera et al., Jurors’ Perceptions of Eyewitness and Hearsay Evidence, 76 Minn. L. Rev. 703, 718 (1992).

\textsuperscript{285} Id. at 720.

\textsuperscript{286} Compare, supra notes 311–313 and accompanying text (summarizing studies that suggest jurors are generally skeptical of hearsay testimony), with Laudan, supra note 275, at 2 (“[W]hatever else it is, a criminal trial is first and foremost an epistemic engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators.”).

\textsuperscript{287} Cf. supra text accompanying notes 282–286.
the presumption that all relevant evidence should be admissible on epistemic grounds. If it is not clear whether hearsay evidence is helpful or harmful, then it should still be admissible on epistemic grounds based on the same presumption. If, and only if, we can be satisfied that hearsay evidence is harmful, however, it should be excluded on epistemic grounds because it will hamper the truth-seeking task of the trier of fact.\footnote{288 See Laudan, supra note 255, at 215. Laudan makes a similar point regarding the American exclusionary rule for retracted confessions:}

Surveying the data regarding the usefulness of hearsay evidence, rather than the judicial rhetoric and dogma, it becomes clear that there is no empirical body of knowledge suggesting with acceptable certainty that hearsay evidence is harmful to a trier of fact.\footnote{289 See supra text accompanying notes 282–286.} On the basis of empirical observations, hearsay evidence might be helpful, neutral, or harmful to fact-finders. In light of this current state of knowledge, or lack of knowledge, about the true value of hearsay evidence, one cannot convincingly argue that hearsay evidence should be excluded from criminal trials on epistemic grounds. Relevant, non-redundant hearsay evidence should always be admitted if truth is the ultimate and only goal of a trial.

2. Justifying Admission of Hearsay on Fairness Grounds

If hearsay and confrontation law is to be principled, and if there is no valid epistemic basis for excluding hearsay, there must be some other non-epistemic, fairness-type reason for excluding such evidence. Recall that I previously accepted the possibility that truth sometimes must be sacrificed in a rule of evidence in order to advance another fairness objective, but that this should occur only in exceptional cases.\footnote{290 See supra text accompanying notes 268–274.} I suggested that such a reprioritization of evidentiary principles can occur in the case of reliable confessions that are extracted through torture, since fairness would demand that these be excluded.\footnote{291 See supra text accompanying notes 268.} As I will explain, however, I cannot conceive of any fairness concern that would require the exclusion of relevant, non-redundant hearsay evidence.

\footnote{288 See Laudan, supra note 255, at 215. Laudan makes a similar point regarding the American exclusionary rule for retracted confessions: It would be premature to suggest that we have any robust evidence from well-designed studies that would either corroborate or undermine the hypotheses that drive these evidentiary exclusions. Until such studies are available, our default assumption should be that relevant evidence is admissible.}
Some commentators suggest that an accused must have a right to a face-to-face confrontation with witnesses in order for the accused’s dignity to be respected. This type of theory generally argues that participation—active participation—by a defendant in her trial is an essential element of a system that respects the dignity of the defendant. The main flaw with this theory, however, is that it asserts a proposition that cannot be proven: How can we authoritatively say that procedure X is more respectful of a defendant’s dignity than procedure Y? Dignity is such an abstract concept that it is difficult to employ it effectively to argue for a concrete formulation of a rule of evidence. In the absence of any obvious indignity to an accused that would accompany the admission of a hearsay statement without opportunity for contemporaneous confrontation or cross-examination, I find the suggestion that dignity demands the exclusion of such evidence to be utterly unpersuasive.

A similar criticism can be leveled against each of the aforementioned non-epistemic justifications for an exclusionary rule of evidence. An accused is shown a full measure of respect and concern at his trial regardless of whether hearsay evidence is admitted, as long as the trier of fact does not callously overlook the inherent weaknesses of the evidence. This requirement of careful deliberation on the part of the fact-finder, however, applies with respect to every piece of evidence that comes before her, not just with respect of hearsay evidence. In other words, the requirement for a trier of fact to deliberate conscientiously out of fairness to the accused is a requirement that demands that jurors be instructed about potential frailties in the evidence, but it is not a requirement that should lead to the exclusion of relevant, non-

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292 See Massaro, supra note 271, at 917.
293 Id. at 902 (“[T]he procedure should allow those affected to participate meaningfully, personally, and on equal footing with their adversary.”). Stein also noted the importance of participations:

Arguably, a criminal defendant’s right to cross-examine prosecution witnesses and the consequent exclusion of hearsay statements should also be perceived as belonging to the family of participation rights that are valuable per se. . . . The issue is whether the community in which criminal trials are conducted without full participation of the accused is attractive in moral and political terms.

Stein, supra note 258, at 31.

294 See The Simpsons: A Milhouse Divided (FOX television broadcast Dec. 1, 1996) (presenting, from the fourth to the sixth minutes, an excellent and humorous animated representation of the difficulty one has when thinking about or attempting to draw dignity).

295 See supra text accompanying notes 291–301.
redundant evidence.\textsuperscript{296} It simply strains logic to suggest that hearsay evidence must be excluded out of abstract notions of “respect and concern” for the accused.

Similarly, the admission of hearsay evidence does not transform an accused from the subject of a criminal trial into a detached object of the proceeding; the fact remains that the accused participates in the trial by his very presence, his arguments through counsel, and, where applicable, his confrontation of witnesses through counsel.\textsuperscript{297} There are differing degrees of participation involved in each of these forms, for each accused, and each counsel. That a reduced form of participation exists for some period of time with respect to some evidence does not, in and of itself, render the trial less fair or demean the accused.

As the above discussion indicates, it is difficult to see how the admission of hearsay evidence, which is justifiable on epistemic grounds, is somehow not justifiable on fairness grounds. Although in exceptional cases some rules of evidence are likely to lead to conflicts between the values of truth and fairness, the hearsay rule is not within this category of evidentiary rules. Hearsay should be admissible because it tends to allow the fact-finder to arrive at the truth (which is, in itself, a fair outcome for either the materially guilty or the materially innocent defendant), and there are no other compelling fairness-related reasons for excluding hearsay evidence.

3. Giving Principled Content to Hearsay and Confrontation Law

Let us now put everything together in order to determine how constitutional and evidence law should treat hearsay statements on a principled basis. Relevant, non-redundant evidence will often come in the form of hearsay.\textsuperscript{298} This type of evidence carries certain inherent weaknesses, namely the inability of the trier of fact to discern, through cross-examination, any problems with the perception, memory, sincerity, or communication ability of the declarant.\textsuperscript{299} If rules of evidence

\textsuperscript{296} Cf. sources cited supra notes 310, 312 (discussing scientific studies that concluded that juries are inherently skeptical of hearsay evidence).

\textsuperscript{297} Cf. Massaro, supra note 271, at 910 (discussing the importance of the defendant’s participation in the trial when hearsay is admitted). But see Choo, supra note 282, at 40–41 (noting that hearsay rules ensure the parties participation in the proceeding); Stein, supra note 258, at 31 (stating that the issue with hearsay evidence is a concern for the full participation of the accused).

\textsuperscript{298} See Lauban, supra note 255, at 137 ("Many of these evidentiary practices hinder the ability of the jury to come to a correct verdict because they block the jury’s access to relevant, often powerfully relevant, evidence.").

\textsuperscript{299} See Choo, supra note 282, at 17.
law are understood as reinforcing both epistemic and fairness principles, however, there is no reason why hearsay should be excluded because there is no empirically valid reason for us to believe that its admission would lead fact-finders away from the truth.\textsuperscript{300} Further, the admission of such evidence would not be an affront to the obligations of fairness, dignity, and respect that are owed by society to an accused.\textsuperscript{301} Every form of evidence comes with its own unique set of weaknesses, but according to epistemic and fairness principles, this is not a sufficient reason for the evidence to be excluded from a trial.

Hearsay evidence should be admissible, but this is not to say that hearsay is free from any weaknesses, or that hearsay evidence should be afforded the same weight in every case as other forms of evidence. No evidence is perfect. Just as with other forms of evidence, however, certain precautions can be imposed so as to draw the fact-finder’s attention to the weaknesses of the evidence. In Canada, for instance, the testimony of unreliable or unsavory witnesses is not excluded from a criminal trial; rather, in accordance with direction from the SCC in \textit{R. v. Vetrovec}, the testimony is admissible, but the trial judge must caution the jury (with a \textit{Vetrovec} warning) of the risks inherent in such testimony.\textsuperscript{302} Similarly, American scholars and judges have long recognized the weaknesses inherent in eyewitness testimony, but instead of excluding eyewitness evidence altogether, which would be absurd, “[m]ost courts now allow some form of cautionary jury instructions on eyewitness evidence, the majority of which are modeled after the instruction set forth by the U.S. Court of Appeals for the District of Columbia Circuit.”\textsuperscript{303} In both of these examples, a principled basis for the rule of evidence developed: Admit the relevant evidence because it will tend to assist the fact-finder in arriving at the truth and because there is nothing unfair in admitting it, but caution the fact-finder about the weaknesses of the evidence because this will also tend to yield more accurate factual findings.\textsuperscript{304} The same principle should be applied in the context of hearsay, and any form of evidence with known weaknesses.

\textsuperscript{300} \textit{See id.} at 42–43 (stating that it is not guaranteed that admissible forms of evidence are any more reliable than evidence excluded under hearsay rules).
\textsuperscript{301} \textit{But see id.} at 41–42 (arguing that the rules prohibiting the admission of hearsay provide the accused with the opportunity to confront and cross-examine witnesses and thus ensure respect for individual dignity).
\textsuperscript{302} \textit{See [1982] 1 S.C.R.} 811, 817–18.
\textsuperscript{304} \textit{See Vetrovec, [1982] 1 S.C.R.} at 817–18; Sheehan, \textit{supra} note 303, at 654.
The broad admission of hearsay statements cannot be opposed on dignity or participation grounds because the admission of hearsay precludes cross-examination of the declarant but it does not preclude cross-examination of the witness who provides the hearsay evidence at trial, nor does it preclude counsel for the accused from making arguments about the weight that should attach to such testimony (where there is uncertainty about the declarant’s perception, memory, sincerity, or communication skill). In other words, even though a lack of opportunity for cross-examination might prevent an accused from conclusively and positively exposing contradictions or falsehoods in the testimony of a witness—something that seems to happen much more often on television than in reality—it still permits the accused to raise reasonable doubt about his guilt by demonstrating the weaknesses inherent in hearsay evidence.

In short, truth and fairness demand that hearsay evidence be admitted, rather than excluded. The fallacy of doing anything else with hearsay evidence is plainly apparent:

To exclude evidence on the ground alone that the fact-finder cannot evaluate it as well as she could evidence that has been exposed to cross-examination makes little sense—almost as little sense as a hungry person refusing food for the reason that it is not as nutritious as it could be.\(^{305}\)

**Conclusion**

American confrontation law lacks principle because it arbitrarily distinguishes between testimonial and non-testimonial evidence and because it is a slave to history, rather than to legal principles. Canadian hearsay law purports to respect principles of reliability and necessity, but often fails to do so by admitting evidence untested by the accepted means of assessing reliability. Neither jurisdiction’s law respects the truth-seeking function of a criminal trial, nor adequately balances epistemic considerations with fairness concerns, in large part because both Canadian and American courts tend to overestimate, or unquestioningly accept, the value of cross-examination in producing truthful, accurate verdicts. I have described here how the principles of truth and fairness can ground a coherent body of evidence law, and can animate the content of hearsay and confrontation law in Canada and the United States, respectively. The truth-seeking function of criminal trials within each

\(^{305}\) Ho, *supra* note 269, at 237.
country may be better respected by simply admitting hearsay evidence accompanied by appropriate arguments by counsel regarding the weight that such evidence should be afforded, and with cautions to the trier of fact about weaknesses inherent in such testimony.

The law that I am proposing might, at first glance, seem to encompass a radical idea. It should be recalled, however, that hearsay evidence has never been categorically excluded from criminal trials in civil law jurisdictions;\footnote{306 See Sklansky, supra note 111, at 36 (“The bottom line is that the hearsay rule . . . remains alien to civil-law legal systems.”).} rather, in those places where “free proof”\footnote{307 See S. E. I. N. T., supra note 274, at 117 (“For fact-finders, free evaluation of evidence entails freedom from legal constraints in inferring facts from evidence. This fundamental freedom is surrounded, but not interfered with, by legal rules that constitute the law of evidence.”).} is the governing doctrine of evidence, hearsay statements can simply form part of the entire evidentiary dossier upon which a court relies when rendering a decision. Furthermore, recently, rules excluding hearsay evidence are generally on the decline, even throughout the common law world.\footnote{308 See generally Marian K. Brown, Reform and Proposed Reform of Hearsay Law in Australia, New Zealand, Hong Kong, and Canada, with Special Regard to Prior Inconsistent Statements, Paper Presented at the 2007 Annual Conference of the International Society for the Reform of Criminal Law (2007), available at http://www.isrcl.org/Papers/2007/Brown.pdf (noting widespread reform of hearsay rules in common law jurisdictions).} In 2003, England created an extremely broad exception to the hearsay exclusionary rule for first-hand hearsay of witnesses who are unavailable to testify at trial due to death or intimidation, among other reasons.\footnote{309 See Criminal Justice Act, 2003, c. 44, § 116 (Eng.).} Since the 1990s, similar sweeping changes to hearsay law occurred in Scotland, New Zealand, and Australia, all by statute, and all toward greater admissibility of hearsay evidence.\footnote{310 Sklansky, supra note 111, at 28–30.} Finally, in Canada, in a case in which the right of a witness to wear her religious veil clashed with the right of an accused to cross-examine a key witness, the Ontario Court of Appeal noted that “appropriate jury instructions may go some considerable way to mitigate any unfairness that may flow from an evidentiary or procedural rule that has limited the scope of cross-examination.”\footnote{311 R. v. S. (N.) (2010), 102 O.R. 3d 161, para. 51 (Can. Ont. C.A.).} Perhaps the idea of admitting all relevant, non-redundant hearsay, with appropriate cautions, is not such a large departure from the common law of evidence after all.

What is more, there already seems to be a trend developing in both Canada and the United States toward increased admission of evidence that has not been cross-examined. In Canada, this trend can be
seen in the continued emphasis by the SCC that a trial judge should only consider threshold reliability when deciding whether to admit hearsay because the trier of fact should be the one who determines ultimate reliability. This movement by the SCC will likely have the effect of rendering more and more hearsay evidence admissible at the initial stage of the inquiry, while leaving it to the jury (with appropriate arguments by counsel and limiting instructions from the judge) to decide what weight the evidence should receive. In the United States, the trend apparently began in lower courts, and continued to the Supreme Court in *Bryant*. Courts are struggling to characterize out-of-court statements as “non-testimonial,” perhaps in order to avoid the blanket exclusionary rule now in force under the Sixth Amendment.

One cannot help but wonder whether Canadian and American courts already recognize that it is difficult to justify the exclusion of hearsay evidence on principled grounds, and whether these courts are now trying to avoid unprincipled outcomes by subversively admitting evidence on unacknowledged grounds. It would be problematic for courts to admit evidence when their common law or constitutional law doctrines tell them to exclude it—not because the results of their evidentiary rulings would be unjustifiable on principled grounds, but because the decisions would be unjustified by reference to espoused principles. It would be far better for the sake of transparency, coherence, and principle, if courts were to “admit”\(^{312}\) the problem that they are having with the exclusion of hearsay evidence, “confront”\(^{313}\) it head-on, and recreate their respective laws in a manner that eliminates the problem: namely, by allowing the admission of all hearsay evidence, encouraging counsel to provide argument about the quality of such evidence, and cautioning fact-finders about the dangers of such evidence. To return to our original nautical metaphor, as good sailors always do when telling stories, I suggest that it is time for courts to halt the “drifting” tendencies of their hearsay and confrontation doctrines by more honestly and effectively “anchoring” these bodies of law in epistemic principle.

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\(^{312}\) The double entendre here is intentional.

\(^{313}\) Here as well.
MULTIKULTI IST DOCH ’NE ERFOLGREICHE REALITÄT: WHY TOLERANCE IS VITAL FOR GERMAN ECONOMIC GROWTH

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Abstract: In October 2010, German politicians declared that multiculturalism in Germany was no longer viable. That controversial declaration ignited a heated debate, and Germans were forced to address the fact that national immigration policies since World War II had produced one of the largest immigrant populations in Western Europe. Indeed, despite the purported failure of multiculturalism, highly qualified immigrants from non-European Union (EU) countries may be the key to securing German economic growth amidst a global race for talent. Accordingly, this Note explores the intricacies of German and EU policies on economic immigration and integration, which are aimed at attracting these highly qualified immigrants. It argues that, although German immigration legislation targets the right population, its integration procedures may not suffice to attract and retain immigrants. Faced with an aging population, Germany should utilize EU guidelines for integration to establish concrete measures to secure a workable multicultural society.

Introduction

“Multiculturalism has absolutely failed.”1 German Chancellor Angela Merkel uttered these now infamous words at an annual meeting of the Junge Union2 in October 2010, adding fuel to a newly rekindled

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1 Will Germany Now Take Centre Stage?, Economist, Oct. 21, 2010, at 27, 28 (internal quotations omitted). Chancellor Merkel’s original statement, in German, is “Der Ansatz für Multikulti is gescheitert, absolut gescheitert!” Merkel erklärt Multikulti für gescheitert, SPIEGEL Online (Ger.) (Oct. 16, 2010), http://www.spiegel.de/politik/deutschland/0,1518,723532,00.html.

2 The Junge Union is a national political youth organization in Germany, sponsored by the Christian Democratic Union (CDU) and Christian Social Union of Bavaria (CSU). Information, JUNGE UNION, http://www.junge-union.de/content/english/2/ (last visited May 18, 2012). Deutschlandtag, the Junge Union’s annual conference at which Chancellor Merkel spoke, is composed of delegates from all German states. See Deutschlandtag, JUNGE
controversy about immigration policy in Germany. Although the viability of multiculturalism is by no means a new topic of conversation in Germany, the publication of Deutschland schafft sich ab in September 2010 renewed heated debate about the topic. In this polemical book, then-director of the German Central Bank Thilo Sarrazin argued that the future of Germany’s economy is in jeopardy because poor and immigrant classes reproduce at a higher rate than the educated. Although xenophobic tendencies have been quietly growing among the German population over the past several years, Sarrazin’s book has brought the issue to light in a very public forum. German media continues to discuss the highly contentious topics of immigration and integration in Germany, often focusing on tensions between the native population and Muslim or Arab immigrants.

Conservative German politicians have seized the opportunity to voice wariness of immigrants and ethnic minorities. Horst Seehofer, head of the Christian Social Union, has presented one of the more extreme policy recommendations: strict integrationist policies that
would prohibit further immigration from Turkey and Arab countries.\textsuperscript{12} Seehofer’s Seven-Point Plan for integration is predicated on evaluating potential immigrants based on their readiness and ability to integrate into German society.\textsuperscript{13} According to Seehofer, immigrants should conform to the German \textit{Leitkultur}, a version of German culture founded on “Christianity, humanism, and enlightenment.”\textsuperscript{14} Chancellor Merkel, meanwhile, has taken a more moderate position. While indicating that immigrants should integrate with German culture, she has nonetheless acknowledged that Islam has become a part of Germany.\textsuperscript{15} And although Merkel does not go so far as to suggest preventing the immigration of Muslims, like Seehofer, she calls for stronger integration policies designed to create more “German-like” immigrants and a less multicultural society.\textsuperscript{16} Similarly, German citizens echo this skepticism of multiculturalism; many believe immigrant minorities threaten the country’s stability.\textsuperscript{17}

Others, however, argue that Germany needs immigrant workers to maintain its position as Europe’s strongest economy.\textsuperscript{18} Germany’s working population is aging quickly, and native Germans are reproducing at a slower rate than immigrants.\textsuperscript{19} Thus, to curtail the declining working population, Germany must attract and retain immigrant workers.\textsuperscript{20} Some influential German politicians, such as Secretary of Labor Ursula von der Leyen and Secretary of Education Annette Schaven, have argued that Germany must remove barriers to entry for qualified workers in order to remain economically competitive.\textsuperscript{21} Indeed, competition on a global level increasingly turns on the ability to attract highly qualified

\textsuperscript{12} See Merkel erklärt Multikulti für gescheitert, supra note 1.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} See Will Germany Now Take Centre Stage?, supra note 1, at 28.
\textsuperscript{16} See Merkel erklärt Multikulti für gescheitert, supra note 1; Will Germany Now Take Centre Stage, supra note 1, at 28.
\textsuperscript{17} See Habermas, supra note 7 (noting that recent polls have shown that over one-third of German citizens believe Germany is becoming “more stupid on average” due to immigration).
\textsuperscript{19} See Klaus F. Zimmerman et al., Immigration Policy and the Labor Market: The German Experience and Lessons for Europe 89 (2007).
\textsuperscript{20} See id. at 85–89.
\textsuperscript{21} See Merkel erklärt Multikulti für gescheitert, supra note 1. Both von der Leyen and Schaven are members of the conservative CDU. See id.
workers. The European Union (EU) has already entered this competition by committing “to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.”

Until the enactment of the Immigration Act of 2004, Germany had no comprehensive immigration policy; instead, its immigration regime consisted of piecemeal legislation intended to address immediate needs. This legislation ranged from attracting unskilled workers during the 1960s to working around a national ban on immigration after the international oil crisis in the early 1970s. These postwar policies have established one of the largest immigrant populations in Western Europe, despite the fact that German politicians have consistently denied that Germany is a country of immigrants. After World War II, approximately eight million ethnic Germans immigrated to Germany from countries formerly occupied by the Third Reich. From 1961 to 1973, Germany accepted 3.5 million immigrants as part of the Gastarbeiter program. Immigration peaked in 1992, when 1.2 million foreigners entered the country. The immigrant population continued to rise after Germany enacted the Aliens Law of 1990 and a green card program easing admission for information technology personnel.

22 See Richard Florida & Irene Tingali, Europe in the Creative Age 11–12 (2004); Shachar, supra note 18, at 152.


24 See Zimmerman et al., supra note 19, at 9.

25 See id. at 16–17.

26 See Cem Özdemir, Germany’s Integration Challenge, Fletcher Forum World Aff., Summer 2006, at 221, 221.

27 Ethnic Germans are immigrants of German descent, primarily from Eastern Europe. See Zimmerman et al., supra note 19, at 7, 10; Rolf Wank, Legal Framework for High-Tech Workers in Germany, 24 Comp. Lab. L. & Pol’y J. 435, 440 (2003).

28 See Zimmerman et al., supra note 19, at 16.


30 Zimmerman et al., supra note 19, at 21. These data include not only labor migrants, but also those joining family members, seeking asylum, and immigration for other reasons. See id. at 19–21. Indeed, calculating the number of immigrants during the post-Gastarbeiter period is difficult because government agencies lack data regarding those who immigrated to join family members. Id. at 19. Nevertheless, “[m]ore than half of all immigration to Germany between 1974 and the mid-1980s can probably be attributed to immigration of family members, until family reunification lost some significance in relation to the strong increase in refugees.” Id.

31 See id. at 10, 21, 29.
During the 1990s, Germany experienced a net increase of 3.8 million people, corresponding to 4.6% of the population. These statistics clearly refute the popular notion that “Germany is not a country of immigrants.” Moreover, the Immigration Act of 2004 constitutes the country’s first attempt to codify comprehensive immigration policies and attract the workers required to respond to demographic decline. Although it is not without its drawbacks, this legislation represents a bold first step to addressing long-term labor market needs.

This Note examines current German immigration and integration policies, arguing that integration reform in particular is needed to promote future economic growth. Part I provides a historical background of Germany’s immigration and migrant labor policies, explaining how the nation developed into a de facto immigration country. Part II discusses the economic policies implicit in the Immigration Act of 2004, as well as the codification of nationwide integration procedures. Part II then examines European immigration legislation focused on attracting highly qualified third-country nationals for employment in the EU, as well as suggested integration policies for all member states. Part III of this Note analyzes Germany’s ability to attract and retain highly qualified foreigners amid a global race for talent. It argues that although current legislation targets the right type of worker and industry, Germany must also encourage toleration of highly qualified immigrants on a national level. The EU policy recommendations on integration provide Germany with a useful framework for establishing mutual accommodation between immigrants and nationals. Finally, based on those recommendations, the Note offers two concrete integration policies to advance toleration—promoting thoughtful public discourse and providing integrated housing schemes—which could drive long-term economic growth in Germany.

32 Id. at 21. The net increase resulted from 12.2 million people entering Germany and 8.4 million people leaving. Id.
33 See Özdemir, supra note 26, at 221.
35 See Shachar, supra note 18, at 190 (noting that Germany’s immigration legislation now targets highly skilled workers in order to bolster competitiveness on a global scale and address long-term economic and demographic interests).
I. Background

A. West Germany’s Experiment with Migrant Labor: 1955–1973

Germany is no stranger to migrant labor schemes; it began developing temporary labor systems as early as 1870, when Polish workers were recruited to help construct mines and steelworks in the Ruhr valley. More than six decades later, the Nazi regime created a vast network of concentration camps to support its wartime economy, which one scholar deemed “the largest and most exploitative temporary labor system” in Europe. To rebuild its shattered economy after the War, Germany initiated the *Gastarbeiter* program, which was arguably the largest and most robust recruitment system in Europe. The program began in 1955, when Germany executed a bilateral recruitment agreement with Italy. Similar bilateral agreements with other Mediterranean countries, including Spain, Greece, Turkey, Morocco, Portugal, Tunisia, and Yugoslavia, later expanded the program.

After World War II, the United States invested significant capital in Germany to bolster its economy. Germany was unable, however, to fill newly created positions with national citizens, and turned to migrant labor to meet its needs. Pursuant to the bilateral agreements, the *Bundesanstalt für Arbeit* (Federal Employment Office) established recruitment offices in foreign countries that screened potential workers for employment in Germany. One of the program’s primary benefits was flexibility: employers had direct control over the number of immi-
grants hired to fulfill their fluctuating labor needs. Once work permits expired and employers no longer needed the additional labor, migrant workers were expected to return to their home countries. Because residence permits were tied to labor permits, foreigners no longer needed by their German employers were prohibited from remaining in the country.

Labor and residence permits granted through the Gastarbeiter program were restricted to specific periods of time (often one year maximum), as well as to particular industries or jobs. Foreign workers were primarily employed in agriculture or construction. While the program later expanded to include other industries, guest workers continued to perform low-skilled, manual roles. Other regulations prescribed by the program were intentionally vague, giving employers the discretion to determine which workers would continue to be employed in Germany.

Although this appeared to be an ideal solution to the shortage of labor during the postwar years, the Gastarbeiter program became difficult for German employers to administer. Because the pool of workers was frequently rotating, employers had to train new employees constantly, causing a drain on internal resources. As the program progressed, employers also found it increasingly difficult to replace foreign employees with natives. Germans were less willing to accept positions previously occupied by foreigners because they typically involved minimal qualifications, paid low wages, and subjected the employees to stressful working conditions.

The Gastarbeiter program did not, however, grant foreign workers rights equal to those of German citizens; for example, guest workers were denied rights to freedom of movement, assembly, association, place of work, and place of education. Given that the work was in-

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44 See Jacoby, supra note 41, at 1582–83.
45 See id.
46 Id.
47 Id.
50 Id.
51 Jacoby, supra note 41, at 1583–85.
52 See id. at 1584.
53 Id. at 1585.
54 Id. at 1584–85.
55 Id. at 1583. During this period, Germany enacted the Aliens Law of 1965 in an attempt to recognize the legal status of foreigners. Kay Hailbronner, Fifty Years of the Basic Law—Migration, Citizenship, and Asylum, 53 SMU L. Rev. 519, 523 (2000). The law focused
tended to be flexible and temporary, the laws discouraged guest workers from bringing dependents with them.56 Nevertheless, many guest workers circumvented these regulations to reunite with family members.57 The government was also unable to prevent guest workers from remaining in Germany after their employment periods expired and the majority of foreign workers who remained in Germany were unable to integrate with the broader society.58 Xenophobia was rampant in the workplace, hindering the development of friendly employment relations between Germans and foreigners.59 Trade unions often prohibited foreign workers from joining and even lobbied against foreign workers’ rights.60 These tensions laid a foundation for the contemporary debate about immigration.61


The Gastarbeiter program was finally terminated in 1973 due to decreased labor demand accompanying a worldwide oil crisis and impending recession.62 At that time, Germany banned the entry of non-European Community (EC) workers in an attempt to reduce the foreign labor force.63 This general ban on immigration applied only to foreigners seeking employment; it did not restrict the entry of existing residents’ family members or individuals seeking asylum.64 Several economic and societal changes over the following decades forced policymakers to create exceptions to the ban in the years after its implementation.65 Immigration policy in Germany therefore developed as a patchwork of exceptions to this general ban, until the first comprehensive immigration legislation took effect in 2005.66

56 See Castles, An Obituary, supra note 36, at 769.
57 See id. Although guest workers were discouraged from bringing family members, spouses often entered Germany as workers to reunite with temporary migrants. Id. This inevitably led to family reunification and the “unplanned and unexpected settlement” of foreigners in Germany. Id.
58 See Jacoby, supra note 41, at 1590–95.
59 See id. at 1592–93.
60 See id.
61 See id. at 1595–99.
62 Castles, An Obituary, supra note 36, at 770.
63 Jacoby, supra note 41, at 1587.
64 Zimmermann et al., supra note 19, at 10.
65 See id. at 10–11.
66 See id. at 9.
Throughout this period, Germany treated foreigners as temporary visitors, allowing them to stay in the country as long as market needs permitted. As labor shortages surfaced in the domestic market—specifically in agriculture—Germany executed bilateral agreements with non-EC countries allowing temporary immigration of additional contract workers. Legislation also allowed for exceptions that applied to specialty positions, such as “au pairs, specialists of international corporations, scientists and teachers, fashion models, artists/performers, and nursing staff.” Before the enactment of comprehensive immigration legislation in 2005, the recruitment ban contained so many exceptions that legislators called for a complete overhaul of the law.

Until 1990, German laws regulating foreign residents applied primarily to their legal status, without addressing individual rights. In 1990, the Aliens Law was amended to recognize different categories of immigrants and to provide limited individual rights to those who obtained permanent residency. Nevertheless, foreigners admitted for employment under the law remained subject to strict residence and employment requirements. The ability to remain in Germany was subject to the needs of the market; the law did not afford foreigners a legal claim to stay without a permit, and permits were only valid for up to five years.

In 2000, Germany implemented a ground-breaking green card program that allowed highly qualified information technology professionals to immigrate without applying for a specific job. The purpose of the program was to address economic needs associated with globalization and labor shortages in technology sectors. It provided regulations governing temporary, as well as unlimited, admission of third-country nationals. As under prior programs, immigrants were re-
quired to meet certain conditions for employment, but the resulting residence permit supplanted other types of permits and generally allowed for longer stays.\textsuperscript{78} This legislation paved the way for political discussions of managed migration and eventually led to the enactment of a new immigration law in 2004.\textsuperscript{79}

II. DISCUSSION

A. Germany’s Immigration Act of 2004

1. Standardizing Admission of Immigrants

The same year Germany implemented its green card program, the Federal Minister of the Interior established the Independent Commission on Migration to Germany (Migration Commission).\textsuperscript{80} Headed by Rita Süssmuth, member of the Bundestag,\textsuperscript{81} the Migration Commission’s task was to “present recommendations for a future immigration policy.”\textsuperscript{82} Taking into consideration the declining population in Germany—and the negative effects this has on both the labor market and the social security system—the Migration Commission “came to the unequivocal conclusion that Germany must permit selective and managed migration in order to advance its economic growth and global competitiveness.”\textsuperscript{83}

This report ultimately led to the drafting and implementation of a comprehensive Immigration Act (Act)\textsuperscript{84} in 2004.\textsuperscript{85} The Act aims to con-
trol migration into Germany based on admission criteria and market needs, while providing specific guidelines for the entry of third-country nationals. The legislation applies only to foreigners without privileged status in Germany, and specific provisions target highly qualified workers such as scientists, senior researchers, and high-level managers in business and industry. The law is modeled after the policies of other immigration countries, such as Canada, and seeks to advance Germany’s economic interests by decreasing barriers to entry for economic immigrants. Through the Act, Germany has recognized that admitting highly skilled third-country nationals is a useful “tool to advance its economic interests and boost global competitiveness.”

Commentators have applauded the legislation as “an act of political courage” and “pioneer[ing] migration policy in the European Union” that will increase Germany’s competitiveness on a global scale. To this end, one of the Act’s major achievements is to acknowledge labor migration as a separate category of immigration, providing additional rights for foreigners accepted as economic migrants. Under previous legislation, economic immigrants were required to obtain separate work and residence permits; the new Act allows economic immigrants to obtain one permit for their stay in Germany. Additionally,
the Act establishes settlement permits for highly qualified third-country nationals, which allow unlimited residence within Germany for the purpose of economic activity.96 To qualify for settlement permits, third-country nationals must be employed in one of the sectors specifically listed in the Act, and must show that he or she can easily integrate into German culture and live without state assistance.97

The Act also applies new regulations to students admitted for study, which may help increase the number of highly qualified foreign employees in Germany.98 Foreign students may now reside in Germany for up to one year after completing their studies in order to search for adequate employment.99 Although this regulation may improve the attractiveness of German education to third-country nationals, students will still be subject to priority hiring during the job search, which favors German and EU citizens.100

The legislation charges the Bundesagentur für Arbeit (Federal Employment Agency) with granting residence permits to immigrants for the purpose of employment.101 In deciding whether a third-country national may seek employment in Germany, the Federal Employment Agency is required to evaluate Germany’s current economic needs, particularly the effect the proposed immigration will have on national unemployment.102 The Federal Employment Agency may approve residence permits for employment if the employment “does not result in any adverse consequences for the labour market” and “no German workers . . . or other foreigners who are entitled to preferential access to the labour market . . . are available for the type of employment concerned.”103 Additionally, the Federal Employment Agency must establish justifiable grounds for admitting third-country nationals based on labor market and integration policies.104

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97 Id.
98 ZIMMERMAN ET AL., supra note 19, at 36.
99 Id.
100 Id.
102 Aufenthaltsgesetz [AufenthG][Residence Act], July 30, 2004, BGBl. I § 18(1).
103 Id. § 39(2).
104 Id.
The Federal Employment Agency also has the power to refuse residence permits to potential immigrants, though the grounds for refusal are relatively limited under the Act.\textsuperscript{105} Refusal is mandatory if placement or recruitment of a foreigner is unlawful.\textsuperscript{106} Refusal is discretionary, however, if the foreigner has breached certain provisions of the Social Code, the Act to Combat Clandestine Employment, or the Act on Temporary Employment Businesses, or if important personal grounds exist for refusal.\textsuperscript{107}

Although many consider the Act a breakthrough for immigration policy in Germany and the EU,\textsuperscript{108} several commentators have criticized the Act’s specific refusal to include a points system similar to those used by Canada and Australia.\textsuperscript{109} In its original iteration, which the German Constitutional Court rejected on procedural grounds, the Act included a provision that imposed a more robust selection process for permanent labor migration.\textsuperscript{110} To determine whether potential immigrants should be allowed settlement permits, the points system considered “integration-relevant criteria in categories like age, education, work experience, family status, and language ability.”\textsuperscript{111} Nevertheless, after the original legislation failed in the Constitutional Court, the CDU lobbied heavily against the points system, believing it would encourage immigration at a time when foreigners should be restricted from entry due to high unemployment levels in Germany.\textsuperscript{112}

2. Codifying Integration Procedures

In addition to setting standards for the admission of third-country nationals, the Act codifies integration procedures for foreigners entering Germany.\textsuperscript{113} The legislation recognizes the importance of promot-
ing “the economic, cultural, and social” integration of foreigners—an aspect of immigration policy that had been noticeably lacking before 2004. The aim of the integration procedures is to acquaint permanent residents with life in Germany, such that they are able “to act independently in all aspects of daily life, without the assistance . . . of third parties.” Although all foreigners are entitled to participate in an integration course, attendance is only required in three circumstances: if the foreigner is unable to communicate in German at a basic level; if the foreigner receives federal benefits, and the body approving the benefits requires attendance; or if the foreigner has special integration needs. In addition to providing requirements and guidelines for integration courses, the Act establishes sanction mechanisms that “are vital for the effectiveness of the entire project.” In cases where an integration course is required, failure to participate may result in “denial of temporary residence permit renewal, denial of a permanent residence permit despite compliance with all other criteria, [or] denial of fast-track naturalization.”

Pursuant to the Act, the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) (BAMF) has established detailed guidelines for integration courses. At the core of the integration courses is language acquisition, which BAMF believes is essential to successful assimilation into both the labor market and German society more generally. BAMF has also developed an orientation course, which offers basic knowledge of German culture, history, and the legal system. The orientation courses are meant to complement language acquisition and “encourage migrants to think positively about their new home.” BAMF’s detailed guidelines enable teaching insti-

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114 Id. § 43(1).
115 See Zimmerman et al., supra note 19, at 41.
116 The integration regulations apply only to “foreigners living lawfully in the Federal territory on a permanent basis.” Aufenthaltsgesetz [AufenthG][Residence Act], July 30, 2004, BGBl. I § 43. A foreigner is considered to be a permanent resident if he or she receives a residence permit for “over one year’s duration or [if he or she] has held a residence permit for more than 18 months.” Id. § 44(1).
117 Id. § 43(2).
118 Id. § 44a(1).
119 Zimmerman et al., supra note 19, at 43.
120 Id. at 42 (internal quotations omitted).
121 See Aufenthaltsgesetz [AufenthG][Residence Act], July 30, 2004, BGBl. I § 43(3).
123 See id. at 20–23.
124 Id. at 4.
tutions and instructors conducting the courses to develop curricula adapted to their students.125

The Act’s integration provisions represent a significant step forward because they offer nationwide integration courses, which were largely unavailable, or inadequate where available under previous policies.126 Yet critics have challenged the Act for not appropriately incentivizing language acquisition and for failing to provide practical advice on how to succeed in the labor market.127 One commentator argues that Germany should consider requiring potential immigrants to take a language test before or immediately after entering Germany.128 Were an individual to fail, he or she would be required to pay a security deposit that would be reimbursed after successfully completing a language course.129 This would provide much stronger incentives for individuals to attend and complete integration courses.130 Additionally, critics point out that orientation courses focus solely on “legal, cultural and historical issues” and lack practical advice about navigating the German labor market.131 Thus, a foreigner who becomes unemployed may not be adequately prepared to search for work.132 To ensure that unemployed immigrants do not become a burden on the state welfare system, critics argue that legislators should consider amending the integration courses to include advice on how to succeed in the labor market.133

Whether or not the statutory integration provisions are robust enough to support the needs of incoming foreigners, the implementation of these provisions has not been able to meet the high demand for integration courses. At the end of October 2010, the Spiegel Online reported that integration courses in Germany were completely full, with

125 See id. at 5.
126 See Zimmerman et al., supra note 19, at 41.
127 Id. at 42.
128 Id.
129 Id.
130 Id. at 42–43.
131 See id. at 42; cf. Fed. Office for Migration & Refugees, supra note 121, at 20–23 (outlining the objectives of orientation courses, which include understanding the German State, fostering a positive attitude toward Germany, providing information on rights and duties, enabling immigrants to acquire information independently, promoting participation in social life, and acquiring intercultural competence; neither the objectives nor the content of courses address the job-seeking process for the unemployed).
132 See Zimmerman et al., supra note 19, at 42.
133 See id.
waitlists exceeding 9,000 willing participants.\textsuperscript{134} Although 140,000 individuals were participating in 16,000 integration courses at the time, the infrastructure for integration courses was unable to satisfy the demand for language training.\textsuperscript{135} The quality of integration courses has suffered as a result, causing the Commissioner for Migration, Refugees, and Integration, Maria Böhmer, to propose reforms to strengthen the integration process.\textsuperscript{136} Among her recommendations, Böhmer has suggested that language courses be offered via the Internet by better qualified instructors.\textsuperscript{137} Böhmer has also indicated that the Ministry of the Interior has set aside €15 million to address deficiencies in the integration process.\textsuperscript{138}

The Immigration Act of 2004 represents a significant step forward for Germany, establishing labor migration as a legitimate category of immigration and providing expedited settlement permits for third-country nationals meeting the Act’s requirements.\textsuperscript{139} That the Act separates highly qualified workers from immigrants seeking other types of immigration—such as asylum and family reunification—indicates that Germany has recognized the importance of promoting economic migration as a long-term solution to labor market problems such as demographic decline.\textsuperscript{140} These economic goals parallel the immigration policies later adopted by the European Union.\textsuperscript{141}

\textsuperscript{134} See Integrationskurse für Migranten sind überlaufen, SPIEGEL ONLINE (Ger.) (Oct. 23, 2010), http://www.spiegel.de/politik/deutschland/0,1518,724960,00.html.

\textsuperscript{135} See id.

\textsuperscript{136} See Böhmer will Integrationskurse verstärken, DER TAGESSPIEGEL (Ger.) (July 8, 2010), http://www.tagesspiegel.de/politik/boehmer-will-integrationskurse-verstaerken/1877884.html; Qualitätsmängel bei Integrationskursen?, BADISCHER WUHR (Ger.) (Mar. 14, 2011), http://www.badischer-zeitung.de/deutschland-1/qualitaetsmaengel-bei-integrationskursen-42627330.html.

\textsuperscript{137} Qualitätsmängel bei Integrationskursen?, supra note 136.

\textsuperscript{138} Böhmer will Integrationskurse verstärken, supra note 136.

\textsuperscript{139} See supra text accompanying notes 94–97.

\textsuperscript{140} See supra text accompanying notes 34, 88–90. Separate provisions of the Act address admission for asylum seekers, Aufenthaltsgesetz [Residence Act], July 30, 2004, BGBl. I §§ 22–26, and those seeking family reunification, id. §§ 27–34.

\textsuperscript{141} See discussion infra Part II.B.
B. The European Union

1. Approach to Economic Migration

Before Germany revamped its immigration policy through the Immigration Act of 2004, the European Council (Council) set a strategic goal, known as the Lisbon Strategy, to become a more competitive, knowledge-based economy. Although the Lisbon Strategy does not directly address the need to harmonize member states’ immigration policies, it focuses heavily on developing an information-based society with a specific focus on promoting research and development to generate economic growth. Subsequent meetings of the European Council in 2003 and 2004 expanded on these ideas, exploring the possibility of increasing immigration from third countries to meet demands of the labor market.

142 The European Council is a formal institution of the EU, consisting of the heads of state of each member state, as well as the President of the European Commission; it is tasked with “defin[ing] the general political directions and policies” of the EU. See Consolidated Version of the Treaty on European Union art. 15(2)–(3), Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU].

143 Lisbon Presidency Conclusions, supra note 23, para. 5. The initiatives associated with the EU’s goal of becoming more competitive globally became known as the Lisbon Strategy, under which a wide variety of policies have been adopted since March 2000.

144 See Lisbon Presidency Conclusions, supra note 23, paras. 5–19.

145 See Presidency Conclusions, Brussels European Council, Annex I, Part III, § 1.4 (Nov. 4–5, 2004) [hereinafter Brussels Presidency Conclusions], available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/82534.pdf (“Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy.”); Presidency Conclusions, Thessaloniki European Council, para. 30 (June 19–20, 2003), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/76279.pdf (“In order to respond to [demographic and economic challenges facing the EU], the European Council stresses the need to explore legal means for third-country nationals to migrate to the Union, taking into account the reception capacity of the member states, within the framework of an enhanced cooperation with the countries of origin which will prove beneficial for both sides.”). The EU first acquired competence to regulate in the area of migration under the 1997 Treaty of Amsterdam. European Commission, A Common Agenda for Integration: Framework for Integration of Third-Country Nationals in the European Union, at 12, COM (2005) 389 final (Sept. 1, 2005) [hereinafter A Common Agenda for Integration]. Article 79(1) of the current Treaty on the Functioning of the European Union allows the EU to “develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows [and] fair treatment of third-country nationals residing legally in Member States.” Consolidated Version of the Treaty on the Functioning of the European Union art. 79(1), Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU]. To achieve this provision’s goals, the European Parliament and the Council have the authority to adopt measures regarding “the conditions of entry and residence, and
Against this backdrop, the European Commission\(^{146}\) (Commission) sought to develop policies to promote economic migration of third-country nationals into the EU.\(^{147}\) In addition to the stated goals of the Council, the Commission recognized the need for long-term immigration policies to address demographic decline and aging populations in European countries.\(^{148}\) Economic migration, the Commission noted, would serve both as a solution to demographic decline and a complement to the Lisbon objective to increase European competitiveness.\(^{149}\) To this end, the Commission stressed the need for a common European policy regarding economic immigrants to meet the needs of the internal market and ensure Europe’s prosperity.\(^{150}\) As part of this policy, the Commission sought to attract third-country nationals by guaranteeing both their legal status and their right to assistance during the integration process.\(^{151}\) Recognizing the traditional sovereignty of member states in the area of immigration, the Commission also suggested that member states maintain the ability to set quotas on the number of immigrants admitted.\(^{152}\)

Ultimately, the Commission proposed that economic migration policies should be harmonized across member states and offered several options that could be implemented at the EU level.\(^{153}\) After several years of discussion within the EU, the Council adopted Directive 2009/50/EC (Directive), outlining “the conditions of entry and residence of third-country nationals for the purposes of highly qualified standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification.” \(^{146}\) The European Commission is a formal institution of the EU with “legislative, administrative, executive, and judicial powers.” \(^{147}\) See Paul Craig & Gráinne de Búrca, EU Law: Text, Cases, and Materials 43 (4th ed. 2008). It consists of nationals of member states, but represents the EU as a whole as an independent body. \(^{148}\) See id. at 39; see also TEU art. 17.


\(^{150}\) See id.

\(^{151}\) See id. at 4.

\(^{152}\) See id.

\(^{153}\) Green Paper on Economic Migration, supra note 147, at 4, 5–12. The Commission offered suggestions on the degree to which immigration policies should be harmonized among member states, see id. at 5–6, options for admissions procedures, see id. at 6–9, application procedures for residence permits, see id. at 9, rights of third-country nationals, see id. at 10, and potential measures to accompany immigration policies, such as integration procedures, see id. at 11–12.
employment.” Under European law, the Directive is not binding on member states. Rather, it establishes the general aims of the EU: to harmonize “[m]easures to attract and retain highly qualified third-country workers” in order to “enhanc[e] the knowledge-based economy in Europe.” The Directive recognizes the importance of making the EU more attractive to highly qualified third-country nationals, and to that end establishes “a fast-track admission procedure” and grants “equal social and economic rights as nationals of the host Member State in a number of areas.”

The Directive establishes the EU Blue Card, which provides “a simplified, accelerated, and standardized admissions process” for third-country nationals to enter member states. It applies to persons engaged in highly qualified employment, broadly defined as having “the required adequate and specific competence, as proven by higher professional qualifications.” Third-country nationals may be admitted as Blue Card holders under the following conditions: they must hold a valid work contract or binding job offer for highly qualified employment lasting at least one year; they must possess valid travel documents, including a visa and residence permit; and they must provide evidence of having health insurance as required by the individual member state. The narrowly defined grounds for refusing a Blue Card application are limited to fraudulent or falsified documentation or employer

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155 According to the TFEU, “[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” TFEU art. 288 (emphasis added). Unlike other types of legislation, member states must pass national implementation measures pursuant to the aims of the directive, and member states maintain significant discretion with regard to the implementation process. See Craig & de Búrca, supra note 146, at 279–80. Failure of member states to implement directives may cause EU policies and goals to suffer. Id. at 280. Although Germany is not per se required to implement Directive 2009/50/EC, failure to do so may result in adverse consequences if existing German legislation achieves effects that are contrary to the aim of the Directive. See id. at 282 (noting that member states may not adopt measures likely to interfere with the aim of a directive). For a more detailed discussion of the enforceability of directives, see id. at 279–303.


157 Id. at 17–18.


160 Id. at 22.
sanctions. Nevertheless, member states maintain the ability to set quotas on the number of third-country nationals admitted under the Directive.

In addition to streamlining the process for application and entry into member states, the Directive contains extensive provisions on rights accorded to Blue Card holders. For example, after two years of employment as a Blue Card holder, third-country nationals have equal access to the labor market as nationals of member states. If the Blue Card holder becomes unemployed, the work permit may not be revoked unless unemployment exceeds three consecutive months. Additionally, Blue Card holders enjoy equal treatment in a number of areas, including working conditions, education and vocational training, freedom of association with labor unions, and free access to the entire territory of the member state. Family members are allowed to join Blue Card holders in the member states, and long-term resident status is relatively easy to obtain after a period of continuous residence within the EU. These benefits are meant to attract highly qualified workers in the interest of increasing human capital in the EU.

Nevertheless, both the Treaty on the Functioning of the European Union and the Directive preserve the sovereignty of member states to determine the volume of admission of third-country nationals. Additionally, the Directive provides that each member state may reject Blue Card applicants where the employment vacancy in question could be filled by a citizen of the member state or the EU.

2. Approach to Integration of Third-Country Nationals

Alongside the common migration policy, the EU has begun to develop common integration policies for third-country nationals, recognizing that increasing immigration presents integration challenges.

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161 Id. at 23.
162 Id.
163 See id. at 25–27.
164 Id. at 25.
166 Id. at 25–26.
167 See id. at 26–27.
168 Id. at 17.
169 See TFEU art. 79(5); Directive 2009/50/EC, supra note 154, at 23.
170 Directive 2009/50/EC, supra note 154, at 23. Thus, EU citizens receive preferential treatment for employment vacancies within the Union. Id.
common among all member states.\textsuperscript{171} In November 2004, the Council established the Hague Programme, which sought to develop Europe-wide policies to promote equal opportunities for and prevent isolation of immigrants.\textsuperscript{172} Rather than establish detailed integration procedures, such as requiring language and orientation courses, the EU has suggested broad policies for, offered best practices from, and provided monetary support to member states for integration measures.\textsuperscript{173}

The Commission’s first attempt to establish a European approach to integration is outlined in its 2005 Communication on a Common Agenda for Integration (Communication).\textsuperscript{174} At the time, member states approached integration through a wide variety of policies.\textsuperscript{175} Based on a review of these varied approaches, the Communication offers general guidance for common integration policies built on basic European principles of “fundamental rights, nondiscrimination, and equal opportunity.”\textsuperscript{176} In addition to supporting language acquisition and cultural education, the Communication recommends that member states promote interaction between immigrants and nationals, and preserve the diverse cultural practices that immigrants contribute to member states.\textsuperscript{177}

The Commission rightly recognized that “[l]egal migration and integration are inseparable and should mutually reinforce one another.”\textsuperscript{178} Just as the EU has streamlined admission of third-country nationals,\textsuperscript{179} standardized integration procedures could maximize the

\textsuperscript{171} See A Common Agenda for Integration, supra note 145, at 3; Brussels Presidency Conclusions, supra note 145, at Annex I, Part III, § 1.5.

\textsuperscript{172} Brussels Presidency Conclusions, supra note 145, at Annex I, Part I, para. 6.


\textsuperscript{174} See A Common Agenda for Integration, supra note 145, at 4. As of July 2011, all actions presented in this Communication had been completed on a European level. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Agenda for the Integration of Third-Country Nationals, at 2, COM (2001) 455 final (July 20, 2011) [hereinafter European Agenda for Integration]. However, the principles of the Communication are still applicable to the current social and economic context in Europe. See id.

\textsuperscript{175} A Common Agenda for Integration, supra note 145, at 3.

\textsuperscript{176} Id.

\textsuperscript{177} See id. at 9.

\textsuperscript{178} Id. at 14.

\textsuperscript{179} See Directive 2009/50/EC, supra note 154, at 17–18.
effectiveness of integration in each member state.\textsuperscript{180} Although member states’ interest in maintaining sovereignty over policies that primarily affect internal borders may outweigh the European interest in common integration procedures,\textsuperscript{181} the EU offers guidance for integration measures currently lacking in German policy.\textsuperscript{182} Placing greater emphasis on mutual toleration between immigrants and nationals, however, may strengthen Germany’s ability to attract third-country nationals and secure economic growth amid the global race for talent.

III. Analysis

A. The Global Race for Talent

As Cem Özdemir, former German representative to the European Parliament, noted, “experts have repeatedly argued that Germany will face a near-term shortage of qualified labor, and that the country must prepare itself to recruit highly qualified immigrants, even if this means starting out gradually.”\textsuperscript{183} A significantly declining birthrate and corresponding aging population are two of the most pressing labor issues currently facing Germany.\textsuperscript{184} Germany’s Immigration Act of 2004 secured measures to attract highly qualified human capital, which, if correctly executed, will eventually relieve this socio-economic strain on the country.\textsuperscript{185} The Act has thus entered Germany into the global race for human capital.\textsuperscript{186} Since the late twentieth century, countries worldwide have been amending their immigration policies—such as those established in Germany and the EU—to target well-educated foreigners, especially those working in technological industries.\textsuperscript{187} This trend has

\textsuperscript{180} See A Common Agenda for Integration, supra note 145, at 14 (suggesting that the EU and member states should work together to maximize the impact of EU integration policies).


\textsuperscript{182} Compare A Common Agenda for Integration, supra note 145, at 5–10 (offering integration strategies emphasizing mutual accommodation and two-way communication between immigrants and member state nationals), with Fed. Office for Migration & Refugees, supra note 121, at 6–23 (outlining integration procedures focused solely on enabling immigrants to achieve self-sufficiency in German society).

\textsuperscript{183} Özdemir, supra note 26, at 222.

\textsuperscript{184} See Zimmerman et al., supra note 19, at 84, 104; Özdemir, supra note 26, at 223.

\textsuperscript{185} See Zimmerman et al., supra note 19, at 84.

\textsuperscript{186} See Shachar, supra note 18, at 191.

\textsuperscript{187} See id. at 151.
resulted in a heated “race for talent,” with countries jockeying for preferred position among the most talented minds in the world.\textsuperscript{188}

The race for talent arises where economic growth increasingly depends on human capital, as opposed to trading goods and services.\textsuperscript{189} Rather than low-skilled, manual labor, countries seek immigrants with “talent, ambition, and expertise, [which] are the \textit{sine qua non} for maintaining a competitive advantage in the knowledge-based global economy.”\textsuperscript{190} To attract highly qualified foreigners, countries have not only relaxed immigration requirements, but have also created non-economic incentives related to immigrants’ desire for “the security and prosperity that is attached to membership in a stable, democratic, and affluent polity.”\textsuperscript{191} Countries participating in the race for talent thus assume that highly qualified workers—that is, talented foreigners in technological industries—will ultimately choose to immigrate to countries offering the ability to settle long-term.\textsuperscript{192} As a result of this global race for talent, countries have begun formulating immigration policies in reaction to those of competing countries.\textsuperscript{193}

The race for talent is further evidenced by the growing importance of technology in our economy.\textsuperscript{194} Technology is the starting point for long-term economic development.\textsuperscript{195} Historically, economic theorists have understood that technology plays a vital role in economic growth, and its importance has become increasingly apparent in the twenty-first century.\textsuperscript{196} High-tech industries promote generation of new products, new wealth, and new jobs, thus sustaining growth.\textsuperscript{197} Technological industries would not exist, however, without the talent to support them.\textsuperscript{198} Within current knowledge-based economies, that talent, in the form of human capital, is key to driving economic development.\textsuperscript{199} Indeed, some scholars believe that geographic regions that combine

\textsuperscript{188} See \textit{id.} at 153.
\textsuperscript{189} See Florida & Tingali, \textit{supra} note 22, at 12.
\textsuperscript{190} Shachar, \textit{supra} note 18, at 150.
\textsuperscript{191} \textit{Id.} at 164.
\textsuperscript{192} See \textit{id.}
\textsuperscript{193} See \textit{id.} at 153–155.
\textsuperscript{194} See Florida & Tingali, \textit{supra} note 22, at 12.
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} Florida & Tingali, \textit{supra} note 22, at 12, 19; see also Richard Florida, \textit{The Rise of the Creative Class} 15–17 (2002) (observing the heated debate over technology in the modern world).
\textsuperscript{197} Florida & Tingali, \textit{supra} note 22, at 19.
\textsuperscript{198} See \textit{id.} at 12.
\textsuperscript{199} \textit{Id.}
technology and talent are well-positioned for long-term economic growth.  

A 2004 study of European competition for human capital indicated that Germany is currently well-positioned to offer the technological employment opportunities that are foundational for economic growth. Only Sweden and Finland spend more on research and development than Germany, and only Finland and the Netherlands submit more high-tech patent applications per million people. These data suggest that high-tech and innovative industries such as biotechnology and information technology already thrive in Germany. Although Germany ranks high regarding technology, however, it falls behind five European countries with respect to scientific talent. Comparing these data indicate that Germany already offers technological opportunities attractive to highly qualified workers, though it does not have the talent to fill these positions.

The Immigration Act of 2004 may respond to this talent gap by easing the admissions process for highly qualified third-country nationals. By passing this comprehensive immigration legislation, Germany has recognized the need to address long-term demographic decline by encouraging economic migration.

See Florida, supra note 196, at 249–52.


See Florida & Tingali, supra note 22, at 12.

See id. at 23 fig.7.

See id. at 19–23.

See id. at 17 fig.4 (showing Finland, Sweden, Denmark, France, and Belgium employ more researchers per thousand workers than Germany).

Compare id. at 19–23, with id. at 15–17.

See supra text accompanying notes 88–98.

See Zimmerman et al., supra note 19, at 44.
lined in the Act allow Germany to consider current economic needs—including filling employment positions for talented immigrants, such as scientists and researchers—while offering “something more” for immigrants, such as opportunities for long-term settlement.\(^{209}\) Moreover, the Act is closely aligned with EU policy as outlined by the Council Directive of 2009,\(^{210}\) but better addresses market needs and incentive measures to attract highly qualified workers.\(^{211}\) Germany’s Act focuses efforts on recruiting a more narrowly defined set of highly qualified workers and offers an immediate opportunity for long-term residence in certain cases.\(^{212}\) The Act thus promotes economic migration based on the most significant areas of growth: scientific and technological development.\(^{213}\)

Germany’s fast-track admissions procedure may be part of that “something more” that could attract potential immigrants.\(^{214}\) Through the Directive, Blue Card holders must enter the EU with a contract for one year’s employment.\(^{215}\) Nevertheless, Blue Card holders do not qualify for long-term residence in the EU until after five years of continuous legal residence within the Union.\(^{216}\) Germany may thus be more attractive to highly qualified third-country nationals than other European countries, because German law offers immediate opportunity for long-term residence through an expedited settlement permit.\(^{217}\) Moreover, as long-term residents of a member state receive the same rights as nationals, the rights of foreigners living in Germany attach more quickly than in other European countries.\(^{218}\) Germany’s

\(^{209}\) See Aufenthaltsgesetz [AufenthG][Residence Act], July 30, 2004, BGBl. I §§ 18–19, 39; Shachar, supra note 18, at 164–65.

\(^{210}\) Compare Aufenthaltsge setz [AufenthG][Residence Act], July 30, 2004, BGBl. I §§ 1, 19 (stating that the purpose of the Act is to enable immigration based on Germany’s labor market needs, and specifically targeting highly qualified third-country nationals), with Directive 2009/50/EC, supra note 154, at 17–18 (“[The Directive] is intended to contribute to achieving [the Lisbon Strategy objectives] by fostering the admission and mobility—for the purposes of highly qualified employment—of third-country nationals”).

\(^{211}\) Compare Aufenthaltsge setz [AufenthG][Residence Act], July 30, 2004, BGBl. I § 19 (offering immediate settlement permits to a narrowly defined set of highly qualified workers), with Directive 2009/50/EC, supra note 154, at 21, 26 (providing long-term resident status for broadly defined Blue Card holders after five years of legal residence).

\(^{212}\) See Aufenthaltsge setz [AufenthG][Residence Act], July 30, 2004, BGBl. I § 19.

\(^{213}\) See id.

\(^{214}\) See id. §§ 9(1), 19.


\(^{216}\) See id. at 26.


long-term residence program is therefore an added incentive for third-country nationals to settle in Germany.\textsuperscript{219}

Efforts to attract human capital, however, must be accompanied by effective measures to retain human capital.\textsuperscript{220} While attracting human capital is effected through immigration policy, retaining human capital is effected through integration policy.\textsuperscript{221} With so many countries involved in the race for talent, highly qualified individuals can be more selective in deciding where to immigrate for employment.\textsuperscript{222} Robust procedures focused on long-term integration, specifically those that promote tolerance, will thus increase the likelihood that highly qualified workers will remain in the country they initially chose.\textsuperscript{223}

**B. Integration Policies Must Reflect Tolerance**

Germany cannot rely on technology alone to succeed in the global race for talent; it must also cultivate tolerance for diversity to remain economically competitive.\textsuperscript{224} Scholars have argued that “openness to immigration is the cornerstone of innovation and economic growth,” and have suggested that countries such as Germany and Japan have declined in economic prosperity due to primarily homogenous populations.\textsuperscript{225} On the other hand, the United States has prospered in the global economy precisely because it is open to and tolerant of innovative people from around the world.\textsuperscript{226} The success of the United States can also be broken down by metropolitan area: immigrants constitute nearly twenty-five percent of the population of Silicon Valley, the world’s leading center of technology.\textsuperscript{227} Although tolerance of immigrants may not directly cause economic growth, regions that are highly

\textsuperscript{219} See Aufenthaltsgesetz [AufenthG] [Residence Act], July 30, 2004, BGBl. I §§ 9(1), 19.

\textsuperscript{220} Cf. Zimmerman et al., supra note 19, at 83 (suggesting that long-term immigration policy is necessary to address the potential effects of labor force decline).

\textsuperscript{221} Cf. id.

\textsuperscript{222} See Shachar, supra note 18, at 200.

\textsuperscript{223} Cf. id. at 164–65 (proposing that “something else,” in addition to economic consideration, is necessary to attract and retain highly qualified immigrants).

\textsuperscript{224} Cf. Florida, supra note 196, 252–55 (discussing the economic success of geographic regions that are tolerant toward outsiders, including immigrants); Florida & Tingali, supra note 22, at 12 (“Tolerance . . . critically affects the ability of nations and regions to mobilize their own creative capacities and compete for creative talent.”).

\textsuperscript{225} Florida, supra note 196, at 252.

\textsuperscript{226} Id. (citing G. Pascal Zachary, The Global Me (2000)).

\textsuperscript{227} Id. at 253.
tolerant of foreigners create low barriers of entry, which increases the likelihood of innovation and growth.\textsuperscript{228}

Promoting tolerance may be a significant challenge for Germany, especially given the current state of national discourse about immigration and multiculturalism.\textsuperscript{229} Germany’s difficulty with welcoming highly qualified third-country nationals is evidenced by the legislative history of the Immigration Act.\textsuperscript{230} Whereas the initial draft of the Act would have immediately offered unlimited settlement permits to immigrants meeting a broad range of “integration-relevant criteria,”\textsuperscript{231} the Act currently in force narrows the ability of immigrants to receive settlement permits upon entry.\textsuperscript{232} Additionally, the Act’s integration policies focus solely on the ability of foreigners to assimilate into German society.\textsuperscript{233} Language and cultural studies, while important, only address half of the problem.\textsuperscript{234} Germany must also attempt to foster tolerance.\textsuperscript{235} Ultimately, Germans themselves must believe that highly qualified third-country nationals are an important addition to German society.\textsuperscript{236}

The EU guidelines for integration, while not binding on Germany, provide Germany with a policy framework to achieve the successful integration of highly qualified third-country nationals.\textsuperscript{237} In addition to

\textsuperscript{228} See id. at 250.
\textsuperscript{229} See supra text accompanying notes 1–17.
\textsuperscript{230} Özdemir, supra note 26, at 222–23.
\textsuperscript{231} Id. at 222.
\textsuperscript{232} See Aufenthaltsgesetz [AufenthG][Residence Act], July 30, 2004, BGBl. I § 19. Although the conditions under which the Act allows settlement permits are more restricted than those initially drafted, the Act still provides a better opportunity for immigrants to receive long-term residence than the EU Directive. See supra text accompanying notes 110–111, 215–217.
\textsuperscript{233} See Aufenthaltsgesetz [AufenthG][Residence Act], July 30, 2004, BGBl. I § 43; see also Fed. Office for Migration & Refugees, supra note 121, at 4–5 (outlining standardized procedures for integration courses).
\textsuperscript{234} See Fed. Office for Migration & Refugees, supra note 121, at 4.
\textsuperscript{235} Cf. Florida & Tingali, supra note 22, at 12 (“[Tolerance critically affects the ability of nations . . . to mobilize their own creative capacities and compete for creative talent . . . . This is a critical dimension of economic competitiveness today.”).
\textsuperscript{236} Cf. Özdemir, supra note 26, at 223 (“The points system also could have helped to change the image of migrants in Germany. If highly qualified Turkish immigrants had come to Germany, this probably would have dispelled several common stereotypes about Turks or Muslim immigrants.”); Habermas, supra note 7 (“The question is this: Does participation in democratic procedures have only the functional meaning of silencing a defeated minority, or does it have the deliberative meaning of including the arguments of citizens in the democratic process of opinion- and will-formation?”).
\textsuperscript{237} See A Common Agenda for Integration, supra note 145, at 5–10; European Agenda for Integration, supra note 174, at 4–10. See generally 2010 Handbook, supra note 173; Director-
recommending integration measures targeted solely toward the immigrant population, the EU guidelines emphasize the importance of mutual accommodation and intercultural dialogue between immigrants and national citizens.\(^\text{238}\) The Justice and Home Affairs Council (JHA), a configuration of the Council of the European Union\(^\text{239}\) consisting of justice ministers and interior ministers of member states, adopted mutual accommodation and intercultural dialogue as basic principles of integration.\(^\text{240}\) These principles recognize that member states must develop societies that both accept immigrants and make them feel welcome.\(^\text{241}\) The JHA explained mutual accommodation as “demand[ing] the participation not only of immigrants and their descendants, but of every resident.”\(^\text{242}\) Similarly, the JHA emphasized that integration generally occurs on a local level, where frequent interactions between immigrants and nationals are encouraged.\(^\text{243}\) Based on these guidelines, two possible measures stand out as particularly likely to increase integration in Germany.

1. Promoting Thoughtful Public Discourse

In the most recent *Handbook on Integration*, the EU emphasizes the importance of dialogue platforms to foster the principle of mutual accommodation.\(^\text{244}\) Increasing diversity in a small community may have negative impacts on the native and immigrant populations by breeding individualism and isolation, two societal characteristics that negatively affect integration.\(^\text{245}\) Thus, to promote positive integration, the *Handbook on Integration* recommends promoting thoughtful public discourse.

\(^\text{238}\) See *A Common Agenda for Integration*, supra note 145, at 5, 9.

\(^\text{239}\) The Council of the European Union, not to be confused with the European Council, is a formal institution of the EU consisting of representatives from each member state. See TEU art. 16(2). It functions as a legislative body and must approve any law proposed by the Commission. See *Craig & de Búrca*, supra note 146, at 52.


\(^\text{241}\) JHA Press Release, supra note 240.

\(^\text{242}\) Id.

\(^\text{243}\) Id. at 23.

\(^\text{244}\) 2010 *Handbook*, supra note 173, at 78.

\(^\text{245}\) See id. at 79, 83.
book recommends policymakers establish dialogue platforms in specific local contexts, such as schools, neighborhood associations, and workplaces. By focusing on small communities, this policy gives immigrants and natives an opportunity to interact on a personal level and engage in a two-way learning process more likely to establish support networks and lead to successful integration.

The heated debate about immigration currently permeating national German media may hinder the integration process by discouraging mutual accommodation. Prominent politicians have presented multiculturalism as simply unworkable in German society. As one distinguished German philosopher noted, this type of dialogue “divert[s] the social anxieties of . . . voters into ethnic aggression against still weaker social groups.” The German government has already addressed the difficulty of multiculturalism by requiring integration courses for newly arrived immigrants. Thus, political discourse discouraging multiculturalism risks negating current efforts to promote integration; negative conversation impedes integration by fueling German nationals’ growing resentment toward immigrants. This weakens social networks that are particularly important for integration, and negatively impacts immigrants relying on these networks to ease the integration process. Furthermore, as immigrants are growing consumers of media in Europe, negative portrayal of immigrant groups in national media may further isolate them from society at large.

Healthy public discourse is best achieved on a small, community level, so that leaders can focus on the specific integration needs facing immigrants and national citizens. To foster productive dialogue, the conversation must move from mainstream media into these smaller fo-

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246 See id. at 81–82.
247 See id. at 83, 91 (suggesting that participants in dialogue platforms are more likely to trust and accommodate one another due to open and respectful exchange of information).
248 See supra text accompanying notes 1–17.
249 See supra text accompanying notes 1–17.
250 See Habermas, supra note 7.
252 See Habermas, supra note 7 (“This discourse [promoting German Leitkultur] is in turn reinforcing trends toward increasing xenophobia among the broader population.”).
253 Cf. 2010 HANDBOOK, supra note 173, at 79 (“This weakening [of social and associational networks] has an impact on the integration of newcomers, who are hit the hardest. During the settlement process, newcomers tend to rely on the existing social and associational networks, more than natives or established groups, in order to make up for their lack of social capital in the country.”)
254 See id. at 27.
255 See id. at 83.
This is not to say that mainstream media must refrain from covering immigration and integration altogether; rather, national leaders should promote local conversation consistent with national integration policy. As the mainstream media serves to inform and educate the public, it should provide “a fair and balanced portrayal of immigrants,” rather than fuel hostilities.

Improving the immigration discussion in national media would allow policymakers to focus on promoting conversation on a local level. Dialogue should be tailored to meet the specific needs of a narrower society. By encouraging a conversation at a manageable local level, both immigrants and natives would have an opportunity to engage in intercultural dialogue that fosters trust, respect, and tolerance. Such a dialogue would in turn strengthen the social networks essential to successful integration and assist foreigners in becoming self-sufficient in German society—an essential component of the Immigration Act.

2. Provide Integrated Housing Schemes

Integrated housing schemes may also support the principle of intercultural dialogue, which focuses on “enhanc[ing] the interactions between immigrants and Member State citizens.” In the 2007 Handbook on Integration, the Commission provided policy guidelines for providing third-country immigrants with housing opportunities. Like

256 Cf. id. at 32 (discussing an effective media strategy and suggesting that integration officials should focus on activities and past experiences in local geographic areas for inspiration in framing their message).

257 See id. at 31–34 (offering strategies for creating an effective media strategy aligned to the interests of media organizations as well as national interests in integration).

258 Id. at 28.

259 Cf. 2010 Handbook, supra note 173, at 31–32 (discussing the effectiveness of media strategies in promoting national as well as local integration agendas).

260 See id. at 83.

261 See id. at 87. The Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) has promoted Migrantenorganisationen (immigrant organizations) as an important integration resource for immigrants, but the organizations are targeted solely at immigrants and not the native population. See Bundesamt für Migration und Flüchtlinge, 2. Fachtagung: ”Kompetenzen nutzen—Migrantenorganisationen stärken” [Second Conference: “Strengthening Immigrant Organizations”] 6 (May 7, 2010).

262 See Aufenthaltsgesetz [AufenthG] [Residence Act], July 30, 2004, BGBl. I § 43(2); Fed. Office for Migration & Refugees, supra note 121, at 4.

263 JHA Press Release, supra note 241, at 22.

264 See 2007 Handbook, supra note 237, at 31–46. The 2007 Handbook on Integration primarily addresses housing policies designed to ensure nondiscrimination against immigrant minorities, particularly where immigrants require affordable housing. See id. at 32–36. This Note focuses specifically on mixed housing affordable for middle class immi-
community-oriented dialogue platforms, integrated housing provides opportunities for immigrants and natives to interact on a personal level, strengthening the social networks on which immigrants rely for successful integration.265

According to a 2008 report on segregation in Germany, thirty to forty percent of immigrants in German cities live in “ethnic neighborhoods”—that is, segregated from national citizens.266 As indicated by the Commission, this isolation from broader German society may hinder the process of integration for immigrants.267 Additionally, a lack of interaction between natives and immigrants may fuel resentment from the native population toward unfamiliar immigrant cultures.268 To counteract the negative impact of isolation, Germany may consider enacting policies to promote integrated housing schemes, such as tax incentives for private developers or property owners.269 Integrated housing would serve not only to increase immigrants’ housing choices and combat nondiscrimination, but it would also foster the intercultural dialogue promoted by the EU.270 This in turn would also support the German integration goal of promoting self-sufficiency for immigrants.271

grants, given that highly qualified third-country nationals will primarily fill this demographic. See id. at 38–39; see also Aufenthaltsgesetz [AufenthG][Residence Act], July 30, 2004, BGBl. I. § 19(2) (“Highly qualified persons . . . are, in particular, . . . specialists and executive personnel with special professional experience who receive a salary equal to or exceeding the contribution assessment ceiling of the general pension scheme.”); Directive 2009/50/EC, supra note 154, at 23 (“[T]he gross annual salary [of highly qualified third-country nationals] shall be at least 1.5 times the average gross annual salary in the Member State concerned.”). 265 Cf. 2007 Handbook, supra note 237, at 37 (“[S]patial [segregation of immigrants and nationals] can have the effect of isolating immigrants from society more broadly and providing few opportunities to learn the language, especially for children.”).

266 See Lena Friedrich, Wohnen und interstädtische Segregation von Migranten in Deutschland [Housing and Intercity Segregation of Immigrants in Germany] 46 (Bundesamt für Migration und Flüchtlinge, Working Paper No. 21, 2008).

267 Cf. 2007 Handbook, supra note 237, at 37 (“[S]patial [segregation of immigrants and nationals] can have the effect of isolating immigrants from society more broadly and providing few opportunities to learn the language, especially for children.”).

268 Cf. Habermas, supra note 7 (“[T]rends toward increasing xenophobia . . . have been apparent for many years in studies and survey data show a quiet but growing hostility toward immigrants.”).


270 See id. at 39; A Common Agenda on Integration, supra note 145, at 9.

CONCLUSION

When it was enacted in 2004, Germany’s Immigration Act was a bold legislative move intended to consolidate and unify a wide variety of disjointed immigration policies from 1973 forward. The Act not only achieved this goal, but also refocused Germany’s efforts to attract immigrants in the global race for talent. Through the Act, Germany is poised to attract the best and brightest minds from around the world. Nevertheless, success in the race for talent depends on much more than attracting well-educated, talented immigrants for knowledge-based industries. The ability to retain highly qualified immigrants is especially important for Germany, a country that faces steep demographic decline in the coming decades. Retaining these in-demand immigrants requires that Germany make significant efforts to amend its integration policies. Current discourse questioning the viability of multiculturalism must give way to discussions promoting mutual respect and understanding. Community-oriented dialogue platforms and integrated housing schemes are two concrete policy measures Germany may implement to strengthen integration procedures. Most importantly, though, guidelines for integration must focus on developing mutual tolerance between immigrants and natives to pave the way for economic growth and stability.
SHORT-TIME COMPENSATION: IS GERMANY’S SUCCESS WITH KURZARBEIT AN ANSWER TO U.S. UNEMPLOYMENT?

Megan Felter*

Abstract: The recent financial crisis caused a global recession that affected the economies of both the United States and Germany. While the ranks of jobless workers expanded in the U.S. and unemployment remain high, Germany’s labor market was less affected by the recession because of its success with Kurzarbeit, a work sharing program. Germany’s experience with Kurzarbeit can provide the United States with useful insights to improve its own version of work sharing—short-time compensation—to better combat unemployment.

Introduction

Unemployment rates soared throughout the world during the 2008–2009 economic crisis.1 The United States and Germany were vulnerable to the recession’s impact; both countries’ economies experienced significant downturns.2 Germany contained its unemployment problem more successfully, however, with Kurzarbeit, a work sharing program.3 The program has garnered international attention because it allows the government to supplement workers’ income during temporary periods of decreased demand.4 Because the German program al-

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3 See Employment Outlook: Germany, supra note 2, at 1.

4 Andreas Crimmann et al., The German Work-Sharing Scheme: An Instrument for the Crisis 13 (ILO Conditions of Work & Emp. Series No. 25, 2010). See generally Nicholas Kulish,
allows individuals to remain employed and receive a sufficient income while working fewer hours, widespread application of a similar framework in the United States could prove useful in managing unemployment rates.\(^5\)

Part I of this Note describes U.S. and German responses to the recession’s impact on unemployment rates, focusing on Germany’s success with work sharing and noting the existence of similar short-time compensation (STC) programs in the United States. Part II juxtaposes the success of \textit{Kurzarbeit} in Germany against the underutilization of STC programs in the United States, and explores why U.S. work sharing programs have not achieved their full potential. Part III considers strategies, informed by Germany’s experience with work sharing, to increase the United States’ use of STC programs to combat unemployment.

\section*{I. Background}

\subsection*{A. The Recession’s Impact on the United States and Germany}

Many countries’ unemployment rates soared during and after the 2008–09 recession.\(^6\) In the United States, the unemployment rate doubled, rising from 5\% to 10\% during this two year period.\(^7\) By mid-2009, U.S. workers filed a record 6.8 million unemployment claims.\(^8\) Making matters worse, many of those filing claims faced unemployment for extended periods.\(^9\) There is a growing concern that such long-term unemployment will leave some workers destitute and perpetually excluded from the job market.\(^10\) In fact, in January 2012, almost 43\% of jobless Americans were considered “long-term unemployed,” having been out of work for at least twenty-seven weeks.\(^11\) Because the economy’s slow recovery has done little to prompt employers to hire more

\begin{footnotes}
\footnotetext[5]{See \textit{Alison M. Shelton}, Cong. Research Serv., R 40689, \textit{Compensated Work Sharing Arrangements (Short-Time Compensation) as an Alternative to Layoffs} 6–10, 14–16 (2010).}
\footnotetext[6]{See \textit{Crisis to Recovery}, supra note 1, at 15–16.}
\footnotetext[7]{\textit{Employment Outlook: U.S.}, supra note 2, at 1.}
\footnotetext[8]{\textit{Crisis to Recovery}, supra note 1, at 16.}
\footnotetext[9]{\textit{Employment Outlook: U.S.}, supra note 2, at 1.}
\footnotetext[10]{Id.}
\end{footnotes}
workers,\textsuperscript{12} the unemployment rate has remained above 8\% for three years.\textsuperscript{13}

The recession battered Germany’s economy to an even greater extent.\textsuperscript{14} Germany’s gross domestic product (GDP) decreased by almost 7\%—“a much stronger decline of GDP” than many other advanced and emerging countries experienced.\textsuperscript{15} As a major exporting country, Germany was particularly vulnerable to the recession in its service and manufacturing industries.\textsuperscript{16} Nonetheless, Germany avoided the significant increase in unemployment rates that the United States and many other countries experienced.\textsuperscript{17} While the U.S. unemployment rate jumped from 5.8\% in 2008 to 10\% in 2009, Germany’s unemployment rate remained relatively stable at approximately 7\%, increasing by only .4\% during the same period.\textsuperscript{18}

B. Kurzarbeit: Germany’s Work Sharing Program

\textit{Kurzarbeit}, meaning “short work,” is a government program that allows workers facing reduced hours due to temporary instances of decreased demand to keep their jobs and receive government funds to partially supplement their diminished income.\textsuperscript{19} \textit{Kurzarbeit} exemplifies

\begin{itemize}
\item \textsuperscript{12} See Employment Outlook: U.S., supra note 2, at 2.
\item \textsuperscript{13} Labor Force Statistics from the Current Population Survey: Unemployment Rate, BUREAU OF LABOR STATISTICS, http://data.bls.gov/timeseries/LNS14000000 (last visited May 18, 2012) (providing monthly unemployment rates from February 2009 to March 2012). Notably, the unemployment rate does not take into account “discouraged workers,” those individuals who have stopped looking for work because they believe no jobs are available for them.” BUREAU OF LABOR STATISTICS, supra note 11, at Frequently Asked Questions (FAQ). Thus, in January 2012, over one million “discouraged workers” were not included in the unemployment rate. \textit{Id.} at 2 & FAQ.
\item \textsuperscript{14} See Crimmann et al., supra note 4, at 5; Employment Outlook: Germany, supra note 2, at 1.
\item \textsuperscript{15} Crimmann et al., supra note 4, at 5; Employment Outlook: Germany, supra note 2, at 1; Members and Partners, OECD, http://www.oecd.org (click on “About” tab; then click on “Membership”) (last visited May 18, 2012).
\item \textsuperscript{17} Employment Outlook: Germany, supra note 2, at 1.
\item \textsuperscript{18} Labor Force Statistics from the Current Population Survey, supra note 13; Crimmann et al., supra note 4, at 4.
\item \textsuperscript{19} Short-Time Work or “Kurzarbeit”: Frequently Asked Questions, GERMAN MISSIONS IN THE U.S., http://www.germany.info (search “Kurzarbeit”; then follow “Short-Time Work or ‘Kurzarbeit’: Frequently Asked Questions” hyperlink) (last visited May 18, 2012); Crimmann et al., supra note 4, at 13. Although two other types of work sharing are available in
work sharing programs found worldwide, in countries such as France, Italy, Japan, Korea, and the Netherlands. Used in Germany during the Weimar Republic, work sharing spread to many industrial countries following World War II. Work sharing is an expansive term that refers to “any arrangement under which a firm chooses to reduce work hours across the board for many or all workers instead of permanently laying off a smaller number of workers.” Countries differ in their level of work sharing participation; in some places, participation is in the millions, while in others, participation is only in the tens of thousands. During the recession, countries that updated and extended their programs found work sharing valuable in combating unemployment.

Germany’s program has a long and robust history. A work sharing scheme was first used by German miners as early as 1910. It flourished under the Weimar Republic in the 1920s, and by 1969, the program was “reaffirmed in the country’s ... employment promotion law.” In the 1990s, work sharing was used to temper job loss during reunification and to respond to a struggling auto industry.

To keep workers employed during the recent recession, Germany used its Kurzarbeit program on an unprecedented scale. In mid-2009, over 1.4 million workers and 63,000 employers participated in the program. The “largest work sharing program[] in the world,” Kurzarbeit

Germany to address “seasonal short-time work” and “permanent loss of employment,” this Note focuses solely on the operation of work sharing programs in response to economic downturns causing short-term job loss. See Crimmann et al., supra note 4, at 13.

20 See Crimmann et al., supra note 4, at 32.
22 Shelton, supra note 5, at 1–2. Work sharing is not the same as job sharing, “where two persons actually share one job.” Crimmann et al., supra note 4, at 1.
23 See Crisis to Recovery, supra note 1, at 32.
24 See id. at 35; Employment Outlook: U.S., supra note 2, at 2.
26 Germany’s Response, supra note 25, at 2.
27 Id.; Wandner, supra note 21, at 20.
28 Crimmann et al., supra note 4, at 17.
29 See Crisis to Recovery, supra note 1, at iii; Germany’s Response, supra note 25, at 2; Vroman & Brusentsev, supra note 25, at 11–14.
30 Crisis to Recovery, supra note 1, at 32, 36.
cost the German government an estimated €5 billion but saved more than 200,000 jobs by the latter half of 2009.\textsuperscript{31}

Under Kurzarbeit, employees working reduced hours receive a “short-time allowance” of 60% of their former full-time wages, or 67% if they have a child.\textsuperscript{32} Workers receive the short-time allowance from their employers.\textsuperscript{33} In turn, the employers submit monthly accounts to the government and are reimbursed for the funds paid in excess of the workers’ net hourly compensation.\textsuperscript{34} Vacation and holiday pay, however, remain the employers’ responsibility.\textsuperscript{35} Employers must also make social insurance contributions, although provisions limited the contributions for lost hours to 80% of normal contribution payments.\textsuperscript{36} The government does, however, reimburse the employer for half of these payments during the first six months, and after six months, the government is responsible for the full amount of social insurance contributions.\textsuperscript{37}

Employers of any size and in any industry can participate in Kurzarbeit\textsuperscript{38} so long as there has been a reduction in available work “for economic reasons or . . . an unavoidable event” that other labor measures cannot adequately address.\textsuperscript{39} The decrease in work must be temporary, and return to normal working time must be anticipated within a year.

\begin{footnotesize}
\begin{enumerate}
\item Crimmann et al., \textit{supra} note 4, at iii, 1; \textit{Employment Outlook: Germany, supra} note 2, at 1. Other sources suggest that up to 432,000 jobs were saved. \textit{See Crisis to Recovery, supra} note 1, at 36; \textit{see also Short-Time Work or “Kurzarbeit,” supra} note 19 (estimating that “400,000 jobs have been saved”). Although this Note focuses solely on the significant role Kurzarbeit played in controlling Germany’s unemployment rate, Germany’s use of working-time accounts, its lack of a real estate and credit bubble burst, and its role as an exporter, particularly to China, may also have affected the country’s job market. \textit{See Crimmann et al., supra} note 4, at 1, 5–6; \textit{Angela in Wonderland, Economist}, Feb. 5–11, 2011, at 17.
\item \textit{Fed. Ministry of Labour & Soc. Affairs, Working Short-Time to Overcome the Crisis} 4 (Mar. 2010) (Ger.); Crimmann et al., \textit{supra} note 4, at 14. If a participating employee’s hours drop to zero, the employee receives a short-time allowance equal to unemployment benefits. Crimmann et al., \textit{supra} note 4, at 13.
\item \textit{Id.} at 4, 9.
\item \textit{Id.} at 7.
\item \textit{Id.} at 5, 7.
\item \textit{Id.}
\item \textit{Short-Time Work or “Kurzarbeit,” supra} note 19. Germany promotes the program as useful to a wide variety of employers, “a graphic arts agency employing five persons, the automotive supplier encompassing 500 employees, or the construction conglomerate with 50,000 workers on its payroll.” \textit{Id.}
\item \textit{Fed. Ministry of Labour & Soc. Affairs, supra} note 32, at 8; \textit{see Crimmann et al., supra} note 4, at 1, 6 (describing additional labor strategies, such as “working-time accounts,” which may have also bolstered German employment).
\end{enumerate}
\end{footnotesize}
and a half.\textsuperscript{40} Due to the recession’s persistence, however, Germany increased the entitlement period to two years.\textsuperscript{41} Temporary or contract workers also gained program eligibility because of the recession.\textsuperscript{42}

To enroll, the employer or works council must notify the local employment agency that the wages of a minimum of one-third of workers would be reduced by more than ten percent for an estimated time period.\textsuperscript{43} The local employment agency, and the employer’s own workers, must approve the program.\textsuperscript{44} If the business has a works council—a non-union body that employees may establish at companies that satisfy certain criteria—that council can provide employee consent.\textsuperscript{45} If there are no works councils and no union agreements applicable to short-time work, the employer must obtain approval from all employees falling under the program.\textsuperscript{46}

\section*{C. Work Sharing and Unemployment Benefits in the United States}

Because U.S. employers laid off workers during the 2008–2009 economic crisis, the government response was largely focused on providing and expanding unemployment benefits.\textsuperscript{47} State and federal governments spent more than $115 billion on unemployment compensation in 2009.\textsuperscript{48} Under the Emergency Unemployment Compensation and Extended Benefit programs, the U.S. government increased the benefits collection period from twenty-six weeks to as much as ninety-six weeks.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{40}\textit{Fed. Ministry of Labour & Soc. Affairs, supra} note 32, at 8. The eligibility period originally lasted only six months. \textit{Global Wage Report, supra} note 16, at 56.
\item \textsuperscript{41}\textit{Short-Time Work or “Kurzarbeit,” supra} note 19.
\item \textsuperscript{42}\textit{Fed. Ministry of Labour & Soc. Affairs, supra} note 32, at 6; see Crimmann et al., \textit{supra} note 4, at 15 (outlining additional Kurzarbeit requirements).
\item \textsuperscript{43}\textit{Fed. Ministry of Labour & Soc. Affairs, supra} note 32, at 8; Crimmann et al., \textit{supra} note 4, at 13, 15. After February 2009, employers had only to prove that the wages of at least one worker would be reduced by more than ten percent. \textit{Fed. Ministry of Labour & Soc. Affairs, supra} note 32, at 5.
\item \textsuperscript{44}\textit{Fed. Ministry of Labour & Soc. Affairs, supra} note 32, at 8; Crimmann et al., \textit{supra} note 4, at 13.
\item \textsuperscript{46}\textit{Fed. Ministry of Labour & Soc. Affairs, supra} note 32, at 8.
\item \textsuperscript{48}See Isaacs et al., \textit{supra} note 47, at 2.
\end{itemize}
nine weeks. Unfortunately, millions of jobless Americans depleted their ninety-nine weeks of benefits in 2011, leaving them without any working income or further unemployment compensation.

Work sharing is a concept that already exists in the United States, and has been recognized as a means “of spreading employment” and avoiding job losses during difficult economic times, including during the Great Depression. Twenty-three states currently offer work sharing programs, known as STC programs. Five of those states authorized STC use within the past three years. Nonetheless, STC plans totaled only 2% of unemployment benefits paid out across the United States in 2009 and saved less than 300,000 jobs in 2009 and 2010 combined.

U.S. employers, employees, and states began calling for STC programs after a recession in the early 1970s. California instituted the first U.S. STC program in 1978, followed soon after by Arizona and Oregon. Although at the time states did not have federal authorization to draw upon their unemployment trust funds for STC benefits, the Department of Labor (DOL) did not object to such funding.

In 1982, the federal government enacted the Tax Equity and Fiscal Responsibility Act (TEFRA), which authorized a three-year federal STC

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49 Isaacs et al., supra note 47, at 1; Crisis to Recovery, supra note 1, at 20–22.
51 Shelton, supra note 5, at 2 (internal quotation marks omitted) (quoting William J. Barrett, The President’s Org. on Unemp. Relief, Spreading Work: Methods and Plans in Use (1932)).
54 Shelton, supra note 5, summary.
55 Ridley, supra note 53.
56 Shelton, supra note 5, at 11.
57 Final Report, supra note 47, at 3-2. The New York state legislature was actually the first to consider STC in 1975; however, no legislation was passed. Shelton, supra note 5, at 11.
58 Shelton, supra note 5, at 11; see infra text accompanying note 73 (describing the structure and funding of the U.S. unemployment insurance scheme).
program allowing state governments to use their unemployment trust fund accounts to supply STC benefits.\(^59\) TEFRA also instructed DOL to issue model legislation, which was distributed in 1983 and became the framework for most states’ STC programs.\(^60\) Once TEFRA’s temporary authorization terminated, however, DOL curtailed its STC endorsement efforts.\(^61\)

After a recession in the early 1990s, Congress permanently approved STC programs in the Unemployment Compensation Amendments of 1992 (UCA).\(^62\) UCA, among other provisions, defined STC programs and required DOL to support the establishment of state programs, to create model legislation, and to issue a review of state programs.\(^63\) Although DOL collected information on STC programs, it did not fully satisfy UCA’s mandate.\(^64\) Efforts to amend the federal law to give explicit approval of current state programs have been unsuccessful, including legislation that was introduced in 2009.\(^65\)

STC programs all share a similar basic framework.\(^66\) State governments can authorize employer-specific proposals so long as hours are reduced by at least 10% and employers obtain union approval.\(^67\) Consistent with the 50% of original earnings that unemployment compensation offers, STC also provides half of an employee’s lost wages.\(^68\)

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\(^{60}\) Shelton, supra note 5, at 11; David E. Balducchi & Stephen A. Wandner, Work Sharing Policy: Power Sharing and Stalemate in American Federalism, 38 Publius: J. Federalism 111, 121 (2008). The DOL’s STC Handbook, distributed in 1987, was particularly helpful to states implementing STC programs during this time, as it included “model language for state STC statutes, the text of legislation passed by states with existing STC programs, and summaries of STC research results.” Final Report, supra note 47, at 8-10.

\(^{61}\) Shelton, supra note 5, at 12.


\(^{63}\) Shelton, supra note 5, at 12.

\(^{64}\) Id.

\(^{65}\) Id. at 13, 15–16.

\(^{66}\) Id. at 2.

\(^{67}\) Id. Employees participating in state STC programs usually work four days per week and receive STC benefits for the remaining day not worked. Neil Ridley, CLASP, Work Sharing—An Alternative to Layoffs for Tough Times 1 (Mar. 26, 2009), available at http://www.clasp.org/admin/site/publications/files/0481.pdf.

\(^{68}\) Shelton, supra note 5, at 2.
STC programs are funded in the same way as unemployment benefits, taxing employers based upon an “experience rating.” As more benefits are collected by laid-off employees, the employer’s experience rating increases, requiring the employer to pay more unemployment insurance taxes. STC can be funded by the Unemployment Trust Fund because it is considered an unemployment compensation program under the Social Security Act.

STC programs are distinguished from partial unemployment benefits, which are paid “to an unemployed worker who has accepted a part-time job while searching for a permanent, full-time job . . . . [and who is] earning less than their weekly benefit amount.” Whereas an unemployed U.S. worker can usually receive unemployment benefits (including partial unemployment benefits) only up to half of his or her normal wages, an employee working half of his or her normal hours can still receive supplemental benefits under an STC program.

II. Discussion

A. Legal Authorization for Work Sharing Programs

Germany’s work sharing program has enjoyed longstanding legal authorization, clear from its decades-old history and more particularly its use during German reunification. Kurzarbeit maintains a unified legal framework because Germany’s federal government is the sole entity responsible for labor and social security policy decisions. German states merely follow federal laws in these areas.

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69 Id. at 3.
70 Vroman & Brusentsev, supra note 295, at 17 n.22.
71 Wandner, supra note 21, at 21–22. The unemployment insurance program, which now encompasses traditional unemployment benefits as well as STC benefits, was established in 1935 to provide financial support for the unemployed. Id. at 17. Federal law dictates the program’s structure, in which “[e]ach state has an account within the Fund from which it pays [unemployment] benefits.” Id. at 17, 21. Though states are responsible for administering the unemployment insurance program, federal taxes finance the cost of program administration in the states. Unemployment Insurance Tax Topic, Dep’t of Labor, http://workforcesecurity.doleta.gov/unemploy/uitaxtopic.asp (last visited May 18, 2012). Federal taxes also fund half of extended unemployment benefits and offer “a fund from which states may borrow, if necessary, to pay benefits.” Id. State taxes are used purely to pay unemployment benefits. Id.
72 Shelton, supra note 5, at 3.
73 Id.
74 Crimmann et al., supra note 4, at 17; Germany’s Response, supra note 295, at 2; Wandner, supra note 21, at 20; Vroman & Brusentsev, supra note 25, at 11.
75 See Weiss & Schmidt, supra note 45, at 19.
76 See id.
In the United States, however, unemployment is addressed through a “federal-state partnership” that gives states the freedom to establish their own unemployment compensation programs so long as they meet initial federal requirements. Although U.S. STC programs have existed for a number of years, the federal government has not established a consistent legal framework to bolster program use by the states.

The first instance of federal inconsistency regarding STC program authorization occurred after TEFRA’s three-year mandate expired and DOL stopped endorsing STC programs. Not only did established state programs still exist, but seven additional state programs were implemented using the expired law’s model legislation. With the enactment of UCA in 1992, the federal government again authorized STC programs following a recession. The statutory definition of STC programs under UCA renders them applicable when “individuals’ work-weeks have been reduced by at least 10%.” During such periods, UCA provides that

STC is paid as a pro rata portion of the full unemployment benefit that an individual would have received if totally unemployed;

. . . STC beneficiaries are not required to meet availability for work and work search requirements, unlike beneficiaries of regular unemployment compensation, but they are required to be available for their normal work week;

. . . STC beneficiaries may participate in employer-sponsored training programs; and . . . the reduction in work hours is in lieu of layoffs.

UCA’s permanent authorization of STC is problematic, however, because it omits provisions contained in TEFRA—provisions that states

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78 See Shelton, supra note 5, at 12.

79 Id.

80 Id.

81 Id. at 3–4, 12.


83 Shelton, supra note 5, at 12 (restating UCA’s provisions). For the actual statutory provisions, see Unemployment Compensation Amendments § 401(d)(1)(B)–(E).
relied upon when they initially crafted their still-existing STC programs. Unlike TEFRA, UCA does not require employers to ... submit work sharing plans to the state for approval; certify to the relevant state agency that the reduction in work hours is in lieu of temporary layoffs; win consent from the relevant union(s); or contribute to health insurance or pension plans as if the employee continued to be fully employed.

Because UCA’s provisions are inconsistent with TEFRA, a number of existing TEFRA-based state STC programs technically violate the more restrictive law currently in effect. If DOL enforced the federal law in its present form, it “would risk confrontations with work sharing states and likely bring the Congress back into a policy debate.” Consequently, DOL has “sidestepped implementation of STC” by failing to provide states with support and updated model legislation and refusing to contest state programs created in accordance with TEFRA.

Congressional efforts to bolster UCA’s definition of STC with some of TEFRA’s original provisions have been unsuccessful. For example, on multiple occasions, Congress has failed to pass legislation giving states the ability to hold employers responsible for submitting STC plans to state agencies and providing full health and retirement benefits to employees. Nonetheless, the recent recession has renewed federal interest in STC, as evidenced by the introduction of a number of different STC bills in 2009.

The Keep Americans Working Act (KAWA) would have required employers to submit written STC plans to state agencies and to continue to provide employees with health and retirement benefits. It

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84 Sheltón, supra note 5, at 12.
85 See id.
86 See id. at 12–13 (“Clinton Administration and DOL officials were concerned that existing state provisions requiring employers to continue to provide health and pension benefits were out of compliance with UCA’s definitions of STC, and DOL would need to require states to roll back these provisions.”); Balducchi & Wandner, supra note 60, at 129.
87 Balducchi & Wandner, supra note 60, at 129.
88 Sheltón, supra note 5, at 12–13.
89 See id. at 13.
91 See id. at 15; infra text accompanying notes 101–103
also called upon DOL to support state STC programs and offer model legislation.\textsuperscript{93} Finally, KAWA would have authorized DOL to provide start-up grants to states with STC programs and declared that states would receive full reimbursement of STC benefit payments until September 30, 2011.\textsuperscript{94}

The Helping Unemployed Workers Act (HUWA) included similar provisions, although it would have extended the reimbursement period through the end of 2011.\textsuperscript{95} Both acts died, however, after languishing in the Senate Finance Committee and the House Committee on Ways and Means during the 111th Congressional session.\textsuperscript{96}

Despite these failures, politicians have continued to propose STC legislation because they recognize that “the deep recession . . . will not be solved overnight.”\textsuperscript{97} In July 2011, members of Congress introduced the Layoff Prevention Act (LPA).\textsuperscript{98} LPA mirrors provisions contained in 2009’s KAWA and HUWA, as well as President Obama’s recently introduced 2011 American Jobs Act, by proposing requirements consistent with TEFRA.\textsuperscript{99} For example, LPA would mandate that employers submit their STC plans to the state and continue to provide health and retirement benefits.\textsuperscript{100} It would also require employers to obtain union approval of their STC plans.\textsuperscript{101}

In addition to refining the contours of STC programs, LPA offers funding and support to enhance program implementation and use.\textsuperscript{102}

\textsuperscript{93} S. 1646; H.R. 4135.
\textsuperscript{94} S. 1646; H.R. 4135.
\textsuperscript{95} Helping Unemployed Workers Act, S. 2831, 111th Cong. (2009); Helping Unemployed Workers Act, H.R. 4183, 111th Cong. (2009); see Shelton, supra note 5, at 15.
\textsuperscript{99} See S. 1333; H.R. 2421; S. 2831; H.R. 4183; S. 1646; H.R. 4135; The American Jobs Act, supra note 97, §§ 341–346.
\textsuperscript{100} See S. 1333 § 2(a) (1); H.R. 2421 § 2(a) (1).
\textsuperscript{101} S. 1333 § 2(a) (1); H.R. 2421 § 2(a) (1).
\textsuperscript{102} S. 1333 §§ 3–5; H.R. 2421 §§ 3–5.
It provides DOL and states with funding to promote STC programs and requires DOL to offer model legislation and technical assistance.\textsuperscript{103} States would receive reimbursement of STC payments from the federal government for up to three years under the LPA’s provisions.\textsuperscript{104} In addition, seasonal or temporary workers would not be eligible for program participation.\textsuperscript{105} Finally, existing state plans would be given two and a half years to comply with program requirements.\textsuperscript{106}

B. National Understanding of Work Sharing’s Proper Role and Benefits

Perhaps as a consequence of Germany’s clear legal mandate for Kurzarbeit, the program’s utility does not appear to be hampered by the widespread misunderstandings that afflict STC in the United States.\textsuperscript{107} Germans understand that work sharing’s limitations are a function of the program’s purpose: to avoid layoffs by spreading the burden of temporary economic decline among more employees through decreased work hours.\textsuperscript{108} STC is an appropriate response only during an economic crisis of limited duration;\textsuperscript{109} it is generally not suitable for an exceedingly lengthy period of economic decline.\textsuperscript{110} It should not be used to avoid necessary structural adjustments, as efforts to save employees facing imminent layoffs would prove futile.\textsuperscript{111} Such was the case with the eventual loss of jobs following the use of work sharing during German reunification.\textsuperscript{112}

The United States, with disjointed STC program authorization and enforcement, lacks a clear, widespread understanding of the benefits of STC programs and their potential role in easing unemployment during a recession.\textsuperscript{113} As an alternative to employee layoffs, STC can create a “win-win-win” situation for all parties.\textsuperscript{114} Employees directly benefit

\textsuperscript{103} S. 1333 §§ 5–6; H.R. 2421 §§ 5–6.
\textsuperscript{104} S. 1333 § 3(b)(2); H.R. 2421 § 3(b)(2).
\textsuperscript{105} S. 1333 § 3(a)(3)(B); H.R. 2421 § 3(a)(3)(B).
\textsuperscript{106} S. 1333 § 2(a)(3); H.R. 2421 § 2(a)(3).
\textsuperscript{107} See Crimmann et al., supra note 4, at 1.
\textsuperscript{108} See Jon C. Messenger, Work Sharing: A Strategy to Preserve Jobs During the Global Crisis, at 1 (ILO TRAVAIL Policy Brief No. 1, 2009).
\textsuperscript{109} See id. at 2.
\textsuperscript{110} See Crimmann et al., supra note 4, at 3.
\textsuperscript{111} See id. Germany has made clear that “no help will be available for products or services that are no longer in demand or that have become obsolete.” Short-Time Work or “Kurzarbeit,” supra note 19.
\textsuperscript{112} See Crimmann et al., supra note 4, at 17.
\textsuperscript{113} See Final Report, supra note 47, at ii–iii.
\textsuperscript{114} Crisis to Recovery, supra note 1, at 34.
from STC by avoiding job loss and receiving supplemental income.\textsuperscript{115} This allows employers to operate during the downturn and retain workers who will be needed once the economy recovers.\textsuperscript{116} Employers also benefit from lower costs because “the preservation of human capital”\textsuperscript{117} allows them to spend less on termination, hiring, and training.\textsuperscript{118} Furthermore, because work sharing avoids laying off those with the least seniority by making cuts across the seniority spectrum, some have argued that “the average hourly wage rate would probably be lower.”\textsuperscript{119} The government also benefits, as STC payments to a particular worker would be smaller than traditional unemployment compensation payments.\textsuperscript{120} Finally, society as a whole benefits from the higher spirits of workers who have kept their jobs after facing the possibility of layoffs.\textsuperscript{121}

Despite these benefits, some states and employers misunderstand STC’s unique advantages.\textsuperscript{122} For example, partial benefits under the traditional unemployment compensation scheme may seem to provide STC-like support; however, these funds are only available when workers collecting unemployment benefits make less in wages than their weekly unemployment allowance.\textsuperscript{123} States have also failed to implement STC programs because they do not perceive any advantage to employers.\textsuperscript{124} A lack of manufacturing employers, consistent seasonal layoffs, and the prevalence of small businesses are reasons states have offered to explain STC’s perceived unsuitability.\textsuperscript{125}

Four distinct apprehensions about STC plan costs may also affect program implementation in the United States.\textsuperscript{126} First, employers may worry about the increased costs associated with paying full retirement and health benefits.\textsuperscript{127} Although UCA does not compel employers to

\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{118} See Crisis to Recovery, supra note 1, at 34; Vroman & Brusentsev, supra note 25, at 4.
\textsuperscript{119} See, e.g., Vroman & Brusentsev, supra note 25, at 3–4. Some argue that work sharing will maintain workplace diversity, assuming layoffs are determined by least seniority, and women, young adults, and minorities are those with the least seniority. See id. at 3. Contra Final Report, supra note 47, at iii (“We found no evidence that STC disproportionately protected the jobs of minorities, women, and young adults.”).
\textsuperscript{120} See Crisis to Recovery, supra note 1, at 34.
\textsuperscript{121} See id.
\textsuperscript{122} See Final Report, supra note 47, at 4-8.
\textsuperscript{123} SHELTON, supra note 5, at 3; Final Report, supra note 47, at 4-8.
\textsuperscript{124} Final Report, supra note 47, at 4-15.
\textsuperscript{125} Id. at 4-15 to -16.
\textsuperscript{126} See id. at 3-3 to -4.
\textsuperscript{127} SHELTON, supra note 5, at 9.
provide STC-participating employees with full retirement and health benefits, many state programs based on TEFRA’s earlier legislation require the continuation of such employer support.\textsuperscript{128}

Second, employers may be worried about increased costs in the form of larger unemployment insurance contributions.\textsuperscript{129} When STC programs were first established, states often required STC-participating employers to pay extra charges that increased their unemployment insurance tax rate.\textsuperscript{130} Apart from extra charges, employers might also face higher average unemployment insurance payments because, in addition to newer workers, longstanding employees with higher wage rates would participate in STC programs.\textsuperscript{131} Because STC involves cutting the hours of employees across the board in lieu of layoffs, benefits payments would be made to higher-wage workers with seniority.\textsuperscript{132}

A third concern involves the duration of STC payments and their source of funding.\textsuperscript{133} If taxpayers believe the overall eligibility period for traditional unemployment benefits is unaffected by STC program participation, some might worry that workers will exploit both programs and thus unduly burden state unemployment trust funds.\textsuperscript{134} This concern amplifies the more fundamental worry that, regardless of program duration, state unemployment trust funds will be unable to handle the sheer number of STC claims filed.\textsuperscript{135}

Finally, states have raised serious questions regarding the costs of STC administration.\textsuperscript{136} STC claims processing may cost more than traditional unemployment claims administration, because approval of STC plans is non-automated and granted on an individual basis.\textsuperscript{137} Because STC is a way to spread the burden of less work among more people, it may also increase the administrative burden on states.\textsuperscript{138} Presumably more workers would participate in STC than would apply for unemployment benefits after being laid off; thus, there would be more claims under STC than there would be for traditional unemployment benefits.

\textsuperscript{128} \textit{Id.} at 11–13.
\textsuperscript{129} \textit{See} \textit{Final Report}, \textit{supra} note 47, at 3-5.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{See} \textit{Final Report}, \textit{supra} note 47, at 5-11; Vroman & Brusentsev, \textit{supra} note 25, at 4.
\textsuperscript{132} \textit{See} \textit{Final Report}, \textit{supra} note 47, at 5-11; Vroman & Brusentsev, \textit{supra} note 25, at 4.
\textsuperscript{133} \textit{See} Vroman & Brusentsev, \textit{supra} note 25, at 4, 18; Ridley, \textit{supra} note 67, at 3–4.
\textsuperscript{134} Vroman & Brusentsev, \textit{supra} note 25, at 4, 10.
\textsuperscript{135} Ridley, \textit{supra} note 67, at 3–4.
\textsuperscript{136} \textit{Final Report}, \textit{supra} note 47, at 4-40. Although some employers believe STC program administration requires considerable effort, one source failed to find a strong correlation between program administration and employer involvement. \textit{Id.} at 4-39.
\textsuperscript{137} \textit{See} Shelton, \textit{supra} note 5, at 7; \textit{Final Report}, \textit{supra} note 47, at 4-40.
\textsuperscript{138} \textit{See} Shelton, \textit{supra} note 5, at 7.
compensation. Additionally, more employees would be eligible for STC benefits than traditional unemployment benefits because “newer workers, who are more vulnerable in layoffs, are more likely to fail requirements for regular unemployment benefits.”

C. Government Promotion and Public Awareness of Work Sharing

The fact that Kurzarbeit was used by more than 1.4 million workers and 63,000 employers during the recession is evidence of the German federal government’s successful efforts to promote the program to state governments and the general public. Although program use reached unprecedented levels during the 2008–2009 recession, “the extensive use of work sharing [was] not new for Germany.” Work sharing was used in the 1990s to temper job loss during reunification and to aid the struggling auto industry. Furthermore, in the pre-recession months of early 2007, thousands of workers participated in Kurzarbeit.

In contrast, the inconsistent and uncertain relationship between federal law and state STC programs has left U.S. employers and workers generally unaware—or worse, skeptical—of these schemes. DOL has been reticent in promoting STC programs and providing guidance to states seeking to establish or expand programs. Before the 2008 recession, STC benefits rarely exceeded 1% of all unemployment benefits. In fact, most of the states that currently offer STC programs “do not actively promote STC.” State officials may not be knowledgeable about the programs; indeed, a survey conducted in the mid-1990s found that three states’ unemployment insurance officials “had not heard of STC.”

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139 See id. at 7 n.14.
140 Id. This is because traditional unemployment compensation is determined by “the time period over which [a worker’s] wages [are] earned and hours/weeks [are] worked.” Id.
141 See Messenger, supra note 108, at 3; Crisis to Recovery, supra note 1, at 32, 36.
142 See Crimmann et al., supra note 4, at 17.
143 See id. at 15, 17.
144 See id. at 17.
145 See Shelton, supra note 5, at 1; Vroman & Brusentsev, supra note 295, at 18.
146 Id., supra note 5, at 16.
147 Id. at 3–4.
148 Id. at 16. Rhode Island is a notable exception—in 2009 it reached an STC-to-unemployment-benefits ratio of 15.9% due to its efforts to increase program awareness. Id. at 5–6.
149 Final Report, supra note 47, at 4-2, 4-8.
Limited funding can also hinder adequate STC program promotion. In the past, STC marketing has been as minimal as summarizing the program in regular employer-targeted unemployment materials or engaging in limited leaflet distribution. Because STC use is so limited, it has failed to garner significant national attention as a feasible solution to temporary unemployment.

III. Analysis

A. Enact Federal Legislation Consistent with Existing State Programs

To make better use of STC programs, the United States should follow Germany’s lead and provide a clear and consistent authorization for these schemes. Although UCA provides a permanent federal STC policy that allows all states to implement STC programs, the relationship between existing state plans and federal legislation is disjointed. New legislation like LPA is thus needed to amend or repeal UCA in favor of provisions that do not conflict with current STC programs.

Congress should reconcile federal law and existing state programs by reinstating some of TEFRA’s original provisions. Because many state programs were created under TEFRA, legislators should abandon UCA’s definition of STC programs in favor of LPA’s more TEFRA-based provisions. This would avoid the significant modifications that would have to be made to states’ current STC programs to bring them into compliance with UCA.

New legislation should require that employers continue to contribute to the health insurance and pension plans of STC-participating workers. Although this proposal may seem controversial, employers in states with TEFRA-based programs are already familiar with such a

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150 See id. at 4-27.
151 Id. Most, if not all, states with established STC programs include information on their respective labor agency’s website. See, e.g., Shared Work—The Layoff Alternative, N.Y. St. Dep’t of Labor, http://www.labor.state.ny.us/ui/dande/sharedwork1.shtm (last visited May 18, 2012); Work Sharing, Emp. Dev. Dep’t, St. of Cal., http://www.edd.ca.gov/unemployment/work_sharing_claims.htm (last visited May 18, 2012); Work Sharing, Mass. Dep’t of Workforce Dev., https://ipasssecurity.detma.org/ipass/login_workshare.asp (last visited May 18, 2012).
152 See Balducchi & Wandner, supra note 60, at 128.
153 See Shelton, supra note 5, at 16.
154 See Balducchi & Wandner, supra note 60, at 129.
155 See Shelton, supra note 5, at 16.
156 See Ridley, supra note 67, at 3.
158 See id. at 11–12.
mandate. In fact, many employers have chosen to provide STC-participating workers with full benefits even though it is not required by law. Surveys reveal that few employers considered these continued benefit contributions to be a significant drawback of STC.

STC legislation should also incorporate TEFRA’s requirements that employers submit written STC plans to state agencies and obtain union consent when appropriate. These conditions not only secure government and employee approval, but increase transparency by making information about STC more available. Because many states created STC programs under TEFRA’s mandate, these provisions would be relatively uncontroversial in states already familiar with them. If implemented, these requirements would mirror Kurzarbeit’s notification and approval provisions.

Reconciliation of TEFRA and UCA should be achieved through legislation because the problem cannot be solved by DOL action alone. If the ultimate goal is to conform federal law to fit existing TEFRA-based programs, DOL can do little more than broaden its interpretation of UCA to permit existing programs. Although such action might draw STC into public discourse as a matter of “political urgency,” the fact remains that only Congress can make the necessary legal changes to solve the problem once and for all.

The need for a legislative response is evident from past Congressional attempts to incorporate TEFRA provisions into UCA’s current framework. During recessionary periods since the 1990s, members of Congress have repeatedly introduced bills to reconcile state programs with federal law by mandating that STC-participating employers submit plans to state agencies, obtain union consent, and continue contribut-

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159 See id.
161 See id.
163 See S. 1333 § 2(a)(1); H.R. 2421 § 2(a)(1).
164 See Shelton, supra note 5, at 11–12.
165 See Fed. Ministry of Labour & Soc. Affairs, supra note 32, at 8; Crimmann et al., supra note 4, at 13.
166 See Balducchi & Wandner, supra note 60, at 129.
167 See id. Congress could give the DOL the power “to determine what provisions are appropriate for the work sharing program beyond the five that are now in permanent federal law.” Id.; see Ridley, supra note 67, at 3. The legal controversy, however, would likely still remain. See Shelton, supra note 5, at 13.
168 See Messenger, supra note 108, at 6; Balducchi & Wandner, supra note 60, at 129–30.
169 See Shelton, supra note 5, at 13.
ing to retirement and health plans.\textsuperscript{170} Although bills introduced in 2009 died in committee,\textsuperscript{171} Congress has another chance to realign federal STC legislation with the introduction of LPA in 2011.\textsuperscript{172} LPA proposes not only to incorporate TEFRA’s requirements, but also to further refine STC’s scope and provide the funding and support needed to properly promote and implement STC.\textsuperscript{173}

B. *Improve National Understanding of Work Sharing’s Potential Role in Combating Unemployment*

To optimize STC use, Congress should enact legislation that evinces an understanding of STC’s proper role and addresses concerns about its potential costs.\textsuperscript{174} Federal authorization must make clear that STC is a program complementary to traditional unemployment benefits and useful to all types of employers facing temporary layoffs.\textsuperscript{175} If properly structured and implemented, the program would ease fears about costs associated with continued retirement and health benefits, unemployment insurance contributions, and the duration of STC benefits.\textsuperscript{176} In fact, employers could experience a decrease in some costs.\textsuperscript{177} Finally, Congressional authorization of temporary federal funding could lessen the financial burden on states paying STC benefits and improving their programs’ administration.\textsuperscript{178}

1. Ensure Understanding of STC’s Appropriate Scope

A clear understanding of the appropriateness of STC programs is as essential to program success as a consistent legal framework.\textsuperscript{179} To ensure that state governments and individuals appreciate the role STC can play in combating unemployment, it must be widely known that as

\textsuperscript{170} See id. at 13, 15.

\textsuperscript{171} See id. at 13, 15–16; H.R. 4135: *Keep Americans Working Act*, supra note 96; S. 2831: *Helping Unemployed Workers Act*, supra note 96.

\textsuperscript{172} See S. 1333; H.R. 2421.

\textsuperscript{173} See S. 1333; H.R. 2421.

\textsuperscript{174} See *Final Report*, supra note 47, at 8-2, 8-7 to -11; Balducchi & Wandner, supra note 60, at 130.

\textsuperscript{175} See *Shelton*, supra note 5, at 3; *Fed. Ministry of Labour & Soc. Affairs*, supra note 32, at 7; Grimmann et al., supra note 4, at 13.

\textsuperscript{176} See *Shelton*, supra note 5, at 3; *Final Report*, supra note 47, at 3-5; *Vroman & Brusentsev*, supra note 25, at 4.

\textsuperscript{177} See *Crisis to Recovery*, supra note 1, at 34; *Final Report*, supra note 47, at 3-5; *Vroman & Brusentsev*, supra note 25, at 4.

\textsuperscript{178} See *Ridley*, supra note 67, at 3–4, 5 n.5.

\textsuperscript{179} See *Shelton*, supra note 5, at 16; *Final Report*, supra note 47, at 8-2.
a work sharing program, STC has a limited purpose: to avoid layoffs during temporary periods of economic decline. It should not be used to avoid layoffs during more permanent periods of decline or to avoid necessary structural changes.

A strong legislative framework can make STC’s scope clear. For example, STC’s appropriateness as a response to temporary periods of economic decline can be supported by legislative provisions that provide benefits for a discrete period of time. Recognizing states’ needs for funding in the current economic climate, LPA offers STC benefit reimbursement to states, but only within the three-and-a-half years following enactment. LPA also defines the proper scope of STC programs by prohibiting the participation of workers who might attempt to use the program on a more permanent basis. “[S]easonal, temporary, or intermittent” workers are not eligible for STC programs that receive federal funding.

Crafting a federal law that clearly establishes STC’s limited role in the United States is important because STC must distinguish itself from Kurzarbeit in at least one regard. In some circumstances, Kurzarbeit has been used to respond to permanent structural changes or as a transitional program with a worker training component. In the United States, however, where STC is underutilized and relatively unknown, these uses not only distort STC’s primary purpose in avoiding layoffs during temporary periods of decline, but they would cause needless confusion to those unfamiliar with STC. Furthermore, STC skeptics concerned about the program’s impact on state unemployment trust funds may fear that, if the program is used to address more permanent redundancies, it might require extension of the eligibility period for unemployment benefits. Thus, it is critical that STC legislation is crafted to avoid program misuse.

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180 See Crimmann et al., supra note 4, at 13.
181 See id. at 3.
182 See S. 1333; H.R. 2421; Balducchi & Wandner, supra note 60, at 128.
183 See S. 1333 § 3(b)(2); H.R. 2421 § 3(b)(2).
184 See S. 1333 § 3(b)(2); H.R. 2421 § 3(b)(2).
186 See Crimmann et al., supra note 4, at 1, 15, 17; Final Report, supra note 47, at 8-12.
187 See Shelton, supra note 5, at 1; Final Report, supra note 47, at 8-12.
188 See Final Report, supra note 47, at 4-8, 8-12 (noting, but not exploring, STC’s possible use in “employment transition”).
189 See id. at 8-12 to -14. In practice, some U.S. employers used STC programs for years; however, states responded to this by limiting repeated program usage. Id. at 8-13 to -14. Thus, although it is possible that employees could “work part-time while simultaneously
Although STC’s limited application makes it “unlikely to ever play a great role in the unemployment compensation system,”\(^ {191}\) the program must nonetheless be promoted to all types of employers.\(^ {192}\) The United States should follow Germany’s lead in endorsing STC’s usefulness to employers in all industries and of all sizes—not just those in manufacturing.\(^ {193}\)

Congress, DOL, and state governments must also make clear to employers and employees that STC will supplement, not supplant, more traditional unemployment benefits schemes.\(^ {194}\) Just as Germany maintains its own separate support program for unemployed workers while successfully utilizing Kurzarbeit, so too can the United States maintain traditional unemployment benefits while making better use of STC.\(^ {195}\) Instead of providing laid-off employees with only 50% of their working wages, the United States can ensure that STC-participating employees facing significant working hour cutbacks can remain employed and continue to receive the majority of their normal working wages.\(^ {196}\)

For example, a worker facing a 50% cut in hours could expect to receive only a 25% decrease in income under the program, because the employer would provide 50% of normal compensation due to hours worked and the government would provide an additional 25% of income in STC benefits.\(^ {197}\) If an STC scheme were not implemented, the worker would not receive an additional 25% supplemental income benefit under the traditional unemployment insurance program.\(^ {198}\) Furthermore, unemployment insurance’s partial benefits would not apply because they are only available when workers collecting unemployment

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\(^ {191}\) See Shelton, supra note 5, at 16.
\(^ {193}\) See Fed. Ministry of Labour & Soc. Affairs, supra note 32, at 7; Crimmann et al., supra note 4, at 10.
\(^ {194}\) See Shelton, supra note 5, at 3; Final Report, supra note 47, at 4-8.
\(^ {195}\) See Shelton, supra note 5, at 3; Crisis to Recovery, supra note 1, at 17 (describing Germany’s spending on unemployment claims during the recession). Germany’s labor market schemes do not render the role of STC and traditional unemployment benefits mutually exclusive; Kurzarbeit allows for payment of benefits not only while an employee is working reduced hours, but also when that employee’s hours have been totally cut to zero. See Crimmann et al., supra note 4, at 13 (noting that workers using Kurzarbeit can receive benefits comparable to traditional unemployment benefits, although the workers are considered legally “employed”).
\(^ {196}\) See Shelton, supra note 5, at 2–3 (describing how STC functions).
\(^ {197}\) See id.
\(^ {198}\) See id. at 3 (explaining the role of partial benefits).
benefits earn less than their weekly unemployment compensation allowance.\textsuperscript{199} Thus, in a period of temporary decline, workers facing a decrease in income would receive greater financial benefit from participating in STC than being laid off and collecting traditional unemployment benefits.\textsuperscript{200}

2. Address Concerns About Program Costs

In addition to explaining STC’s proper role, Congress, DOL, and state governments must address concerns about STC costs.\textsuperscript{201} The government should emphasize that STC can actually lower some costs for employers, including termination, rehiring, and training expenses.\textsuperscript{202} Further, to allay concerns about continued retirement and health benefit contributions, the government should note that such payments are already required by TEFRA-based state programs, and have not been considered significant drawbacks of program use.\textsuperscript{203}

STC-participating employers must understand that they will not be overburdened by significantly greater unemployment insurance contributions.\textsuperscript{204} Regardless of whether Germany’s Kurzarbeit framework treats STC and traditional unemployment benefits the same for purposes of social insurance contributions, past U.S. experience with STC should ease employer concerns.\textsuperscript{205} Many states with STC programs no longer distinguish between STC and traditional unemployment benefits when setting employer contribution levels.\textsuperscript{206} Unless Congress amends federal law to determine contributions for both programs under different rubrics, states enacting STC programs can treat employer

\textsuperscript{199} See id.
\textsuperscript{200} See id.
\textsuperscript{201} See Final Report, supra note 47, at 3-3 to -4, 8-2.
\textsuperscript{202} See Crisis to Recovery, supra note 1, at 34; Vroman & Brusentsev, supra note 25, at 4.
\textsuperscript{203} See Final Report, supra note 47, at 3-3 to -4, 8-2.
\textsuperscript{204} See id. at 3-5, 4-24.
\textsuperscript{205} See id. Because Germany’s social insurance framework is more extensive than U.S. social insurance schemes, likely reflecting broader ideological differences between the two countries, a sufficient comparison of social insurance systems would require exploration beyond this Note’s scope. See Final Report, supra note 47, at 3-5 to -7 (contrasting U.S. reliance on layoffs with more robust responses in Germany and other European countries); Weiss & Schmidt, supra note 45, at 19 (“[Germany’s federal republic] is based on . . . the principle of welfare improvement . . . which plays a significant role in the discussion of labour law and of social security law.”).
\textsuperscript{206} Final Report, supra note 47, at 3-5, 4-24; Vroman & Brusentsev, supra note 25, at 17. Seven states do, however, impose additional taxes on employers participating in STC. Shelton, supra note 5, at 3.
use of STC and traditional unemployment benefits the same. In fact, LPA would not use employer-paid portions of STC benefits under a federal-state STC agreement “for purposes of calculating an employer’s contribution rate.”

Such treatment of STC and traditional unemployment benefit contributions could even lessen the burden on STC-participating employers. Because STC payments to a particular worker would likely be less than traditional unemployment benefits, employers’ resulting contributions to the state’s unemployment trust fund would not increase with the implementation of STC. Although one commentator speculates that significantly increased STC use could strain the unemployment trust fund, STC’s limited utility in saving only the jobs needed once the economy improves could offset this fear.

To strengthen an understanding of STC in the United States, Congress, DOL, and state governments must also explain that STC does not increase costs by extending the overall unemployment benefit eligibility period. Because STC program participation counts against the traditional unemployment benefits period, it does not provide additional weeks of compensation that could drain state unemployment trust funds. LPA confirms this in its proposal to limit explicitly program funding to the twenty-six week period normally allowed for unemployment benefits. Although U.S. STC programs differ from Kurzarbeit in

207 See Final Report, supra note 47, at 3-5, 4-24; Shelton, supra note 5, at 3.
208 S. 1333 § 4(b)(3); H.R. 2421 § 4(b)(3). STC agreements, as distinguished from STC programs, may be entered into by states without laws “provid[ing] for the payment of short-time compensation program.” S. 1333 § 4(a)(1); H.R. 2421 § 4(a)(1).
209 See Shelton, supra note 5, at 3.
210 See id. (explaining that workers with working hour reductions as low as 10% can participate in STC, whereas unemployment benefits supplement up to 50% of wages).
211 See id.; Federal-State Partnership, supra note 77, at 10 (“[Experience rating] formulas are devised to establish the relative experience of individual employers with unemployment or with benefit costs.”).
212 See Crimmann et al., supra note 4, at 13; Final Report, supra note 47, at 8-7.
213 Vroman & Brusentsev, supra note 25, at 4.
214 See id. at 4. This argument does not address whether STC could be an extra burden on the Unemployment Trust Fund due to STC use by workers who would not otherwise collect traditional unemployment benefits. Because STC is only intended to be used to avoid layoffs during temporary periods of economic decline, in theory the only workers who would participate in the program would be those otherwise needing full unemployment benefits. But cf. Employment Outlook: Germany, supra note 2, at 1 (“[E]stimates . . . suggest[ ] that Kurzarbeit ends up supporting some jobs that would have been maintained even in the absence of the subsidy.”).
this respect, counting STC participation against the unemployment benefits period is likely better suited to the current condition of the U.S. economy.

In light of the fact that many states “ha[d] trusts funds that [were] barely solvent” during the recession, Congress should authorize federal funding to help states pay STC benefits. If Congress were to pass LP A, it would repay states with legally authorized STC programs 100% of STC benefit payments made for up to three years. Such temporary federal funding could alleviate concerns about STC’s potential burden on states and thus make Americans and states more amenable to STC program expansion. Because STC is not yet a topic of national discourse, however, authorization of federal funding to expand STC would likely face significant opposition. With a number of states and individuals unsure of STC’s appropriateness and concerned about the program’s costs, it is reasonable to assume that many taxpayers would disapprove or be skeptical of a federally funded STC initiative.

Nonetheless, even if there is not adequate support for a temporary, comprehensive, federally funded STC program, more modest goals could be achieved with federal support. Federal funding could drive DOL’s efforts to provide states with better technical assistance, marketing strategies, and administrative procedures. For example, LP A would allow DOL a portion of available funds “to provide for outreach and to share best practices.” If these efforts were properly funded, they could play a significant role in encouraging the appropriate use of STC.

Comprehensive efforts to encourage STC use in the United States would also require states to make improvements to existing STC frameworks. Program administration is one area in which both Germany

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216 Vroman & Brusentsev, supra note 25, at 13. STC use in Germany does not impact the eligibility period for full unemployment benefits. Id.
217 See Ridley, supra note 67, at 3–4, 5 n.5 (noting the serious impact the recession had on state unemployment trust funds); Vroman & Brusentsev, supra note 25, at 18.
218 See Ridley, supra note 67, at 3–4, 5 n.5.
219 See S. 1333 § 3(a)(1), (b)(2); H.R. 2421 § 3(a)(1), (b)(2).
220 See Ridley, supra note 67, at 3–4.
221 See Balducci & Wandner, supra note 60, at 128.
222 See Final Report, supra note 47, at 3-3 to -4.
223 See id. at 4-45.
224 See S. 1333 § 5(e); H.R. 2421 § 5(e).
225 See Final Report, supra note 47, at 4-45.
226 See id. at 8-8.
and the United States have shown a need for improvement. Just as Germany streamlined its application process to facilitate approval of Kurzarbeit participation, so too must the United States consider ways to ease the administrative burden of STC program implementation and operation. One measure that could ease significant concerns about STC administration costs is to permit employers to file STC claims. Because STC increases the number of employees filing for unemployment compensation, requiring employers, instead of employees, to file workers’ claims would ease the burden on state employment agencies. With employer-filed claims, states could avoid an onslaught of workers individually approaching the agency for approval.

Germany’s administrative improvements should also encourage the United States to mechanize claims processing and streamline program approval. Automating the claims filing system would allow states to handle better the increased claims that accompany STC participation. Streamlining the authorization process would allow states to avoid “the layers of approval” that hinder plan submissions and program implementation. States seeking enhanced program administration systems could expect STC administrative costs no greater than those of traditional unemployment programs. Recognizing the need for updated STC administration, LPA would provide states with grants to improve processes for filing STC plans and claims.

C. Increase Awareness of STC Programs

Federal legislation, in addition to authorizing clearly STC and its appropriate use, should support efforts to increase STC awareness.

229 Shelton, supra note 5, at 7.
230 See id.
231 See id. Some states also eased the burden associated with filing claims, usually filed every week or two weeks, by requiring only employers, instead of individual employees, to verify claims with a signature. See Final Report, supra note 47, at 8-4.
232 See Shelton, supra note 5, at 7.
233 See id.
234 See id.
235 See Final Report, supra note 47, at 8-3 to -4.
236 See S. 1333 § 5(a), (d)(3); H.R. 2421 § 5(a), (d)(3).
237 See Final Report, supra note 47, at 4-8; Balducchi & Wandner, supra note 60, at 128.
Lacking Germany’s more robust history of work sharing, the United States must actively promote the benefits of STC to its states and citizens. Underutilization of work sharing can be tackled only if a national discourse on STC programs is established.

Most fundamentally, DOL should actively endorse STC. Although Congressional action is more desirable than DOL’s action alone, DOL’s promotion of STC programs could provide the spark that makes STC an issue of pressing national concern. DOL is already legally authorized to endorse STC in states without programs and support states’ efforts to publicize established programs. If such DOL action eventually prompts Congress to reconcile STC policy at the state and federal levels, DOL could promote STC without fearing any conflict, and could singularly focus on reaching a level of program awareness similar to that found in Germany.

To promote STC, DOL should create model legislation for states to follow in crafting their own STC programs. Although Germany’s governmental structure merely requires states to implement federal law, the United States must provide legislative guidance to address adequately the freedom its own system gives to states constructing unemployment compensation programs. If enacted, LPA would require the Secretary of Labor to create model legislation that “allow[s] sufficient flexibility by States and participating employers while ensuring accountability and program integrity.”

UCA required DOL to produce model legislation in early 1993, but DOL has not yet done so. DOL’s unwillingness to provide model legislation until federal and state policy are reconciled is understandable, because promoting STC could put existing TEFRA-based state

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238 See Shelton, supra note 5, at 1–2; Crimmann et al., supra note 4, at 17.
239 See Ridley, supra note 67, at 3.
240 See Balducchi & Wandner, supra note 60, at 128.
241 See id. at 128–30.
242 See id.
243 See id. at 130.
244 See id. at 128–29.
245 See id. at 128.
246 See Weiss & Schmidt, supra note 45, at 19.
247 See Federal-State Partnership, supra note 77, at 1; Balducchi & Wandner, supra note 60, at 128.
248 S. 1333 § 6(b); H.R. 2421 § 6(b). The Act would also require the Secretary of Labor to “consult with employers, labor organizations, State workforce agencies, and other program experts” in creating such guidance. S. 1333 § 6(c); H.R. 2421 § 6(a).
249 Balducchi & Wandner, supra note 60, at 128.
programs at risk. Nonetheless, DOL should be concerned about the lack of legal guidance for states and be prepared to issue model legislation once a consistent federal and state framework is established. If states do not have clear guidance from DOL, it is unlikely that work sharing implementation in the United States would reach even a fraction of that found in Germany.

DOL must also promote STC by providing technical assistance for STC program implementation. Like the unreleased model legislation, DOL did not make technical assistance and support available after UCA was enacted. While states with established STC initiatives may not need further technical assistance to construct their programs, they could still benefit from DOL’s more updated guidance. States implementing programs for the first time could also benefit. LPA recognizes this need by requiring DOL to “provide technical assistance and guidance in developing, enacting, and implementing such programs.” Specifically, DOL could assist states by organizing educational conferences, compiling a best practices manual, or creating an online forum with STC-related information. These types of renewed DOL efforts could address the stagnation of STC program establishment that occurred after UCA’s enactment.

DOL should also support the efforts of state governments in promoting STC to the labor community. Efforts to encourage employer and worker awareness would be especially effective if DOL and state governments connected with unions and business associations. For instance, DOL could engage in various marketing and outreach efforts to target the labor community in a particular area and report its efforts back to the states. Contact with unions and business associations

250 See Shelton, supra note 5, at 12.
251 See id. at 16.
252 See Shelton, supra note 5, at 16; Crimmann et al., supra note 4, at 11 (showing the number of employers using Kurzarbeit in each geographical region).
253 See Balducchi & Wandner, supra note 60, at 128.
254 See id.
255 Id. at 129.
256 See Final Report, supra note 47, at 4-45 (explaining that states sought further technical assistance from DOL).
257 See Balducchi & Wandner, supra note 60, at 129.
258 S. 1333 § 6(a) (2); H.R. 2421 § 6(a) (2).
259 See Final Report, supra note 47, at 8-10 to -11; Ridley, supra note 67, at 3.
260 See Ridley, supra note 67, at 3.
261 See id.
262 Id.
263 See Final Report, supra note 47, at 8-10.
would ensure that these crucial players are aware of STC programs, and make it more likely that individual workers and employers are similarly informed. Because the United States has not enjoyed an STC history as extensive and robust as Germany’s history with Kurzarbeit, the United States must undertake these additional efforts to inform the labor community of STC opportunities.

Finally, DOL could support states’ promotion efforts by endorsing innovative or effective state practices. It could recommend Rhode Island’s operation of “rapid response team[s]” to explain the benefits of STC in the face of significant layoffs, or it could recommend New York’s use of press conferences to promote STC. Some legislators found such tactics so useful that, if enacted, LPA would authorize grant disbursement to states that use “rapid response teams . . . [and] provi[de] education or assistance to employers to enable them to assess the feasibility of participating in [STC].” By promoting STC to the states in these ways, DOL could remedy the unfortunate situation in which “[m]ost states do not actively promote STC.” More robust marketing efforts at the state level would increase program awareness and lead to ultimately greater STC use.

**Conclusion**

Germany’s success with Kurzarbeit during the recent recession has directed needed attention to work sharing programs and their potential role in combating unemployment. In the United States, STC could be an appropriate and effective response to the layoffs that accompany a recession. Although the United States has its own history of STC use, a host of issues prevent STC from being properly utilized by states. Thus, the United States should contemplate Germany’s success with Kurzarbeit and discern areas for improvement in its own STC policy and legislation.

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264 See id. at 4-43. Through the various measures described above, the DOL could reach “key stakeholders” that also include “representatives from the state’s employment security agency, legislators, . . . labor groups, or the governor.” See id.

265 See Shelton, supra note 5, at 11–13; Crimmann et al., supra note 4, at 17; Wandner, supra note 21, at 20.

266 See Ridley, supra note 67, at 3.

267 See Final Report, supra note 47, at 8-10; Ridley, supra note 67, at 3.

268 See Ridley, supra note 67, at 3.

269 S. 1333 § 5(d) (1)–(2); H.R. 2421 § 5(d) (1)–(2).

270 Shelton, supra note 5, at 16; see Ridley, supra note 67, at 3.

271 See Final Report, supra note 47, at 4-44.
Most fundamentally, the United States needs a consistent legal framework upon which DOL and states can act regarding STC. Congress needs to reconcile established state STC programs and federal law by changing UCA to incorporate TEFRA provisions. If Congress were to enact a framework like LPA, it could initiate a more thoughtful dialogue to address widespread misunderstandings of STC. With a clear vision of STC’s proper role, the government could offer comprehensive guidance, funding, and support for STC programs.

Although Germany’s success with Kurzarbeit can inform a reassessment of U.S. STC policy, STC will be useful in combating U.S. unemployment only when appropriate Congressional action converges with public awareness.
HACKTIVISM: A NEW BREED OF PROTEST IN A NETWORKED WORLD

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Abstract: After WikiLeaks released hundreds of thousands of classified U.S. government documents in 2010, the ensuing cyber-attacks waged by all sides in the controversy brought the phenomenon of hacktivism into popular focus. Many forms of hacktivism exploit illegal access to networks for financial gain, and cause expensive damage. Other forms are used primarily to advocate for political or social change. Applicable law in most developed countries, including the United States and the United Kingdom, generally prohibits hacktivism. However, these countries also protect the right to protest as an essential element of free speech. This Note argues that forms of hacktivism that are primarily expressive, that do not cause serious damage, and that do not exploit illegal access to networks or computers, sufficiently resemble traditional forms of protest to warrant protection from the application of anti-hacking laws under widely accepted principles of free speech.

INTRODUCTION

Early on the morning of November 30, 2010, WikiLeaks.org came under assault by a hacker known as “th3j35t3r” (The Jester).1 By launching what is known as a denial of service (DoS) attack with software of his own invention, The Jester overwhelmed WikiLeaks’ servers with requests for information.2 WikiLeaks.org soon crashed, and remained down for more than twenty-four hours.3 Days before, WikiLeaks made international headlines by posting on its website roughly 250,000 classified documents stolen from the U.S. government.4 On his Twitter feed, The Jester claimed credit: “www.wikileaks.org—TANGO DOWN—for

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2 See Neil J. Rubenkind, WikiLeaks Attack: Not the First by th3j35t3r, PCMag.com (Nov. 29, 2010), http://www.pcmag.com/article2/0,2817,2373559,00.asp.

3 See Correll, ‘Tis the Season, supra note 1.

attempting to endanger the lives of our troops, ‘other assets’ & foreign relations #wikileaks #fail.”

To get its website back online, WikiLeaks promptly switched hosting providers and began renting bandwidth from Amazon.com. DoS and other attacks against WikiLeaks continued, but were unsuccessful. Shortly thereafter, however, Amazon ousted WikiLeaks from its servers after Senator Joseph Lieberman contacted Amazon “for an explanation” of its decision to provide hosting services to the whistle-blower site. WikiLeaks then moved to another hosting service, but again was cut off by the service provider after ongoing DoS attacks threatened the stability of every other website hosted by the provider. Finally, after establishing a number of mirror sites (thereby multiplying the number of sites on which its content appeared), the WikiLeaks website was once again stable.

The controversy surrounding WikiLeaks, however, was only beginning. Soon, major companies that provided services to WikiLeaks and its users began withdrawing support. Citing violations of its Acceptable Use Policy, PayPal cancelled WikiLeaks’ account, preventing WikiLeaks from receiving donations through the popular online payment service. Three days later, MasterCard suspended cardholder

9 See Ragan, supra note 8 (quoting EveryDNS.net’s press release concerning WikiLeaks and providing a link to a list of WikiLeaks’ mirror sites).
10 See id.
payments to WikiLeaks. The next day, Visa did the same. Swiss bank PostFinance closed the account of WikiLeaks founder Julian Assange, claiming that Assange provided false information concerning his place of residence. Bank of America, citing concerns that WikiLeaks “may be engaged in activities that are, among other things, inconsistent with our internal policies,” likewise pulled the plug, refusing to process payments to WikiLeaks.

The uproar that accompanied these corporate announcements sparked an online backlash. An amorphous, international group of individuals, known as “Anonymous,” began to bombard the websites of entities it deemed opposed to WikiLeaks with distributed denial of service (DDoS) attacks. Many of the sites crashed, and others were rendered inoperable for some time. The group’s declared mission, called Operation Payback, was to raise awareness of the actions of WikiLeaks’ opponents, to fight what it perceived to be censorship by identifying and attacking those responsible for the attacks on WikiLeaks, and to support “those who are helping lead our world to freedom and democracy.”

To some, the conflict surrounding the WikiLeaks controversy was the first real example of a war over digital information. John Perry Barlow, co-founder of the Electronic Frontier Foundation, announced on Twitter that “[t]he first serious infowar is now engaged. The field of battle is WikiLeaks. You are the troops.” To others, including members of Anonymous, Operation Payback is the most prominent recent example of a trend that has been developing since the invention of the

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18 See id.
19 See id.
20 Id.
22 Id.
Internet: computer savvy individuals deploying their skills online to protest for or against a cause—or, more simply, “hacktivism.”

Like many aspects of Internet activity, hacktivism is transnational in scope; as a result, any effective legal response should include international coordination that draws on widely accepted democratic principles of free speech. Part I of this Note describes the differences between hacking and hacktivism. In addition to investigating the threats posed by hackers, this section explores the desirable aspects of hacktivism. Part II discusses the existing international legal framework in the area of cybersecurity, in particular the Council of Europe’s Convention on Cybercrime. It compares the domestic regimes of criminal laws affecting hacktivism in two key signatory states, the United States and the United Kingdom, and it considers how U.S. and UK law protect legitimate protest as a form of free speech, petition, and assembly. Part III analyzes how certain methods of hacktivism may be compared to conventional means of protest. Finally, this Note concludes that a narrow subset of hacktivism is sufficiently similar to traditional forms of protest to warrant protection under widely accepted free speech principles.

I. Background

A. A Brief Description of Hacktivism

The term hacktivism has been defined as the nonviolent use for political ends of “illegal or legally ambiguous digital tools” like website defacements, information theft, website parodies, DoS attacks, virtual sit-ins, and virtual sabotage. Capitalizing on the power and pervasive-
ness of the Internet, hacktivists attempt to exploit its manifold access points to gain publicity and spread information about their views.\textsuperscript{26}

Although it has not always carried a clever name, people have turned to hacktivism since the Internet’s early days.\textsuperscript{27} For example, to protest the passage of the Communications Decency Act of 1996, a hacker defaced the website of the Department of Justice (DOJ) with images and commentary:

Free speech in the land of the free? Arms in the home of the brave? Privacy in a state of wiretaps and government intrusion? Unreasonable searches? We are a little behind our 1984 deadline, but working slowly one amendment at a time. It is hard to trick hundreds of millions of people out of their freedoms, but we should be complete within a decade.\textsuperscript{28}

Furthermore, as the behavior of The Jester and Anonymous demonstrates, hacktivism is often used by all sides in a debate.\textsuperscript{29}

As the Internet has evolved, so too have the tools used by hacktivists to pursue their ideological goals; moreover, an individual’s objective and point of view will likely determine his form of hacktivism.\textsuperscript{30} Forms of hacktivism run the gamut from those that are clearly covered by existing anti-hacking laws—like redirects, site defacements, and DoS attacks\textsuperscript{31}—to forms, like virtual sit-ins, whose legality is far less certain.\textsuperscript{32}

\section*{B. Hacktivism versus Hacking}

Although hacktivism has its origins in both hacking and activism,\textsuperscript{33} distinguishing between hacktivism and hacking is not straightforward.\textsuperscript{34} In one sense, the two practices have divergent motives: hacking is often done out of the hacker’s self-interest, while hacktivism is often done to achieve a social or political goal.\textsuperscript{35} But the term hacking has not always

\textsuperscript{26} See id. at 5.
\textsuperscript{27} See id. at 9; Bar-Yosef, supra note 23.
\textsuperscript{28} Samuel, supra note 25, at 9 (citing a copy of a site defacement stored on a mirror site unavailable to the public).
\textsuperscript{29} Compare Lee, supra note 5 (analyzing th3j35t3r’s attacks on WikiLeaks), with Correll, Payback, supra note 17 (analyzing the response of members of Anonymous to the WikiLeaks controversy).
\textsuperscript{30} See Samuel, supra note 25 at 8, 48–49.
\textsuperscript{31} See id. at 49.
\textsuperscript{32} See id. at 71, 72.
\textsuperscript{33} See id. at iii.
\textsuperscript{34} See id. at 39.
\textsuperscript{35} See id. at 4.
been used to describe the conduct of a cybercriminal.\textsuperscript{36} It originally described an innovative use of technology to solve a problem.\textsuperscript{37} In addition, hacking is frequently practiced in defense or furtherance of a unique set of norms that have developed as part of the Internet’s culture.\textsuperscript{38} For present purposes, however, hacking may be differentiated from hacktivism, in that hacking lacks political objectives.\textsuperscript{39}

Much hacking is motivated by nefarious and fraudulent aims.\textsuperscript{40} Hackers are responsible for identity theft, fraud, commercial espionage, and other crimes with an annual cost in the trillions of dollars.\textsuperscript{41} The FBI has declared that cybercrime is the most significant criminal threat facing the United States, and that anti-cybercrime efforts are a top priority, behind only counterterrorism and counterintelligence.\textsuperscript{42}

Moreover, cyberwarfare, waged by hackers on behalf of state and non-state actors, is considered the next phase in the evolution of threats to national security.\textsuperscript{43} As such, this species of hacking arguably is motivated by political objectives.\textsuperscript{44} A major difference from hacktivism, however, is that hacking in cyberwarfare may be analogized to operations on the battlefront, while some forms of hacktivism are more analogous to sit-ins or other forms of nonviolent civil disobedience.\textsuperscript{45} Mike McConnell, former Director of National Intelligence, told President Bush in 2007 that if the perpetrators of the September 11th attacks had instead successfully targeted a single American bank with cyber-attacks, the damage to the U.S. economy would have been “an order-of-magnitude” greater.\textsuperscript{46} Similarly, law enforcement officials fear that cyber-attacks on the networks crucial to the nation’s critical infra-

\begin{footnotesize}
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\item \textsuperscript{36} See Samuel, supra note 25, at 39–44.
\item \textsuperscript{37} See id. at 51.
\item \textsuperscript{38} See id. at 39.
\item \textsuperscript{39} But see id. at 42 (noting that while hacking may seem apolitical on its face, certain aspects of hacker culture are inherently political).
\item \textsuperscript{41} See Will Knight, Hacking Will Cost World $1.6 Trillion This Year, ZDNet (U.K.) (July 11, 2000), http://www.zdnet.co.uk/news/security-management/2000/07/11/hacking-will-cost-world-16-trillion-this-year-2080075/.
\item \textsuperscript{42} See Chabinsky, supra note 40.
\item \textsuperscript{44} Compare id., with Samuel, supra note 25, at 6.
\item \textsuperscript{45} Compare Mueller, supra note 43, with Samuel, supra note 25, at 6.
\item \textsuperscript{46} See Lawrence Wright, The Spymaster, New Yorker, Jan. 21, 2008, at 51.
\end{itemize}
\end{footnotesize}
structure—for example, air traffic control systems, electrical grids, and water purification systems—could have even more catastrophic consequences.\(^47\)

By contrast, hacktivism tends to be motivated by political concerns that are at least partly focused on “offline” issues.\(^48\) It is engaged primarily with communicative, not destructive, goals.\(^49\) For example, the defacement of the DOJ website in protest of the Communications Decency Act of 1996 reflects both political support for individual rights and concerns that the implicated legislation would degrade the culture and value of the Internet through censorship.\(^50\) It also reflects the communicative element of hacktivism, in that the website remained largely operational during and after the attack, and the cost of repairing the defacement was minimal.\(^51\)

C. Forms of Hacktivism

To analyze hacktivism as a form of protest, five methods are particularly well-suited for discussion in light of their popularity and the varying degrees to which each resembles legitimate expression. It should be noted, though, that as technology evolves, so too will the forms of hacktivism. As a result, the methods described below are merely a sample of hacktivism as it has existed in the recent past; the most popular methods could be very different in the near future. The principles that this Note argues should be applied to determine whether a form of hacktivism ought to receive protection as a legitimate form of protest, however, remain the same.

1. Denial-of-Service Attacks

DoS attacks, the form of hacktivism frequently used during the WikiLeaks incident, involve attempts to block access to websites by any of several means.\(^52\) Access to the targeted site can slow significantly or


\(^{48}\) See Samuel, supra note 25, at 14.

\(^{49}\) Cf. id. at 51, 54, 216, 235 (noting that a significant objective of hacktivism is communication).

\(^{50}\) Cf. id. at 9, 42; supra text accompanying note 28.

\(^{51}\) Cf. id. at 54 (explaining that as a primarily communicative method of hacktivism, site defacements leave the targeted sites largely unharmed).

be prevented entirely while the attack is underway. During a common type of DoS attack, the party initiating the attack saturates the computer server hosting the target website with requests for information, dramatically increasing the consumption of computational resources and eventually causing the server to slow down or reset.

A popular iteration of the DoS attack is a DDoS attack, which may be distinguished from a DoS attack by its use of a network of multiple attacking computers. In a DDoS attack, the initiating party activates a network of computers under its control, called a botnet, to multiply the power of the attack, thereby directing an exponentially increased volume of information requests to the target server. So-called because of the manner in which the computers—known as “slaves” or “zombies”—are manipulated by the party initiating the attack, botnets are networks of individual computers that have been infiltrated by a virus or other malicious program that brings them under the control of the infiltrator.

Generally, in order to compromise the security of the infiltrated computer, the virus exploits vulnerabilities in the system. There is no shortage of such vulnerabilities, particularly on home computers and networks. Consequently, botnets are widespread and numerous. In fact, reports suggest that the supply of botnets far exceeds demand, leading to a steep drop in their rental price. With so low a barrier to entry, DDoS capability is proliferating.

Unsurprisingly, DDoS attacks have increased substantially in the past few years. And along with enhanced DDoS capacity has come

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53 See Samuel, supra note 25, at 10.
57 See Patrikakis et al., supra note 55, at 13; McMillan, supra note 56.
58 See Patrikakis et al., supra note 55, at 13.
59 See Geer, supra note 24, at xi; McMillan, supra note 56.
60 See McMillan, supra note 56.
61 See id.
62 See id.
63 Compare Samuel, supra note 25, at 10 (noting that as of 2004, DDoS attacks are rarely used by hacktivists), with McMillan, supra note 56 (describing an increase in DDoS attacks between 2008 and 2009).
improved and vastly simplified operating software. The software that was widely used during the WikiLeaks episode was called the Low Orbit Ion Cannon (LOIC), which enabled even novice users to join in the DDoS attacks by making participation relatively simple. LOIC allowed users to participate in the attacks in two ways: directly, by entering the target IP address and clicking “fire”; or, alternatively, by volunteering their computer or network to the so-called “LOIC Hivemind,” and thereby allowing other users to direct attacks from the surrendered system. The latter option describes a voluntary botnet, in which each computer in the controlled network has effectively been donated for a prescribed use. Unlike members of involuntary botnets, LOIC users retain the ability to add or remove their computers from the attacking network.

Because of the structure of the Internet, DDoS attacks often implicate the laws of multiple nations. An initiating party located in country A can control a network of computers located in countries B, C, and D to attack a website hosted on servers located in country E. Thus, the victim, the evidence, and the perpetrator may be located in different countries, many of which likely have different cybersecurity regimes, or no regime at all.

2. Site Defacements

Site defacements, like that perpetrated against the DOJ website, are believed to be the most common form of hacktivism. They involve obtaining unauthorized access to a web server and either replacing or altering a web page with new content that conveys a particular message. Defacements may be limited to a single site, or they may occur

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65 See id.

66 See id.


68 See id.

69 See Geer, supra note 24, at ix.

70 See id.; Patrikakis et al., supra note 55, at 20–21.


73 See id. at 8.
in huge volumes across hundreds or thousands of sites.\textsuperscript{74} Yet, although they effectively hijack the targeted site in order to communicate a message, defacements do not necessarily damage the targeted site.\textsuperscript{75} Instead, site defacements are commonly used not only as a means to communicate a message, but also to demonstrate the technical prowess of the defacer; that is, they are as much about garnering attention for the perpetrator as they are about raising awareness for a cause.\textsuperscript{76}

3. Site Redirects

As the name suggests, redirects send users to a site that is different than the one indicated by the web address.\textsuperscript{77} That is, by gaining unauthorized access to a web server and adjusting the address settings, the perpetrator causes would-be users to reach an alternative site.\textsuperscript{78} Quite often, the alternative site is critical of the original, searched-for site.\textsuperscript{79} By this method, the hacktivist essentially hijacks access to the targeted site and asserts control over the content that is displayed when an Internet user enters the web address of the targeted site.\textsuperscript{80}

4. Virtual Sit-Ins

As a form of hacktivism, the virtual sit-in can be compared to a DDoS attack in the sense that the object of both methods is to slow or crash a targeted server by overwhelming it with requests for information.\textsuperscript{81} The difference is that rather than commanding a network of voluntary or involuntary botnets, virtual sit-ins involve individual protesters reloading web pages.\textsuperscript{82} Some virtual sit-ins are accomplished simply by users manually and repeatedly reloading the targeted web page; others allow participants to download special code that automatically and repeatedly reloads the targeted site.\textsuperscript{83} The virtual sit-in is considered “a mass form of hacktivism . . . [and] a more democratic or representative form of hacktivism.”\textsuperscript{84}

\textsuperscript{74} See id. at 9.
\textsuperscript{75} See id. at 54.
\textsuperscript{76} See id. at 55.
\textsuperscript{77} See id. at 10.
\textsuperscript{78} See Samuel, supra note 25, at 10.
\textsuperscript{79} Id.
\textsuperscript{80} See id.
\textsuperscript{81} See id. at 12.
\textsuperscript{82} See id.
\textsuperscript{83} See id. at 12–13.
\textsuperscript{84} Samuel, supra note 25, at 12.
5. Information Theft

Finally, information theft, a method of hacktivism that is arguably indistinguishable from ordinary burglary, involves gaining unauthorized access to a computer or network and stealing private data. Although the illegality of information theft is probably the least ambiguous of the methods of hacktivism described in this section, it is surprisingly, and distressingly, well-accepted by hacktivists.86

II. Discussion

The threat posed by hackers has not eluded lawmakers. Indeed, most advanced nations have enacted laws that prohibit hacking.87 To coordinate international anti-hacking efforts, the 2001 Council of Europe Convention on Cybercrime (Convention) established a framework for domestic legal regimes.88 The prescribed regimes are general in scope, and could conceivably be applied to forms of hacktivism that resemble traditional forms of protest.89 The legal systems in the United States and the United Kingdom both feature long established principles and doctrine protective of the freedom of expression.90 In the context of hacktivism as a form of protest, these doctrines could be used to shield a narrow subset of hacktivism from the general prohibition on hacking.91

A. The European Convention on Cybercrime

Because its drafters deemed international cooperation critical to effective cybercrime regulation, the Convention prescribes a common criminal policy regarding cybercrime,92 and signatory parties are bound to establish domestic criminal laws governing intentional acts of

85 Id. at 11.
86 See id. at 123, 137, 143–44.
88 See generally Convention, supra note 87.
89 See, e.g., 18 U.S.C. § 1030; Computer Misuse Act, c. 18 (Eng.).
90 See discussion infra Parts II.B–C.
91 See discussion infra Part III.
92 See Convention, supra note 87, pmbl.
cybercrime.\textsuperscript{93} The Convention outlines requirements for substantive laws concerning offenses against the integrity of computer data and systems.\textsuperscript{94}

1. Definitions

Article 2 of the Convention requires regulation of illegal access to computer systems.\textsuperscript{95} Parties are obligated to enact criminal laws prohibiting access to any part of a computer system “without right.”\textsuperscript{96} Article 2 specifies that such access may be obtained either by circumventing security measures or by exploiting authorized access to one system to gain unauthorized access to other systems.\textsuperscript{97} In addition, parties may require that unlawful access be motivated by intent to obtain computer data or other dishonest intent.\textsuperscript{98}

The Convention also requires parties to establish criminal laws prohibiting the intentional, unauthorized interception of computer data.\textsuperscript{99} Article 3 specifies that such interception should be prohibited when it is accomplished by technical means and when the intercepted data is part of a nonpublic transmission.\textsuperscript{100} Moreover, the interception of “electromagnetic emissions” from computer systems is prohibited.\textsuperscript{101}

Similarly, Articles 4 and 5 respectively require parties to prohibit interference with both data and systems.\textsuperscript{102} The Convention provides that data interference may be accomplished when a person intentionally and without authorization damages, deletes, deteriorates, alters, or suppresses computer data.\textsuperscript{103} Article 4 states that parties may require that data interference result in serious harm before criminal liability

\textsuperscript{93} See id. art. 2. The Convention mandates that signatories create new cybercrimes, which may not have been recognized as offenses under existing legal regimes. See Baron, supra note 71, at 270.

\textsuperscript{94} See id. § 1.

\textsuperscript{95} See id. art. 2. The Convention defines computer systems as devices, either freestanding or networked with other devices, that perform automatic data processing using a program. Id. art. 1(a).

\textsuperscript{96} Id. art. 2.

\textsuperscript{97} See id.

\textsuperscript{98} See Convention, supra note 87, art. 2.

\textsuperscript{99} Id. at art. 3. Computer data is defined as “any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function.” Id. art. 1(b).

\textsuperscript{100} Id. art. 3.

\textsuperscript{101} Id.

\textsuperscript{102} See id. arts. 4, 5.

\textsuperscript{103} Id. art. 4(1).
Article 5 obligates parties to prohibit intentional system interference. Actions cause system interference when they seriously hinder the functioning of a computer system by the inputting or transmitting of data, or the manipulation of data by many of the same means involved in data interference.

In addition to outlining a regime of criminal laws governing data and computer systems, the Convention also describes laws regarding the misuse of devices. Unlike the provisions governing data and computer systems, Article 6 does not impose liability so long as the devices in question are not used to commit offenses set forth in Articles 2 through 5. For devices that are designed or adapted primarily to intercept or interfere with data or systems, however, parties are obligated to enact laws prohibiting their possession, “production, sale, procurement for use, import, distribution or otherwise” being made available if they are intended for use in the commission of offenses under Articles 2 through 5. Furthermore, Article 6 imposes the same restrictions on computer passwords, access codes, and similar information capable of accessing any part of a computer system.

2. Domestic Regimes Prescribed by the Convention

The Convention outlines requirements for domestic laws regarding computer-related offenses. Article 7 mandates that parties establish anti-forgery laws to prohibit the intentional, unauthorized manipulation or fabrication of data that results in inauthentic data intended to be accepted as genuine. The Article further stipulates that parties are free to condition criminal liability on intent to defraud or other dishonest intent. Relatedly, Article 8 describes antifraud laws to prohibit interference with or manipulation of data or systems that deprive victims of property with the fraudulent intent of procuring an economic benefit for the perpetrator.
Finally, the Convention requires parties to establish laws concerning “offences related to infringements of copyright and related rights,”\textsuperscript{115} and to establish a legal regime governing ancillary and corporate liability for accessories to cybercrime.\textsuperscript{116} The Convention is not exhaustive of the possible forms of cybercrime, however, and it authorizes parties to enact laws regarding all “other criminal offences committed by means of a computer system.”\textsuperscript{117}

3. Enforcement Provisions of the Convention

The Convention requires parties to establish procedures to allow domestic law enforcement to implement the new laws and investigate and prosecute cybercrimes.\textsuperscript{118} It also stipulates that parties must cooperate with each other in the enforcement of cybercrime laws.\textsuperscript{119} The Convention describes extradition arrangements that provide for the extradition of suspects from one party state to another to face charges arising from cybercrime laws enacted under the Convention.\textsuperscript{120} In addition, the Convention encourages mutual assistance between parties to investigate and prosecute cybercrimes.\textsuperscript{121}

Beyond mandating the establishment of domestic cybercrime laws, though, the Convention requires that the implementation and application of laws enacted under the Convention accord with international agreements concerning the protection of human and civil rights.\textsuperscript{122} Specifically, Article 15 refers to the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and “other applicable international human rights instruments.”\textsuperscript{123} The Article requires incorporation of the principle of proportionality, and provides that judicial supervision should be given where appropriate.\textsuperscript{124} Lastly, Article 15 obligates parties to consider the impact of such laws on the rights and interests of third parties.\textsuperscript{125}

\textsuperscript{115} Id. art. 10.
\textsuperscript{116} See Convention, supra note 87, tit. 5.
\textsuperscript{117} See id. art. 14(2).
\textsuperscript{118} See id. art. 14(1).
\textsuperscript{119} Id. art. 23.
\textsuperscript{120} Id. art. 24.
\textsuperscript{121} Id. arts. 25, 27–34.
\textsuperscript{122} Convention, supra note 87, art. 15.
\textsuperscript{123} Id.
\textsuperscript{124} Id. art. 15.
\textsuperscript{125} Id. art. 15(3).
B. The American Domestic Regime

1. The Computer Fraud and Abuse Act of 2006

At least forty different federal statutes govern computer-related crimes in the United States. Foremost among these for the regulation of hacking and, potentially, hacktivism, is the Computer Fraud and Abuse Act of 2006 (CFAA). Under the statute, seven categories of conduct are prohibited as they relate to “protected computers,” which are defined as:

[A] computer . . . used by or for a financial institution or the United States Government . . . or, which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.

In other words, any computer in the United States that is connected to the Internet, and even some foreign computers, are subject to the CFAA. Subsection (a)(1) of the statute prohibits obtaining or transmitting classified information through unauthorized computer access if the actor has “reason to believe” the information could be used either to the detriment of the United States, or to the advantage of any foreign nation. The next subsection prohibits obtaining financial information, information from any government entity, or information from any “protected computer,” through unauthorized computer access. Third, the CFAA forbids unauthorized access of any nonpublic computer of the United States government. Subsection (a)(4) proscribes unauthorized computer access with intent to defraud and obtain something of value.

The fifth subsection, § 1030(a)(5), is directed specifically at hacking. The provision describes two distinct types of offenses. The first type involves knowingly transmitting “a program, code or com-

126 See McCurdy, supra note 24, at 300.
127 18 U.S.C. § 1030 (2006); see McCurdy, supra note 24, at 304.
128 18 U.S.C. § 1030(e)(2); see McCurdy, supra note 24, at 304–05.
129 McCurdy, supra note 24, at 304; see 18 U.S.C. § 1030(e)(2).
134 See 18 U.S.C. § 1030(a)(5); McCurdy, supra note 24, at 305.
135 See 18 U.S.C. § 1030(a)(5)(A); McCurdy, supra note 24, at 305.
mand that intentionally causes damage to a protected computer,” regardless of whether the actor has authorized access.\textsuperscript{136} The second type of offense involves unauthorized access of a protected computer that causes damage.\textsuperscript{137} This type of offense does not require intent to cause damage or loss, and liability can attach as a result of either recklessness or negligence.\textsuperscript{138}

The sixth subsection forbids the knowing trafficking of passwords or similar information with intent to defraud that permits unauthorized computer access if the trafficking affects interstate or foreign commerce, or if the accessed computer is used by or for the U.S. government.\textsuperscript{139} Finally, subsection § 1030(a)(7) prohibits the transmission, with intent to extort, of any communication that threatens to damage a protected computer; to gain unauthorized access to a protected computer and retrieve or impair confidential information; or to extort money in the course of damaging a protected computer.\textsuperscript{140}

2. U.S. Courts and the Right to Protest

The distinction between permissible protest and impermissible disruption has been a subject of controversy for generations.\textsuperscript{141} According to the U.S. Supreme Court, “the right to engage in peaceful and orderly political demonstrations is, under appropriate conditions, a fundamental aspect of ‘liberty’ protected by the Fourteenth Amendment.”\textsuperscript{142} Even protests that rile the audience or cause excitement that is potentially disruptive to the civic peace are generally protected so long as they are not “directed to inciting or producing imminent lawless action and [are not] likely to incite or produce such action.”\textsuperscript{143} In the context of the First Amendment, contributions to the civic debate on matters of public concern are considered essential to a functioning

\textsuperscript{136} McCurdy, \textit{supra} note 24, at 305; see 18 U.S.C. § 1030(a)(5)(A)(i).

\textsuperscript{137} See 18 U.S.C. § 1030(a)(5)(A)(ii)–(iii); McCurdy, \textit{supra} note 24, at 305.

\textsuperscript{138} See 18 U.S.C. § 1030(a)(5)(A)(iii); McCurdy, \textit{supra} note 24, at 305.

\textsuperscript{139} 18 U.S.C. § 1030(a)(6).

\textsuperscript{140} 18 U.S.C. § 1030(a)(7).


\textsuperscript{142} Shuttlesworth v. City of Birmingham, 394 U.S. 147, 161 (1969) (Harlan, J., concurring).

democracy, and the Supreme Court has been extremely reluctant to allow punishment of false or even grievously offensive speech in this area.

The government’s ability to limit protest by imposing reasonable time, place, and manner restrictions on speech, however, is largely unquestioned. In this sense, protests can be channeled, but not stifled completely, even if they are peaceful and involve matters of public concern. Restrictions of this kind must be “content-neutral,” in that they cannot prohibit speech on the basis of its subject matter or the speaker’s identity or viewpoint, they must serve a significant government interest, and they must leave open ample alternative avenues for communication. Such restrictions are permissible even on speech that occurs in areas, like public streets, that traditionally have been used for the exchange of ideas. In the context of the Internet, and as applied specifically to hacktivism, it is not entirely clear what form a permissible time, place and manner restriction can take.

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144 See Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). In an important and oft-quoted passage, Justice Roberts declared that “the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.” Id.

145 See id.; see also Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (“[A]s a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”); New York Times Co. v. Sullivan, 376 U.S. 254 passim (1964) (overturning jury verdict for defamation against a newspaper for statements published in a full-page issue advertisement concerning the treatment of civil rights protestors by police and state officials).

146 See, e.g., Frisby v. Shultz, 487 U.S. 474, 487 (1988) (upholding a municipal ordinance specifically prohibiting residential picketing directed at, and occurring in front of, a residence); Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 98–99 (1972) (invalidating a municipal anti-picketing ordinance on equal protection grounds, but recognizing the government’s ability to regulate picketing and other forms of protest through reasonable time, place, and manner restrictions); Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (upholding a municipal ordinance prohibiting the use of sound trucks on public streets).

147 See, e.g., Frisby, 487 U.S. at 487; Mosley, 408 U.S. at 98–99; Kovacs, 336 U.S. at 83.


149 See Kovacs, 336 U.S. at 87. Writing for a plurality, Justice Reed noted that “[c]ity streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control.” Id.

150 The Supreme Court has yet to address the question of time, place, and manner restrictions on Internet conduct, and the decisions of lower courts have been limited primar-ily to a variant of the question involving domain name registration. See, e.g., Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 587 (2d Cir. 2000) (finding that an amendment to a U.S. Department of Commerce agreement concerning competition in domain name registration was a valid time, place, and manner restriction).
The public forum doctrine generally protects speech in “places which by long tradition or by government fiat have been devoted to assembly and debate.”\textsuperscript{151} In a public forum, the government may impose content-neutral time, place, and manner restrictions.\textsuperscript{152} It may also impose a licensing or permit system for the use of public forums so long as the system serves an important purpose, leaves virtually no discretion to the licensing authority, and provides procedural safeguards including judicial review of license denials.\textsuperscript{153} Moreover, the public forum doctrine has potential ramifications for speech on private property, if the property is open to the public.\textsuperscript{154} It is as yet unclear, however, how, if at all, the Supreme Court will apply the public forum doctrine in the context of the Internet.\textsuperscript{155}

C. The British Domestic Regime

1. The Computer Misuse Act of 1990

In the United Kingdom, acts of hacktivism generally fall under the Computer Misuse Act of 1990 (CMA).\textsuperscript{156} Unlike the American CFAA, the CMA does not define the machines protected by its provisions.\textsuperscript{157} Instead, the statute prohibits unauthorized access to “computer material” and defines the actions to which criminal liability will attach.\textsuperscript{158} Section 1 provides that a person violates the CMA by knowingly and intentionally gaining unauthorized access to programs or data held in any computer.\textsuperscript{159} The provision clarifies the intent requirement by noting that the perpetrator need not intend to gain access to a particular

\textsuperscript{151} Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983).


\textsuperscript{153} See Cox, 312 U.S. at 576.

\textsuperscript{154} See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 79 (1980) (affirming state supreme court decision upholding state constitutional amendment protecting speech in privately owned shopping centers, and thereby preventing property owners from excluding certain speakers).


\textsuperscript{156} Computer Misuse Act, c. 18 (Eng.).

\textsuperscript{157} Id. § 1. Compare with 18 U.S.C. § 1050.

\textsuperscript{158} Computer Misuse Act, c. 18 (Eng.).

\textsuperscript{159} Id. § 1(1).
program or data of any kind on any computer; intentionally gaining unauthorized access to the information is sufficient for culpability.\textsuperscript{160} The section further states that the maximum sentence of incarceration is two years.\textsuperscript{161}

Section 2 of the CMA prohibits actions that violate Section 1 and that are taken with intent to commit further offenses, or to allow others to commit offenses by means of unauthorized access.\textsuperscript{162} Specifically, Section 2 applies to crimes for which there are statutorily fixed sentences or to offenses carrying sentences of five years or more.\textsuperscript{163} The further crimes need not occur at the same time as unauthorized access is gained, nor even be possible; the section prohibits arranging for further offenses even if the planned offenses are in fact impossible.\textsuperscript{164} The maximum sentence for offenses made in contemplation of further crimes is five years.\textsuperscript{165}

Particularly relevant to DDoS attacks and site defacements, Section 3 prohibits unauthorized acts that impair the operation of a computer, prevent or hinder access to programs or data on a computer, or enable others to impair computer operations or hinder access to systems.\textsuperscript{166} A person violates Section 3 if he knowingly does “any unauthorized act in relation to a computer.”\textsuperscript{167} Notably, liability attaches under this section even if the acts are not intentional, but simply reckless.\textsuperscript{168}

As with Section 2, a prohibited act need not be intended to affect a particular computer, program, or data; the act need only be intended to have some effect on some computer, program, or data.\textsuperscript{169} The Section further specifies that acts whose effect is only temporary are nevertheless prohibited, as if the effect was permanent.\textsuperscript{170} The maximum sentence under this section is ten years.\textsuperscript{171}

Section 3A prohibits making, supplying, or obtaining “articles” to be used in offenses under Sections 1 and 3.\textsuperscript{172} “Article” is defined as any

\begin{itemize}
\item \textsuperscript{160} Id. § 1(2).
\item \textsuperscript{161} Id. § 1(3).
\item \textsuperscript{162} Id. § 2(1).
\item \textsuperscript{163} Id. § 2(2).
\item \textsuperscript{164} Id. § 2(5).
\item \textsuperscript{165} Id. § 2(3)–(4).
\item \textsuperscript{166} Id. § 3(2).
\item \textsuperscript{167} Id. § 3(1).
\item \textsuperscript{168} Id. § 3(4).
\item \textsuperscript{169} See id. § 3(4).
\item \textsuperscript{170} See Computer Misuse Act, § 3(5)(c).
\item \textsuperscript{171} Id. § 3(6).
\item \textsuperscript{172} Id. § 3A.
\end{itemize}
program or data held in electronic form.\textsuperscript{173} This provision is violated if a person supplies or offers to supply an item believing that it is likely to be used to commit or assist in the commission of an act which violates Sections 1 or 3.\textsuperscript{174} Violations under Section 3A are punishable by a maximum sentence of two years.\textsuperscript{175}

Section 4 of the CMA describes the territorial scope of offenses under Sections 1 through 3. Although it requires “at least one significant link with domestic jurisdiction,”\textsuperscript{176} the section states that it is “immaterial” whether the offense itself was committed in the United Kingdom, or whether the accused was in the United Kingdom when the offense was committed.\textsuperscript{177} Section 5 provides that either the accused person’s presence in the United Kingdom at the time the act was committed, or the presence of the computer that was wrongfully accessed, constitute a significant link with domestic jurisdiction.\textsuperscript{178}

2. British Courts and the Right of Expression

In the United Kingdom, free speech receives less robust protection than in the United States.\textsuperscript{179} Indeed, some argue that free speech in the United Kingdom is almost totally reliant on “cultural norms to check the abuse of government power to restrict or ban expression.”\textsuperscript{180} Judicial review of laws restricting speech is largely nonexistent; the freedom of speech is protected nearly exclusively by parliamentary “self-control.”\textsuperscript{181} The United Kingdom does not have a written constitution, and the only textual protection for speech rights is the Human Rights Act of 1998 (HRA),\textsuperscript{182} which codifies, among other things, Arti-

\begin{enumerate}
\item Id. § 3A(4).
\item Id. § 3A(2).
\item Id. § 3A(5).
\item Computer Misuse Act, § 4(2).
\item Id. § 4(1).
\item Id. § 5(2)–(3).
\item See, e.g., Krotoszynski, supra note 179, at 187.
\item Id. at 187–88.
\item Id. at 184.
\end{enumerate}
Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. 183

This is not to say that speech rights are unprotected in the United Kingdom; to the contrary, at common law free speech is a legal principle to be considered by courts interpreting acts of Parliament or deciding cases that implicate speech rights. 184 British courts frequently have invoked the common law principle to cabin laws that would otherwise inhibit the exercise of free speech. 185 In libel cases, for example, British courts have formulated fair comment and privilege defenses that protect speech. 186 Common law principles of free speech have also been invoked to limit the scope of legislation that could have restricted speech rights. 187

Nevertheless, partly because of the absence of a constitutional guarantee of free speech, common law presumptions require a balancing of speech rights against other, competing rights that may weigh against free speech. 188 In addition, there has been little consideration in British courts of the extent of free speech rights outside certain, well-established areas of law—namely, defamation, breach of confidence, and contempt of court. 189 As a result, the principle of free speech in the United Kingdom remains comparatively limited at common law. 190

III. ANALYSIS

A. Hacktivism as Legitimate Protest

This Note argues that those forms of hacktivism that are primarily expressive, that do not involve obtaining or exploiting illegal access to computers or networks for commercial advantage or financial gain, and

183 See id. at 183. Article 10 provides that “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The freedoms described in paragraph 1 are qualified, however, by paragraph 2, which declares that “[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such . . . restrictions or penalties as are prescribed by law and are necessary in a democratic society.” Id. art. 10(2).
185 See id. at 40.
186 See id.
187 See id. at 41.
188 See id. at 41–42.
189 See id. at 42.
190 Cf. id. at 41–42.

Just as traditional means of protest can inconvenience and frustrate both the object of the protest and the general public, hacktivism, too, can often seem more like a nuisance than an exercise of protected rights of expression.\footnote{See \textit{WikiLeaks, Protest and the Law: The Rights and Wrongs of Hacktivism}, \textit{supra} note 191.} And the unique forum of online protest—cyberspace, which exists on privately owned servers, and yet functions as a global public square\footnote{See \textit{Jeremy A. Kaplan, We Want YOU, Say Hacktivists . . . But Is It Legal?}, \textit{Fox News} (Dec. 9, 2010), \url{http://www.foxnews.com/scitech/2010/12/09/wikileaks-operation-payback-hacktivists-legal/}.}—further complicates the question of whether the Internet is an appropriate situs for demonstration.\footnote{See \textit{WikiLeaks, Protest and the Law: The Rights and Wrongs of Hacktivism}, \textit{supra} note 191.} Nevertheless, the same democratic interests that require toleration of civil demonstration in the physical world demand that a narrow subset of hacktivism be protected as a legitimate form of political protest.\footnote{See \textit{Samuel, \textit{supra} note 25, at 7.}} Given that hacktivism may take a wide variety of forms,\footnote{See \textit{WikiLeaks, Protest and the Law: The Rights and Wrongs of Hacktivism}, \textit{supra} note 191.} to separate the “good” hacktivism from the “bad,” it is useful first to establish some parameters.

1. Hacktivism as Protected Expression

To warrant protection, it is not sufficient that hacktivism merely convey a message; the world over, graffiti bans are accepted as reasonable and necessary measures to deter damage to both public and pri-
vate property. Hacktivism that causes damage (for example, information theft) or involves the manipulation of hijacked private property (for example, DDoS attacks using involuntary botnets) therefore is not likely to be considered expression at all.

Like protestors in a picket line, hacktivism within the jurisdiction of the United States should be subject to reasonable restrictions on the time, place, and manner of the demonstration. While it is not at all clear what such restrictions would look like in the context of the Internet, given the often critical importance of certain websites as a source of vital information, restrictions on otherwise permissible cyberprotests are likely in many circumstances. For example, virtual sit-ins waged against the official website of an incumbent political officeholder that

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199 See, e.g., Miller v. California, 413 U.S. 15, 24 (1973) (upholding a conviction for a violation of a state obscenity law on grounds that, inter alia, the material lacked any serious artistic, literary, or scientific value).


201 See, e.g., Frisby v. Schultz, 487 U.S. 474, 487 (1988) (upholding a municipal ordinance specifically prohibiting residential picketing directed at, and occurring in front of, a residence); Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 98–99 (1972) (invalidating a municipal anti-picketing ordinance on equal protection grounds, but recognizing the government’s ability to regulate picketing and other forms of protest through reasonable time, place, and manner restrictions); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (upholding a municipal ordinance prohibiting the use of sound trucks on public streets).

202 The Supreme Court has not yet addressed time, place, and manner restrictions in the context of the Internet; however, because hacktivism can take forms that are analogous to traditional methods of protest, restrictions on those forms should be no greater than those imposed on the traditional methods. Compare City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994) (invalidating a municipal ordinance prohibiting the display of yard signs on private property), Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943) (invalidating a municipal ordinance prohibiting door-to-door distribution of handbills), and Schneider v. State, 308 U.S. 147, 162 (1939) (invalidating a municipal anti-leafleting ordinance), with Heffron v. Int’l Soc’y for Krishna Consciousness, 452 U.S. 640, 651 (1981) (upholding a state regulation prohibiting the sale or distribution of merchandise and literature at the state fair, except from a booth rented from the state, on grounds that the state had sufficiently substantial interest in regulating solicitation activities at fairgrounds), Greer v. Spock, 424 U.S. 828, 838 (1976) (“[T]he business of a military installation ... is to train soldiers, not to provide a public forum.”), and Adderley v. Florida, 385 U.S. 39, 47–48 (1966) (“[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”).
might be otherwise protected could conceivably be prohibited in the period leading up to an election.\textsuperscript{203} Or, while a virtual sit-in by students on the website of a high school might be permissible—in response, perhaps, to a decision by the administration to cancel prom—the same attack made by students on the website of the high school newspaper could be punished on the theory that the state has a substantial interest in controlling the terms of debate within secondary schools.\textsuperscript{204} Assuming arguendo—as one must, given the embryonic state of the law—that the use of these methods would be cognizable as protected expression, they likely would be subject to all manner of other restrictions that the Supreme Court has recognized as consistent with the First Amendment.\textsuperscript{205}

Hacktivism in the United Kingdom is likely to be even more tightly restricted and less likely to be considered protected expression, notwithstanding the passage of the HRA.\textsuperscript{206} In the context of the


\textsuperscript{204} Cf. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988) (upholding high school principal’s exclusion of two stories from student newspaper on grounds that educators properly retain near-total control over school activities that might reasonably be perceived to be endorsed by the school); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986) (upholding the punishment of a high school student for vulgar speech given in a student election); Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 509 (1969) (holding that student expression cannot be suppressed unless it will materially or substantially disrupt the work and discipline of the school). But cf. Papish v. Bd. of Curators, 410 U.S. 667, 671 (1973) (finding that a state university violated the First Amendment when it expelled a graduate student for distributing newspaper on campus featuring political cartoon depicting a policeman raping the Statue of Liberty and the Goddess of Justice).

\textsuperscript{205} See, e.g., \textit{Hill}, 530 U.S. at 714 (upholding a state law restricting protests outside of health care facilities); \textit{Cox}, 312 U.S. at 576 (affirming convictions for violations of a municipal ordinance requiring a special permit to hold a parade); \textit{Frisby}, 487 U.S. at 487 (upholding a municipal ordinance specifically prohibiting residential picketing directed at, and occurring in front of, a residence); \textit{Cmty. for Creative Non-Violence}, 468 U.S. at 289 (upholding a National Park Service regulation prohibiting sleeping overnight in public parks); \textit{Miller}, 413 U.S. at 36–37 (upholding a conviction for a violation of a state obscenity law on grounds that, inter alia, the material lacked any serious artistic, literary, or scientific value); \textit{Kovacs}, 336 U.S. at 87 (upholding a municipal ordinance prohibiting the use of sound trucks on public streets).

\textsuperscript{206} See \textit{Barendt}, supra note 184, at 43 (noting that while the HRA incorporates the guarantee of the right of free expression in Article 10 of the ECHR, it is not clear what functions are encompassed by the clause); \textit{Krotoszynski}, supra note 179, at 190 (“[Although] British
WikiLeaks controversy, this premise will almost certainly be tested in the near future as members of Anonymous have “declared war” on the British government.\textsuperscript{207} Indeed, reports indicate that at least five people have already been arrested in the United Kingdom under the CMA for their role in attacks related to the WikiLeaks controversy.\textsuperscript{208} Given the British courts’ wide discretion in applying common law principles to statutory interpretation, and in light of the uncertainty surrounding the interpretation of the HRA,\textsuperscript{209} as such attacks proliferate it is likely that various types of hacktivism will be prosecuted.\textsuperscript{210}

It would not be surprising if British courts refused to recognize a free speech exception to the CMA for hacktivism, even under the HRA.\textsuperscript{211} There is some precedent, however, that might support finding that punishing certain forms of hacktivism would infringe speech rights.\textsuperscript{212} But recent trends suggest that at least in the near future, the British government may be increasingly inclined to suppress protest.\textsuperscript{213}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{207} Jerome Taylor, WikiLeaks “Hacktivists” Declare War on the UK, INDEPENDENT (Feb. 1, 2011), http://www.independent.co.uk/news/media/online/wikileaks-hacktivists-declare-war-on-the-uk-2200172.html.
\item \textsuperscript{208} Id.
\item \textsuperscript{209} See Barendt, supra note 184, at 41–42 (explaining that common law presumptions require a balancing of speech rights against other rights that may weigh against free speech).
\item \textsuperscript{210} See Taylor, supra note 207 (noting criticism of British government’s cybersecurity preparedness and vulnerability to DDoS attacks in light of threat of mass cyberprotests).
\item \textsuperscript{211} Compare R v. Shayler, [2002] UKHL 11, [2003] 1 A.C. 247 (H.L.) [6], [36] (appeal taken from Eng.) (finding that disclosure of information by former member of security service “in the public and national interest” by Official Secrets Act of 1989 was not protected by freedom of expression under HRA), with Krotoszynski, supra note 179, at 206 (describing a “rare burst of judicial activism” in which the Law Lords “took upon themselves the task of safeguarding the . . . right to free expression”).
\item \textsuperscript{212} See, e.g., Brutus v. Cozens, [1973] A.C. 854 (H.L.) 863 (U.K.) (affirming dismissal of charges of using insulting behavior); R v. Home Secretary, ex p Simms [2000] 2 A.C. 115 (H.L.) 130–31 (finding that provisions of Prison Service Standing Orders should not be construed to ban prisoners from giving interviews to journalists on grounds that doing so would infringe prisoners’ speech rights). Lord Reid, the renowned common law judge, found that “Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace.” Therefore, “vigorous and . . . distasteful or unmannerly speech . . . is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting.” Brutus, [1973] A.C. 854 at 862.
\item \textsuperscript{213} See, e.g., Mark Hughes, Student Protests May Be Banned Altogether if Violence Continues, INDEPENDENT (Dec. 15, 2010), http://www.independent.co.uk/news/uk/crime/student-protests-may-be-banned-altogether-if-violence-continues-2160620.html (describing Scotland Yard’s}
\end{itemize}
\end{footnotesize}
In the case of Anonymous’ DDoS attacks, government crackdowns have already begun.\textsuperscript{214} Whether or not the courts or Parliament will recognize these attacks as a protectable form of expression is yet to be seen.\textsuperscript{215}

To the extent that an act of hacktivism is expressive, however, it should be eligible for protection as a form of legitimate protest.\textsuperscript{216} Certain forms of hacktivism—namely, virtual sit-ins and voluntary DDoS attacks—closely resemble traditionally accepted forms of protest, like physical sit-ins and picket lines.\textsuperscript{217} This is not to say that an act of hacktivism’s expressive nature, standing alone, should be sufficient to guarantee immunity. But, like forms of peaceful demonstration that have historically received presumptive protection, so too should acts of hacktivism that are primarily expressive receive protection.\textsuperscript{218}

2. Hacktivism, not Hijacking

Although the U.S. Supreme Court has recognized that some private property owners are limited in their ability to exclude speakers from their property, it is far from clear whether it would tolerate the kind of hijacking of property that occurs through the use of some


\textsuperscript{215} See \textit{id.} (describing the discretion given to police to prohibit street demonstrations); \textit{supra} text accompanying notes 179–189 (describing limited textual protection for free expression and discretion granted to courts and Parliament to restrict speech in favor of other interests).


\textsuperscript{218} See Cox v. Louisiana, 379 U.S. 536, 546, 547 (1965) (overturning conviction for breach of the peace on the grounds that the State’s prohibition on certain conduct as a breach of the peace was unconstitutional); Edwards v. South Carolina, 372 U.S. 299, 235 (1963) (finding that arrest and conviction of peaceful protestors on charge of breaching the peace infringed the protestors’ First Amendment rights); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (articulating the principle that the First Amendment requires toleration of unpleasant and even insulting speech).
forms of hacktivism. Website defacements, for example, are unlikely to be protected, in part because they involve hacking into web servers and replacing the owners’ content. Moreover, lower courts have interpreted the CFAA to prohibit the hijacking of third-party computers, by a bot or by other means, in order to access a website; thus, even voluntary DDoS attacks could be considered violations of the statute. And it should go without saying that acts like information theft will almost invariably be condemned under any statute. The same is true of acts that are undertaken with a view to obtaining commercial or financial advantage.

Likewise, British courts are unlikely to look favorably on methods of hacktivism that seize control of computers and other electronic devices either to steal data or to use the devices for some other purpose. Because certain species of hacktivism do not entail the hijacking of third-party systems and are performed without the motive of commercial or financial gain, these forms should not be grouped with those actions that are properly prohibited under the CFAA and the CMA. Thus, primarily expressive forms of hacktivism that do not involve involuntary or unauthorized access and control, like virtual sit-ins

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222 See, e.g., SEC v. Dorozhko, 574 F.3d 42, 51 (2d Cir. 2009) (finding that, although it is unclear that exploiting a weakness in computer code to gain unauthorized access to information is “deceptive” under Securities Exchange Act of 1934, it is entirely possible that computer hacking could be prohibited under the statute).


and voluntary DDoS attacks, should be eligible for protection as legitimate means of protest.\textsuperscript{226}

3. Hacktivism Without Harm

There is little to commend speech that leaves in its wake material destruction and physical injury.\textsuperscript{227} In the context of hacktivism, permissible forms of protest likely to result in actual damage are more readily categorized as conduct rather than expression.\textsuperscript{228} Indeed, methods like site redirects, involuntary DDoS attacks, information theft and virtual sabotage\textsuperscript{229} all feature as primary components actions that are both necessary to the method and unambiguously criminal.\textsuperscript{230} What is more, the actions in question—namely, hacking computers, web servers, and networks—are largely distinguishable from speech.\textsuperscript{231} These forms of hacktivism may be undertaken with a view to expressing some message, but the means involved forfeit any claim for protection.\textsuperscript{232}

\textsuperscript{226} Cf. \textit{Cantwell}, 310 U.S. at 310 (articulating the First Amendment's requirement that unpleasant and even insulting speech be tolerated); \textit{Edwards}, 372 U.S. at 235 (finding that arrest and conviction of peaceful protestors on charge of breaching the peace infringed the protestors' First Amendment rights); \textit{Cox}, 379 U.S. at 545 (overturning conviction for breach of the peace on the grounds that the State's prohibition on certain conduct as a breach of the peace was unconstitutional).

\textsuperscript{227} See, e.g., \textit{Feiner v. New York}, 340 U.S. 315, 321 (1951) (“It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that when . . . the speaker passes the bounds of argument . . . and undertakes incitement to riot, they are powerless to prevent a breach of the peace.”); \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568, 572 (1942) (“It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”); \textit{Cantwell}, 310 U.S. at 309–10 (“Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”).

\textsuperscript{228} See, e.g., \textit{Samuel}, \textit{supra} note 25, at 8–12 (describing forms of hacktivism like site defacements, site redirects, involuntary DoS attacks, information theft, and virtual sabotage that more closely resemble conduct rather than expression).

\textsuperscript{229} See \textit{id.} at 11–12.

\textsuperscript{230} See \textit{id.} at 10–11.

\textsuperscript{231} See \textit{id.} 8–11.

Like the difference between a legitimate protest and a riot, permissible forms of hacktivism should have as their primary purpose the nonviolent communication of a coherent message. In fact, those forms of hacktivism that do pose a threat of physical damage or violence—that is, virtual sabotage and other malicious activity—are better described as cybercrime or cyberterrorism. Forms of hacktivism that cause significant monetary harm—as a result of information theft or damage to servers caused by the installation of malware, for example—should likewise be differentiated from hacktivism, and are properly prohibited as cybercrime.

It does not follow, however, that if any harm is caused by an act of hacktivism, the act should be considered criminal. It may be that some forms of permissible hacktivism, like virtual sit-ins and voluntary DDoS attacks, do impose some cost on the targets of the protest. In a recent example unrelated to WikiLeaks, a massive DDoS attack against a “non-English blog” on WordPress.com resulted in connectivity problems for other WordPress users. In another example, DDoS attacks on Twitter in 2009 caused the site to shut down for several hours, and rendered several of the service’s features unusable for some time thereafter. While these attacks were apparently targeted at individual


235 See id. at 28–29.

236 See id.


238 See Dunn, supra note 237.

users of both services, their effects had implications for millions of other users. The services themselves likely devoted significant time and resources to defending against and recovering from the attacks. These unfortunate facts alone, however, do not justify criminalizing the attacks.

Protests and demonstrations cause inconvenience, annoyance, and distraction; they can impede commerce and attract unwanted attention. Frequently, they burden the target of the protest and dominate the forum of the demonstration. But, with some exceptions, like the target of a lawful, peaceful demonstration in the physical world, the target of a permissible form of cyberprotest must generally tolerate the inconvenience caused by hacktivism. It is part of the price to be paid for the freedom of expression.

B. Protest Without Borders

The burden that must be borne at the site of a protest may be made more tolerable in light of the unique, transnational character of hacktivism. The World Wide Web spans countries and continents,

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240 See Dunn, supra note 237; Van Buskirk, supra note 239.
241 See Dunn, supra note 237; Van Buskirk, supra note 239.
245 See PruneYard Shopping Ctr., 447 U.S. at 87–88. But see Frisby, 487 U.S. at 487–88 (noting that the government may prohibit intrusive speech that is directed at a captive audience). It should be noted that the captive audience doctrine referenced by the Supreme Court is largely cabined to circumstances in which it is not possible for an onlooker to avert his eyes or otherwise avoid exposure to the offending expression. Cf. Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974). Such circumstances typically occur in and around a home, car, or public transit. Cf. Frisby, 487 U.S. at 487–88; Lehman, 418 U.S. at 304. It is less clear that a store’s customers or employees would be considered a captive audience. Cf. PruneYard Shopping Ctr., 447 U.S. at 74, 79; Cohen v. California, 403 U.S. 15, 20 (1971) (implying that persons at a courthouse are not a captive audience).
246 See Cantwell, 310 U.S. at 310 (articulating the principle that the First Amendment requires that unpleasant and even insulting speech be tolerated).
and users are able to share information with a global audience with unprecedented speed. News of injustice in a previously unreachable locale can be broadcast around the world in an instant. Social media is credited as an important tool for information sharing and organization in the ongoing political unrest in the Middle East. As a result, nonresidents are able to learn of, encourage, and participate in domestic affairs to an extent not possible before the Internet revolution. Using forms of hacktivism as a means of protest, nonresidents are also able to take collective action against injustice.

The upshot is that organizations and governments that were once insulated from criticism by virtue of censorship, oppression, or physical distance are now fair game. In countries that restrict Internet access, motivated nonresidents can give voice to dissent that might otherwise go unheard. And where street protests are subject to vicious crackdowns, hacktivism is a reasonably safe means of demonstrating against a regime. Hacktivism can also be a useful tool for communicating complaints against corporations, as Anonymous demonstrated with its attacks during the WikiLeaks episode.


See supra note 247.

See id.; see also Sarah Joseph, Essay, Social Media, Political Change, and Human Rights, 35 B.C. INT’L & COMP. L. REV. 145, 166–67 (“[T]here is little doubt that the ‘weak activist’ tool of social media has been used in the Arab world by a loose network of people to encourage or facilitate their taking of very great risks.”).

See, e.g., Interview by Bob Garfield, supra note 247; Denn, supra note 247; McHugh, supra note 247.

See supra text accompanying notes 240–244.

See supra text accompanying notes 240–244.

See Leyden, supra note 251; Hacktivists Target Egypt and Yemen Regimes, supra note 251; “Hacktivists” Target Iran’s Leadership Online, supra note 251.

See supra text accompanying notes 11–17.
are multinational, hacktivism can allow people to register grievances with companies even if the corporate headquarters are located on another continent. In other words, hacktivism offers a tool whereby the object of protest cannot avoid being targeted by virtue of its power or its location, or a people’s poverty or oppression.

**Conclusion**

As exemplified by Anonymous in the context of the WikiLeaks controversy and the uprisings in the Middle East, hacktivism is increasingly becoming a popular form of protest against perceived injustice. The existing legal regimes at both the international and national levels establish very general categories of prohibited conduct, and courts have not yet squarely addressed the applicability of principles of free speech to laws regulating computer use. This Note has argued that in light of the importance of hacktivism as a legitimate form of protest, courts should interpret laws like the Computer Misuse Act and the Computer Fraud and Abuse Act with the expressive function of hacktivism in mind. In addition, the potential for hacktivism as a transnational tool of protest justifies the marginal burden it imposes in its permissible forms. Although most current forms of hacktivism are rightly regulated or prohibited outright, a narrow subset of hacktivism should be protected on the grounds that it is primarily expressive, does not involve the hijacking of computers or networks, and causes no significant damage.

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256 See id.

257 See Leyden, supra note 251; Hacktivists Target Egypt and Yemen Regimes, supra note 251; “Hacktivists” Target Iran’s Leadership Online, supra note 251.
CONSTITUTIONALIZING AN ENFORCEABLE RIGHT TO FOOD: A NEW TOOL FOR COMBATING HUNGER

Michael J. McDermott*

Abstract: Although international treaties recognize a right to food, few nations have established a domestic, legally enforceable right to food. A justiciable national right to food can provide a basis for legal redress, national food policies, and state aid programs. India, South Africa, and Brazil provide insight and lessons that can be applied to other nations, like Mexico, to identify effective means for creating a national right to food. This Note compares effective national right to food efforts and identifies essential elements underlying a justiciable national right to food. By evaluating the development of a right to food within the international and national systems it is clear that the right to food is most effective when national constitutions provide justiciable means for legal redress and enforcement of that right.

When millions of people die in a famine, it is hard to avoid the thought that something terribly criminal is going on. The law, which defines and protects our rights as citizens, must somehow be compromised by these dreadful events . . . . In seeking a remedy to this problem of terrible vulnerability, it is natural to turn towards a reform of the legal system, so that rights of social security can be made to stand as guarantees of minimal protection and survival.

—Jean Drèze & Amartya Sen1

INTRODUCTION

From 1997 to 2002, serious droughts threatened the lives of fifty million people in the northwest Indian state of Rajasthan.2 In early

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2000, almost seventy-four percent of Rajasthan’s villages were affected by drought, nearly fifty percent of all children in the state were malnourished, and half the state’s rural population lived below the poverty line.³ Despite the drought, Rajasthan’s food crisis was not entirely caused by a lack of food, but rather by a failure to distribute national surplus grain stocks to the region.⁴ In response to government inaction, the People’s Union for Civil Liberties (PUCL), a non-governmental Indian civil liberties organization, utilized “Public Interest Litigation” standing, to sue the Indian government for endangering the Rajasthani’s “right to life” by violating their “right to food.”⁵ PUCL argued that India’s inaction violated the Rajasthan Famine Code of 1962 and prior case law that recognized a constitutional right to life with human dignity, and demanded access to adequate nutrition.⁶ After ten years of litigation, the People’s Union for Civil Liberties case has produced interim court orders demanding the release of national stocks of surplus food-grains to famine stricken communities, nationally sponsored lunch programs, and judicial enforcement of a constitutional “right to food.”⁷

Although international treaties recognize a right to food, few nations have established a domestic enforceable right to food.⁸ And fewer

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⁴ See id. at 698; see also Press Release, Rajasthan People’s Union for Civil Liberties, Rajasthan PUCL Writ in Supreme Court on Famine Deaths (Nov. 2001), available at http://www.pucl.org/reports/Rajasthan/2001/starvation-writ.htm. The Indian national government refused to release any of the fifty million tons of surplus grains stored in government silos.


⁶ See Birchfield & Corsi, supra note 3, at 694, 697.


⁸ See Knuth & Vidar, supra note 7, at 2, 13; see, e.g., International Covenant on Economic, Social and Cultural Rights art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (requiring states party to ICESCR to respect, protect, and fulfill the international right to food); Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 25(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (declaring that every person has a right to an adequate standard of living, including access to food).
have even begun to implement the international right to food established in these agreements, such as the International Covenant on Economic, Social, and Cultural Right’s (ICESCR) basic obligation of each nation to report its progress in protecting and preserving the right to food.\(^9\) Without national legal enforcement mechanisms, an international right to food fails to serve as an effective tool for combating hunger.\(^10\) Like India, some nations have recognized a justiciable right to food as South Africa’s post-apartheid constitution provides a right to food and Brazil’s recently amended constitution explicitly grants the right to food.\(^11\) Applying the Indian, South African, and Brazilian experiences with a national right to food, it is clear that Mexico is beginning to experience the gradual progression towards a nationally recognized right to food.\(^12\)

This Note compares effective national right to food efforts and identifies essential elements underlying a justiciable national right to food. Part I of this Note provides historical background of the internationally recognized right to food and an overview of national responses to this right. Part II discusses the right to food as a constitutional provision, and details how the right has been created, defined, and enforced in South Africa, India, and Brazil. Additionally, Part II identifies the foundational movements within Mexico progressing towards a national right to food. Finally, Part III applies the insight from South Africa, India, and Brazil to Mexico’s efforts to ensure the right to food through national policies and grassroots social movements. This Note concludes that the right to food is most effective when national constitutions provide justiciable means for legal redress.

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\(^10\) Cf. *id.* ¶ 21 (opining that the most appropriate means for implementing the right to food is at the national level through legal and social policy mechanisms).


I. Background

Prior to the 1940s, the right to food was not recognized, or even discussed, in international or national laws. During World War II, however, leaders and humanitarians began to envision social and economic rights that would provide basic needs and a healthy life for all. Throughout the early 1940s, organizations like the American Law Institute and the Americans United for World Organization proposed an international Bill of Human Rights that included the right to food. A 1946 draft proposed that “[e]veryone has the right to food and housing,” and the creation of a duty for states “to take such measures as may be necessary to ensure that all its residents have an opportunity to obtain these essentials.”

At the conclusion of World War II, nations participating in the initial drafting conferences for the Universal Declaration of Human Rights (UDHR) generally agreed that there should be a social and economic right to food, but disagreed about imposing a positive obligation on states. Consequently, the final language of Article 25, of the UDHR, only required states to “respect, protect, and fulfill” a right to an adequate standard of living, without requiring states to create positive, enforceable laws.

The right to food received relatively little further attention until 1976, when Article 11 of the ICESCR recognized the right “to an adequate standard of living . . . including adequate food” and called on states party to ICESCR to ensure “the realization of this right.” Additionally, ICESCR recognized “the fundamental right of everyone to be free from hunger” and urged states to establish programs improving

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14 See President Franklin D. Roosevelt, The Annual Message to the U.S. Cong. (Jan. 6, 1941), in 9 The Public Papers and Addresses of Franklin D. Roosevelt, 1940 War—and Aid to Democracies 672 (1969); U.N. Ctr. for Human Rights, supra note 13, ¶¶ 84–87.


17 See Ams. United for World Org., supra note 16; see also U.N. Ctr. for Human Rights, supra note 13, ¶ 86; Eide, supra note 15, at 390.

18 See Eide, supra note 15, at 385.

19 See id. at 386, 387–88.

20 See ICESCR, supra note 8, art. 11(1).
the production and distribution of global food supplies.\textsuperscript{21} Despite ICESCR’s clear recognition of a right to food and subsequent international attempts to further entrench the right to food, many nations have failed to implement or even report on their progress in implementing Article 11.\textsuperscript{22} On the eve of the 1996 World Food Summit, Asbjørn Eide, a United Nations sub-commission’s Special Rapporteur on the Right to Adequate Food, lamented the limited political will for enforcing the right to food and highlighted the need for states to ensure the enjoyment of the right to adequate food.\textsuperscript{23}

The right to food received increased international diplomatic attention in the late 1990s, as international organizations attempted to further clarify the right to food, propose additional obligations, and create more comprehensive enforcement mechanisms.\textsuperscript{24} In 1999, states party to ICESCR were put on notice that they were obligated to “respect, to protect, and to fulfill” the right to adequate food when the United Nations Committee on Economic, Social and Cultural Rights (UN Committee) published “Comment 12” to ICESCR.\textsuperscript{25} Comment 12’s clarifications responded to the “disturbing gap . . . between the standards set in [ICESCR] Article 11 . . . and the situation prevailing in many parts of the world,” that had contributed to the chronic hunger of 840 million people worldwide.\textsuperscript{26}

The “obligation to respect” is a negative obligation preventing states from reducing any existing access to food.\textsuperscript{27} In contrast, the “obligation to protect” requires states to actively prevent third parties from interfering with access to food.\textsuperscript{28} Finally, the “obligation to fulfill” means that states must “pro-actively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security” and act on behalf of individuals who need assistance to enjoy their right to adequate food.\textsuperscript{29} The obligations

\textsuperscript{21} See id. art. 11(2).
\textsuperscript{22} See Comment 12, supra note 9, ¶ 2.
\textsuperscript{23} See Asbjørn Eide, The Human Right to Adequate Food and Freedom from Hunger, in The Right to Food in Theory and Practice 2, 5 (1998); see also Chris Downes, Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food, 47 Va. J. INT’L L. 619, 671–72 (2007) (“Although the obligation to respect the right to food may be broadly established . . . there are numerous examples of states failing to adhere to this obligation . . . States regularly fail to criticize state behavior that neglects this obligation.”).
\textsuperscript{24} See Downes, supra note 23, at 669–70.
\textsuperscript{25} See Comment 12, supra note 9, ¶ 15.
\textsuperscript{26} See id. ¶ 5.
\textsuperscript{27} See id. ¶ 15.
\textsuperscript{28} See id.
\textsuperscript{29} See id.
“to protect” and “fulfill” place affirmative duties on states to implement and strengthen the right to food within their borders.\textsuperscript{30}

Despite the recognition and recent clarification of a right to food in international law, there are few instances when the right to food has been invoked successfully, or even invoked at all.\textsuperscript{31} The International Court of Justice’s (ICJ) sole discussion of the international right to food was provided in its advisory opinion regarding Israel’s construction of a wall in the Occupied Territory of Palestine.\textsuperscript{32} In its decision, the ICJ concluded that Israel violated its ICESCR obligations because the wall “aggravated food insecurity,” thereby impeding the Palestinians’ ability to achieve an adequate standard of living.\textsuperscript{33} Although the ICJ identified an international right to food, it qualified this right by stating that some national security concerns could justify interference with access to food and water.\textsuperscript{34} Nevertheless, the opinion is important because it discusses the right to food and recognizes that impeding access to fertile farm land, drinking water, or food supplies may be national violations of a right to food.\textsuperscript{35}

The weakness of the international right to food is further exemplified by the U.N. Human Rights Council’s impasse on a three-year-old non-binding resolution, introduced by sixty-seven nations, expressing “grave concern” about the world food crisis.\textsuperscript{36} The resolution urges states to establish “mechanisms and processes which ensure participation of rights-holders, particularly the most vulnerable, in the design and monitoring” of national strategies.\textsuperscript{37}

Because international treaties only require states to respect, protect, and fulfill the international right to food, a truly effective right to food relies on action and implementation in national legal systems.\textsuperscript{38}

\textsuperscript{30} See Downes, \textit{supra} note 23, at 673–76.
\textsuperscript{31} See Guha-Khasnobis & Vivek, \textit{supra} note 2, at 308 (“[T]here are only a few instances where these provisions have been employed judicially . . . .”).
\textsuperscript{32} See \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 133 (July 9).}
\textsuperscript{33} See \textit{id.}
\textsuperscript{34} See \textit{id. ¶¶ 133, 135.}
\textsuperscript{35} See \textit{id.}
\textsuperscript{37} See \textit{id. ¶ 5.}
\textsuperscript{38} See Knuth & Vidar, \textit{supra} note 7, at 3 (“However, in order for [the right to food] to be effective for individuals . . . national legislation must reflect the right in such a way as to make it applicable. This may take place through its incorporation into the constitution and through framework laws and sectoral laws. In some countries, international treaties are directly applicable; thus the right to food could be protected even without being recognized specifically in the constitution or law.”).
Constitutional or legislative language can provide a justiciable national right to food.\textsuperscript{39} Constitutional recognition of the right has been minimal, however, as only 11 of the 160 nations that are party to ICESCR\textsuperscript{40}—Belarus, Bolivia, Brazil, the Democratic Republic of the Congo, Ecuador, Guyana, Haiti, Malawi, Nepal, Nicaragua, and South Africa—explicitly provide a constitutional right to adequate food for all persons.\textsuperscript{41} Other nations recognize a more limited right to food in constitutional or legislative language.\textsuperscript{42} They either restrict the populations that can rely on the right, like the young, sick, or imprisoned, or by refer to the right as a mere directive principle to guide legislators and national policy.\textsuperscript{43}

Currently, most nations overlook the right to food established by international treaty and acknowledge it only as symbolic of the global hunger concerns plaguing the poorest populations.\textsuperscript{44} As exemplified by the ongoing \textit{People's Union for Civil Liberties} litigation, this essential socioeconomic right will have no actual impact until states recognize a justiciable national right to food, providing legal redress and facilitating the application and enforcement of this right.\textsuperscript{45}

\section*{II. Discussion}

The right to food in international treaties does not establish clearly defined obligations for states.\textsuperscript{46} A justiciable national right to food can provide a basis for legal redress, national food policies, and state aid programs.\textsuperscript{47} Three nations provide instructive examples of domestic approaches to an enforceable right to food: South Africa, India, and

\begin{itemize}
  \item \textsuperscript{39} See \textit{id}.
  \item \textsuperscript{41} See Knuth & Vidar, \textit{supra} note 7, at 22, 23–25. Other commentators state that twenty-two to twenty-four nations have constitutions explicitly recognizing a right to food for some population. \textit{See id.} at 22; Downes, \textit{supra} note 23, at 669. If those twenty-two to twenty-four nations are included, fifty-six national constitutions implicitly or explicitly provide a right to food. \textit{See Knuth & Vidar, supra} note 7, at 22.
  \item \textsuperscript{42} See Knuth & Vidar, \textit{supra} note 7, at 22.
  \item \textsuperscript{43} See, \textit{e.g.}, \textit{Constitución de 1949}, Nov. 8, 1949, Art. 82 (Costa Rica) (“The State shall provide food and clothing for indigent pupils, according to the law . . . .”); \textit{India Const.} art. 47 (including the right to food in the directive principles section of the constitution).
  \item \textsuperscript{45} See \textit{id}.
  \item \textsuperscript{46} See \textit{U.N. CTR. FOR HUMAN RIGHTS}, \textit{supra} note 13, ¶ 95.
\end{itemize}
Brazil. Additionally, Mexico’s current social and political movements supporting a right to food indicate the foundations underlying a right to food.

A. South Africa: Constitutional Emphasis on Socio-Economic Rights, Including the Right to Food

South Africa’s experience with apartheid resulted in a national constitution, in 1996, that explicitly addresses justiciable social and economic rights, including rights to healthcare, social security, social assistance, water, and food.48 Section 27 of the post-apartheid constitution provides the right to access “sufficient food and water.”49 The constitution requires the state to take reasonable legislative measures to “achieve the progressive realization . . . of these rights.”50 Emphasizing the importance of childhood nutrition, the constitution guarantees every child the right to “basic nutrition.”51 To better interpret these socio-economic rights, South African courts have looked beyond national laws and incorporated international law.52

1. An Analogous Judicial Interpretation of the Constitutional Right to Water

The South African Constitution’s social and economic rights are legally enforceable, providing victims of hunger an avenue for legal redress.53 To date, no case has been initiated against the government claiming a violation of the right to food under section 27.54 There are, however, cases providing legal redress for the section 27 rights to water that suggest how South African courts would treat similar claims to enforce the right to food.55

In City of Johannesburg v. Mazibuko, the South African Supreme Court of Appeal, the country’s intermediate appellate court, held that


50 Id. § 27(2).

51 See id. § 28(1)(c).

52 See, e.g., Mazibuko v. Johannesburg 2010 (4) SA 1 (CC) para. 17 (S. Afr.).

53 See Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC) at 736 para. 25 (holding that socio-economic rights are clearly justiciable).


55 See id.; see, e.g., Mazibuko, 2010 (4) SA 1 paras. 7–10.
the city violated section 27(1) of the constitution when it restricted water usage in the impoverished community of Phiri to twenty-five liters per day. The city relied on national regulations when it determined that twenty-five liters “ensure[d] sufficient water and an environment not harmful to health.” Despite the city’s reliance on national regulations, the court held that the local government could not simply rely on national minimums and must evaluate local needs and situations to determine what would provide an adequate standard of living. The Court of Appeal ordered the city to provide forty-two liters of free water per day for each indigent resident, which was interpreted as adequately meeting the constitutionally required right to sufficient water.

Mazibuko is instructive because it indicates how the South African courts might treat a similar claim for sufficient food. It establishes that section 27 of the constitution requires national and local governments to enact and enforce policies that feasibly guarantee a minimum enjoyment of social and economic services. Section 27 also requires local governments to evaluate and establish their own minimum levels of social and economic services, rather than depend solely on nationally established minimums. Finally, it recognizes that an individual’s section 27 rights to food, water, and health services are not unlimited, but rather are subject to resource availability and the financial constraints facing each level of government. This resource-based limita-

56 See Mazibuko, 2010 (4) SA 1 para. 62.
57 See Water Services Act 108 of 1997 §§ 2(a), 3(3) (S. Afr.); Mazibuko, 2010 (4) SA 1 paras. 9, 10.
58 See Mazibuko, 2010 (4) SA 1 paras. 13–14.
59 See id. para. 62. To determine the “adequate” amount of water required for Phiri residents, the Court reviewed both parties’ affidavits, which calculated the minimum water necessary for a Phiri resident to replace fluids, prepare food, bathe, and have waterborne sanitation (to clean pit latrines because the community lacks flush toilets). See id. paras. 21–22. The court held that forty-two liters of water provided an adequate standard of living, because it included three liters for drinking, fourteen liters for bathing and washing, about nine liters for food preparation, and fifteen liters for waterborne sanitation. See id. paras. 21–22, 24.
60 Cf. Cohen & Brown, supra note 47, at 55 (looking to various South African cases interpreting economic and social rights, because no South African court has addressed the right to food).
61 See Mazibuko, 2010 (4) SA 1 paras. 5, 62.
62 See id. paras. 13, 14.
63 See id. paras. 26–27, 30. The Court noted that the Constitutional Court held, in Soobramoney v. Minister of Health, that state obligations under sections 26 and 27, establishing numerous social and economic rights, are dependent on resources being available and that rights can be limited if resources are lacking. See id. para. 26 (quoting Soobramoney v. Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC) para. 11).
tion is essential to ensuring that everyone, not just the indigent, has access to sufficient water.64

The court based its holding on section 27’s purpose of providing citizens with a dignified human existence.65 To support its conclusions, the court referenced the 2002 General Comment 15 of the UN Committee, that states that “[the] human right to water is indispensable for leading a life in human dignity” and a “prerequisite for the realization of other human rights.”66 Consequently, the nationally calculated minimum failed to provide a volume of water that is “adequate” for human dignity and life in Phiri.67

2. Prioritizing the Right to Food and Other Socio-Economic Needs

Even though a right to food in South Africa would be limited by available resources, a 2004 suit brought by traditional “artisanal” fisherman indicates that a right to food would supersede other policy objectives.68 In West Coast Rock Lobster Ass’n v. Minister of Environmental Affairs & Tourism, a commercial fishermen’s association sought to prevent the South African government from exempting artisanal, subsistence fishermen from legislation prohibiting offshore and near shore fishing of certain maritime species.69 The court upheld the agreement between subsistence fishermen and the South African government to allow these subsistence fishermen to catch lobsters and fish to provide for themselves and their dependents, as an exemption to the commercial fishing law.70 One argument the subsistence fishermen advanced to receive the exemption was that they relied on their traditional fishing

64 See id. para. 27.
65 See id. para. 17.
67 See id. para. 62.
69 See West Coast Rock Lobster Ass’n v. Minister of Envtl. Affairs & Tourism 2008 ZAWCHC 123, paras. 1, 2, 4, 5 (Western Cape High Court, Cape of Good Hope Provincial Division) (S. Afr.), available at http://www.saflii.org/za/cases/ZAWCHC/2008/123.html (upholding the unpublished Equality Court case George v. Ministers of Environmental Affairs and Tourism). Marine Living Resources Act 18 of 1998 (MLRA) had established fishing limitations to protect threatened marine species. Id. paras. 4, 8–10.
70 See id. paras. 6, 8–10.
practices for their livelihood and to support their families. The Minister of Environmental Affairs and Tourism explained that the exemption was granted to address “real social-economic” needs of this fishing community. The court confirmed that the government must identify those traditional fishermen affected by the MLRA and allow them to catch a limited number of fish and lobsters.

West Coast Rock Lobster Ass’n illustrates how the South African government and courts balance the right to basic subsistence with other policy goals. The case articulates that it is reasonable to allow a poor community, historically depending on maritime resources for survival to be exempted from other national policy objectives.

B. India: Judicial Activism Providing an Enforceable, Constitutional Right to Food

Similar to apartheid’s impact on South Africa’s constitution, India’s history of colonization resulted in a progressive constitution that provides a foundation for a justiciable right to food. Article 47 establishes the guiding principle that the state should raise the “level of nutrition and the standard of living of its people.” Additionally, Article 21 provides a justiciable right to life that India’s highest court has interpreted to include inherent rights to food and water.

Unlike the South African Constitution’s right to food, Article 47 of the Indian Constitution’s “right to food” is a directive principle providing non-judicially enforceable rights, which was originally intended only to guide governmental policies. The drafting history to these

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71 See id. para. 8; Skonhoft & Gobena, supra note 68, at 27. Additionally, the fishermen argued that the Marine Act violated the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See West Coast Rock Lobster 2008 ZAWCHC 123 para. 9.
72 See West Coast Rock Lobster 2008 ZAWCHC 123 para. 11.
73 See id. paras. 10, 53.
74 See id. paras. 10–11, 47.
75 See id. paras. 11, 53, 55.
directive principles indicates that their unenforceability was intended to be temporary, because these directive principles allowed the newly independent state to begin governing before facing the burdens of fulfilling all constitutional obligations.\(^80\) Paralleling the history of the directive principles, in *People’s Union for Civil Liberties*, the court has elevated the right to food as now being enforceable against the government.\(^81\)

1. A Right to Food Is Inherent in the Constitutionally Enforceable Right to Life

*People’s Union for Civil Liberties*, ordering state governments to provide nutritional assistance program, has converted a constitutional directive principle into an enforceable right to food.\(^82\) *Mullin v. Administrator* justifies the court’s interim orders in *People’s Union for Civil Liberties*.\(^83\) *Mullin* examined whether the preventative detention of a British national violated her right to life.\(^84\) The Court examined the legal effect of Article 21, which prevents the executive from depriving life beyond procedures established by law, and broadly defined the term “life” as more than “mere animal existence.”\(^85\) The court opined, “[w]e think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter.”\(^86\) Similar to the South African court in *Mazibuko*, the *Mullin* court recognized a governmental responsibility to provide for some adequate level of survival.\(^87\) Additionally, both courts recognized that any obligation on the government to provide food, water, or other necessities of life, is proportional to the nation’s level of economic development.\(^88\)

\(^{80}\) See Birchfield & Corsi, *supra* note 3, at 708–09.


\(^{82}\) See Birchfield & Corsi, *supra* note 3, at 709.


\(^{85}\) See id. at 528–29.

\(^{86}\) See id. at 529.

\(^{87}\) Compare id., with *Mazibuko*, 2010 (4) SA 1 paras. 26–27 (showing that both courts discussed governmental responsibility to provide for human survival).

\(^{88}\) Compare *Mullin*, (1981) 2 S.C.R. at 529, *with Mazibuko*, 2010 (4) SA 1 paras. 26–27 (recognizing that a right to food, water, or other socio-economic rights can be limited by the economic realities facing the government).
Another case that explains the recent constitutional interpretation evinced in People’s Union for Civil Liberties is Jagannath v. India, where the Supreme Court of India read together Articles 21’s right to life and Article 47’s right to nutrition and public health to establish a government obligation to ensure adequate nutrition and public health. In Jagannath, the petitioner sued the national government on behalf of rural, impoverished, coastal communities seeking a court order requiring the government to adhere to its coastal and environmental laws and protect the ecologically fragile coastal areas essential to these communities. The court examined national environmental laws and ruled that the government must require those industries violating coastal regulations and polluting fishing communities to pay for environmental cleanup and compensate those harmed. To support its ruling, the court stated that such “polluter pays principles” fall within the government’s constitutional duties to ensure the “right to life” and “raise the level of nutrition and the standard of living to improve public health.” Read together, Article 21 and Article 47 provide legal redress for communities facing nutritional insecurity due to the government’s failure to protect the environment.

Related to the right to food and the minimum nutritional resources required for a dignified life, Pattnayak v. State of Orissa discussed what governmental action was required in response to human starvation claims. The case consolidated two separate petitions. The first asked the Supreme Court of India to give direction to the state government to prevent starvations, while the other challenged a District Court judge’s factual findings denying the existence of starvation deaths in the district of Kalahandi. The petitioners alleged that the residents were so impoverished that they had to sell their children and endure extreme exploitation to prevent starvation. They further argued that, in light of the extreme poverty, the government had a legal duty to take “immediate steps to prevent starvation deaths.” Although there was no reference to constitutional rights, the Supreme Court confirmed that the State of Orissa must investigate all starvation cases and ensure that relief

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90 See id. at 91–92.
91 See id. at 145–46, 147–48.
92 See id. at 145–46.
93 See id.
95 See id. at 60–61.
96 See id. at 60.
97 See id. at 61.
measures fully adhere to the Orissa Relief Code. The court found that the state met its duty by implementing programs to mitigate starvation in Kalahandi after the petitions had been filed. The programs provided nutritional assistance to 20,000 people, funded irrigation construction projects to provide access to drinking water, initiated agricultural assistance, and set a government-fixed price for surplus paddy (a rice-based dietary staple) to be sold in Kalahandi markets.

2. Current Litigation and Public Debate About the Court’s Interim Orders Establishing an Enforceable Right to Food

The Supreme Court of India’s interpretations and orders in the ongoing People’s Union for Civil Liberties case stem from a growing recognition that the state is obligated to ensure the right to life by preventing hunger and starvation. Although the court’s decision seems remarkable because the court relied on a nonjusticiable directive principle to require the government to provide food aid, the court’s current interpretations and orders simply expand previous interpretations regarding a dignified life and preventing starvation and nutrition. The case’s impact has expanded over time, as a petition to seek effective management of the public distribution of food grains in six states has evolved into a revolution of the nation’s approach to hunger and nutritional assistance; court orders have created or bolstered nutritional assistance programs and triggered a national food movement.

For example, in December 2006, the court held that the government failed to implement a youth nutritional assistance program and ordered all state governments to increase funding for and actually implement the program. The court held that “huge amounts of money

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98 See id. at 62.
99 See id. at 65–66.
101 See, e.g., id. at 64–65.
102 See Birchfield & Corsi, supra note 3, at 698, 709.
103 See Guha-Khasnobis & Vivek, supra note 2, at 308–09; Case Status, People’s Union for Civil Liberties v. India, Sup. Ct. India (Feb. 21, 2011), http://courtnic.nic.in/courtnicsc.asp (follow “Case Number” hyperlink; then select Case Type as “Writ Petition (Civil)” and enter Case No. as “196” and select Year as “2001”; then follow “Click Here for Archive Orders” hyperlink).
104 See People’s Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001, at *8 (Dec. 13, 2006) (interim order) (India), available at http://judis.nic.in (follow “Supreme Court of India” hyperlink; then follow “Case No.” link; then select Case Type as “Writ Petition (Civil)” and enter Case No. as “196” and select Year as “2001” and select Reportable as “all”; then follow link for decision dated “13/12/2006”) (expanding
is [sic] being left unspent and the rightful beneficiaries are being de-
nied critically needed supplementary nutrition." Consequently, rec-
ognizing that the right to food is enforceable, the court ordered the
state and national governments to allocate two to three rupees to each
person per day for supplementary nutrition for malnourished children
under three years and for pregnant and nursing mothers. This De-
cember 2006 order reiterated the court’s recognition of a legally en-
forceable right to food and established a national spending minimum
to support a program that ensured the realization of the right.

Even though the Supreme Court’s interim orders in People’s Union
for Civil Liberties only offer a temporary solution to India’s hunger and
malnourishment problems, the litigation has stimulated more enduring
legislative action. In June 2009, the president of India announced
the National Food Security Act (NFSA), which would provide a statu-
tory basis for food security programs and codify many of the interim
orders in People’s Union for Civil Liberties. Despite a year and a half of
drafting and debate, state governments continue to evaluate the
NFSA. Critics debate the successes of the current court ordered pro-
gress, the size and feasibility of the NFSA, and whether the statute rec-
ognizes all of the food security schemes currently included under People’s Union for Civil Liberties interim orders. Despite the slow legislative
drafting process and the continued pendency of People’s Union for Civil
Liberties, the Indian Constitution’s right to food is being supported by
national courts and politicians that have resulted in national programs
that ensure the enjoyment of a right to food.

the Integrating Child Development Scheme in all states and territories to provide higher
levels of funding and full implementation).

105 See id. at *5.
106 See id. at *4.
107 See id.
108 See Birchfield & Corsi, supra note 3, at 752.
109 See id.
110 See Centre Consulting States on Food Bill: Patil, HINDU (New Delhi) (Feb. 21, 2011),
http://www.thehindu.com/news/national/article1476832.ece. As of November 2011, the bill
was slated to be finalized in the 2012 session with budgetary provisions indicating prepara-
tion to begin certain programs in 2013. See Subodh Ghildiyal & Nitin Sethi, National Food
timesofindia.indiatimes.com/2011-11-09/india/30377221_1_national-food-security-bill-pri-
ority-category-nac.
111 See Centre Consulting States on Food Bill: Patil, supra note 110.
112 See id.; Ghildiyal & Sethi, supra note 110.
C. Brazil: A Policy Approach to Constitutionalizing a National Right to Food

The government of Brazil recently recognized the right to food and has actively pursued both international and national policies to protect and bolster this right.\textsuperscript{113} As a civil law nation with a monistic approach to international law, the government must adhere to ICESCR because the treaty’s obligations have been incorporated into the national legal system when Brazil ratified the treaty in 1992.\textsuperscript{114} Accordingly, a right to food inheres in the constitutional rights to non-discrimination, social assistance, and life.\textsuperscript{115} In addition to recognizing an international right to food, the Brazilian constitution was amended in 2010 and now explicitly provides a national right to food.\textsuperscript{116}

1. Social Movement and Politics Establishing the Right to Food

Prior to Brazil’s explicit recognition of a right to food in 2010, citizens led an anti-hunger campaign, Ação Cidadania contra a Fome e Miseria e pela Vida (Citizens’ Action Against Hunger and Poverty and For Life), that mobilized thirty million citizens to participate in public health and nutrition programs and called on the government to recognize their right to food.\textsuperscript{117} In the early 1990s, this campaign eventually led to the establishment of the Conselho Nacional de Segurança Alimentar e Nutricional (National Council on Food and Nutritional Security) (CONSEA),

\textsuperscript{114} See Cohen & Brown, supra note 47, at 56; Jacob Dollinger, Brazilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism, 22 Cap. U. L. Rev. 1041, 1092 (1993). States embracing monism, typically civil law countries, apply international law within the national legal order simply upon ratification of the international treaty. See Knuth & Vidar, supra note 7, at 15. This allows citizens to rely upon treaty obligations in national courts. See id. Dualists, including all common law and some civil law nations, distinguish between international and national legal orders and require domestic legislation to incorporate international law within the national system. See id. at 16. The difference between monism and dualism is that while a monistic state recognizes only one legal order (encompassing international and national law), the dualistic state requires that domestic legislation explicitly recognize and incorporate international treaty rights and obligations into the national system. See id. at 15–16. A nation’s acceptance of monism or dualism can affect a citizen’s ability to rely on an international right within the national legal system. See id. at 15.
\textsuperscript{116} See Emenda Constitucional no. 64, de 4 de fevereiro de 2010, Diário Oficial da União [D.O.U.] de 5.2.2010 (Braz.) (amending Article 6 of the constitution to include the right to food).
\textsuperscript{117} See Valente, supra note 113, at 188.
which works to investigate and prevent hunger and malnutrition.\footnote{118} During its first year, CONSEA created the first National Food Security Conference, a forum for discussing the promotion of food security as a national priority.\footnote{119} Unfortunately, President Fernando Cardoso disbanded CONSEA in 1995, bending to external pressure from international finance and corporate organizations.\footnote{120}

In 2004, CONSEA was resurrected to advise the president on establishing a national policy for food and nutritional security.\footnote{121} Through CONSEA, the government initiated discussions of Sistema Nacional de Segurança Alimentar e Nutricional (SISAN), and bolstered monitoring activities related to a right to food.\footnote{122} For example, discussions in CONSEA have increasingly included other human rights and public services-related ministries in order to establish a national commission responsible for investigating and proposing remedies for right to food violations.\footnote{123}

The 2004 reinstatement of CONSEA was just one of the poverty focused initiatives initiated by President Luis Inacio Lula da Silva, who replaced President Cardoso.\footnote{124} President Lula, sworn into office in 2003, created the Programa Fome Zero (Zero Hunger Program) to provide government-sponsored initiatives to assist in fighting hunger.\footnote{125} In 2006, the food and nutritional discussions initiated by CONSEA culminated in the creation of SISAN to implement food and nutritional security.\footnote{126}

\begin{footnotes}
\footnote{118} See Mission to Brazil (2003), supra note 115; Valente, supra note 113, at 188–89.
\footnote{119} See Valente, supra note 113, at 189.
\footnote{120} See id.
\footnote{121} See Decreto No. 5.079, de 11 de maio de 2004, Diário Oficial da União [D.O.U.] de 13.5.2004 (Braz.) (reinstating CONSEA as an advisory body to the President).
\footnote{122} See Valente, supra note 113, at 202–03.
\footnote{123} See id.
\end{footnotes}
Additionally, Brazil’s Federal Prosecutor’s Office, a branch of the Public Ministry, has the constitutional mandate to investigate government actions and ensure constitutional compliance. The Public Ministry provides public hearings to identify possible violations of the right to food and improper implementation of nutritional programs, like the National School Feeding Program. It also has the ability to propose changes and reparations that local public authorities should institute to ensure the realization of social and economic rights.

The UN Special Rapporteur on the Right to Adequate Food recognized these policy and institutional advancements as positive steps by the Brazilian government towards the realization of a national right to food.

2. Establishing the Right to Food Through Constitutional Amendment

Most importantly, on February 3, 2010, the Brazilian legislature amended the national constitution to clearly express the right to food. The amendment expands Article 6 of the Brazilian Constitution to recognize a national right to food. Article 6 of the 1988 constitution provided “education, health, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute” as social rights protected by the constitution. The 2010 amendment includes “food” as one of these social rights. The impact of “food” as a social right is that the malnourished and hungry can now do more than just claim that they “need” food; they can rely on a constitutional right and hold their government account-

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127 See Mission to Brazil (2003), supra note 115, ¶ 21; see also Franceschini et al., supra note 124, at 7 (describing Brazilians’ ability to bring claims before public institutions to prevent the violation of their constitutional rights, as well as citizens’ rights to a timely response and appropriate government action to remedy any violation of constitutional rights).
128 See Valente, supra note 113, at 204.
129 See id.
130 See Mission to Brazil (2009), supra note 125, ¶¶ 2, 14.
131 See id. ¶ 16.
132 See Emenda Constitucional no. 64, de 4 de fevereiro de 2010, Diário Oficial da União [D.O.U.] de 5.2.2010 (Braz.) (amending Article 6 of the constitution to include the right to food); see also Olivier De Schutter, Right to Food as a Constitutional Right in Brazil, YouTube (Feb. 5, 2010), http://www.youtube.com/watch?v=SbZeICLdd6Q.
133 See Constituição Federal [C.F.] [Constitution] art. 6 (Braz.).
134 See Emenda Constitucional no. 64, de 4 de fevereiro de 2010, Diário Oficial da União [D.O.U.] de 5.2.2010 (Braz.) (amending Article 6 of the constitution to include the right to food).
able for the enforcement and implementation of nutritional assistance programs.\textsuperscript{135}

The amendment was the result of years of sequential social movements and political initiatives developing and expanding national support for governmental programs addressing hunger and malnutrition.\textsuperscript{136} In his video address applauding Brazil’s constitutional amendment, the UN Special Rapporteur on the Right to Food, Olivier De Schutter, identified the amendment’s many foundational factors.\textsuperscript{137} Specifically, the years of political efforts to establish nutritional assistance programs and the growing global recognition of the right to food, like in India and South Africa, provided the constitutional amendment with necessary social and political support.\textsuperscript{138} The existence of national projects, like the federal prosecutors compliance efforts, also provided tangible examples of the usefulness of a legally enforceable right to food.\textsuperscript{139} Consequently, this constitutional amendment, which provides a legally enforceable right to food, is the culmination of previous social movements and political activism that had already begun to establish a nationally recognized right to food.\textsuperscript{140}

Even with Brazil’s constitutional amendment and recent national food security policies, the right to food has not yet been fully realized in Brazil. International observers have noted that politics and fiscal instability still threaten the funding and implementation of national programs ensuring and protecting the right to food.\textsuperscript{141} Over the past decade Brazil has achieved great progress in recognizing and enforcing the right to food within its legal system, but almost forty percent of the Brazilian population continues to face food insecurity.\textsuperscript{142}

**D. Mexico: Social and Political Movements Supporting a Right to Food**

Mexico’s social and political movements provide the foundations for the establishment of an enforceable right to food.\textsuperscript{143} For example,
La Vía Campesina is a global movement that is active in Mexico providing the requisite social and political pressure to establish a Mexican constitutional right to food.\textsuperscript{144} This movement, that coordinates peasant organizations’ efforts to promote agricultural reforms to ensure national food security, has ties to the Mexican National Union of Regional Autonomous Peasant Organizations, a body that continues to have a strong political impact in Mexico today.\textsuperscript{145}

1. Mexican Legislative and Constitutional Language Provides the Foundation for a National Right to Food

Recent legislation, in Mexico’s Federal District, indicates political support to recognize a right to food.\textsuperscript{146} On August 17, 2009, the legislative assembly of the Federal District of Mexico enacted the “Food Security and Nutrition System of the Federal District,” which created a food security program that promotes the right to food by funding and evaluating nutritional assistance programs.\textsuperscript{147} The United Nations Food and Agriculture Organization lauded the efforts of the legislative assembly, because the Federal District’s food security initiative provides tangible legal and social resources for the malnourished in Mexico City and indicates progress towards achieving a national right to food.\textsuperscript{148}

Additionally, the Mexican Constitution already provides socioeconomic rights that could be interpreted to establish or support a justiciable national right to food.\textsuperscript{149} Five separate articles of the Mexican
Constitution discuss socio-economic rights that either recognize or are related to food and nutrition. The most explicit references to a right to food are provided in Articles 2(B)(III) & (VIII), which require federal, state, and municipal authorities to promote effective access to health services for indigenous and children populations by providing nutritional and social support programs. Article 4 provides everyone with the right to health protection and specifically provides children with the right to food, health, and education. Article 18 requires the government to develop a penal system that prepares prisoners for reintegration into society by providing not only access to educational opportunities, but also by protecting prisoners’ health. Finally, Article 27 recognizes that the nation’s land and water resources are essential for agricultural production and for the survival of population centers. Together, these articles suggest an implied right to food for all citizens and establish an explicit right to food and nutrition for children.

2. Active National Courts Provide the Opportunity for a Judicial Interpretation Establishing the Right to Food

Mexico’s courts have previously directed and shaped public policy on social and political issues. The capacity of the Mexican Supreme Court to engage in judicial activism, including the power to declare governmental actions unconstitutional, emerged from judicial reforms instituted by President Ernesto Zedillo, in 1994. Since these judicial reforms, the Supreme Court has begun to use its new judicial oversight to revise outdated codes and limit governmental actions. In 2005, the court tested its new oversight, when it established constitutionally based socio-economic rights).

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150 See Constitución Política, arts. 2(B)(III) & (VIII), 3, 4, 18, 27 (Mex.).
151 See id. art. 2(B)(III) & (VIII).
152 See id. art. 4.
153 See id. art. 18.
154 See id. art. 27.
155 See id. arts. 2(B)(III) & (VIII), 3, 4, 18, 27.
156 Matthew M. Taylor, Judging Policy: Courts and Policy Reform in Democratic Brazil 1 (2008) (“Courts are playing an increasingly important role in shaping public policy in contemporary Latin America . . . and in Mexico, courts have had a hand in fashioning policies ranging from public sector pension reform to industrial expropriation.”).
158 See id. at 421–22.
lished the unprecedented power for the Mexican congress to constitutionally reject presidential additions to the federal budget. Another example of the court’s new powers to affect social policy is found in Ley Robles, a case in which the court confirmed the constitutionality of certain abortions. In Ley Robles, the court held that a Mexico City law decriminalizing abortions for women who were raped or when the pregnancy created a health risk was constitutional, despite staunch opposition and a range of criminal laws prohibiting abortion. A constitutional right to an abortion was again confirmed by the Mexican Supreme Court, in 2006, when it deemed criminal laws and health codes unconstitutional if they prevented access to abortions in certain medical or rape situations. The Mexican Supreme Court’s power to rule on the constitutionality of legislation and government conduct in social, economic, and politically influenced cases indicates that the court has the judicial activism and jurisdiction required to infer a national right to food from constitutional text.

III. Analysis

The insight from South Africa, India, and Brazil’s experiences with developing and enforcing a right to food provide guidance for Mexico’s right to food movement. This insight suggests that Mexico has the constitutional foundation, activist judiciary, social movements, and political progress required for the establishment of a justiciable national right to food.

Certain key similarities among South Africa, India, Brazil, and Mexico permit Mexico to learn from the experiences of the former three countries. All four nations are newly industrialized countries experiencing economic growth, a widening middle class, and a transition away from a large agriculture sector, while still facing the hardships of

159 See id. at 422.
163 See Kossick, supra note 160, at 770.
164 See generally FAO, Mexico, supra note 12 (documenting local efforts to recognize the right to food, identifying the prevalence of food insecurity in Mexico City, and noting some national governmental efforts to promote and demonstrate the right to food).
poverty, hunger and malnutrition. Additionally, all four nations have active courts that have interpreted social and economic rights in ways that have enforced, expanded, or created national social policies or social welfare programs. Most importantly, South Africa, India, Brazil, and Mexico were each shaped by histories of colonialism, democratization, and inequality, with all four adopting constitutions in the twentieth century that explicitly provide social and economic rights.

A. Legal Foundation for a Justiciable National Right to Food

1. Weak International Law Obligations Explain Need for National Right to Food

A nation’s approach to the supremacy of international law within its own legal order can partly explain the attention, or lack of attention, given to the internationally recognized right to food. As a civil law

165 See Philip McMichael, Development and Social Change 76–79 (3d ed. 2004) (describing the characteristics of Mexico and Brazil that indicate their inclusion as newly industrialized countries (NICs)). Various sources provide conflicting lists of the NICs, but both India and South Africa have economic growth and industrialization indicating their inclusion in the NIC classification; both have been recognized as a NIC in an academic or professional publication. See, e.g., Gay W. Seidman, Manufacturing Militance: Worker’s Movements in Brazil and South Africa 44 (1994).

166 See Heinz Klug, The Constitution of South Africa 143–44 (2010) (recognizing South African courts’ willingness to scrutinize governmental programs to ensure the protection of socio-economic rights); Taylor, supra note 156, at 1 (“Courts are playing an increasingly important role in shaping public policy in contemporary Latin America. In Brazil, the judiciary has molded policy initiatives governing everything from political party representation to privatization . . . and in Mexico, courts have had a hand in fashioning policies ranging from public sector pension reform to industrial expropriation.”); Birchfield & Corsi, supra note 3, at 713–14 (describing India’s unique judicial oversight of constitutional interpretation and human rights jurisprudence).

167 See 2 Basu, supra note 79, at 310–12 (describing the 1949 Indian Constitution’s inclusion of directive principles as reflecting the drafters’ intent to create a welfare state promoting social welfare and the common good and including references to the impact of British colonialism on the constitution); Klug, supra note 166, at 21, 132 (identifying the influence that colonialism, apartheid, exploitation, social and economic depravity, and democratic struggles had on the inclusion of socio-economic rights in the 1996 South Africa Constitution); Taylor, supra note 156, at 158–61 (acknowledging that the 1988 Brazilian Constitution instituted democratic reforms after years of political inequality and military coups); Stephen Zamora et al., Mexican Law 78–79 (2004) (describing the 1917 Mexican Constitution as a socially revered document for its provisions relating to Mexican society and social welfare and the influence of Mexico’s political history and civil law tradition); see also Asbjørn Eide et al., Economic, Social and Cultural Rights 172 n.17 (2d ed. 2001) (recognizing that Mexico was the first country to include economic, social, and cultural rights in its constitution, even before the Universal Declaration of Human Rights).

168 See Knuth & Vidar, supra note 7, at 15–16.
nation, Mexico, like South Africa, takes a dualist approach to international law. Under Mexico’s dualist approach, national and local governments are not required to give effect to international treaty obligations unless the treaty is self-executing and does not conflict with national law or has been incorporated through national legislation.

The impact of a dualist system, like in Mexico, is shown by the South African right to water case law where simply signing an international treaty does not establish grounds for citizens to demand domestic enforcement of an international treaty obligation. In Mazibuko, when requiring the Johannesburg government to provide an increased volume of water to indigent residents of Phiri, the court referred to, but did not rely on, the United Nations General Comment 15 stating that Article 11 or 12 of ICESCR provides an international right to water. The court merely recognized the existence of the international right to water to bolster its order against Johannesburg.

The limited impact of an international right to food in Mexico is further exemplified by Mexico’s failure to “respect, protect, and fulfill” other socio-economic rights established by ICESCR. Like Brazil, In-

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169 See Tratados Internacionales, Se ubican jerárquicamente por encima de las leyes federales y en un segundo plano respecto de la Constitución Federal, Pleno de la Suprema Corte de Justicia [SCJN][Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo X, noviembre de 1999, Tesis P. LXXVII/99, página 46–47 (Mex.); see also Patrick Del Duca, The Rule of Law: Mexico’s Approach to Expropriation Disputes in the Face of Investment Globalization, 51 UCLA L. Rev. 35, 121 n.490 (2003) (describing Mexico’s dualist approach to international law) (“The Court determined that Article 68’s implicit limitation to recognition of only one union contradicted the broad freedom to organize guaranteed by the Convention. It determined under Constitution Article 133 that the Convention, as a treaty ratified by Mexico, trumped the conflicting federal statute.”).

170 Cf. Del Duca, supra note 169, at 122–24 (discussing the effect of dualism on Mexico’s ratification of the North American Free Trade Agreement (NAFTA), highlighting that the Mexican Constitution remains supreme and that NAFTA was ratified within Mexico’s constitutional framework, and further noting that while it conflicts with some national and local legislation, it does not conflict with constitutional language). The South African Constitution recognizes that international law supersedes national law only when the international law does not conflict with the constitution and is either a self-executing treaty or has been subsequently addressed by the national legislative branch. See S. Afr. Const., 1996, §§ 231, 232.


173 See Mazibuko, 2010 (4) SA 1 para. 17.

dia, and South Africa, Mexico is party to ICESCR and has been criticized for its failure to fully comply with ICESCR obligations.\footnote{175 See International Covenant on Economic, Social and Cultural Rights, UN Treaty Collection: Status Treaties (Jan. 18, 2011), http://treaties.un.org/doc/Publication/MTDSG/Volume I/Chapter IV/IV-3/en.pdf (indicating that India ratified on April 10, 1979; Mexico on March 23, 1981; Brazil on January 24, 1992; and South Africa signed on October 3, 1994); see, e.g., Consideration of Reports (1999), supra note 174, ¶ 36; U.N. Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Mexico, ¶ 13, UN Doc. E/C.12/1993/16 (Jan. 5, 1994) [hereinafter Consideration of Reports (1993)] (“The Committee also recommends the increased construction of rental housing, as well as adoption of other measures to enable Mexico to comply fully with its obligations under article 11 . . . .”).}

In 1994, ICESCR’s monitoring mechanism, the UN Committee, chastised Mexico for failing to comply with Art. 11(1), because the government did not provide inexpensive rental housing, allowed large-scale evictions, and failed to ensure access to adequate housing.\footnote{176 See Consideration of Reports (1993), supra note 175, ¶¶ 9, 10, 13, 14.} The UN Committee also recognized that constitutional language without further governmental action or enforcement would not satisfy international socio-economic obligations.\footnote{177 Compare Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 4, Diario Oficial de las Federación [DO], 5 de febrero de 1917 (Mex.), with Consideration of Reports (1993), supra note 175, ¶¶ 9, 10, 13, 14 (comparing the language in the Mexican Constitution with the UN Economic and Social Council report on socioeconomic rights in Mexico).} The UN Committee criticized Mexico for its failure to comply with ICESCR’s adequate housing obligations despite the Mexican Constitution’s explicit recognition of a right to housing and the creation of a federal housing program.\footnote{178 See Constitución Política [C.P.], art. 4 (Mex.); Consideration of Reports (1993), supra note 175.} In 1999, the UN Committee’s follow-up report criticized Mexico for failing to address the previous report’s discussion of forced evictions and housing shortages, but no longer stated that Mexico was not complying with Art. 11(1).\footnote{179 See Consideration of Reports (1999), supra note 174, ¶ 27. International criticism may highlight the weakness of international law in securing a socio-economic right, but it does not indicate that the nation has failed to take any action to secure that right within its national legal order. See, e.g., Mission to Brazil (2009), supra note 125, ¶ 51. For example, in 2010, after the UN Special Rapporteur on the Right to Food visited Brazil to examine its efforts to comply with the international right to food, including ICESCR Article 11(1), he identified numerous areas that the Brazilian government should improve to comply fully with the right to food, even though Brazil had just enacted its constitutional amendment. See id.}
2. Constitutional Language Implying a Right to Food

South Africa’s, India’s, and Brazil’s justiciable national rights to food were derived from constitutional language granting general socio-economic rights; the existence of similar language in Mexico’s constitution offers the same opportunity to establish a right to food.\(^\text{180}\) Constitutional language recognizing socio-economic rights is a foundational element for establishing a justiciable national right to food.\(^\text{181}\)

India’s justiciable right to food relies on a combined reading of Article 21’s right to live with human dignity and Article 47’s directive principle instructing the government to raise the level of nutrition of its people.\(^\text{182}\) In *Mullin*, the court used the Article 47 directive principle to define “life” in Article 21, concluding that the constitution requires that the government ensure a life with human dignity, which includes basic necessities like nutrition.\(^\text{183}\)

South Africa’s constitution more explicitly recognizes the right to food in three separate sections, most predominantly in section 27(1)(b), which gives everyone the right to have access to “sufficient” food.\(^\text{184}\) Although there has been no South African case law further defining the right to sufficient food, it is clear, from cases like *Mazibuko*, that the national and local governments must take feasible steps to protect socio-economic rights ensuring a life with human dignity.\(^\text{185}\) It is also clear that constitutional socio-economic language will not be read in a vacuum as such rights are interlinked and interdependent.\(^\text{186}\) For example, when evaluating the economic and environmental rights and laws related to the fishing industry, in *West Coast Rock Lobster Association*, the

\(^{180}\) See Constituição Federal [C.F.][Constitution] art. 6 (Braz.) (prior to the addition of the right to food by constitutional amendment in 2010); India Const. arts. 21 & 47 (prior to the judicial transformation of a “guiding principle” into a justiciable right); Constitución Política [C.P.], art. 4 (Mex.); S. Afr. Const., 1996, § 27(1)(b).

\(^{181}\) See, e.g., People’s Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (Dec. 13, 2006) (interim order) (India), available at http://judis.nic.in (follow “Supreme Court of India” hyperlink; then follow “Case No.” link; then select Case Type as “Writ Petition (Civil)” and enter Case No. as “196” and select Year as “2001” and select Reportable as “all”; then follow link for decision dated “13/12/2006”) (requiring all state governments to expand nutritional assistance programs to ensure the right to food as implied by the constitutional right to life and “directive principle” on the right to food).

\(^{182}\) See Indıa Const. arts. 21 & 47.


\(^{184}\) See S. Afr. Const., 1996, § 27(1)(b); see also id. §§ 28(1)(c) & 35(2)(e) (providing every child the right to basic nutrition and detained persons a right to adequate nutrition, respectively).

\(^{185}\) See, e.g., Mazibuko, 2010 (4) SA 1 para. 17.

court recognized the connection between the economic and actual livelihood of subsistence fishermen and the right to food.\textsuperscript{187}

Brazil’s constitution provides the most explicit recognition of a right to food through the 2010 amendment that relied heavily on the constitution’s enumeration of closely related rights.\textsuperscript{188} Article 6 of the Brazilian Constitution originally included ten social rights, such as a right to health, a right to motherhood, and a right to childhood.\textsuperscript{189} Constitutional amendment advocates successfully argued that the inclusion of similar socio-economic rights indicated that constitutional drafters were concerned with the holistic health of the population, which requires a justiciable right to food.\textsuperscript{190}

The Mexican Constitution already contains language similar to the constitutions of India, South Africa, and Brazil that could be interpreted to establish or support a justiciable national right to food.\textsuperscript{191} Five separate articles of the Mexican Constitution discuss socio-economic rights that either recognize or are intertwined with food and nutrition.\textsuperscript{192} Although not explicitly articulated, the right to food could be inferred from the requirements that the government provide health services and educational programs and also the recognition that land and water resources are essential to the development of communities.\textsuperscript{193} Both the Indian and South African courts, in Mullin and Mazibuko respectively, have relied on similar considerations of health, the necessities for human life, and the societal and nutritional importance of natural resources when establishing and prioritizing their respective rights to food.\textsuperscript{194} An analogous interpretation of Articles 2(B)(III), 3 and 27 of

\textsuperscript{187} See West Coast Rock Lobster Ass’n v. Minister of Envtl. Affairs & Tourism 2008 ZAWCHC 123, paras. 8–10 (Western Cape High Court, Cape of Good Hope Provincial Division) (S. Afr.), available at http://www.saflii.org/za/cases/ZAWCHC/2008/123.html.
\textsuperscript{188} See Constituição Federal [C.F.][Constitution] art. 6 (Braz.).
\textsuperscript{189} See id.
\textsuperscript{190} Cf. id.; Daniela Sanches Frozi, Campaigning for the Right to Food in Brazil, TEARFUND Int’l. Learning Zone (Jan 13, 2011), http://tilz.tearfund.org/Publications/Footsteps+81-90/Footsteps+83/Campaigning+for+the+right+to+food+in+Brazil.htm (discussing that the arguments used to advocate for a right to food included relying on the original socio-economic rights provided by Article 6).
\textsuperscript{191} See Constituição Federal [C.F.][Constitution] art. 6 (Braz.) (prior to the addition of the right to food by constitutional amendment in 2010); India Const. arts. 21 & 47 (prior to the judicial transformation of a “guiding principle” into a justiciable right); Constitución Política [C.P.], art. 4 (Mex.); S. Afr. Const., 1996, § 27(1)(b).
\textsuperscript{192} See Constitución Política [C.P.], arts. 2(B)(III) & (VIII), 3, 4, 18, 27 (Mex.).
\textsuperscript{193} See id. arts. (2) (B) (III), 3, 27.
the Mexican Constitution would support a similar implied right to food.\textsuperscript{195}

Like the Indian court’s interpretation, in \textit{Mullin v. Administrator}, that the Indian Constitution provides a prisoner’s right to life with human dignity, Article 18 of the Mexican Constitution requires the penal system to protect the health of the prisoner.\textsuperscript{196} For example, in \textit{Mullin}, the Indian court recognized that Article 21 demands that a prisoner in India be provided the basic necessities of life, including adequate nutrition, clothing, shelter, and facilities for reading and writing.\textsuperscript{197} In Mexico, Article 18 requires the federal and state governments to develop a penal system that prepares prisoners for reintroduction into society by providing access to educational opportunities and protecting the prisoners’ health.\textsuperscript{198} This constitutional language, especially the reference to the prisoner’s health, suggests that the Mexican courts would similarly interpret Article 18 to establish a prisoner’s right to receive the basic necessities for life, including food.\textsuperscript{199}

Finally, the Mexican Constitution contains provisions granting access to natural resources that are analogous to the constitutional provisions that the South African and Indian courts relied on to recognize rights to access life-sustaining natural resources and secure food.\textsuperscript{200} In \textit{Jagannath}, the Indian court relied on its previous interpretation of Article 21, providing a right to life with human dignity, and Article 47, directing the government to improve nutrition and public health, when it required polluting fishing corporations to pay for the socio-economic and environmental damage they caused to coastal communities that relied on coastal natural resources for their livelihood.\textsuperscript{201} Similarly, Article 27 of the Mexican constitution explicitly recognizes that natural resources are essential for the development of population centers supports.\textsuperscript{202} The third paragraph of Article 27 provides that public interest in the protection of agricultural and nutritional resources can justify


\textsuperscript{196} Compare Constitución Política [C.P.], art. 18, ¶ 2 (Mex.), with \textit{Mullin}, (1981) 2 S.C.R. at 529.


\textsuperscript{198} See Constitución Política [C.P.], art. 18, ¶ 2 (Mex.).

\textsuperscript{199} See id.

\textsuperscript{200} Compare Constitución Política [C.P.], art. 27, ¶ 3 (Mex.), with \textit{Jagannath v. India}, (1997) 2 S.C.C. 87, 145–46 (India), and \textit{West Coast Rock Lobster}, 2008 ZAWCHC paras. 8, 10, 11 (identifying language within the Mexican constitution that is similar to constitutional language relied on by municipal courts in India and South Africa).


\textsuperscript{202} See Constitución Política [C.P.], art. 27, ¶ 3 (Mex.).
limitations on private property rights. Additionally, just as the South African court in *West Coast Rock Lobster* stated that subsistence fishermen should be allowed to catch very limited quantity of protected fish and crustaceans to provide for their socio-economic needs, Mexico’s Article 27 recognizes that natural resources are fundamental to the socio-economic needs of the Mexican population. Together these cases indicate that Article 27’s could be interpreted to grant top priority to the protection of access to these natural resources when a person’s socio-economic or nutritional needs depend on that natural resource.

**B. Judicial Activism and Interpretive Powers: Establishing a Justiciable National Right to Food**

In South Africa, India, and Brazil, constitutional language implying justiciable socio-economic rights would have remained dormant, but for their activist national judiciaries. Like these three countries, Mexico has an active judiciary that has already shaped governmental programs and policies related to socio-economic rights, which indicates that the court has the authority to interpret or enforce a justiciable national right to food.

Examples of judicial activism regarding socio-economic rights are found in India’s ongoing *People’s Union for Civil Liberties* litigation and South Africa’s *Mazibuko* case. In *People’s Union for Civil Liberties*, the court first recognized an enforceable right to food in the constitution, and subsequently relied on that interpretation to justify court orders requiring national and state governments to establish or bolster nutritional assistance programs. Similarly, in *Mazibuko*, the South African court interpreted the constitutional right to water to be a universal guarantee of access to enough water to provide a life with human dignity. This led the court to order Johannesburg to provide indigent residents of Phiri with at least forty-two liters of water per person per

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203 See id.

204 Compare Constitución Política [C.P.], art. 27, ¶ 3 (Mex.), with *West Coast Rock Lobster* 2008 ZAWCHC paras. 8, 10, 11.

205 See, e.g., *Mullin*, (1981) 2 S.C.R. at 529; *Pattnayak*, (1989) 1 S.C.R. at 61; *Mazibuko*, 2010 (4) SA 1 paras. 9, 10; *Taylor*, supra note 156, at 1 (identifying the judiciaries of Mexico and Brazil as using judicial decisions to influence policy-making).

206 See *Taylor*, supra note 156, at 1.

207 See *People’s Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (Dec. 13, 2006) (interim order) at *4; Mazibuko*, 2010 (4) SA 1 paras. 9, 10.

208 See *People’s Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (Dec. 13, 2006) (interim order) at *4.

209 See *Mazibuko*, 2010 (4) SA 1 paras. 17, 21.
day, rather than the nationally established minimum volume of twenty-five liters of water.\footnote{See id.}

Although Brazil’s courts have been relatively silent on the right to food, Brazil’s judiciary actively participates in the political system and policy-making.\footnote{See Taylor, supra note 156, at 159.} The judiciary’s effect on policy deliberations is evident not just in its decisions, but in the parties and cases the judiciary favors.\footnote{See id. at 160, 163.} For example, from 1996 to 1999, the Supremo Tribunal Federal, Brazil’s highest court, enjoined legislative attempts to reform the nation’s pension system and voiced staunch opposition to any further social security reforms.\footnote{See id. at 58, 61–62.}

Like the three former judiciaries, Mexico’s courts have directed and shaped public policy, and thus have the potential to take similar steps towards an enforceable right to food.\footnote{See id. at 1.} Although the Mexican Supreme Court has had strong judicial oversight for less than three decades, it has repeatedly engaged in judicial activism, declaring governmental actions unconstitutional and shaping policy.\footnote{See Zamora & Cossío, supra note 157, at 421; see also supra text accompanying notes 21–22.} The Mexican Supreme Court’s power to rule on the constitutionality of government codes and actions in social, economic, and political cases proves that it has the judicial activism and jurisdiction required to infer a national right to food from constitutional text.\footnote{See Kossick, supra note 160, at 770.}

C. Social and Political Support for a Justiciable National Right to Food

Every expression of the right to food, whether international or national, has emerged from a vocal and persuasive social or political movement.\footnote{See, e.g., Valente, supra note 113, at 188 (describing Citizens’ Action Against Hunger and Poverty and For Life, an anti-hunger campaign that was instrumental in the constitutional recognition of the right to food).} The international right to food emerged from civil society’s response to the devastation of the World Wars and was introduced in the Universal Declaration of Human Rights.\footnote{See Eide, supra note 15, at 390.}

After Brazil emerged as a democracy following years of military rule, civil society organizations and political movements focused on socio-economic reforms to combat corruption, hunger, poverty and
inequality. In 1993, the social movement was catalyzed by the creation of Citizenship Action Against Hunger, Poverty and Life (Citizenship Action), an organization that eventually grew to 7,000 local committees involving more than 30 million Brazilians. These committees, which engaged more than half the country’s population, established local social and capacity-building efforts, such as creating urban vegetable gardens, supporting the agrarian reform movement, and assisting in food distribution. As Citizenship Action grew, it joined with the National Food Security Council and developed national food security policies throughout the 1990s that culminated with the recognition of the Brazilian right to food.

In India, nutrition and food assistance have always been recognized as a national priority, even when a constitutional right to food was unenforceable. More recently, in light of the temporary court orders creating nutritional assistance programs, in People’s Union for Civil Liberties, there has been growing political support for national legislation codifying the temporary orders. Despite the ongoing debate about the feasibility and scope of these nutritional assistance programs, the national consensus is that the government must enforce and protect its citizens’ right to food.

Like India and Brazil, Mexico has experienced social and political movements that provide the foundation for a right to food. La Vía Campesina’s activities in Mexico provide the requisite social or political pressure to establish a Mexican constitutional right to food. Further, the recent legislation in Mexico’s Federal District also indicates that Mexico is socially and politically ripe for the constitutional recognition of the right to food. Even the United Nations Food and Agriculture Organization recognized that the Federal District’s food security initiative provides tangible legal and social resources for the malnourished

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220 See id. at 188.
221 See id.
222 See Franceschini et al., supra note 124, at 20; Valente, supra note 113, at 188.
223 See Basu, supra note 79, at 310–11, 324.
224 See Birchfield & Corsi, supra note 3, at 752.
225 See id. at 758–59.
226 See FAO, Mexico, supra note 12 (recognizing the Federal District’s affirmation of an enforceable right to food as one local, decentralized action progressing towards a national right to food); Desmarais, supra note 143, at 37, 47 (identifying Mexico as one of the many birth places of the La Vía Campesina movement, which promotes agrarian reform and food sovereignty).
227 See Desmarais, supra note 143, at 38–39.
228 See FAO, Mexico, supra note 12.
in Mexico City and indicates progress towards achieving a national right to food.\footnote{229 See id.}

**Conclusion**

India, South Africa, and Brazil provide insight and lessons that can be applied to other nations, like Mexico, to identify effective means for creating a national right to food. Since 1947, international organizations and treaties have repeatedly recognized the right to food. Unfortunately, hundreds of millions remain hungry or malnourished because the international right to food is often treated simply as an unenforceable, symbolic gesture. In light of the international legal system’s failure to address world hunger, national legal systems provide an effective forum to develop the legal foundation required to eradicate hunger. Brazil, South Africa, and India’s recent recognition of a national, justiciable right to food proves that legal enforcement of this right can result in positive steps to prevent starvation and hunger.

This Note has identified three essential elements that lay the foundation for the development of a justiciable right to food in Mexico. First, a national right to food is supported and bolstered by the socio-economic rights already existing in a Mexico’s constitution. Second, Mexico has the active and empowered judiciary required to define and enforce the right to food. Finally, the country’s supportive social and political movements facilitate the development of a Mexico’s national right to food. Mexico’s legal system, alone, will not eradicate hunger, but a justiciable national right to food provides the underrepresented and malnourished with the ability to seek legal remedies preventing hunger, ensures a life with human dignity, and guarantees those minimal protections required for survival.
UNCLE SVEN KNOWS BEST: THE ECJ, SWEDISH GAMBLING RESTRICTIONS, AND OUTMODED PROPORTIONALITY ANALYSIS

Paul Caligiuri*

Abstract: The free movement of services is a fundamental tenet of the European Union’s Common Market. Gambling services’ free movement, however, has long been obstructed by municipal gambling restrictions. One such restriction in place in Sweden authorized the prosecution of two newspaper editors for publishing advertisements of foreign-based online gambling operators. In the course of the editors’ appeal from their conviction, the Swedish courts referred questions to the European Court of Justice regarding the compliance of Sweden’s domestic restriction with European treaty provisions enshrining the free movement of services. The Court of Justice provided little guidance, however, when it addressed the dispositive question of proportionality; that is, whether Sweden’s law went beyond the point needed to affect Sweden’s legitimate underlying policy objectives. The court, in its deferent and cursory proportionality analysis, employed a standard ill-equipped to account for the effects national gambling restrictions have on the Common Market in the online age.

Introduction

On July 8, 2010, the European Court of Justice (ECJ) handed down a preliminary ruling on questions referred to it by Sweden’s Court of Appeals (Svea hovrätt) in Criminal Proceedings Against Sjöberg & Another.¹ Both disputes stemmed from criminal charges brought against two newspaper editors who had published advertisements for foreign gambling enterprises.² The ECJ had been asked to decide whether

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² Id. paras. 19–22.
Sweden’s ban on the promotion of foreign gambling violated Article 49 of the Treaty Establishing the European Community (Article 49).³

Article 49 prohibits European Union (EU) Member States from restricting the free movement of services across national borders within the EU.⁴ In its judgment, the ECJ reasoned that Article 49 did not preclude Sweden’s ban on gambling promotion, because the ban reflects Sweden’s legitimate objective of excluding profit-making interests from its domestic gambling sector, and is proportional to achieving that objective.⁵

This holding, however, was premised upon precedent derived in part from the notion that a gambling operator has to physically encroach upon the territory of a Member State in order to promote itself there.⁶ Yet, online gambling is a large and growing part of the EU’s market.⁷ In its Sjöberg judgment, the ECJ missed an opportunity to introduce a new standard for evaluating the proportionality of Member States’ restrictions on the free movement of services.⁸ Such a standard is necessary to uphold Article 49’s effect on the gambling industry by confining relevant domestic restrictions to their Member States.⁹

Part I of this Comment provides the factual and procedural background of the Sjöberg case. Part II presents the ECJ’s relevant Sjöberg holdings, its gambling precedents, and brief overviews of the European gambling market and EU Member States’ comparative gambling laws.

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³ See id. paras. 1, 27.
⁴ Consolidated Version of the Treaty Establishing the European Community art. 49, Dec. 24, 2002, 2002 O.J. (C 325) 54 [hereinafter TEC]. This Comment cites to the TEC with the pre-Lisbon numbering to conform with the ECJ’s treaty citations in the Sjöberg judgment.
⁶ See, e.g., Case C-275/92, Customs & Excise v. Schindler, 1994 E.C.R. I-1039, para. 62 ("[T]he prohibition on the importation of materials intended to enable nationals of that Member State to participate in such lotteries organized in another Member State cannot be regarded as a measure involving an unjustified interference with the freedom to provide services.").
⁷ Commission Green Paper on On-Line Gambling in the Internal Market, at 8, COM (2011) 128 final (Mar. 24, 2011) [hereinafter Green Paper on On-Line Gambling] (stating that, as of 2008, on-line gambling accounted for 7.5% of the EU’s internal gambling market, and adding that the on-line market was expected to double within five years).
framing the proportionality issue in Sjöberg within the larger scheme of EU movement-of-services doctrine. Part III explains why Sjöberg presented an opportunity for the ECJ to introduce a new standard for assessing the proportionality of restrictions on cross-border gambling services, and why the court should have seized the opportunity.

I. Background

In 2003 and 2004, two Swedish newspapers, Expressen and Aftonbladet, published advertisements for gambling organized outside of Sweden.10 Four separate for-profit gambling operators—all lawfully organized in other EU Member States—purchased the ads.11 At the time of publication, Otto Sjöberg and Anders Gerdin were the editors-in-chief and publishers of Expressen and Aftonbladet, respectively.12

Swedish authorities prosecuted Sjöberg and Gerdin for violating section 54 of the Lotterilag, the Swedish lotteries act that governs all domestic gambling activities.13 Section 54 prescribes criminal sanctions for individuals who promote domestic participation in commercial gambling activities that have been organized abroad.14

The Stockholm District Court (tingsrätt) convicted both defendants and ordered each to pay a 50,000 kronor penalty.15 Both appealed their convictions to the Svea hovrätt.16 Although the Svea hovrätt initially declined to hear the appeals, the Supreme Court (Högsta domstolen), upon defendants’ petitions, ordered it to do so.17

As part of this order, the Högsta domstolen held that Section 54 of the Lotterilag might violate EU treaty provisions mandating the free

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13 Id. paras. 3, 22.
14 54 § Lag om ändring i lotterilagen (Svensk författningssamling [SFS] 1994:1000) (Swed.), translation available at http://gamingintelligence.com/legislation/Sweden%20Lotteries%20Act%201994.pdf (last visited May 20, 2012). Although this provision purports to limit itself to promotions which “particularly relate[] to participation from Sweden,” the Sjöberg Court does not say that the ads were anything other than nationally-generic, or that Section 54’s qualifying language is important. Id.; see Sjöberg, [2011] 1 C.M.L.R. paras. 19–20.
15 Sjöberg, [2011] 1 C.M.L.R. para. 23. Fifty thousand kronor is equivalent to roughly 7500 USD.
17 Id. paras. 24–25.
movement of services between EU Member States. This holding prompted the Svea hovrätt to stay the appeals and refer to the ECJ the question of whether Section 54 of the Lotterilag was compatible with EU treaty provisions that provide for the free movement of services. The ECJ joined the two defendants’ cases for joint hearing and judgment.

II. Discussion

All questions referred to the ECJ conceded that Lotterilag Section 54 constitutes a “restrictive policy” under Article 49. Once a Member State’s law is deemed restrictive, the ECJ considers whether it is justified by “overriding reasons relating to the public interest.” In Sjöberg, the court held that Section 54’s objective is compatible with Article 49 because it is justified by such concerns.

In its referral, the Svea hovrätt emphasized its finding that the exclusion of profit-making interests from the domestic gambling market is vital to Sweden’s gambling policies. The ECJ found that this objective was a sufficient “overriding reason,” citing both the seminal case Customs & Excise v. Schindler—in which it upheld a similar objective proffered by the United Kingdom—and the wide latitude traditionally afforded to Member States to establish domestic regulatory schemes. Having held Sweden’s stated objective for the restriction to be permissible, the court then upheld Section 54 because it was proportional to achieving the stated objective. This determination is particularly relevant to the focus and analysis of this Comment.

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18 Id. para. 26.
19 Id. para. 27.
20 Id. para. 28.
21 See Joined Cases C-447 & 448/08, Sjöberg v. Åklagaren, [2011] 1 C.M.L.R. 11, para. 27.
24 Id. para. 41.
25 Id. para. 42; see Case C-275/92, Customs & Excise v. Schindler, 1994 E.C.R. I-1039, paras. 57, 59.
26 Sjöberg, [2011] 1 C.M.L.R. 11 para. 43.
27 Id. paras. 44–46.
28 See infra text accompanying notes 97–100 (proposing a new standard for evaluating the proportionality of national gambling restrictions, based upon the foundation laid by earlier case law).
A. The ECJ’s Pre-Internet Judgments of the Proportionality of Gambling Restrictions

The ECJ determines proportionality by assessing whether or not the restrictive Member State law in question is “suitable for achieving the objective . . . invoked” and “go[es] beyond what is necessary in order to achieve [that objective].”29 “[N]ational legislation is [suitable to] ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.”30

Under Schindler, only the national courts and legislatures pursued this inquiry.31 This was due to the ECJ’s determination that the general tendency of Member States to regulate gambling, the risk of crime or fraud posed by gambling, and the dangers of gambling addiction, all merited allowing the United Kingdom to decide for itself what was necessary to accomplish the objectives of its gambling laws.32

The court cited Schindler’s holding regarding Member State autonomy to determine proportionality in Läärä v. Kihlakunnansyttäjä, which concerned the Finnish government’s monopoly on slot machines.33 Unlike in Schindler, though, the court here engaged in a proportionality analysis, holding that the monopoly was proportionate to the objective of shifting gambling profits to an operator whose gain would more likely be reinvested in the public interest.34

Eight years after Läärä, in Criminal Proceedings Against Placanica & Others, the ECJ received preliminary references from Italy questioning the legality of a law limiting the total number of gambling licenses is-

32 See id. paras. 60–61.
34 Id. paras. 37–43.
sued nationwide.\textsuperscript{35} The court stated that it lacked a factual basis to rule on the law’s validity, but instructed the referring court to determine whether the law met the ECJ’s proportionality standards.\textsuperscript{36} This judgment reaffirmed the court’s reasoning from Läärä and cemented proportionality as a required feature of Member States’ gambling restrictions.\textsuperscript{37} Further, the cases of this period emphasized that national restrictions must not “go[] beyond what is necessary to achieve the [Member State’s] objective . . . .”\textsuperscript{38}

B. The Liga Portuguesa Decision: Proportionality and Promotion of Online Gambling

On September 8, 2009, the ECJ issued a judgment that addressed internet gambling.\textsuperscript{39} In Liga Portuguesa de Futebol Profissional \& Bwin International, Ltd. v. Departamento de Jogos da Santa Casa, the court was asked to rule on the validity of Portuguese laws that imposed fines for offering or promoting electronic gambling opportunities identical to those run by Santa Casa, Portugal’s government gambling monopoly.\textsuperscript{40} Bwin International, a Gibraltar-based internet gambling operator, agreed to sponsor the Liga, in exchange for the Liga’s promotion of Bwin’s gambling website.\textsuperscript{41} Portugal prosecuted the Liga for promoting games in competition with Santa Casa.\textsuperscript{42} With regards to proportionality, the court looked to precedent that recognized the efficacy of gambling monopolies in constraining illegal activity,\textsuperscript{43} Portugal’s inability to rely on other Member States to effectively regulate their gambling establishments,\textsuperscript{44} and the suspicion of wrongful activity arising from Bwin’s particular arrangement with the Liga or internet gambling in general.\textsuperscript{45} The court upheld Portugal’s law.\textsuperscript{46}

\textsuperscript{35} Placanica, 2007 E.C.R. paras. 4–14, 28.
\textsuperscript{36} Id. paras. 57–58.
\textsuperscript{38} Placanica, 2007 E.C.R. para. 62.
\textsuperscript{39} Liga Portuguesa, [2010] 1 C.M.L.R. para. 74.
\textsuperscript{40} Id. paras. 10–12, 28.
\textsuperscript{41} Id. paras. 20–25.
\textsuperscript{42} Id. para. 26.
\textsuperscript{43} Id. paras. 64–67 (addressing the suitability of the law to attain the stated objective).
\textsuperscript{44} Id. para. 69 (addressing the necessity of the law).
\textsuperscript{45} Liga Portuguesa, [2010] 1 C.M.L.R. paras. 70–71 (addressing the necessity of the law).
\textsuperscript{46} Id. para. 73.
C. Europe’s Online Gambling Market and the Scope of Restrictions

To date, the ECJ has exclusively analyzed foreign gambling’s impact on national regulatory schemes; it has not analyzed national regulatory schemes’ impacts on the Common Market.\(^{47}\) Gambling services in all EU Member States generated €75.9 billion in 2008.\(^{48}\) Online gambling operators accounted for €6.16 billion, or 7.5% of revenue,\(^{49}\) a figure that is expected to increase by nearly seventy percent to €11 billion by 2012.\(^{50}\) Further, among nineteen remote gambling operators in Europe, approximately twenty to thirty percent of remote gambling is done by consumers from outside the operators’ respective nations of establishment.\(^{51}\)

Online gambling in the European Union continues to flourish despite conflicting Member State regulatory schemes and prohibitions that restrict market participation.\(^{52}\) As of 2005, “a majority of Member States [imposed] specific requirements as to the type of legal entity entitled to run [a] gambling activity.”\(^{53}\) Sweden is among that majority because it categorically excludes private profit-making operators from licensure.\(^{54}\)

In \textit{Sjöberg}, the ECJ provided the foundation for the Swedish courts’ eventual reversal of the defendants’ convictions, holding Section 54 invalid for imposing stricter penalties for promoting unlawful foreign gambling than it did for promoting unlawful domestic gambling.\(^{55}\) The court’s proportionality analysis was brief, however, simply acknowledging that the gambling operators were for-profit entities, and concluding that, because Sweden seeks to reserve its gambling market to public...
non-profit entities, prohibiting the advertisement of those operators is proportional to that aim.\(^{56}\)

In reaching its conclusion, the court merely introduced the long-existing proportionality standard and followed it with language from *Schindler*.\(^{57}\) In *Schindler*, however, the gambling promotions were sent in envelopes specifically addressed to U.K. consumers.\(^{58}\) The advertisements in *Sjöberg*, however, originated in Sweden, but the court did not discuss the scope of their potential audience.\(^{59}\)

### III. Analysis

The ECJ should adopt a standard to guard against the frustration of lawful cross-border gambling services by domestic laws.\(^{60}\) Such a standard is necessary because *Custom & Excise v. Schindler* is outmoded; consequently, the *Sjöberg* court’s reliance on it is faulty.\(^{61}\)

#### A. Shortcomings of the ECJ’s Reasoning in *Sjöberg*

There are two primary shortcomings in the ECJ’s reasoning in *Sjöberg*.\(^{62}\) First, the language from *Schindler* upon which the court relied is based on outmoded perceptions of gambling, and was undermined by subsequent ECJ case law.\(^{63}\) Second, the court’s failure to instruct the Swedish courts to examine Section 54’s effects outside of Sweden ignored the law’s impact on the larger European online gambling market and economy as a whole.\(^{64}\)

1. *Schindler*: Caught in the Middle of Evolving Perceptions

Public perception of gambling in many Western nations became more forgiving in the years prior to *Schindler*,\(^{65}\) with “[t]he moral stigma, which had previously marked gambling . . . largely vanish[ing]” by

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\(^{56}\) See *Sjöberg*, [2011] 1 C.M.L.R. paras. 44–45.

\(^{57}\) See id. paras. 40–43; *Schindler*, 1994 E.C.R. paras. 57–60.

\(^{58}\) See *Schindler*, 1994 E.C.R. para. 4.

\(^{59}\) See *Sjöberg*, [2011] 1 C.M.L.R. paras. AG60–AG73, 40–44.

\(^{60}\) See Swiss Inst. of Comparative Law, *supra* note 51, at xxxiv.

\(^{61}\) See infra text accompanying notes 71–77.

\(^{62}\) See infra text accompanying notes 63–64.


\(^{64}\) See Swiss Inst. of Comparative Law, *supra* note 51, at xliii–xlvii.

\(^{65}\) See Binde, *supra* note 63, at 171.
2010. The Schindler case arose amidst this change in attitude, but the ECJ’s absolute deference to U.K. policy reflected earlier perceptions of gambling as morally questionable “incitement to spend.”

The ECJ’s jurisprudence began conforming to newer perceptions with a group of judgments including Criminal Proceedings Against Placanica & Others. Under the holding in Placanica, a municipal law that unduly impedes the provision of services between two other states is disproportionate if it “goes beyond what is necessary in order to achieve [its] objective . . . .” In Sjöberg, however, the ECJ did not analyze this requirement, perhaps following the reasoning of Advocate General (AG) Yves Bot, who did not mention necessity aside from opining that the court’s reasons for upholding the law in Liga Portuguesa de Futebol Profissional & Bwin International, Ltd. v. Departamento de Jogos da Santa Casa “apply a fortiori to a measure less restrictive than an outright prohibition of [gambling itself] . . . .” This statement suggests that a ban on the promotion of unlicensed gambling is patently less restrictive than a ban on the provision of unlicensed gambling itself.

2. Liga and Sjöberg: Running Back to the Middle of Evolution

The AG’s assumption—that a ban on the mere promotion of unlicensed gambling is less restrictive than a ban on such gambling itself—ignores the advertising ban’s effects on foreign States where gambling is not so restricted. This becomes apparent considering the newspapers’ circulation: Expressen and Aftonbladet together reach approximately two million daily print readers, and receive almost 2.6 million

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66 Id.
67 Case C-275/92, Customs & Excise v. Schindler, 1994 E.C.R. I-1039, para. 60; see Binde, supra note 63, at 171.
68 See Hörnle & Zammit, supra note 37, at 149, 151–52.
72 See Bernardo S. Blum & Avi Goldfarb, Does the Internet Defy the Law of Gravity?, 70 J. INT’L ECON. 384, 387–92 (2006). Although the assertions in this Comment may run contrary to this study’s main conclusion, Table 2 does show that the American households included in the study averaged approximately one visit to Swedish websites during the study period, in addition to all other foreign web visits. Id.
daily web views, any number of which could conceivably be foreign.\textsuperscript{73} The court may have overlooked this fallacy due to \textit{Liga Portuguesa}'s departure from the \textit{Placanica} doctrine when applying proportionality to restrictions on internet gambling.\textsuperscript{74} \textit{Liga Portuguesa}'s return to \textit{Schindler}-era deference to Member States' policy choices gives the court authority to virtually bypass the analysis of whether a restriction is within the bounds of necessity.\textsuperscript{75} Yet the potential for more widespread foreign circulation in \textit{Sjöberg} ought to have compelled the court to again limit its deference to national governments.\textsuperscript{76}

\textbf{B. Consequences of the Sjöberg Decision}

The consequences of the ECJ's failure to examine Section 54's possible impact on foreign gambling services illustrate why Article 49 TEC requires a more stringent standard.\textsuperscript{77} These consequences are twofold.\textsuperscript{78} First, Section 54 could harm lawful online gambling—a growing industry—at a time when the European economy faces declining jobs and public revenue.\textsuperscript{79} Second, there is no standard to prevent a more extreme restriction from further burdening foreign gambling.\textsuperscript{80}

1. Online Gambling: Growth During a Time of Contraction?

Europe's economy, like others around the world, reeled after the 2008 financial crisis.\textsuperscript{81} Granted, online gambling growth cannot single-handedly overcome recent job loss and government budget crises, but


\textsuperscript{74} See Hörnle & Zammit, \textit{supra} note 37, at 159.

\textsuperscript{75} See Schindler, 1994 E.C.R. para. 61; Hörnle & Zammit, \textit{supra} note 37, at 161.

\textsuperscript{76} Cf. Siffror [Figures], Aftonbladet, \textit{supra} note 73; Daily Mail, Standard Certificate of Circulation 2, available at http://www.abc.org.uk/Certificates/17193395.pdf (last visited May 20, 2012) (showing a UK national newspaper, with more comprehensive available data and overall per issue circulation comparable to Aftonbladet, has over 90,000 copies of each issue circulate overseas).

\textsuperscript{77} See Hörnle & Zammit, \textit{supra} note 37, at 141–42.

\textsuperscript{78} See infra text accompanying notes 79–80.

\textsuperscript{79} See, e.g., Barbara Hagenbaugh et al., Job Cuts Deepen Across USA: Wave of Layoffs Here and in Europe Reflects Severity of the Recession, USA TODAY, Jan. 27, 2009, at 1A.

\textsuperscript{80} Compare Hörnle & Zammit, \textit{supra} note 37, at 142 (“[A]pplication of the proportionality test is crucial for the outcome of whether . . . the national restriction on gambling is an infringement of the freedoms in the EC Treaty . . . .”), \textit{with Sjöberg}, [2011] 1 C.M.L.R. paras. 40–45 (applying proportionality doctrine in an arguably cursory manner).

\textsuperscript{81} See, e.g., Hagenbaugh et al., \textit{supra} note 79.
it can certainly help to offset some of the downward trends in those areas.  

The remote gambling industry’s presence in the European labor market is hardly pervasive, but gambling operators have reported increasing aggregate employment figures each year between 2000 and 2009. Further, approximately fifteen percent of this growing number of jobs belongs to nationals of other Member States. Although these operators employ a large proportion of non-European nationals, this proportion has remained constant. Growth for these operators could therefore generate more jobs for Europeans.

Some governments have recently tried to generate revenue by allowing more gambling and taxing operators’ income. Italy reported “about €150 million in taxes last year as a result of a partial liberalization of [online gambling].” In fact, Sweden considers such revenue generation to be an “incidental benefit” of its own regulatory scheme.

Although too few restrictions on private gambling operators might actually reduce government revenues by undermining State operators, court intervention favoring operators could precipitate a more prosperous, widespread, and efficient market for both private and public operators.

2. Sjöberg’s Reasoning Fails to Protect Lawful Cross-Border Gambling

The consequence of the ECJ’s failure to consider the scope of the Swedish newspapers is evident when relating another European national newspaper’s more-detailed foreign circulation figures to the basic figures of the Swedish papers. If Expressen and Aftonbladet’s combined foreign circulation is two-fifths that of the Daily Mail, a U.K. na-

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83 Swiss Inst. of Comparative Law, supra note 51, at 1422.
84 Id.
85 Id. at 1422–23.
86 See id.
87 Pfanner, supra note 82 (stating that measures to ease domestic restrictions have been passed in France, Denmark, Greece, Italy, and Britain, while similar measures are being considered in Switzerland, Spain, and Germany).
88 Id.
89 See Sjöberg, [2011] 1 C.M.L.R. paras. 27(2), 41.
90 See Swiss Inst. of Comparative Law, supra note 51, at xliii–xlvii.
91 See Daily Mail, supra note 76, at 2 (showing large foreign circulation figures per issue).
tional newspaper, then nearly 40,000 copies leave Sweden each day.\textsuperscript{92} Then, even with only one reader per foreign issue,\textsuperscript{93} 40,000 readers outside Sweden—about five percent of whom are likely online gamblers—would not see the advertisement.\textsuperscript{94} Yet despite such a possibility, the court’s non-analysis obviated Section 54’s extraterritorial effects, as only the nature, and not the scope of the prohibition was considered.\textsuperscript{95} Further, the ‘discriminatory effect’ ground upon which Svea hovrätt eventually reversed Sjöberg’s and Gerdin’s convictions allows for the exact same restriction, so long as it is applied with equal force to a totally distinct group of offenders.\textsuperscript{96}

C. A New Proposed Standard: Significant Foreign Burdens

The Sjöberg court should have instructed the Swedish courts that Section 54 contravenes Article 49 TEC if its application significantly burdens the provision of services between two foreign Member States.\textsuperscript{97} This holding would be founded on the notion that the ban “go[es] beyond what is necessary” to affect any valid domestic justification.\textsuperscript{98} In so doing, the court would guide national courts to consider the effects that domestic provisions might have on Europe’s overall economic efficiency.\textsuperscript{99} Such an instruction would also provide a substantive boundary that more precisely upholds the range of policy choices made by Member States in the absence of EU online gambling legislation.\textsuperscript{100}

The Liga Portuguesa case arguably presented an opportunity to introduce such a standard, but Sjöberg presented a more compelling op-

\textsuperscript{92} See id. The Daily Mail reaches just more than 4.5 million readers per day, while the Swedish papers together reach approximately two million readers per day. \textit{Compare Circulation & Readership, Mail Classified}, http://www.mailclassified.co.uk/circulation-readership/circulation-readership (last visited May 20, 2012) (showing 4,622,000 readers per weekday issue), with I Siffror, supra note 73 (showing 1,014,000 readers as print version’s range per day), and Siffror, supra note 73 (showing daily print version’s range as 925,550 readers).

\textsuperscript{93} Cf. \textit{Circulation & Readership, supra} note 92 (showing more than 2.25 readers per circulated issue).

\textsuperscript{94} See \textit{Swiss Inst. of Comparative Law, supra} note 51, at 1409. Under the proposed standard in Part III.C., a publication’s ability to run different ads in its foreign and domestic editions would be relevant, and could patently mitigate a restriction’s effects, but it should not be assumed.

\textsuperscript{95} See Sjöberg, [2011] 1 C.M.L.R. paras. 40–45.

\textsuperscript{96} See id. paras. 52–57 (allowing restriction if applied equally to persons promoting unlicensed domestic gambling operations).

\textsuperscript{97} See TEC art. 49.

\textsuperscript{98} See Placanica, 2007 E.C.R. para. 62.

\textsuperscript{99} See \textit{Swiss Inst. of Comparative Law, supra} note 51, at xxxiv, xliii–xlvii.

\textsuperscript{100} See id. at 1414–19.
portunity. In *Liga Portuguesa*, a number of the Liga’s advertisements for Bwin appeared on non-circulating objects located in Portugal. The court mentioned the possibility that foreigners viewed the Liga’s web advertisements, but did not incorporate that possibility into its proportionality analysis. Given *Sjöberg*’s more exclusive focus on the mere promotion of internet gambling, the Swedish newspapers’ potential foreign circulation, and Lotterilag Section 54’s ability to abridge the operation of lawful gambling elsewhere in the Common Market, the court missed its most prominent opportunity to date to establish a more refined standard for an evolving industry that needs one.

### Conclusion

The European Court of Justice missed an opportunity in *Criminal Proceedings Against Sjöberg & Another* to announce a new standard checking national gambling restrictions’ effects on the free movement of services under Article 49 TEC. Had the ECJ advised the Swedish courts that extraterritorial effects of Sweden’s ban on the promotion of unlicensed gambling render the ban contrary to Article 49, it could have induced Sweden to truly evaluate the scope of its restrictive gambling policy in the European market. Although Sweden’s restrictive policy may not necessarily harm the lawful gambling market in Europe, the possible foreign circulation of the banned advertisements suggests that it could. This possibility alone would validate an instruction to national courts to consider the foreign effects of their policies that restrict the movement of services, especially during a time of economic difficulty.

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101 *See* Case C-42/07 *Liga Portuguesa de Futebol Profissional* v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, [2010] 1 C.M.L.R. 1, para. 25 (stating that the Liga’s internet ads “mak[e] it possible for consumers in Portugal and other States to use [Bwin’s] gambling services,” but failing to state the scope of the use by consumers in other States) (emphasis added).

102 *See id.* (stadiums and player uniforms).

103 *See id.* paras. 25, 60–68.

104 *See Sjöberg*, [2011] 1 C.M.L.R. para. 58(1); *Swiss Inst. of Comparative Law, supra* note 51, at xlvi–xlvii.
Abstract: The Arab Spring was a period of great transition in the Middle East and North Africa, when people in many nations united in protest against their oppressive and tyrannical governments. In February 2011, the Libyan people filled their city streets in peaceful demonstrations against Muammar Gaddafi’s regime. Attempting to quell the dissent, the Gaddafi regime allegedly engaged in a systematic campaign of violence against the dissidents. These attacks escalated into a full-fledged civil war, triggering United Nations intervention to protect civilians. In response to the Gaddafi regime’s attacks on civilians, the UN Security Council passed a resolution referring the alleged human rights abuses to the International Criminal Court (ICC) for prosecution. This Comment explores the effect of the warrant, the ICC’s complementary jurisdiction over the matter, and argues that both Libyan and ICC officials should be instrumental in trying the accused members of the Gaddafi regime.

Introduction

On May 16, 2011, the prosecutor at the International Criminal Court (ICC), Luis Moreno-Ocampo, filed warrants for the arrest of Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi for alleged human rights abuses in connection with the 2011 Libyan uprising. The prosecution accused these three men of planning and implementing “widespread and systematic attacks against a civilian population, in particular demonstrators and alleged dissidents.” Using the Libyan armed forces as agents, the men allegedly
detained, tortured, and killed hundreds of civilians in an attempt to suppress the growing popular challenge to Gaddafi’s authoritarian rule. Judge Sanji Monageng of the ICC issued warrants for their arrest and ordered the men to stand trial at the Hague for human rights abuses pursuant to its prosecutorial power.

Part I of this Comment provides a brief background on the Gaddafi government, the 2011 civilian uprising and its connection to the Arab Spring, and the alleged human rights abuses of the Gaddafi regime. Part II focuses on the ICC’s jurisdictional powers and its ability to legitimately and effectively prosecute crimes against humanity, while also respecting domestic criminal jurisdiction. Part III analyzes the appropriateness of the ICC as the proper tribunal for prosecuting the accused. This section explores the available alternative options for prosecution, such as the post-revolution Libyan courts or a hybrid prosecution in Libya involving both ICC and Libyan officials. It will also demonstrate that the ICC is the proper organization to undertake the prosecution, although the Hague may not be the ideal location. Lastly, this section also explores the prudence of the ICC issuing the warrant during Gaddafi’s reign and the deepening civil war.

I. Background

A. A Pattern of Abuse: Gaddafi and His Government

Muammar Gaddafi seized power in Libya in a bloodless military coup on September 1, 1969, replacing the ruling Sanusi Monarchy. Gaddafi assumed a key position in the Revolutionary Command Council, and his powers gradually coalesced from revolutionary leader to authoritarian autocrat. Gaddafi consolidated his power by capitalizing

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on the nation’s oil reserves, and propagandized his revolutionary and social philosophy through the dissemination of his *Green Book.* With his control solidified, Gaddafi ruled Libya continuously from 1969 until his overthrow and death in 2011.\(^7\)

Under Gaddafi, the Libyan government allegedly committed numerous human rights abuses and state-sponsored acts of terrorism, including the infamous 1988 Lockerbie bombing.\(^9\) In response to these abuses and criminal acts, Gaddafi’s regime faced international reprisals throughout his reign, including both military intervention and economic sanctions.\(^10\) Though Gaddafi appeared to relax his belligerent attitude when he abandoned the Libyan nuclear program under international pressure in 2003,\(^11\) his response to the recent popular uprising demonstrated his continued disregard for human rights.\(^12\)

Saif al-Islam Gaddafi, one of Muammar Gaddafi’s sons, was a key figure in the inner circle of the regime.\(^13\) After studying at the London School of Economics, he became an unofficial but instrumental presence within the government.\(^14\) Saif al-Islam was also thought to entertain progressive, western-friendly ideals, and to be attempting to transform Libya into a thriving democratic state.\(^15\)

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\(^10\) Id. at 32, 45–46.

\(^11\) See id. at 63–64.


Saif al-Islam’s reformist attitude changed abruptly in response to the growing protests against his father’s regime. As tensions escalated, Saif al-Islam adamantly supported his father’s right to power, dismissed the protestors as rabble, and warned of bloody civil war if the demonstrations continued. Gaddafi’s brother-in-law and the head of Libyan intelligence, Abdulla al-Senussi, was also allegedly instrumental in the forceful response against demonstrators. Thus, the ICC charged both Saif al-Islam and al-Senussi with human rights violations in connection with the government’s response to the uprising.

B. Arab Spring Rising: The Libyan Chapter

The recent Arab Spring effectively began on December 17, 2010, when an unemployed Tunisian, desperately frustrated with economic and social conditions in his nation, set fire to himself in the street in an act of protest. The flames embodied a frustration felt by millions of similar citizens, galvanizing political actors and sparking widespread demonstrations throughout Tunisia and the wider Arab world. After civilian protests in Tunisia and Egypt evolved into successful popular revolutions, many Libyans also began to voice their frustrations and stand in resistance to the Gaddafi regime. Unlike the Tunisian and Egyptian governments, who responded to the peoples’ calls for reform by stepping down, the Gaddafi regime reacted violently to the protests in an attempt to maintain power.

By late February 2011, the popular protests in Libya became widespread and prominent; in response, the Gaddafi regime escalated its
brutal crackdown on protestors.\textsuperscript{24} One group of independent human rights activists, concerned by the increasing death toll, confirmed more 220 deaths by February 21.\textsuperscript{25} There were further incidents of violence, including allegations that Gaddafi forces used rape as a weapon of fear and intimidation.\textsuperscript{26} In response, the ICC began an investigation into these alleged crimes against humanity.\textsuperscript{27}

II. Discussion

A. Jurisdiction of the International Criminal Court

The ICC was established at the Hague in 1998, after the United Nations ratified the Rome Statute.\textsuperscript{28} Article 5 of the Rome Statute enumerates the court’s jurisdiction over crimes against humanity, war crimes, genocide, and the crime of aggression.\textsuperscript{29} The ICC theoretically has jurisdiction to prosecute these crimes when they are committed.\textsuperscript{30} To limit the court’s interference in domestic prosecutions, however, the drafters of the Rome Statute erected jurisdictional hurdles that must be cleared before the ICC can hear a case.\textsuperscript{31}

To admit a case, the court must find that it meets the jurisdictional requirements under Article 19.\textsuperscript{32} Ordinarily, only the states that are signatories to the Rome Statute are subject to the jurisdiction of the ICC.\textsuperscript{33} Libya is one of the United Nations member states that has not ratified the Rome Statute, and therefore is generally outside the jurisdiction of the court.\textsuperscript{34}

The Rome Statute provides other means for the court to obtain jurisdiction, however, including a referral from the United Nations Se-
security Council. Article 13(b) authorizes the court to exercise jurisdiction if the Security Council determines a listed crime has been committed and refers the issue to the court. Because non-parties are not bound to the terms of the treaty, there is no true enforcement mechanism to the Security Council’s recommendation. Nevertheless, Article 12(3) allows non-member states to accept the court’s jurisdiction and cooperate in the matter, if they so choose. Accordingly, on February 26, 2011, the United Nations Security Council passed Resolution 1970 that unanimously referred the Gaddafi matter to the ICC. The resolution conceded that it is not binding on Libya, but it did strongly encourage Libya to cooperate with the court. Thus, the resolution effectively granted the ICC jurisdiction over the matter if Libya decided to consent and cooperate, which is a point of some contention.

Even if Libya opts to cooperate with the investigation, though, ICC prosecution of the Gaddafi regime faces a second jurisdictional hurdle if Libya decides to prosecute the regime in domestic courts. The drafters of the Rome Statute sought to limit the ICC’s power in matters where the individual state’s internal judicial system has the capacity to handle the matter adequately. The ICC’s jurisdiction is expressly intended to be “complementary to national criminal jurisdictions.” As such, Article 17 states that the court shall determine a case is admissible only where the state with original jurisdiction is “unwilling or unable genuinely to carry out the investigation or prosecution.” To determine such inability, the court is bound to consider whether the state’s judicial system is unable to “obtain the accused or the necessary evidence and testimony” resulting from a “total or substantial collapse or unavailability of its na-

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35 Rome Statute, supra note 4, art. 13.
36 Id. art. 13(b).
38 Rome Statute, supra note 4, art. 12(3).
42 See Rome Statute, supra note 4, art. 17.
43 SCHABAS, supra note 33, at 59–60.
44 Rome Statute, supra note 4, pmbl.
45 Id. art. 17(1)(a).
national judicial system.” After years of authoritarian dominance and corruption, the Libyan judiciary is generally considered to be weak. However, the newly established ruling National Transitional Council (NTC) is working to develop a legitimate justice system and may desire the responsibility of prosecuting its former leader. Thus, this aspect of the issue of the ICC’s jurisdiction hinges on the present capacity of the Libyan courts to administer justice effectively.

B. The Prosecutor’s Burden: Obtaining the Warrant

Once a viable argument for the court’s jurisdiction has been established, the ICC prosecutor may initiate an investigation into the alleged crimes if “the information available to the prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed.” In this case, jurisdiction was arguably established through the passage of UN Resolution 1970 on February 15, 2011. Prosecutor Moreno-Ocampo subsequently began the official investigation into the alleged crimes on March 3.

During an ICC investigation, the prosecutor must meet certain procedural thresholds to comport with the fundamental due process rights mandated by the drafters of the Rome Statute. One such protection is the “reasonable basis” threshold. Here, the offenses are “crimes against humanity,” defined by the Rome Statute as any number of enumerated acts, such as murder, torture, and rape “committed...
as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”\(^{58}\) The accused must have performed a criminal act within the court’s jurisdiction in order for the prosecutor to have a “reasonable basis.”\(^{59}\)

To this end, Prosecutor Moreno-Ocampo collected evidence indicating Gaddafi and his associates perpetrated crimes against humanity.\(^{60}\) The evidence collected included a plan to suppress demonstrations through “the use of lethal force against demonstrators and alleged dissidents,” accounts of snipers strategically placed to fire on crowds of civilians leaving mosques, and incidents of torture and abuse.\(^{61}\) Direct evidence of these abuses was also corroborated through the “scale, scope and duration of the attacks.”\(^{62}\) On the basis of this evidence, the ICC concluded that the prosecutor had met his “reasonable basis” burden, and granted the warrant on June 27, 2011.\(^{63}\)

### III. Analysis

#### A. Potential Challenge to ICC Jurisdiction

With Libya’s cooperation, the ICC appears to meet the jurisdictional requirements to prosecute Saif al-Islam and al-Senussi, but some Libyans have expressed a desire to try the accused in domestic courts.\(^{64}\) Libya is not bound to cooperate with the ICC, and the NTC may contest jurisdiction if it establishes a viable justice system before the prosecutions begin.\(^{65}\) Because of the ICC’s commitment to the principle of complementarity, national prosecutions take precedence over ICC prosecutions, provided the domestic institutions are willing and able to undertake the complex proceedings.\(^{66}\) Neither the principle of complementarity, nor the threshold of the domestic court’s prosecutorial

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\(^{58}\) Rome Statute, \textit{supra} note 4, art. 7.

\(^{59}\) \textit{Id.} arts. 5, 53(1)(a).

\(^{60}\) \textit{See} Prosecutor’s Warrant Application, \textit{supra} note 1, paras. 12, 14, 15, 27.

\(^{61}\) \textit{Id.} paras. 12, 20, 27.

\(^{62}\) \textit{Id.} para. 12.

\(^{63}\) \textit{Decision on Prosecutor’s Warrant Application, supra} note 4, para. 41.

\(^{64}\) \textit{See} Kaye, \textit{supra} note 49; Walt, \textit{supra} note 41.

\(^{65}\) \textit{See} Schabas, \textit{supra} note 33, at 59–60.

ability is explicitly defined in the Rome Statute.\(^6^7\) This sets the stage for a flashpoint of jurisdictional contention.\(^6^8\)

The NTC may contest ICC jurisdiction on the grounds that it is not bound by the Rome Statute and is willing and able to try Saif al-Islam and al-Senussi on Libyan soil.\(^6^9\) Some have advanced the view that this scenario is the only one that will allow Libyans to feel vindicated, and to legitimize the new popular government.\(^7^0\) Furthermore, trying Saif al-Islam and al-Senussi in Libya would allow the prosecution of other alleged criminal acts against the people during Gaddafi’s reign that were not included in the warrant and that the ICC has not pursued.\(^7^1\)

Should Libya choose to prosecute Saif al-Islam and al-Senussi domestically rather than to accept the jurisdiction of the ICC, the ICC may nevertheless attempt to retain jurisdiction by arguing that Libya is “unable genuinely to carry out the investigation or prosecution.”\(^7^2\) To support this position, the ICC may conclude that the Libyan courts are not yet sufficiently established as an independent judiciary after decades of authoritarian control.\(^7^3\) Under Gaddafi, the Libyan courts lacked independence and were subject to his supremacy and influence.\(^7^4\) And before Gaddafi was in power, his predecessors exercised similar control over the judiciary.\(^7^5\) Therefore, the Libyan legal system has long been subject to authoritarian dominance without the freedom to develop as a just and independent force.\(^7^6\) With such a history of corruption, there is reason to believe the new Libyan government may struggle to establish an effective court system capable of guaranteeing a fair trial for former regime officials so soon after the revolution.\(^7^7\)

Yet, these arguments address neither the problem of trying the accused in courts previously dominated by the Gaddafi government, nor the due process concerns inherent in post-revolutionary regime

\(^{67}\) Benjamin N. Schiff, Building the International Criminal Court 77 (2008).

\(^{68}\) See Kaye, supra note 49.

\(^{69}\) See Schabas, supra note 33, at 59–60; Kaye, supra note 49.


\(^{71}\) See Rome Statute, supra note 4, art. 5; Ronen, supra note 9, at 43–45 (referencing Libya’s Lockerbie Bombing involvement); Evan Hill, Libya Survivor Describes 1996 Prison Massacre, Aljazeera (Oct. 21, 2011), http://english.aljazeera.net/indepth/features/2011/09/20119223521462487.html (discussing alleged al-Senussi massacre).

\(^{72}\) See Rome Statute, supra note 4, art. 17(1)(a).

\(^{73}\) See id.; Vandewalle, supra note 5, at 191; Wright, supra note 7, at 80.

\(^{74}\) Vandewalle, supra note 5, at 191; Wright, supra note 7, at 80.

\(^{75}\) Wright, supra note 7, at 80.

\(^{76}\) Vandewalle, supra note 5, at 191; Wright, supra note 7, at 80.

\(^{77}\) See Vandewalle, supra note 5, at 191; Wright, supra note 7, at 80.
prosecutions.\textsuperscript{78} With reports surfacing that allege NTC mistreatment of common prisoners of war, there is reason to fear that similar disregard for due process would befall Saif al-Islam and al-Senussi.\textsuperscript{79} Additionally, questions over the manner of Gaddafi’s death, and accusations that it was an extra-judicial execution, exacerbate skepticism of Libya’s ability to guarantee a legitimate prosecution and the due process rights of the accused.\textsuperscript{80} If Saif al-Islam or al-Senussi are captured alive, there is a valid concern that they will neither be safe in the custody of Libyan military authorities, nor receive the due process to which they are entitled.\textsuperscript{81} Without a reliable and independent Libyan judicial system, it is unclear that a wholly domestic prosecution would achieve real justice.\textsuperscript{82}

In order to address both the Libyan people’s demands for justice and to palliate the concerns of critics, some suggest the trial should be held in Libya but supervised by the ICC.\textsuperscript{83} Such a cooperative prosecution is not unprecedented in international criminal cases.\textsuperscript{84} Holding an ICC trial in Libya would ensure due process for the accused and provide Libyans just and well-orchestrated criminal proceedings on their home soil.\textsuperscript{85} This experience would offer Libyan citizens a sense of vindication, and establish a paradigm of legitimate criminal justice for the courts.\textsuperscript{86} One concern with this model is the capacity of the NTC to ensure security and safety during the trial.\textsuperscript{87} This is especially disconcerting in light of Gaddafi’s controversial death and the treatment of NTC prisoners of war.\textsuperscript{88} Despite these concerns, since the NTC acquired control

\textsuperscript{78} See Vandewalle, supra note 5, at 191; Wright, supra note 7, at 80; Ian Black, \textit{Libyan Revolutionaries Accused of Widespread Torture}, SYDNEY MORNING HERALD, Jan. 28, 2012, at 16 (demonstrating due process violations, torture, and similar concerns for prisoners).


\textsuperscript{82} See Kaye, supra note 49.

\textsuperscript{83} Id.


\textsuperscript{85} See Kaye, supra note 49.

\textsuperscript{86} Id.

\textsuperscript{87} See id.

of the country, conditions have come to appear suitable for a prosecution.89

In all, it seems that a Libyan domestic prosecution poses risks to due process, but it is unclear that the ICC would have jurisdiction if Libya chooses not to cooperate.90 A trial at the Hague would probably be the most efficient, safe, and effective means of prosecution. Nevertheless, an ICC trial in Libya could satisfy all due process concerns of the accord, while also vindicating the Libyan people’s demands for justice and setting a benchmark for judicial independence and integrity in the Libyan transition to democracy.91

B. Prudential Aspects of the ICC Warrant

Even if legal jurisdiction is established, the ICC still faces certain political concerns regarding the prudence of issuing its arrest warrant for Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi.92 For one, because the vast majority of the ICC’s cases to date involve African nations and their leaders, some criticize the ICC as merely a tool of Western imperial powers specifically for use against African nations.93 Scholars point out that because the ICC primarily prosecutes African leaders, it risks being labeled as a “selective prosecutor,” providing justice “only for those countries too weak to resist it.”94

To the contrary, most African nations have themselves voluntarily referred cases to the ICC, a fact that support’s the court’s legitimacy as a forum of international justice.95 In the present matter, the UN Security Council unanimously referred this issue to the court in Resolution 1970, displaying international consensus extending beyond western

90 See Rome Statute, supra note 4, pmbl.; El Zeidy, supra note 66, at 158–59; Nossiter & Gladstone, supra note 80.
91 See Kaye, supra note 49.
93 See Lin, supra note 92, at 760–61.
nations. Additionally, members of the new Libyan government have applauded the efforts of the international community to back their revolution. Despite concerns about the limited application of ICC jurisdiction to African nations, it is clear that the action taken against Gaddafii has widespread international support and legitimacy.

A second prudential criticism levied against the ICC is the timeliness of the warrant. Critics contend that the ICC should not have granted the warrant for Gaddafii and his associates while he still held significant power. This arguably incentivized Gaddafii to entrench himself and perpetuate the violence, rather than to investigate exit options involving political compromise. To this effect, the African Union released a declaration imploring its member states not to cooperate with the ICC warrant because it “seriously complicates the efforts at finding a negotiated political solution to the crisis.” Nevertheless, UN Security Council Resolution 1970 urged the cooperation of all UN member states, making a political solution involving exile and asylum quite difficult. Even if Gaddafii had sought amnesty in another nation the harboring country would have faced heavy international pressure to extradite the former dictator.

Although the issuance of the warrant may have been a theoretical disincentive to negotiate, it is clear Gaddafii intended to crush the rebellion and was not willing to talk either before or immediately after the warrant was granted. Both Gaddafii’s rhetoric and actions reinforced the fact that he was determined to maintain power at any cost and would not be deterred. Even under the force of NATO air-

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100 Id.
101 Id.
102 African Union, Decision on the Situation in Libya, para. 6, Assembly/AU/Dec. 385(XVII) (July 1, 2011); Booth, supra note 99.
103 See UN Press Release on Resolution 1970, supra note 39; Booth, supra note 98.
105 See Prosecutor’s Warrant Application, supra note 1, ¶¶ 12, 14, 17, 20, 27; Kirkpatrick & El Naggar, supra note 3; Muammar Gaddafi in His Own Words, GUARDIAN (U.K.), Oct. 20, 2011, at 4.
106 See Prosecutor’s Warrant Application, supra note 1, ¶¶ 12, 14, 17, 20, 27; Fahim & Kirkpatrick, supra note 3; Muammar Gaddafi in His Own Words, supra note 105.
strikes, a retreating front line, high-level government ministers defecting, and the capture of Tripoli by NTC forces, Gaddafi continued to use his military forces against his own people. It was only after his defeat appeared inevitable that reports emerged of his potential willingness to negotiate. Gaddafi defiantly held out to the last, reduced to a small area of a few square blocks, until his violent demise. Furthermore, the ICC warrant demonstrated growing international support for the cause of the NTC’s fighters, which is an important consideration in evaluating the prudence of the warrant. Thus, the warrant’s benefits outweighed any adverse effects, given Gaddafi’s clear intention to violently crush the rebellion both before and after it was issued.

CONCLUSION

For over forty years, Muammar Gaddafi oppressed the people of Libya as dictator, until he was deposed in a popular uprising during the Arab Spring in 2011. During peaceful political demonstrations, Gaddafi’s government allegedly repressed the protests through the systematic use of lethal force against civilians. In response to these acts, the United Nations Security Council adopted a resolution condemning the violence and referring the Gaddafi government’s alleged crimes against humanity to the International Criminal Court. Based on this authority and the existing evidence, the prosecutor of the ICC applied for a warrant which the court subsequently granted. If the new Libyan government chooses to cooperate, the ICC would certainly have jurisdiction. However, Libya is not a party to the Rome Statute, so it would not be subject to the Court’s jurisdiction if it chose not to cooperate. The ICC may contend that Libya is unable to try the matter effectively because it lacks the institutions and a functional judiciary capable of ensuring due process. There may be some credence to this argument, but it may not be sufficient to outweigh an uncooperative Libya because it is not

107 MacFarquhar, supra note 8.
111 See MacFarquhar, supra note 8; Muammar Gaddafi in His Own Words, supra note 105.
bound by the Statute. An ICC trial in Libya is certainly a viable solution to serve both parties' interests of achieving a just trial, doling out punishment for crimes if the defendants are found guilty, and allowing the Libyans to observe with these patriotic and democratic experiences on their home soil. In all, the ICC warrant for Gaddafi, Saif al-Islam, and al-Senussi was warranted by the circumstances surrounding the Gaddafi regime’s brutal oppression of the popular uprising, and was a service to international justice and the Libyan people.
LEFT HANGING: THE CRUCIFIX IN THE CLASSROOM AND THE CONTINUING NEED FOR REFORM IN ITALY

REBECCA E. MARET*

Abstract: Increased immigration throughout Europe and expanding religious pluralism have exerted pressure on European States to make further accommodation for minority religious populations. This poses a challenge for Italy and other European States whose national identities are informed, at least in part, by a single religion. A recent decision by the European Court of Human Rights, holding that Italy could refuse parents’ requests to remove crucifixes from the walls of public school classrooms, has reinvigorated debate throughout Europe on the appropriate place of religion in the public arena. This Comment posits that in issuing this opinion, the Grand Chamber of the European Court of Human Rights has missed an opportunity to provide meaningful insight into the debate on how European States may confront the challenges posed by an increasingly religiously diverse society. As such, European States are left to determine the policies and parameters of religious accommodation individually.

Introduction

On March 18, 2011, the Grand Chamber of the European Court of Human Rights (ECtHR) issued a judgment in the case of Lautsi v. Italy, in which it declared that the display of crucifixes on the walls of public school classrooms in Italy did not violate the human rights of its citizens, as set forth by the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).\(^1\) The decision was delivered in stark contrast to the previous ruling issued by the Second Section of the ECtHR on November 3, 2009, in which the court unanimously held that the public display of crucifixes in Italian public school classrooms did amount to a violation of Article 2 of Protocol No. 1 and Article 9 of the Convention.\(^2\) These successive decisions emerge within an ongoing debate in Europe concerning the appropriate place of religion in the pub-

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lic arena. The Grand Chamber’s judgment in Lautsi will have broad implications for that debate, and for the search for an appropriate balance between States’ interests in preserving the right to forge and maintain their own State identities and the rapidly evolving need to accommodate an increasingly religiously plural European society.

This Comment proceeds in three parts. Part I provides a background on Lautsi and the reasoning used by the Grand Chamber in reversing the Second Section’s decision. Part II discusses how the historical tradition of Christianity in Italy and throughout Europe has informed the European identity, and how the intertwining of these elements poses a challenge for States under the Convention. Part III analyzes in greater detail the text of the Grand Chamber’s opinion, with particular focus upon the court’s use of the “margin of appreciation” doctrine. This section argues that the Grand Chamber failed to contribute any meaningful insight to the debate on how European States may confront the challenges of an increasingly religiously diverse society.

I. Background

At the start of the case, Soile Lautsi, a Finnish-born Italian national, lived in Italy with her eleven and thirteen year-old sons, Dataico and Sami Albertin. During the 2001–2002 school year, the boys attended the Istituto comprensivo statale Vittorino da Feltre (Istituto), a State public school in Abano Terme, in the province of Padua. In each of the school’s classrooms, including those rooms in which Ms. Lautsi’s children had lessons, a crucifix hung on the wall. On April 22, 2002, Ms. Lautsi’s husband voiced his concern during a meeting of the school’s governors about the crucifixes in his sons’ classrooms, and inquired whether they could be removed. By a majority vote, the school’s governors decided not to remove the crucifixes from the classroom.
Ms. Lautsi appealed to the Veneto Administrative Court on July 23, 2002, complaining that the school’s policy infringed upon her right to a secular education for her children under Articles 3 and 19 of the Italian Constitution, and Article 9 of the Convention.\textsuperscript{10} The case was dismissed on March 17, 2005 after the Administrative Court ruled that the presence of crucifixes in public school classrooms did not offend the principle of secularism.\textsuperscript{11} The court suggested that the crucifix could be used to reinforce Italian identity in the face of an influx of different cultures into Italy, and that “to prevent that meeting from turning into a collision it is indispensable to reaffirm our identity, even symbolically.”\textsuperscript{12}

After Ms. Lautsi’s appeal to the Supreme Administrative Court of Italy was defeated, her case was accepted by the ECtHR.\textsuperscript{13} On November 3, 2009, the Second Section issued a unanimous judgment in favor of Ms. Lautsi, in which it declared that:

The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion . . . .

The Court cannot see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism . . . could serve the educational pluralism which is essential for the preservation of “democratic society” within the Convention meaning of that term.\textsuperscript{14}

The court explained that among the many meanings of the crucifix, the religious meaning was predominant.\textsuperscript{15} Its presence in classrooms was therefore capable of both interfering with the Applicant’s right to a secular education for her children, and causing an emotional disturbance for the students of non-Christian or non-religious backgrounds.\textsuperscript{16}

Italy appealed the case to the Grand Chamber, and on March 18, 2011, the Grand Chamber reversed the Second Section’s ruling, holding that although “the crucifix is above all a religious symbol,”\textsuperscript{17} it is “an essentially passive symbol . . . [i]t cannot be deemed to have an influ-

\textsuperscript{10} See id.

\textsuperscript{11} See id. at 65.

\textsuperscript{12} Id.

\textsuperscript{13} See id. at 68.


\textsuperscript{15} See \textit{Lautsi II}, 54 Eur. H.R. Rep. at 75.

\textsuperscript{16} Id.

\textsuperscript{17} Id. at 85.
ence on pupils comparable to that of didactic speech or participation in religious activities.” To support its conclusions, the Grand Chamber noted that “there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.” The Grand Chamber further explained that in keeping the crucifixes on display in the school’s classrooms, the Istituto’s officials acted within the “margin of appreciation” afforded to Contracting States to make decisions in matters concerning the place accorded to religion within the school environment. Provided that such decisions “do not lead to a form of indoctrination,” the Grand Chamber would find no breach of the requirements of the Convention.

II. Discussion

A. The Christian Tradition

Europe “is the Bible and the Greeks.” Certainly, European history may be explained, in large part, by Christendom. From its roots as a Jewish millenarian sect of the Roman Empire, Christianity gained momentum after the Edict of Milan, which gave the religion recognition under the law, thereby allowing it to enjoy “the same toleration as other religions.” Through the fifteenth century, Europe, as a territory, was marked by a distinctly Christian identity, in which “the idea of a Christian community provided not only a legitimating myth for medieval kingship, but also served as a medium of cultural cohesion for groups otherwise separated by language and ethnic traditions.” In effect, Christianity provided the European geographical region with the conceptual basis to distinguish itself from the non-Christian world, as well as a means by which to foster an internal sense of social unity.

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18 Id. at 87.
19 Id. at 88.
20 Id. at 86.
23 See John T.S. Madeley, EUROPEAN LIBERAL DEMOCRACY AND THE PRINCIPLE OF STATE RELIGIOUS NEUTRALITY, 26 W. EUR. POL. 1, 8 (2003) (“Europe’s historic association with Christianity is itself unambiguous and strong; indeed it is the only part of the old world which has ever been integrated on the basis of adherence to a single world religion.”).
24 Id. at 10.
26 See id.
Italy, in particular, has fashioned a State identity inextricably tied to its Catholic heritage.\(^{27}\) With the rise of the Savoy monarchy in 1861, Catholicism—the dominant religion throughout the Italian peninsula—provided a means by which to unify a country marked by distinct territorial regions, languages and cultures, where “the fidelity of the new country to ‘its’ religion represented a sort of implicit rule that later influenced all Italian history by nourishing a strong rhetoric of continuity.”\(^{28}\)

As fascism took hold in the country in the early twentieth century, the Italian government issued successive royal decrees requiring the display of crucifixes in Italian primary and middle school classrooms.\(^{29}\) By the end of World War II and the arrival of the new Italian Republic, however, the principle of religious freedom was enshrined in four provisions of the Italian Constitution.\(^{30}\) Article 7 of the Constitution declares that “[t]he State and the Catholic Church are independent and sovereign, each within its own sphere,”\(^{31}\) and Article 8 reads: “All religious denominations are equally free before the law.”\(^{32}\) Although the Italian Constitution guarantees the right of its citizens to religious freedom, and though the prior royal decrees requiring the display of crucifixes in public school classrooms have since been rendered void, the Italian government maintains the view that keeping crucifixes in public school classrooms is “a matter of preserving a centuries-old tradition.”\(^{33}\)

**B. The Convention and Europe Today**

In the wake of World War II, Italy and other European nations became signatories to the Convention, which entered into force in 1953.\(^{34}\) In an effort to effect greater unity between its members, and to further advance the rights recognized in the 1948 Universal Declaration of Human Rights, the Convention set forth a number of fundamental

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\(^{28}\) Id. at 842.


\(^{30}\) See *Const. of the Italian Republic* Dec. 27, 1947, arts. 7, 8, 19, 20.

\(^{31}\) Id. art. 7.

\(^{32}\) Id. art. 8.


rights and freedoms that would become binding upon its members. Article 2 of Protocol 1 affirms that “[n]o person shall be denied the right to education,” and that “the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” Article 9 of the Convention protects freedom of thought, conscience and religion, and provides:

1. Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In upholding the freedoms guaranteed by the Convention, member nations are free to claim a State religion, or to declare a secularist national government as have both France and Turkey; neither posture conflicts with the Convention. Increased immigration and expanding religious pluralism, however, have exerted pressure on Convention members to further accommodate religious minorities. This poses a challenge for Italy and other Convention members whose national identity is, at least in part, informed by religion.

In response to this challenge, some Convention members—notably, France—have adopted a strict form of secularism, on the view that a shared secular space best encourages social unity, transcending the divisions created by the various inheritance narratives claimed by religious

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36 Convention, supra note 34, protocol 1, art. 2.
37 Id. art. 9.
38 See Alvarez, supra note 3, at 373; Grégor Puppinck, Dir., European Ctr. for Law & Justice, Presentation at the International Law and Religion Symposium: Lautsi v. Italy—The Leading Case on Majority Religions in European Secular States, Presentation at the International Law and Religion Symposium, 4–5 (Oct. 3–6, 2010).
39 See McGoldrick, supra note 4, at 457; Andrea Pin, Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State, 25 EMORY INT’L L. REV. 95, 140 (2011).
40 See McGoldrick, supra note 4, at 457; Pin, supra note 39, at 140.
groups. Under the French system of laïcité, the relegation of religious expression to the private sphere of society is regarded as an ideologically sound and historically justifiable means to ensure both the freedom of religious practice for all French citizens, as well as the preservation of a political body free from the influence of any one religious doctrine.

Recognizing the freedom that laïcité affords members of society within shared, communal public spaces, former French President Jacques Chirac declared that “it is the privileged site for meeting and exchange, where people find themselves and can best contribute to the national community. It is the neutrality of the public space that permits the peaceful coexistence of different religions.”

This form of secularism is one effective means of confronting the challenges of an increasingly religiously plural society. Such an approach, however, is less appealing to—indeed, is opposed by—nations that have an interest in preserving a national identity steeped in religious historical tradition. Professor Joseph H. H. Weiler, in his oral submission to the Grand Chamber on behalf of the third-party intervening States in Lautsi, insisted that:

[T]he legal imperative of the Convention should not extend the justified requirement that the State guarantee negative and positive religious freedom, to the unjustified and startling proposition that the State divest itself of part of its cultural identity simply because the artefacts [sic] of such identity may be religious or of religious origin.

Though the Italian Constitution declares a separation between Catholic Church and State, the prevailing “Italian constitutional interpretation believes pluralism is enriched by religious culture and thought in public


43 Bowen, supra note 42, at 29.

44 See Brian Barry, Culture & Equality 28 (2001).

45 See Joseph H.H. Weiler, State and Nation; Church, Mosque and Synagogue—the Trailer, 8 Int’l J. Const. L. 157, 163 (2010) (arguing on behalf of the third party intervening States before the Grand Chamber that States should be able to maintain religiously informed identities as part of their cultural identities).

46 Id.

47 Const. of the Italian Republic Dec. 27, 1947, art. 7; see Ferrari, supra note 27, at 849.
institutions such as schools.” Indeed, the Government of Italy argued in *Lautsi* that “the presence of crucifixes in classrooms made a legitimate contribution to enabling children to understand the national community in which they were expected to integrate,” and that removing these crucifixes “would amount to ‘abuse of a minority position.’”

III. Analysis

Ruling in Italy’s favor, the Grand Chamber determined that the decision to keep crucifixes on the walls of public school classrooms was a matter “falling within the margin of appreciation” accorded to Contracting States to decide for themselves the place of religion within public educational institutions. The application in this case of the margin of appreciation doctrine, namely, the principle that international courts should “exercise restraint and flexibility when reviewing the decisions of national authorities,” has been heralded as a triumph of State sovereignty. Proponents of the decision urge that Italy’s victory reaffirms “the freedom of nations/states to include in their self-definition, in their self-understanding and in their national and statal symbology, a more or less robust entanglement of religion and religious symbols.” On this view, granting Italy a wide margin of appreciation to make decisions on whether to allow crucifixes to hang on the walls of public school classrooms “is not unfair given the fact that the Catholic religion is the majority religion practiced in Italy, despite the secular nature of the Italian State.”

Although the Grand Chamber’s reliance upon the margin of appreciation doctrine may be legally sound, its effect is to perpetuate the marginalization of minority religions in Italy. Though Italy does not formally engage a State religion, Catholicism is, nevertheless, the dominant religion within the State. Without careful consideration or adopt-

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50 *Id.*
52 See McGoldrick, *supra* note 4, at 475–76.
54 See Weiler, *supra* note 45, at 158.
55 Puppinck, *supra* note 38, para. 47.
56 See McGoldrick, *supra* note 4, at 497.
57 See Puppinck, *supra* note 38, para. 47.
tion of policies directed at further accommodation of minority religions, “[t]he inevitable consequence is that non-dominant traditions . . . will not be equally represented or perpetuated in the public reasoning and public visual squares.” In effect, the Grand Chamber’s holding provides Italy with an international legal endorsement to maintain a national identity that inevitably excludes individuals and groups whose historical, religious, or cultural traditions are different from those recognized by the State, despite stirrings of discontent from within its population.

In its opinion, the Grand Chamber conceded that application of the margin of appreciation doctrine is not without limit: the court would defer to the decisions of Contracting States “provided that those decisions do not lead to a form of indoctrination.” The court’s task, then, was to determine whether the limit of indoctrination had been exceeded. The problem with the Grand Chamber’s use, in this case, of indoctrination as the limit to the margin of appreciation doctrine is that it suggests that only overt acts of indoctrination could satisfy this standard. Surely, the hanging of crucifixes in public school classrooms has the effect, whether direct or indirect, of indoctrinating students or compelling those who do not belong to Catholicism to feel that they are outsiders within the school environment. As long as the Italian government maintains, as they did in Lautsi v. Italy, that the sign of the cross forms an “identity-linked symbol,” the effect may be to preclude religious minorities from fully participating in educational, civic and social life as “Italians” for want of subscribing to the dominant Italian religious tradition. The Grand Chamber’s holding, in acquiescing to the margin of appreciation doctrine, effectively propagates a policy of non-accommodation in the State’s religiously plural society. Given the reality of expanding religious diversity within its borders, is the outcome in Lautsi really Italy’s victory?

In relying upon the margin of appreciation doctrine, the Grand Chamber failed to contribute any meaningful insight to the debate on how European States may confront the challenges of increasing reli-

58 McGoldrick, supra note 4, at 497.
59 See id.
61 Id.
62 See Lamb, supra note 35, at 771.
64 See Lautsi II, 54 Eur. H.R. Rep. at 76.
65 See McGoldrick, supra note 4, at 497.
gious pluralism in diverse society with deep historical roots in Catholicism. An alternative approach would have been to encourage further reflection by Italy and other European States on how national policies aimed at greater accommodation of religious pluralism might better serve religious freedom and foster a greater sense of internal unity. Certainly, any specific suggestions made by the Grand Chamber to Italy, such as instituting a system of strict secularism like that of French laïcité, would likely neither be welcomed by Italy, nor be understood by the Grand Chamber as within its ambit to propose. Nevertheless, the Grand Chamber might have encouraged Italy to enter into an “actual dialogue with itself,” and acknowledge the realities of the religious and philosophical traditions within its borders “in order to master the necessary pluralism of [its] future.” As any such suggestions are absent from the Grand Chamber’s analysis, it is left to Italy and other European States, individually, to adopt policy changes aimed at further accommodation of an increasingly religiously plural society. Until they do, the crosses on the walls and the fate of Italy’s religious minorities are all left hanging.

Conclusion

The decision by the Grand Chamber in Lautsi v. Italy has reinvigorated an ongoing debate throughout Europe on the appropriate place of religion in the public sphere. Increased immigration and expanding religious pluralism have exerted pressure on Convention members to further accommodate minority religious populations within their borders. This poses a challenge for Italy and other Convention members whose national identity is, at least in part, informed by a single religion. In relying upon the margin of appreciation doctrine, the Grand Chamber’s holding has the effect of perpetuating the unequal representation of minority religions and philosophies in Italy. The victory in the case offers Italy an international legal endorsement to continue its

69 Tariq Ramadan, What I Believe 83 (2010).
71 See id.
religious and educational practices, despite stirrings of discontent from within its population. In the wake of the Grand Chamber’s holding, any trend toward policies of greater accommodation of religious diversity is left to European States to adopt individually, within their own margins of appreciation.