ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA
DEPARTMENT OF LEGAL STUDIES

VOL.6
ISSUE 2
2022

UNIVERSITY OF BOLOGNA LAW REVIEW

CONFERENCE PAPERS

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E-ISSN 2531-6133

Doi: 10.6092/issn.2531-6133/v6-n2-2021

University of Bologna Law Review

E-ISSN 2531-6133

GENERAL INFORMATION

The University of Bologna Law Review is a student-run, peer-reviewed, open access journal published by the University of Bologna, Department of Legal Studies. The Journal is published twice a year (all year around). The Journal is a Scopus Q3 indexed journal. Publication number E-ISSN 2531-6133. The Journal is hosted and mantained by ASDD-AlmaDL.

SUBMISSIONS

The University of Bologna Law Review accepts articles, essays, notes and conference papers. Authors can submit their manuscripts via email to bolognalawreview@unibo.it, via Scholastica, or via website.

SYSTEM OF CITATION

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UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/14697

Received: 29 Aug. 2021 | Accepted: 29 Aug. 2021 | Published: 3 Apr. 2022

Front Temporal Dementia and Imputability

The Role of Forensic Neurosciences in the Ability to Understand and Want

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CONFERENCE OR MEETING PROCEEDING

"Lectio magistralis" held at the second edition of the University of Bologna Law Review annual Colloquium, held in Bologna and online on the 22nd of February 2021.

KEYWORDS

Neurolaw; Dementia; Delirium; Imputability; Behavioral Disorder

INTRODUCTION

In all forms of dementia, neuropsychiatric symptoms are present alongside cognitive ones. For a long time, the latter have been considered characteristic of dementias, and only since 2011 has their presence been recognized as a distinctive clinical element.[1]

In the new criteria proposed by the National Institute on Aging and the Alzheimer Association, dementia is diagnosed when there are "cognitive or neuropsychiatric symptoms that interfere with the ability to perform work or usual activities and represent a decline from previous levels of functioning and performance, not explained by delirium or major psychiatric disorders".[2]

The evaluation of neuropsychiatric symptoms represents a focus in the approach to the patient with dementia, both for their relevance from the diagnostic point of view, for the impact on the quality of life of the patient and the family, and also because they constitute one of the outcomes of the therapeutic intervention (pharmacological and non-pharmacological) of dementia.[3]

The presence of neuropsychiatric symptoms [hereinafter N.P.S.] involves an increase in the risk of early institutionalization, with the same neurological severity of dementia, it causes extreme disability and worse cognitive performance, a reduction in the quality of life of patients and caregivers, a significant increase in social costs and stress for the caregiver.[4]

The definition and characterization of non-cognitive symptoms, as well as the appropriate methodology and assessment tools when diagnosing, are still a subject of debate. It is a symptom complex that is not easily characterized in a homogeneous way; for a long time, the generic expression "non-cognitive symptoms" was used to define everything that appeared different from the nucleus or syndrome considered central in dementia. In 1996, the Consensus Conference of the International Psychogeriatric Association [hereinafter I.P.A.] published a definition of these symptoms, promoting the term Behavioral and Psychological Symptoms of Dementia [hereinafter B.P.S.D.]. According to the I.P.A., "the term behavioral disturbances should be replaced with that of behavioral and psychological symptoms of dementia (B.P.S.D.) defined as: symptoms of

[1] Guy M. McKhann et al., *The diagnosis of dementia due to Alzheimer's disease: recommendations from the National Institute on Aging-Alzheimer's Association workgroups on diagnostic guidelines for Alzheimer's disease*, 7 The J. Alzheimer's Ass'n 263 (2011).

[2] Angelo Bianchetti et al., *I nuovi criteri per la diagnosi di demenza e di Mild Cognitive Impairment dovuti alla malattia di Alzheimer* [*The new criteria for a dementia and Mild Cognitive Impairment diagnosis due to Alzheimer's disease*], 2 Associazione Italiana Psicogeriatria [Italian Ass'n Psychogeriatrics] 90 (2011) (Ita.).

[3] Helen C. Kales et al., *Assessment and management of behavioral and psychological symptoms of dementia*, 350 Brit. Med. J. (2015).

[4] Renzo Rozzini et al., Medicina della fragilità. Manuale di Lavoro [Medicine of Frailty. Working Manual] 189-2013 (2014).

altered perception, thought content, mood of behavior frequently present in patients with dementia".[5] These symptoms are grouped according to the frequency and level of stress caused and complexity in management.[6]

2. DEMENTIA WITH BEHAVIORAL DISORDERS

We have just seen that all dementias present behavioral disturbances in their syndromic procession. There are, however, some that, more than others, have behavioral disorders at onset as their gold standard. Among them we have the family of fronto-temporal dementias, which, together with Lewy body dementia and frontal variant Alzheimer's dementia, are those with an elective self-presence with neuropsychiatric symptoms, followed by vascular dementia (Va.D.) and from substance abuse dementia (alcohol and drugs).

This is because the frontal lobe is involved and the circuitry that, from it, leads to the nuclei of the base, in particular to the caudate nucleus. This circuitry is involved in the ability to self-control. Since it is the first to deteriorate in these forms of dementia, often the patient who is affected by this disease comes to the attention of a psychiatrist before a neurologist is consulted. It is not infrequent that these patients are treated for extended periods, even years, in psychiatric institutions, demonstrating a poor response to psychotherapeutic treatments, until the appearance of cognitive deficits leads these patients to a neurologist. They are the kind of patients who, in their medical history, might have, at the onset of the disease, some criminal proceedings for minor crimes that they would never have committed, a sign of a change in character. The writer remembers having diagnosed fronto-temporal dementia, a behavioral variant, in a seventy-five-year-old lady, who was the recipient of a summons for stealing a low-value lipstick (€2.90) at the supermarket, an action that she would never have purposely executed and that had negative consequences on her family as well.

The lady, apparently well-kempt and still in order in terms of clothing and self-care, nevertheless showed a kind of trivialization of the problem, which she did not understand. She was not at all aware of having to undergo a criminal trial for theft, and this alerted the writer who, instead of limiting himself to a basic neurological vision, spent time performing neuropsychological tests, from which the impairment of the functions underlying the frontal lobe, such as the ability to criticize and judge, to plan and to solve problems, clearly emerged.

[5] Sanford I. Finkel et al., *Behavioral and psychological signs and symptoms of dementia: a consensus statement on current knowledge and implications for research and treatment*, 8 Int'l Psychogeriatrcis 497 (1996).

[6] *See* International Psychogeriatric Association, *Better Mental Health for Older People* http://www.ipa-online.org (last visited Feb. 13, 2022).

At that point, as a first action, I advised a morpho-volumetric Magnetic resonance imaging [hereinafter M.R.I.], of the second and third level tests, and I entrusted it to a good criminal lawyer, who was able to ask for an expert opinion from which emerged his inability to understand and decide for himself, for a frontal dementia-temporal, electively behavioral variant, of intermediate degree. The M.R.I. images, in fact, allowed to demonstrate a severe atrophy of the left frontal lobe, consistent with the tests, which also showed a language deficit.

3. DEMENTIA AND IMPUTABILITY

One of the most complex questions to answer, and much debated, is the following, well expressed by the title of an article that I propose to the reader: "When can a person with dementia be held liable for her actions?".[7]

The relatively recent data gives us the measure of how much this problem is relevant, not only in the civil field but, also and above all, in the criminal field, where responsibility is personal.

This article proposes, for example, two problem questions in the civil field, which are useful for a reflection on the criminal one as well. Here are the two scenarios and their solutions:

- Case 1: Lisa G. is suffering from dementia, lives in a nursing home and has spilled paint on the parquet floor. In an attempt to remove the stains with unsuitable products, she damaged the parquet. Does she have to pay for the damage herself and pay for the repair work? The civil liability insurance found that Lisa G. was not required to compensate for the damage caused as she was unable to discern. Consequently, the insurance company is not obliged to do so either. Consequently, the health care institution that suffered the damage had to bear the costs. The family would have preferred the liability insurance to pay for the damage, as Lisa G. has been paying premiums for years.

- Case 2: Margrit K. has dementia and still lives at home alone. She wrongly disposed of her waste bags, and the municipality imposed a 150 franc fine on her. Her son challenged it in front of the competent court. The latter ruled that in these situations, it is very likely to have a lack of imputability or reduced imputability.

[7] Sanford I. Finkel et al., *Behavioral and Psychological Signs and Symptoms of Dementia: Implications for Research and Treatment,* 8 Int'l Psychogeriatrics 497 (1997). Quando una persona affetta da demenza può essere ritenuta responsabile? [When can a person with dementia be held liable for her actions?], Auguste, Alzheimer Schweiz [Alzheimer Switzerland], April 2019, https://www.alzheimer-schweiz.ch/it/auguste/diritto/detail/quando-una-persona-affetta-da-demenza-puo-essere-ritenuta-responsabile.

The case must be reviewed by the court of first instance. If, due to dementia, Margrit K. was no longer able to judge which garbage bag was to be used, she is not liable. In that case the sentence would have been revoked. The article concludes in this way:

> Both cases show that a diagnosis of dementia does not automatically equate to an inability to discern. Many factors play a role. It is often difficult to determine whether or not the person concerned is incapable of discernment or imputable in the concrete situation. However, if you are not aware of the consequences of your actions, you cannot under any circumstances be held responsible [t/n original article in German, French and Italian].

Therefore, the question is when, and by what means, can a person with dementia be considered aware or not of the consequences of their actions, or capable of "understanding" pursuant to art. 85 of the Italian Criminal Code?

The answer is very complex and cannot ignore an important consideration: there is no single type of dementia; instead, there is a vast variety of forms of dementia, due to different etiopathogenesis and different neuronal networks involved.

Once, Alois Alzheimer identified the "Queen" of dementias by means of an anatomo-clinical correlation between the memory defect (or, better, of the different forms of memory) and an atrophy in a particular brain area (the hippocampus, seat of our ability to memorize). In later times, sophisticated work of study and classification has made it possible to identify alternative forms of dementia, some of which do not necessarily entail a loss of memory. However , they are no less relevant from the point of view of imputability, as they affect areas (such as the frontal lobes) which are the seat of our capacity for criticism and judgment, as well as for impulse control and of our inner needs.Therefore, a complete answer to this question must consider the different forms of dementia known today, their evolutionary fate, and the consequences of it on the side of so-called behavioral disorders (B.P.S.D.).

4. BEHAVIORAL DISORDERS IN DEMENTIA

Let's start by considering the field of behavioral disorders, a real problem that underlies the evaluation of a demented patient's ability to understand and / or want.

Internationally, behavioral disorders have been defined as "alterations in perception, thought content, mood or behavior, which are frequently observed

in patients with dementia".[8]

The term, "behavioral and psychological symptoms of dementia" (B.P.S.D.), is intended to function as an "umbrella" term, covering various paroxysmal manifestations, and not necessarily as a definition of a specific clinical condition.[9]

What we must immediately bear in mind is this fact: 90% of people with dementia will experience cognitive behavioral symptoms during their illness, which are severe enough to become a problem on their own.[10]

They are symptoms of dementia, identified by Alzheimer's himself, and appear at any stage of dementia.[11]

We must also bear in mind that their severity is independent of the severity of the disease. Put simply, the severity of these disorders does not correlate with cognitive impairment (memory impairment and other higher cortical functions), which is why it can happen (and this is to be borne in mind in the criminal context) that a patient with an apparently mild (only from a cognitive point of view) dementia, is already in the throes of a severe behavioral disorder.

It happens, as we will see later when we will mention the different forms of dementia, in those so-called "frontal" forms of dementia (the "frontal-temporal dementias" or the "front-front" variant of Alzheimer's dementia), where the peculiar stigmata is precisely the dis-control of impulses, and the inability to resist a provocation, with a reaction that is often uncontrolled and disproportionate to the stimulus.

A characteristic aspect of behavioral disorders, beyond the fact that they are seen in all forms and stages of dementia , is their probable correlation with some types of dementia. In Alzheimer's, it seems that delusions and hallucinations may predominate; in Lewv body dementia, we can find aggressive behavior and hallucinations, especially visual; in the fronto-temporal dementias, as mentioned before, we can encounter delusions and disturbances of social conduct, with the appearance of abilities;[12] in dementia secondary to Huntington's chorea (which always affects the frontal and fronto-caudal network) we can see early onset depression with later psychotic

[8] Sanford I. Finkel & Alistair Burns, *Behavioral and Psychological Symptoms of Dementia: A Clinical and Research Update,* 12 Int'l Psychogeriatrics 9 (2000). Behavioral and Psychological Signs and Symptoms of Dementia: Implications for Research and Treatment, Proceedings of an international consensus conference held in Lansdowne, Virginia (April, 1996), *in* 8 International Psychogeriatrics 1996, at Suppl. 3:215-552.

[9] *See* S. I. Finkel and A. Burns, *Behavioral and Psychological Symptoms of Dementia (BPSD): a clinical and research update*, 12 International Psychogeriatrics (2000); 9–12.

[10] *See* I.P.A's update of 2000.Michael S. Mega et al., *The Spectrum of Behavioral Changes in Alzheimer's Disease,* 46 Neurology 130 (1996).

[11] *See, e.g.*, B. Reisberg et al., *The stage specific temporal course of Alzheimer's disease: functional and behavioural concomitants upon cross-sectional and longitudinal observation.* in review. prog. clin biol res 1989; 317: 23-41.

[12] *See, e.g.*, Sonia Rosso et al., *Complex compulsive behaviour in the temporal variant of frontotemporal dementia*, 248 J. Neurology 965 (2001) ; Bruce Cumming et al., *Cortical Area MT and the Perception of Stereoscopic Depth*, 394 Nature 677 (1998).

disorders;[13] finally, in vascular dementia, we can find emotional instability, agitation or apathy (depending on the site affected by the cerebral stroke, be it ischemic or hemorrhagic).

In all cases, behavioral disorders are the cause of severe stress on caregivers,[14] the most frequent cause of medical intervention, drug prescription, and even institutionalization.[15]

They cause a reduced quality of life of the patient and the caregiver,[16] increase in disability,[17] increase in the economic costs of disease.[18] The last problem also includes possible compensation for damages (pursuant to articles 2043-2059 of the Italian Civil Code) if the patient is not correctly studied in the entirety of his disorder, and is thus wrongly held capable of understanding and / or wanting.

5. CLASSIFICATION B.P.S.D.

More recently, a working group of the International Society to Advance Alzheimer's Research [hereinafter I.S.T.A.A.R.T.] and Treatment (Neuropsychiatric Syndromes Professional Interest Area (N.P.S.-P.I.A.) of I.S.T.A.A.R.T.) has produced a series of recommendations and among these the use of the term "neuropsychiatric symptoms of dementia" (neuropsychiatric symptoms (N.P.S.) grouping them into five clusters (in decreasing order of prevalence): depression, apathy, sleep disturbances, agitation and psychosis.[19]

To try to classify behavioral, or neuropsychiatric, disorders, we can bear in mind that they fall into two broad categories: altered behavioral symptoms and altered psychological symptoms.

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[13] J.L.Cummings, Behavioural and psychiatric symptoms associated with Hungtington's disease, Adv Neurol (1995); 65:179-186.

[14] *See* J.L. Cummings ., *Behavioural and psychiatric symptoms associated with Hungtington's disease*, Adv Neurol (1995).

[15] *See generally* Elizabeth J. Colerick & Linda K. George, *Predictors of Institutionalization among Caregivers of Patients with Alzheimer's Disease*, 34 J. Am. Geriatrics Soc'y 493 (1986). Neil Morris & Dylan M. Jones, *Memory Updating in Working Memory: The Role of the Central Executive*, 81 Brit. J. Psych. 111 (1990); Steele et al., *Alcol myopia: Its prized and dangerous effects*, in American Psychologist 1990, 45(8), 921-933; B.F. O' Donnell et al., *Incontinence and troublesome behaviors predict institutionalization in dementia,* 5 Journal of Geriatric Psychiatry and Neurology 45 (1992).

[16] *See* Gary T. Deimling & David M. Bass, *Symptoms of Mental Impairment Among Elderly Adults and Their Effects on Family Caregivers*, 41 J. Gerontology 778 (1986); *see also* M.S. Bourgeois et al., *When Primary and Secondary Caregivers Disagree: Predictors and Psychosocial Consequences*, 11 Psychol. & Aging 527 (1996).

[17] *See* E.B. Brody, *Are We for Mental Health As Well As Against Mental Illness? The Significance for Psychiatry of a Global Mental Health Coalition*, 139 Am. J. Psychiatry 1588 (1982).

[18] *See* Jiska Cohen-Mansfield, *Stress in Nursing Home Staff: A Review and a Theoretical Model*, 14 J. Applied Gerontology 444 (1995).

[19] *See* Yonas E. Geda et al., *Neuropsychiatric Symptoms in Alzheimer's Disease: Past Progress and Anticipation of the Future*, 9 Alzheimer's & Dementia 602 (2013).

Altered behavioral symptoms are usually identified by observation of the patient, and include aggression, yelling, continuous movement, agitation, sexual disinhibition, culturally inappropriate behavior, hoarding, swearing and stalking.

Altered psychological symptoms, usually and mainly assessed on the basis of interviews with patients and relatives, include anxiety, depressive mood, hallucinations and delusions.

It is important to mention their prevalence, or the number of cases in the general population. Since it is a chronic disease, in patients with delayed diagnosis (with rare exceptions such as dementia in Creutzfeldt Jakob spongiform encephalopathy) for several years, the prevalence is quite high.[20]

6. FREQUENCY

N.P.S. (meaning "neuropsychiatric symptoms") tend to be fluctuating and their persistence throughout the course of dementia (especially in Alzheimer's disease) can be variable. Depression and anxiety have a prevalence of 60% at two years, delusions and hallucinations tend to have a lower persistence (in 30% of cases it is present for the course of the disease), agitation, irritability and wandering tend to be more persistent (about 80% at two years of observation), apathy is the symptom with greater prevalence and persistence over time.[21]

Delirium has a frequency between 10 and 37% depending on the studies.[22] The most frequent forms are the delusion of persecution and paranoia,[23] but there are others. There are practically five most frequent delusions:I) delusion of theft (most common); the patient hides things and does not remember where he has placed them; in the most serious cases, he believes that people enter the house to steal what, in reality, they have lost; II)delusion of loss; the patient does not recognize his home as he remembers that of his childhood; a desire to return to a childhood home is present even years after first institutionalization; III) the spouse or caregiver is an impostor (Capgras phenomenon); IV) delirium of abandonment; the patient believes there is a conspiracy to institutionalize or abandon him; V)delusion of infidelity, sexual or otherwise, on the part of the spouse; the patient believes he is betrayed.

We must bear in mind, and this is especially relevant for lawyers who defend a suspect suspected of dementia and judges who decide those cases, that the delusion can

[20] *See* Cohen GD & Bergen M Hasegawa K, *Finkel SI Psychogeriatrics in the 1990's*, Int Psychogeriatr. (1990) Spring; 2(1): 7-8.
[21] *See* Rianne M. van der Linde et al., *Longitudinal Course of Behavioural and Psychological Symptoms of Dementia: Systematic Review*, 209 Brit. J. Psychiatry 366 (2016).
[22] *See* R.E. Wragg et al., *Overview of Depression and Psychosis in Alzheimer's Disease*, 146 Am. J. Psychiatry 577 (1989).
[23] *See supra* note 15, Morris.

lead to aggression, not always desired or controllable by the patient. To this end, I recall an example, a clinical case in which I was asked for a report by the judge of the criminal court of Verona, on a patient in a nursing home in eastern Verona. One evening, tired of hearing her roommate (also demented) scream, she got up in a delirium of thievery (she thought she had thieves in the house) and crushed her forehead and nose with a chair. The police officers intervened, reported to the Verona Public Prosecutor's Office, and the patient was served a summons for serious personal injury. Since she was only transportable in a wheelchair and was in a state of very serious dementia (she was not even aware of what she had done), the judge immediately deemed necessary, rather than an expert opinion, a report by the neurologist who followed her for dementia, given previous relationships exhibited by family members.

The patient, clearly incapable of understanding and willing, was declared not only unable to stand trial but not attributable pursuant to art. 85 of the Italian Criminal Code. In this case, the patient was also very cognitively impaired but, as we have already said, the opposite can also happen, namely that the behavioral disorder is the onset indicator of dementia, when the cognitive aspect still seems to be preserved.

This is why, in approaching the examination of imputability, one must always keep in mind, alongside the purely psychiatric aspect, the neurological-organic aspect of the behavioral disorder.

Among other symptoms, we have hallucinations, with a frequency ranging from 14 to 29%. The most frequent are visual ones and occur in moderate dementia.[24] They increase markedly, so much so that they become one of the diagnostic criteria in Lewy body dementia, where they settle on a frequency of 80%.

The most frequent form is to see people who are not there. In some cases, these hallucinations can generate agitation, and in this case they must be treated. The origin seems to be the difficulty in recognizing faces or objects (visual agnosia or prosopagnosia) associated with difficulty in distinguishing light-dark contrasts. It is advisable that each patient is assessed on the visual ability and that the environments are adequately illuminated in order to reduce visual hallucinations.

Then we have the misidentifications. They are disorders in perception. Unlike delusions, which do not follow an external stimulus, misidentifications are alterations in the perception, or misperceptions, of external stimuli that are processed until they become real delusions.

Misidentifications can be of four types: presence of people in the house or ghost tenant syndrome, inability to recognize oneself in the mirror, inability to recognize

[24] *See* Carol F. Lippa et al., *Alzheimer's Disease and Lewy Body Disease: A Comparative Clinicopathological Study,* 35 Annals Neurology 81 (1994).

other people, inability to recognize what is happening on the T.V. with the belief that people seen on T.V. are present in real space. We then have particular syndromes. Capgras or impostor syndrome, which makes one believe that a person has been replaced by an identical copy, is associated with the lack of affective signs and this leads the patient to the conclusion that the person is an impostor. Fregoli syndrome makes people believe that they dress like different people in order not to be recognised by others. There is also inter-metamorphosis, whereby the physical appearance of one person corresponds to that of another.

Depression affects 40-50% of patients. While in the initial forms of dementia the diagnosis can be made during an interview, in the more advanced stages of dementia, language and communication difficulties make it even more challenging.

Apathy affects about 50% of the demented. It manifests itself as a loss of interest in daily activities and personal care. It can be confused with major depression, but unlike in case of the latter, the patientdoes not have dysphoria and typical vegetative symptoms.

Anxiety can be isolated or linked to other Borderline Personality Disorders (B.P.D.s). It manifests itself with anxiety about finances, illness, and the future. The most common manifestation is Godot syndrome, in which the patient repeatedly asks about an event that is about to take place. Another form is the fear of being alone, especially when the cohabiting caregiver leaves the room in which the patient is for short moments. Then we have the phenomenon called wandering (or Wandering) which is particularly tiring for the caregiver. This term includes the continuous search of the caregiver, the stalking, walking, trying ineffectively to perform a task, and walking without purpose, often associated with the alteration of the sleep-wake rhythm, as well as hyperactivity, the attempt to return to a childhood home, and escape attempts from the care facility.

Agitation is defined as inappropriate verbal, vocal or motoric activity that does not result from a person's needs or confusion.[25] It is a sign and symptom of lack of comfort or discontent and puts the patient at risk of fracture. But not all agitation should be treated pharmacologically, and, when treated, it is necessary to be clear about what triggered it (one counts as an agitation due to a state of anxiety, as a delirium, another as an agitation due to a depressive syndrome). Above all, certain drugs (such as benzodiazepines) should be avoided, to avoid the so-called "paradox effect" (accentuation of agitation leading to delirium).[26]

[25] *See* Jiska Cohen-Mansfield & Nathan Billig, *Agitated Behaviors in the Elderly: I.A. Conceptual Review*, 34 J. Am. Geriatrics Soc'y 711 (1986).

[26] *See* Cohen G.D., *Biopsychiatry in Alzheimer's disease*, Annu Rev Gerontol Geriatr. (1989); 9: 216-231.

7. THE DELIRIUM

Delirium has a high probability of occurring in the demented. It must therefore be recognized and distinguished from other B.P.S.D.s. There are key criteria.
In order to speak of delirium, the following elements must be present: I) acute onset and fluctuating course; II)lack of attention.
To these must be added one of the following symptoms: III) disorganized thinking: hallucinations with agitation; IV) altered level of consciousness.

Delirium must be immediately identified. It is important to notice that it has many causes, including some "exogenous", or from external factors, and not only from dementia. Among the "exogenous" causes infections, especially urinary ones, the intake of some drugs (we remember the antibiotics of the quinolone family), malnutrition or dehydration, some metabolic diseases (liver or kidney), and changes in the caregiver or environmental surgical interventions are considered highly relevant. Some of these causes can cause delirium in a patient who is not demented, a situation that must be kept in mind in the criminal sphere, given that, in these situations, the delusion then disappears leaving a person intact. If accused of a crime during the state of delirium, it must be investigated, studied and identified.

8. ETIOLOGY OF B.P.S.D.

B.P.S.D.s arise from various causes. At the moment it is considered a single model that provides genetic alterations: receptor polymorphism, neurobiological aspects, neurochemical and neuropathological psychological aspects: personality, stress response and social aspects: changes in the environment, caregiver problems.

They depend on an alteration at the level of neuronal transmission within the central nervous system. The neurotransmitters involved in dementia are acetylcholine (the main neurotransmitter involved), dopamine, norepinephrine, serotonin and glutamate. The latter is an excitatory amino acid which, in dementia, can cause the so-called "glutamate excitotoxicity".

It must be kept in balance because its deficiency, in the long run, generates problems, including psychotic symptoms. On the other hand, with respect to the other neurotransmitters, the cholinergic deficit causes memory loss, hallucination and delirium, a deficit of dopamine causes alteration of working memory and aggression, the noradrenergic one generates depression, while the reduction of serotonin creates depression, anxiety, agitation, restlessness, aggression. Not all symptoms and signs respond to drug therapy. Some of them (anxiety, depression, sleep disturbances, mania, delusions and hallucinations, verbal or physical aggression, inappropriate sexual

behavior) can be treated to a certain extent. Others, do not respond to drugs: wandering, urinating or defecating inappropriately, dressing and undressing inappropriately, endlessly repeating acts (perseveration) or vocalizations, hoarding, eating "inedible" things, aiming or snatching the means protection, pushing the wheelchair against others or against the wall and other antisocial gestures.

9. EVALUATION OF BEHAVIORAL DISORDERS

The assessment of behavioral disturbances in patients with dementia presents a methodological and clinical challenge. The coexistence of cognitive impairment with behavioral alterations makes it difficult for both the family members and the operators to observe and characterize individual disorders. For this reason, various tools have been developed for evaluating the global and specific characteristics of behavioral symptoms.[27] Many of these assess a narrow range of behavioral disorders, without analyzing their characteristics as a whole. Direct observation of behavioral disorders is often limited to institutionalized subjects or may only be possible in specialized centers, so in most cases an interview is made with the caregiver who reports the disorders observed by him at home. There is a tendency on the part of family members to over or underestimate the present disorders, depending on the relationship with the patient or the stress due to the care burden.

Cummings developed a behavioral disorder rating scale called NeuroPsychiatric Inventory [hereinafter N.P.I.], able to assess, on the basis of information obtained from the caregiver, the frequency and severity of behavioral disorders through the use of a questionnaire.[28]

The N.P.I. allows to evaluate a wide range of behavioral disorders, for the accuracy of twelve: delusions, hallucinations, agitation-aggression, dysphoria-depression,ansia, euphoria-exaltation, apathy-indifference, disinhibition, irritability-lability, aberrant motor behavior, sleep disorders, appetite and eating disorders. The single items are explored with further sub-items that allow to obtain more detailed information. Behavioral disorders are graded with a differentiated score by frequency (0: never, 1: rarely, 2: sometimes, 3: frequently, 4: almost constantly) and severity (1: mild, 2: moderate, 3: severe). The overall score, therefore, ranges from zero to 144, and is an index of the severity of the disturbance. The evaluation of stress on the caregiver also follows, with a score from zero (none) to five (severe) for each disorder, so

[27] *See* Alberto Costa et al., *The Need for Harmonisation and Innovation of Neuropsychological Assessment in Neurodegenerative Dementias in Europe: Consensus Document of the Joint Program for Neurodegenerative Diseases Working Group*, 9 Alzheimer's Rsch. & Therapy, Apr. 17, 2017, at 1.

[28] *See* Jeffrey L. Cummings et al., *The Neuropsychiatric Inventory: Comprehensive Assessment of Psychopathology in Dementia*, 44 Neurology 2308 (1994).

the overall stress, on the twelve items, varies from zero to sixty. This scale has proved to be an objective and effective tool for the assessment of behavioral disorders in patients suffering from various types of dementia (A.D., V.D. and frontotemporal dementia); it can also be an aid in the differentiation of the various forms of dementia.[29] There are different versions of the N.P.I. for use in institutionalized patients and for self-assessment by patient caregivers.

An aspect that deserves particular attention concerns the evaluation of depression. There are numerous tools in this regard, both scales that detect the presence of depressive symptoms through direct request to patients (such as the Geriatric Depression Scale) and observational scales (better applicable even in the most serious patients). The Cornell Scale was specially designed for the assessment of depressive symptoms in demented patients.[30] It uses a standardized series of items detected through an interview with a person who knows the patient (family member or operator) and a semi-structured interview with the patient.

10. THE TREATMENT OF B.P.S.D.. NOTES ON CURRENT EUROPEAN RESEARCH.

The treatment of N.P.S. represents one of the main outcomes in the care of the demented patient and is often a challenge that requires a multimodal approach, which includes the education of family members and caregivers, the use of drugs and behavioral or other non-pharmacological procedures. The intensity of the treatment, the choice of strategies (non-pharmacological, environmental, pharmacological approach) and the choice of the type of pharmacological treatment depend on various clinical and socio-environmental factors.[31]The approach to the patient with N.P.S. requires a systematic assessment of the environmental and relational factors that may have contributed to the onset of symptoms.

An operative method is described by Kales and is called "D.I.C.E." (Describe, Investigate, Create, Examine).The program details the conditions of the patient, caregivers and the environment at each step of the approach and describes the "concrete" and environmental behavioral interventions that should be considered. In short, the components are: *D*: Describe - the situations and contexts related to the appearance of behaviors; *I*: Investigate - examine aspects of the patient's health, drug treatments, sleep disorders or physiological variables; *C*: Create - develop a plan for the prevention and management of behavioral problems shared with the caregiver and

[29] *See* Giuliano Binetti et al., *Behavioral Disorders in Alzheimer Disease: A Transcultural Perspective,* 55 Arch. Neurol. 539 (1998).
[30] *See* George S. Alexopoulos et al., *Cornell Scale for Depression in Dementia*, 23 Biological Psychiatry 271 (1988).
[31] *See* Angelo Bianchetti et al., *Pharmacological Treatment of Alzheimer's Disease*, 18 Aging Clinical Experimental Rsch. 158 (2006).

operators; *E*: Examine - evaluate the effects of the interventions and make changes if necessary.[32]

Pharmacological interventions should be reserved for situations in which N.P.S. put the patient or caregivers at risk, when symptoms are very disturbing or when non-pharmacological approaches are not possible or have been found to be ineffective.

Pharmacological treatment of B.P.S.D.s should be undertaken after making sure that B.P.S.D. have no physical causes are not caused by other drugs they do not respond to non-pharmacological interventions.

In the following cases, it is possible to make use of drugs: I)if someone has made an accurate diagnosis of the level of deterioration; II) if all non-pharmacological welfare and management measures have been applied at the family and environmental level; III)if the cause of the symptoms, for example a disease, has been looked for; if the possible side effects of the drugs have been evaluated according to the characteristics of the patient; IV) if the particular response to drugs of the demented subject has been considered, for example the paradoxical effect of benzodiazepines.

A European multicentre study is underway, funded by the European Union, of which the undersigned is part as coordinator of the Dementia Center of the Mantua Hospital.[33] The study is called RECage (REspectful Caring for the AGitated Elderly), and it is committed to identifying the most effective ways of taking charge and treating behavioral decompensation, which often requires temporary hospitalization of the patient in the so-called Special Care Unit type B [hereinafter S.C.U.-B.] centers where an attempt is made to treat the disorder with non-pharmacological treatment, allocating this only to temporary phases. The results are compared with those obtained by the Special Care Unit type A [hereinafter S.C.U.-A.], where the patient is received and treated pharmacologically. The leaders of this study are Prof. Carlo Alberto Defanti and Dr. Sara Fascendini, respectively Health Director and Primary of one of the S.C.U.-B. leaders in Italy, the one present in Gazzaniga (B.G.), managed by F.E.R.B. Onlus. This is due to the fact that, to date, there are no univocal answers on the strategies to be adopted in the event of behavioral decompensation. There are ten European hospitals enrolled, including the Dementia Neurology Center of the Civil Hospital of Mantua, coordinated by the author.

In S.C.U.-A., where behavioral decompensation is treated pharmacologically, there are rules for prescribing the therapy:I)In the demented elderly the dosages are

[32] *See* Helen C. Kales et al., *Management of Neuropsychiatric Symptoms of Dementia in Clinical Settings: Recommendations from a Multidisciplinary Expert Panel,* 62 J. Am. Geriatric Soc'y 762 (2014).

[33] *See* Mirko Avesani et al., *Respectful Caring for the AGitated Elderly*, Asst Mantova (https://www.asst-mantova.it/recage) (last visited Feb. 12, 2022).

lower than in the young and non-demented people; II) Hypoalbuminemia causes the drug to remain in the site of action for longer; III) Reduced hepatic and renal metabolism slows their elimination with the risk of toxicity and interaction; IV) Their half-life is increased because being lipophilic they accumulate in the increased fat mass of the old man. V)Lewy's dementia manifests hypersensitivity to neuroleptic drugs.

The drugs to be prescribed belong to the families of antipsychotics (typical and atypical, i.e. first and second generation), of antidepressants, benzodiazepines, and anticonvulsants. Obviously, the pharmacological choice cannot be separated from a correct nosographic and nosographic identificationetiopathogenesis of the B.P.S.D. type.

11. INVESTIGATORS RECOMMENDED IN INVESTIGATED / ACCUSED PATIENTS

By now, the classic psychiatric report is completely outdated, considering that, as we have seen, there are neuropsychiatric symptoms associated with dementia, which are of neurological relevance.

First of all, a thorough neurological evaluation is needed with at least first and second level tests (by first level the author suggests e.g. the Mini Mental Test Evaluation, [hereinafter M.M.S.E.]; by second level the author suggests e.g. the clock test and the Frontal Assessment Battery [hereinafter F.A.B.]. The integration of the clinical examination (which highlights any apraxias, or visual field deficit, or language deficit in informal interview, or orientation deficit or presence of delusions and hallucinations, as well as neuromotor focal deficits) with these three tests, allows the diagnoser to investigate different cognitive functions, both cortical and subcortical, both frontal, temporal lobe and hippocampus.

To these tests, the N.P.I. scale must be applied, to better investigate behavioral disorders and the Geriatric Depression scale [hereinafter G.D.S.], a scale that helps us to understand the degree of depression and the quality of the head in the context of a possible decay. cognitive with probable dementia manifestation.

It is also important to understand the progress and time of presentation, if it was gradual and progressive or acute / subacute. It is essential to understand if the disorders are fluctuating or persistent, if they reduce the person's personal autonomy. Below we present the two rating scales Activities of Daily Living [hereinafter A.D.L.] and Instrumental Activities of Daily Living [hereinafter I.A.D.L.].

To calculate the A.D.L. index, a simplified scale is used which provides for the assignment of a point for each independent function in order to obtain a total

performance result ranging from 0 (complete dependence) to 6 (independence in all functions). For the attribution of the score it is necessary to translate the three-point assessment scale (without assistance, partial assistance, or complete assistance) into the dichotomous classification "employee / independent". Also for the calculation of the I.A.D.L. index, a simplified scale is used which provides for the assignment of a point for each independent function in order to obtain a total performance result that varies from 0 (complete dependence) to 8 (independence in all functions). After this evaluation, it is advisable to proceed with the complete Neuropsychological tests, in order to have both a confirmation and a better characterization of the deficits.

It is acceptable, if the patient is being investigated for a differential psychiatric pathology diagnosis, to proceed with the personality tests: Minnesota Multiphasic Personality Inventory-2 (M.M.P.I.-2); Million Clinical Multiaxis Inventory-III (M.C.M.I.-III); Dissociative Experiences Scale-III (D.E.S. II). In subsequent steps, we move on to laboratory and instrumental evaluation, which have now become fundamental. At the laboratory level, by means of a lumbar puncture we evaluate the alterations of some cerebrospinal fluid (C.S.F.) proteins (protein 14.33, sign of neuronal necrosis; protein TAU, pTAU, B-amyloid 1-42, ratio pTAU / B-amyloid 1-42) and the presence of some antibodies that today characterize some forms of encephalopathy, autoimmune encephalopathies (among these antibodies to N-methyl-D-aspartate (N.M.D.A) receptor, and other neuronal receptors). They are newly discovered encephalopathies that can begin with neuropsychiatric disorders as well as with epileptic seizures. The onset of a disorder of this type, in a person who was in full well-being, must always make us keep this possibility in mind. At the instrumental level, in addition to a classic M.R.I., a morpho volumetric M.R.I. is essential to understand which brain areas are subject to atrophy. It is also important to perform a P.E.T-C.T. scan with fludeoxyglucose, to highlight brain areas with.. reduced cerebral metabolism, to be compared with neuropsychological tests and clinical examination. Furthermore, a new method is gaining ground: Functional Magnetic Resonance Imaging [hereinafter f.M.R.I] in resting state mode. This method, combining the high temporal definition of the electroencephalography [hereinafter E.E.G.] (in the order of multiple sclerosis) with the high definition of the f.M.R.I, allows to highlight activations and deactivations related to brain electrical biorhythms using the so-called independent components (I.C.A.) technique.

VOLUME 6 ISSUE 2 OBITER DICTUM

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/13812

Securitizing Notes of Small Businesses and Needy Workers

EDITORIAL NOTE
A previous version of this paper was published in Bloomberg Tax (09/28/2020). The current one has been reprinted with the Author's permission.

Businesses, whether large ones or small ones, such as restaurants and small shops, are presently closed and some of their employees have been laid off.[1] Currently, the government is lending money to these small businesses[2] and the now unemployed workers for their sustenance. It then collects the payments from some of the borrowers and the source of the rest of the money is taxes.[3] Since not all, or perhaps only a few, small businesses own real estate, they might sign notes promising to repay the loans but can offer no asset backing. Presumably, the nation's financial deficit is growing.[4] The government adds the aggregate of the loans to the country's costs and tax collection.[5]

[1] *E.g.,* Andrew Bender, *COVID-19 Claims Nearly 73,000 US Businesses, with No End in Sight,* Forbes, July 29, 2020, *available at* https://www.forbes.com/sites/andrewbender/2020/07/29/covid-19-claims-nearly-73000-us-businesses-with-no-end-in-sight/#42442d75d73f (last visited July 31, 2020).

[2] Brianna McGurran & Kelly Anne Smith, *List of Coronavirus (COVID-19) Small Business Loan and Grant Programs,* Forbes, Apr. 10, 2020, *available at* https://www.forbes.com/sites/advisor/2020/04/10/list-of-coronavirus-covid-19-small-business-loan-and-grant-programs/#50b8d323cc4b (last visited July 31, 2020).

[3] *See* Kelly Anne Smith, *Congress Approved More Funding for the Paycheck Protection Program. Here's What You Need To Know,* Forbes , Apr. 22, 2020, available at https://www.forbes.com/sites/advisor/2020/04/22/the-senate-approved-more-funding-for-the-paycheck-protection-program-heres-what-you-need-to-know/#329f97304084 (noting that loans will be forgiven if certain requirements are met).

[4] Cong. Budget Office, *Monthly Budget Review for June 2020, available at* https://www.cbo.gov/publication/56458 (last visited July 31, 2020) (noting that estimated "federal budget deficit in June 2020 was $863 billion, compared with a deficit of $8 billion in the same month last year," due "economic disruption caused by the 2020 coronavirus pandemic" and "federal government's response to it").

[5] *E.g.,* Jeff Cox, *The Government Budget Deficit Is About to Explode to Fight the Coronavirus,* CNBC, Mar. 22, 2020, *available at* https://www.cnbc.com/2020/03/22/government-budget-deficit-is-about-to-explode-to-fight-the-coronavirus.html (last visited July 1, 2020).

1. Is there any other way in which some, if not all, of these loans could be financed by investors? An imperfect model that was tried and succeeded, for a while, to an extent, it was the securitization of mortgages.[6] The good and bad experiences of the mortgage securitization helped design a better securitization system for the notes of small businesses and employees.[7] To be sure, mortgages make a more solid backing than notes. In addition, although we have a long track record of recessions, and therefore we may have a good sense of what recovery looks like in the current case, we do not, and cannot, know what the aftermath of the coronavirus crisis would be like. It might cause a fundamental change to our economy and, as importantly, changes in people's habits.

2. The securitization of the notes is not similar to that of mortgages and to mutual funds holding notes. The comparison of securitization of the proposed notes to the securitization of mortgages or to pools (mutual funds) of corporations' notes is not precise. In fact, the first step of securitization was the pooling of notes, but they were offered by very large corporations.[8] In addition, there are currently mutual funds that hold small notes issued by corporations. They are fairly safe and help both parties.[9] Moreover, small business investment companies make equity and debt investments in small businesses,[10] and business development companies generally invest in debt of middle-market companies.[11] Small restaurants and other small businesses during the coronavirus era are different from mortgages during a market decline. Most small businesses do not own real estate but rather rent their offices and restaurants.

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[6] *See, e.g.,* Stephen L. Schwarcz, *The Future of Securitization,* 41 Conn. L. Rev. 1313 (2009) (identifying defects with use of securitization).

[7] *See* Bd. of Governors of the Fed. Reserve Sys., Report to the Congress on the Availability of Credit to Small Businesses (Sept. 2017), *available at* https://www.federalreserve.gov/publications/2017-september-availability-of-credit-to-small-businesses.htm (last visited July 31, 2020) (noting that "securitization of small business loans has the potential to substantially influence the availability of credit to small businesses" and "[p]otential benefits exist for lenders, borrowers, and investors"; "[h]owever, the obstacles to securitizing small business loans are large").

[8] *See What Is the Difference Between Factoring and Securitization?,* Companeo, *available at* https://www.companeo.co.uk/factoring/FAQ/difference-factoring-and-securitisation (last visited Aug. 3, 2020) (noting that securitization is "better suited to large companies"); *see generally* Tamar Frankel & Arthur B. Laby, The Regulation of Money Managers (Ann Taylor Schwing ed., 3d ed. 2015); Tamar Frankel, Securitization: Structured Financing, Financial Assets Pools, and Asset-Backed Securities (Ann Taylor Schwing ed., 2d ed. 2005).

[9] *See, e.g., Short-Term Debt Funds,* Coverfox.com, *available at* https://www.coverfox.com/personal-finance/mutual-funds/short-term-funds/#:~:text=What%20are%20short-term%20debt%20funds%3F%20A%20short-term%20debt,usually%20accompanied%20by%20stable%20returns%20and%20modest%20risks.

[10] U.S. Small Bus. Admin., *Apply to Be an SBIC, available at* https://www.sba.gov/partners/sbics/apply-be-sbic#section-header-0 (last visited Aug. 4, 2020).

[11] FS Investments, *Business Development Company (BDC), available at* https://fsinvestments.com/education/bdc/ (last visited Aug. 4, 2020); Andrew Weinberg, *Private Equity Will Show Its True Colors in the Covid-19 Recovery,* Forbes, July 8, 2020, *available at* https://www.forbes.com/sites/andrewweinberg/2020/07/08/private-equity-will-show-its-true-colors-in-the-covid-19-recovery/#2a4a61bc59ed (defining "middle-market" as firms with annual revenues of $25 million to $1 billion).

The notes they issue are of relatively small amounts. These small businesses may not reopen even after the virus is overcome. Small restaurants may already have outstanding loans. Customers might acquire the habit of ordering cooked food, or the habit, and perhaps, the pleasure of cooking at home. Supported employees might not return to work for health, age, or other reasons. In summation, the borrowers' note-obligations are fairly risky.

3. Would health recovery bring about the same businesses to full life? Not necessarily. Restaurants may have to share their business with the rising food and cooking suppliers and services. Besides, people may have changed their habit of meeting in restaurants.[12] Habits take time to form, but once they do, they take time to change or revert to old habits. History has demonstrated a similar result. Before cars took over and substituted horses and buggies, the "buggy whip" was necessary and highly used for transportation. When carts were substituted by cars, the industry that produced the "buggy whip" was gone.

4. In sum, the risk associated with loans to small businesses is different from the risks of loans in a traditional recession. To be sure, the government could substitute its direct lending by insuring some of the risk associated with the notes portfolio. That would give lending banks a measure of comfort that if a wave of bankruptcies occurred as a result of these general economic and habitual changes, they would not get caught holding all or most of the bad notes. Another possible support is the government's guarantee of bank losses, but some of the notes will support not only the banks' business, but also the small business.

5. What are the benefits in pooling such small notes and selling participations in the pool to investors? Why would investors buy such participations?

a. The Treasury may help. Let the Treasury give a discount from taxes to such investments. For some investors this might be sufficiently attractive to cover the risk of failures to pay the notes. The benefits of securitizing these notes are numerous for many participants as well as for the country.

b. The notes-issuers will not be worse off, except that they might be subject to bankruptcy rules rather than viewing their obligations as fully enforceable. There is some justification for this reaction; yet, the law may offer the borrowers in this case some relaxation as relief, and if the issuers go through banks, the government may allow

[12] *See, e.g.*, Heather Lalley, *How Will the COVID-19 Crisis Change Consumer Dining Behavior?*, Restaurant Bus. Online, Apr. 10, 2020, *available at* https://www.restaurantbusinessonline.com/consumer-trends/how-will-covid-19-crisis-change-consumer-dining-behavior (last visited Aug. 3, 2020) (citing poll data suggesting that consumers may have adopted long-term changes in restaurant dining behavior).

banks the type of relaxation that would help the borrowers. No law is necessary for these rules, because the Treasury may have the authority to offer it, provided it is offered to all banks in the same position. In fact, currently, banks have some discretion to relax their requirements with respect to any borrower. That is, although banks ordinarily are reluctant to lend to borrowers that are close to bankruptcy, they may set different criteria for this type of borrower.

c. Investors may be somewhat worse off as compared to lending to other businesses. However: (i) their investments are not a donation; (ii) the investment should be given public recognition that it deserves; (iii) the successful revival of any supported business should be publicized; (iv) the recipients of the money may be given a platform to thank the anonymous buyers of the securitized notes. Pictures may show the opened restaurants, and, if they so wish, their owners and workers. These are not and should not be financial rewards. Yet, they are valued more than any monetary rewards. The satisfaction of helping while risking some of one's money may balance the risk.

d. However, the donors' names, whether personal or incorporated or in groups, should not be publicized. If pressure to publicize is great, then it would be allowed only if the donees' group-members are joined. In sum, business and finance need not be drained of all humanity and satisfaction of sharing.

e. In addition, banks should institute appropriate safeguards. The bank should be responsible for the quality of the manager of the pool. Moreover, the cost of the pool should not be charged to any other mutual fund or pool.

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VOLUME 6 ISSUE 2 OBITER DICTUM

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/13921

A New International Crime of Ecocide?

As part of an internship in the discipline of international criminal law, I came into contact with a topic of debate that seems to be of interest to many actors in academic circles - and beyond. The new international crime of ecocide. In this regard, in early 2021, I had the opportunity to interview two scholars immersed in the topic, Professor Emanuela Fronza, from the Department of Legal Sciences of the University of Bologna and Professor Adán Nieto Martin from the University of Castilla-La Mancha. They kindly answered my questions about the international crime of ecocide.

PROFESSOR FRONZA

1. The introduction of a new crime of ecocide is increasingly at the center of debate. Can you tell us more about this controversial topic? Climate urgency, climate crisis, increases in average global temperatures, CO2 and greenhouse gas emissions, depletion of ecological resources, and extension of urbanization to the detriment of wild areas. The expressions of ecological concerns continue to multiply, but they are all based on what science tells us about the state of the planet: we must intervene immediately. If not, the present dangers will damage our future irreversibly. They will make the Earth uninhabitable for human beings and other forms of life. It is not a question of if, but of when it will occur, if we do not change the way these crises are managed. That a clear emergency exists, cannot be disputed. What is unresolved and extremely complex, however, is the debate about the measures to be taken and their effectiveness.

Faced with this urgency, made more evident by the global pandemic, initiatives about what measures ought to be taken are burgeoning. Among them is the proposal for a new international crime of ecocide.

Ecocide comes from the Greek word *"oikos"*, meaning home, and the Latin verb *caedere*, to kill. Literally, it means the destruction of the common home of humans and other inhabitants of planet Earth. In this sense, "ecocide", a word with powerful rhetorical resonance, evokes another term, "genocide".

At present, however, the rhetorical force of the term is not accompanied by a precise legal definition. Highlighting this point is essential. On one hand, there are many types of conduct - even lawful ones - which significantly impact the environment, damaging and depleting available resources. Some of them are, however, already punishable under environmental criminal law. On the other hand, introducing a new international crime, namely "ecocide", requires further necessary steps: to identify the conduct that could be considered criminally relevant and, subsequently, to determine which ones are serious enough to reach the threshold of severity typical of international crimes.

As far as the origins of ecocide are concerned, the concept first appeared in the mid-1970s in relation to the environmental damage caused by the use of Agent Orange during the Vietnam War. The ecological damage that was caused by its use generated great concern.

Currently, the call for a new crime of ecocide is at the core of a renewed interest in our planet's ecological woes; as such, it is advocated by a number of civil society organisations (such as End Ecocide on Earth; End Ecocide Sweden; Global Alliance for the Rights of Nature; Earth Law Alliance; Stop Ecocide Foundation) and institutional initiatives. While the Rome Statute of the International Criminal Court (ICC) does not contain a specific provision on ecocide, moves are being made in the ICC framework to deal with such issues. In particular, the 2016 Policy Paper on Case Selection and Prioritization marked a step towards environmental concerns. That Policy Paper requires the Office of the Prosecutor of the International Criminal Court (OTP), which is responsible for analyzing those situations that could fall under the jurisdiction of the court, to select and prioritize the prosecution of crimes which involve damage to or destruction of the environment. It should be noted that the Paper – despite its limited impact – expresses the OTP's intention to address these issues.

This fits well within a growing call for action, including the formulation of a specific international crime. Such an endeavour requires a careful justification as to why existing instruments are insufficient for resolving the challenges of the climate emergency. A significant problem in dealing with the climate crisis is that, at present, legal instruments for protecting the environment are numerous, fragmented and not rationally organized at international, regional and domestic levels. The seriousness and

systematic nature of the criminal phenomena and the insufficiency of the existing protection system call for a new international crime. The introduction of a separate offence would fill this gap, providing structure and universal protection, which could be implemented at national, regional and international levels.

2. Do you consider Criminal Law as an instrument adequate to respond to the climate crisis? First, if ecocide is to be prosecuted, it must be kept in mind that not every violation can fall under this crime, but only those environmental violations that are more serious and massive. An important consideration in order to correctly criminalize ecocide may be to distinguish this legal category from the one of the ecocrimes, as we have already done with the working group under the supervision of Laurent Neyret in 2015. In addition, the reflection on the criminalization of ecocide could also be an opportunity to rationalize the existing material. In this respect, I believe that criminal law can be used, but not solely by itself. Civil law and administrative law will also be needed.

In other words, criminal law can perform the function of «giving a name», but only to the most serious violations of the "common home" of humanity. With regard to the crime of ecocide, it may answer the purpose of conferring a denomination to serious phenomena and making people aware of the climate crisis.

As stated by the chairwoman of the Monsanto Tribunal *Françoise Tulkens*, "[t]his offence still does not exist and in order for that to happen, it first has to be *precisely* defined". However, the introduction of a new criminal offence of ecocide requires the *precise* description of its constitutive elements.

The path to a new crime demands awareness that, for the codification of a vaguely defined legal concept into a criminal offence, it is not sufficient for it to be anchored to a narrative/symbolic/pedagogical function. The outcome of such a complex law-making process is uncertain.

A key question in our discussion concerns a fundamental choice, that of whether international criminal law or economic criminal law should drive the introduction of a crime of ecocide. The question then arises whether the latter could not be located at the intersection of the two disciplines. In this case, would it require a simple evolution of international criminal law or a real integration of new notions within it? In the latter case, which discipline of law should cover the center and which the periphery: classical international criminal law or economic criminal law?

A commitment not only from civil society and governments, but also from international criminal lawyers is needed. Only political will along with the required legal

technical knowledge, and combined with imagination, can develop thinking about how to respond to the climate crisis.

It may be that the conclusion is that it is either not suitable, useful or necessary to introduce a new international crime. It could be that legal measures and mechanisms already exist, even outside criminal law, such as in administrative law or civil law. It seems important to not assume a binary logic in dealing with this. Rather, different steps can mark the resolution of this complex process. To this regard, harmonization, a constructively collaborative dialogue between national judges and cooperation between institutions might actually foster paths of universalization towards the achievement of a definition of ecocide to be agreed on.

Ultimately, if the crime of ecocide is to be introduced, a *precise* definition of its constitutive elements has to be found and adopted. The definitions of its component parts (namely of the contextual element) should be consistent with general principles of criminal law.

In conclusion, I hope that the debate will continue, that it will be conducted responsibly to avoid trivializing the category of international crimes and that it will be accompanied by a multi-level discussion: international, regional and national. With the eventual creation of an *ad hoc* Committee, composed of representatives from the academic, judicial and corporate worlds. In particular, the involvement of multinational companies in the process is essential, so that they can be socialized to the message that this indictment does not mean *criminalizing* them but making them *responsible*.

The debate on the need for a crime of ecocide will also be an opportunity to reflect on how to legally translate the need to protect a new universal common good, the common home of humanity. Furthermore, it will promote the acknowledgment of the interdependence between human beings and nature. The protection of nature, in this sense, is necessary for the human being.

Indeed, establishing a new pact for humanity's common home is a challenging, crucial target, which is not to be addressed by criminal law alone. To conclude, if ecocide is to become an international crime, thus signaling awareness of and an assumption of responsibility vis-a-vis the climate and health crisis, its contours will have to be carefully defined in accordance with the functions and limits proper of criminal law. We better hurry, before it is too late.

PROFESSOR MARTIN

3. The instance of criminalization of ecocide presents the criminal law sphere with some challenging issues. Among them is the question of identifying the appropriate sanctions for this new crime. What can you tell us about this? The criminalization of ecocide as an international crime presents many legal and technical questions regarding its characterization, but in my opinion, the debate about ecocide should contribute to opening up a meaningful reflection on the shaping of criminal policy in international criminal law. The iconography on which international criminal law is based remains Nuremberg. A framework of discussion that was characterized by a retributive view of criminal law and an identification of international criminal law with warfare contexts, in which the perpetrators were mainly state agents.

Ecocide poses the challenge of building an international criminal law for peacetime, in which the main actors can also be multinational companies, and in which the victims, together with the reparation of the harm suffered, must enjoy the major role. This change of perspective, and of interpretation of what international criminal law should be, seems to me to be more important than the criminalization of ecocide itself. Perhaps, for instance, some cases of very serious harms to the environment could be considered under the existing case law pertaining to crimes against humanity, in which results such as the damage to a certain community lifestyle, forced transfers and the submission of a population to conditions that endanger its life or its health, are already contemplated.

If we place international criminal law within the framework of corporate crime, one of the most important debates concerns the introduction of legal persons' criminal liability. This should be linked to compliance programs and human rights due diligence obligations. At this moment, a draft of a directive about due diligence is being discussed at the EU. In some countries, such as France, there are already laws that oblige parent companies to monitor respect for human rights and the environment in their subsidiaries or in the supply chain. A similar piece of legislation is currently being discussed in Germany. In the last week, a large French supermarket was sued for its involvement in the devastation of the Amazon region and other large textile companies, such as Zara, have also been prosecuted for using slave labor for using cotton that had been produced in China by the Uighurs. Therefore, I believe that the time has come to discuss the introduction of the criminal liability of legal persons into international criminal law, a discussion which, as is well known, dates back to Nuremberg. At the moment, moreover, there is an increasingly widespread model in comparative law for

establishing this liability. It is a model similar to the Italian model established in Legislative Decree 231.

What we lack at the moment are new sanctions, a new system of punishment. To fine a multinational company for committing a crime against humanity, genocide or, in the future, ecocide, seems to me a ridiculous idea. Criminal sanctions must have the expressive potential of being socially perceived as genuine punishment. The fine also has other no less important problems. It would seem absurd if, for instance, Italy imposed a fine on a large Italian company for a crime of ecocide committed in Brazil or Ecuador, and if the funds coming from that fine went to the Italian Treasury. The same would happen, for example, with the seized funds, if the company had obtained some kind of profit from the crime.

And what could these sanctions be? I have been proposing formulas, such as an equity fine or capital fine, for a long time. This is a penalty that is already used in countries like Australia. An equity fine consists of reducing the capital of the company, depreciating the value of the shares, and then issuing new shares for the same value. Then, the latter could be managed by the victims, empowering them within the entity. In this way, they would be able to influence the management of the company, and use the benefits of these shares for projects addressing the devastated community etc.

However, there are other possible sanctions. Think, for example, of a "traditional" fine, the amount of which is used to build a trust fund administered by victims, and that functions as a "spin off" for reparations. Similarly, we can think of a model of intervention penalty, in which victims, for instance, become part of the monitoring body.

To conclude, what I want to emphasize is that the debate on the crime of ecocide must focus also on developing an appropriate system of penalties, especially for legal persons, and on the reparation of the harm. As far as I can see, efforts have focused on the definition of the crime, which represents only a small part of the problem.

4. What role could restorative justice play, taking into consideration the characteristics of the victims and perpetrators of these violations? Restorative justice plays a very marginal role in the current criminal justice system; it is almost an "exotic" element. My view is that it will gradually become more important in the future. Then, as it evolves, from being almost an alternative solution to criminal law, as is still conceived today, it may become one of its constituent components. At this point, it would be possible to proceed to reshape elements of the criminal justice system from its base. The "traditional" criminal law approach to the whole social conflict generated by a case of very serious environmental pollution, reduces the problem to very specific elements; those that serve to establish the *fattispecie.* It neglects the other elements that

make up the conflict generated by the crime. The social damage produced by a crime is much more complex than the damage to a legal good. In a similar way, it is illusory to think that the world would be much better for everyone by imposing a 10-year prison sentence on the perpetrators of an environmental catastrophe.

Therefore, restorative justice may be, in my opinion, a more effective way to deal with corporate macro-crime cases. Corporate victims in many cases need the company that caused the damage to continue to invest and provide jobs in the area. In addition, the company itself will need to reacquire its legitimacy in the social context in which it operates, if it intends to pursue economic activities in the region that has been devastated by its past wrongdoings. In other words, the company needs to be seen in a positive light to continue developing its activities. Actually, restorative justice in these cases could be interpreted as a special manifestation of corporate social responsibility. Today it is often said that the purpose of corporate social responsibility consists precisely in managing the legitimacy of the company.

The problem is how to combine corporate restorative justice with the criminal justice system. A proposal to be discussed would be the confirmation of what I have called *restorative deferred prosecution agreements*. Well known in the United States, but by now also in some EU countries, this type of agreement is a system of probation for the legal person, who must comply with a series of conditions imposed by the prosecutor. The proposal is that this tool be used to enable companies and victims, on a voluntary basis, to participate in restorative processes, under the direction of a mediator. The European directive about the protection of the victims, recognizes the right of restorative justice to all of them. There is no reason to exclude victims of corporate activities, who have a degree of helplessness and, therefore, a need for rights, at least as great, if not greater, than the victims of other traditional crimes.

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VOLUME 6 ISSUE 2 ARTICLES & ESSAYS

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/14076

Received: 27 Jan. 2021 | Accepted: 14 Febr. 2021 | Published: 20 Dec. 2021

Law in a Time of Corona: Global Pandemic, Supply Chain Disruption and Portents for "Operationally-Linked (but) Legally Separate" Contracts

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ABSTRACT

The novel coronavirus (Covid-19) pandemic has resulted in the disruption of activities in major centres of global production, with adverse portents for contractual obligations across global supply chains. The global pervasiveness and dynamic propagation of the risks arising from contractual failures provides an opportunity to reconsider the nature and impact of mechanisms for excusing failure to perform contractual obligations under adverse circumstances (Excuse). Such mechanisms include those found in the general law (for example, frustration in common law and analogous doctrines in civil law traditions) and contractual clauses (for example, Force Majeure and hardship clauses). Establishing extant rights and obligations under current contracts may provide only limited illumination on how parties will address these failures. Principles in economics of contract (e.g. incomplete contract and transaction cost theories) and the commercial reality of global supply chains both suggest that parties tend to lean towards contract- and relationship-saving adjustments, rather than strict enforcement of rights. Therefore, this article analyses the doctrinal and contractual regimes of Excuse with a view to assessing their respective scopes for transaction and relationship saving. It also highlights the peculiar nature of supply chain relationships wherein exchange partners enter into a sequence of dyadic relationships aimed at delivering a good or service to the end user. The tension between that operational logic and the legal principle of privity of contract makes these relationships – undergirded as they are by what we call "operationally-linked (but) legally separate" (O.L.L.S.) contracts – peculiarly vulnerable to mismatches in their Excuse regimes.

Mismatches occur where failure to perform a determinant contract is more easily or much earlier excusable than in a dependent contract within the same chain operation. This may, in turn, exacerbate risks of supply chain disruptions in a pandemic scenario. The article designs a framework by which the doctrine-contract complex in the regimes may be used to test the dynamic scenarios of a global pandemic for the purpose of scanning for such mismatches. This framework will be useful in both post-event circumstances, as parties embark on relationship-saving negotiations, and in designing ex ante risk management measures. Through the understanding of the peculiarity of supply chain relationships and the O.L.L.S. contracts, this article also proposes to open up new directions in which the insights therefrom might be useful. An example suggested and prefatorily explored in this article is in the "governance beyond privity" conundrum in the context of supply chain disruption. Another is its potential contribution to the emerging multifactorial approach to determining frustration of contract in some common law courts.

KEYWORDS

Contract Law; Force Majeure; Supply Chain; Covid-19; Incomplete Contract

JEL CODES

K120, L140, D860

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INTRODUCTION

The World Health Organisation [hereinafter W.H.O.] declared the novel coronavirus disease, Covid-19, a pandemic in the second week of March 2020.[1] This follows the spread of the epidemic from its ground zero in the Chinese city of Wuhan to about one hundred and thirteen other countries. At the time of that declaration, one hundred and eighteen thousand cases had been recorded, resulting in four thousand two hundred and ninety-one fatalities. By the end of March 2020, fourteen of the world's leading economies in gross domestic product terms[2] were on the list of the leading 20 hubs of the pandemic.[3] The sweep of the pandemic portends dire situations for global production and trade, or global value chains [hereinafter G.V.C.s]. To signalise the impact of the pandemic on the G.V.C.s, China is a major hub in global production networks and is responsible for twenty per cent of global trade in manufacturing intermediate products.[4] Its share of input in some products, for example computers, could be even larger by far.[5]

Following a rash of closures of ports of entry and effective wind-down of global logistics, the United Nations Conference on Trade and Development [hereinafter U.N.C.T.A.D.] predicts the impact of the pandemic on the world's economies as follows:

> The most badly affected economies will be oil-exporting countries, but also other commodity exporters, which will be losing more than one percentage point of growth, and those with strong trade linkages to the initially shocked economies. Countries like Canada, Mexico and the Central American region, in the Americas; countries deeply inserted in the G.V.C.s of East and South Asia; and countries in proximity of the European Union will likely experience growth decelerations between 0.7 and 0.9 per cent.[6]

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[1] *W.H.O. Director-General's opening remarks at the media briefing on COVID-19 (Mar. 11, 2020),* https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—11-march-2020 (last visited Mar. 23, 2020).

[2] World Bank Group, World Development Indicators Database, World Bank, 23 December 2019, https://databank.worldbank.org/data/download/GDP.pdf (last visited Mar. 23, 2020).

[3] W.H.O., Coronavirus Disease (COVID-19) Dashboard,https://covid19.who.int (monitored on Mar. 27, 2020. The situation deteriorated significantly in the following months, with the same dashboard monitored on Sept. 21, 2020, at 4.30 p.m. C.E.T., showing that the total number of cases at thirty million, nine hundred and forty-nine thousand, eight hundred and forty as well as nine hundred and fifty-nine thousand, one hundred and sixteen deaths.

[4] *See* U.N.C.T.A.D., Global Trade Impact of the Coronavirus (Covid-19) Epidemic' (Mar. 4, 2020), https://unctad.org/en/PublicationsLibrary/ditcinf2020d1.pdf (last visited Mar. 27, 2020).

[5] *See* Fred Pearce, Confessions of an Eco Sinner: Travels to Find Where My Stuff Comes From 159-68 (2008).

[6] U.N.C.T.A.D., Coronavirus shock: a story of another global crisis foretold and what policymakers should be doing about it (Mar. 9, 2020), https://unctad.org/en/PublicationsLibrary/gds_tdr2019_update_coronavirus.pdf (last visited Mar. 27, 2020).

The impact of these mega-trends will not be unpredictable at firm level. The G.V.C.s, which represent 80% of global trade,[7] have been described as "globally dispersed and organisationally fragmented production and distribution networks."[8] These chains, or networks, of firms dealing across national and organisational boundaries are coordinated through models that span anything from the more hierarchical or vertically-integrated (governed through ownership or high managerial control) to the more horizontal (coordinated, more or less by a lead firm, through a chain of contracts). It also embraces complex systems such as intertwined supply networks [hereinafter I.S.N.s] defined as "interconnected [supply chains] which, in their integrity secure the provision of society and markets with goods and services".[9] Thus, while recognising that G.V.C.s span a broad range from multinational corporations [hereinafter M.N.C.s], at one end, to the loosest supply chains, at the other end, supply chain in this article is used as a catch-all for all manners of sequential, contract-based production synergies, whilst "G.V.C." is used when the meaning includes more hierarchical forms such as M.N.C.s.[10]

Regardless of the coordination model, contracts are important to the organisational logic of the G.V.C.s. Even M.N.C.s increasingly rely on contract-based strategies for global production, including offshore sourcing, subcontracting and licensing.[11] Meanwhile, besides global producers, logistics companies that facilitate supply chain activities now commonly pursue operational efficiency through contract-based strategies such as alliances, slot-sharing, dedicated terminals, and performance-based pricing contracts.[12] In the light of these complex linkages, any major disruption to production and logistical activities will, through backwards and forward risk propagation, adversely affect the ability of firms to perform interlinked contracts up and down the chains.

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[7] *See* U.N.C.T.A.D., *World Investment Report: Global Value Chains – Investment and Trade for Development*, at xxii, U.N.C.T.A.D./WIR/2013, Sales No. E.13.II.D.5 (2013).

[8] Gary Gereffi, John Humphrey and Timothy J. Sturgeon, *The Governance of Global Value Chains*, *in* GLOBAL VALUE CHAINS AND DEVELOPMENT: REDEFINING THE CONTOURS OF 21ST CENTURY CAPITALISM 111-12 (2018).

[9] Dmitry Ivanov & Alexandre Dolgui, *Viability of intertwined supply networks: extending the supply chain resilience angles towards survivability. A position paper motivated by COVID-19 outbreak,* 58 INT'L. J. PROD. RSCH. 2904, 2906 (2020).

[10] In fact, Gereffi et al., *supra* note 8, have distilled five typologies of G.V.C. coordination from their analysis of relevant factors (*See infra* Section .5.2. for an overview of that analysis). *See also generally* Gary Gereffi, *Global Value Chains in a Post-Washington Consensus World*, *in* GLOBAL VALUE CHAINS AND DEVELOPMENT: REDEFINING THE CONTOURS OF 21ST CENTURY CAPITALISM 400 (2018).

[11] *See* Sara U. Douglas, Stephen A. Douglas and Thomas J. Finn, *The Garment Industry in the Restructuring Global Economy*, *in* GLOBAL PRODUCTION: THE APPAREL INDUSTRY IN THE PACIFIC RIM 5 (Edna Bonacich et al. eds., 1994).

[12] *See generally*Kum Fai Yuen & Vinh V. Thai, *The Relationship between Supply Chain Integration and Operational Performances: A Study of Priorities and Synergies*, 55 TRANSP. J. 31, 45 (2016).Citing Trevor D. Heaver, *The Evolving Roles of Shipping Lines in International Logistics,* 4 INT. J. MAR. ECON. 210 (2002).

A last notable outcome will be the loop-back of imminent massive failure of contracts into the larger economy. The financial sector will be impacted as many of the relevant contracts are typically underlain by financing supports. Major obligations that will be highly strained under the circumstances include those with respect to loans and credit support – letters of credit, overdrafts and term loans supporting working capital and procurement – as well as insurance of logistical activities, etc.. This may lead to cutback in the financial sector, with a spiralling effect on entire financial markets and broader economies.

Since the eye of the ripple will be the risk of failure of contracts, this is one key area that will engage the attention of commercial actors and their advisers in the coming months. We expect frenetic efforts to review relevant provisions of current contracts, with a view to ascertaining extant rights and obligations that may be affected or potentially triggered by failure to perform. Such efforts would also entail developing and assessing options for risk-avoidance, if possible, or risk-mitigation.

Most legal regimes recognise, to different degrees, the importance of relieving parties of contractual obligations where a supervening event has disrupted performance. Practices in contract drafting have both recognised and progressively developed terms from these doctrinal bases for excusing failure to perform [hereinafter Excuse].[13] Therefore, it is tempting to assume that most failed contractual obligations in the current circumstances of a global pandemic would be easily discharged. However, this article takes off from a different assumption. Outcomes will turn on the interplay of two factors. The first factor is the attitude of the parties to disruptive events in the larger context of their relationship. The other is the approach of the applicable regime – doctrinal or contractual – to the issues of defining the Excuse-making event, or its effect, and assigning legal consequence to it.

Different legal systems define the events differently, based on degrees of supervening effect that stretch from impossibility to mere commercial hardship. The latter, which arises from change of circumstance, is treated in some jurisdictions as a separate doctrine with distinct legal consequences (and does not usually support a case for immediate discharge). Worse, in some other jurisdictions, effects of a more commercial nature do not constitute a different doctrine and hardly provide ground for discharge at all.[14] This diversity makes the factual circumstances of businesses affected

[13] *See infra* note 37 for discussion of the distinction between uncertainties and ordinary risks and *infra* note 41 on how these are reflected in contractual practices.

[14] This disparity in legal consequences explains our preference for the term "excusing failure to perform" ("Excuse") over the more common term, contract avoidance, which tends to connote only a terminal consequence.

by Covid-19 an important factor. Those circumstances are themselves dynamic, so that, in a single jurisdiction, as the nature of the impact changes, it creates different degrees of supervening effect, thus triggering different grounds for Excuse as time goes on.

Before outlining the progression of the article, it bears justifying to centralise the law of contract in the examination of pandemic-linked disruption of supply chain performance. Eller has argued that the "dominant epistemology and social imaginary" of the law of contract is not a good fit for accounting for the role of law in G.V.C..[15] Thus, he has highlighted the limits of the "privileged lens" of contract law (a holdover from previous analyses of "contractual networks"[16]), even while acknowledging the central role of contract as a building block of the G.V.C..[17] At its core, his argument is that notions such as *common purpose* and *reciprocity*, which underlie contractual expectations, do not fully explain the legal nature of commitment by all categories of participants across the entirety of the chain. In his view, relative to the situation at the core of the G.V.C. – comprising the lead firm and the "first tier" participants – these notions grow weaker as we approach the periphery, or the informal tiers of participants. At the periphery, explains Eller, participation is better underlain by the factor of the *production logic* of the chain itself.[18]

Indeed, the notable privileging of contract law in emerging analyses of the G.V.C. has been reflected in scholarships that are directed at private governance of chain-wide risks.[19] These analyses are typically problematised – and therefore enriched – by consideration of the challenges that the fundamental principle of privity of contract poses to maintaining the span of control required in such an endeavour ("governance beyond privity"[20]). Typical risks in concern include production interruptions (which may be considered internal to the chain operation), media exposure, reputational risks, litigation threats, etc. (which arise from externalities).[21]

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[15] Klaas Hendrik Eller, *Is "Global Value Chain" a Legal Concept? Situating Contract Law in Discourses Around Global Production*, 16 Eur. Rev. Cont. L. 3, 12-3 (2020).
[16] *Id.* at 14.
[17] *Id.* at 3.
[18] *Id.* at 15.
[19] *See, e.g.*, for scholarships taking this approach: Kishanthi Parella, *Reforming the Global Value Chain through Transnational Private Regulation*, 12 S.C. J. Int'l L. & Bus. 71 (2015). Kevin Sobel-Read et al., *Recalibrating Contract Law: Choses in Action, Global Value Chains and the Enforcement of Obligations Outside of Privity*, 93 Tul. L. Rev. 1 (2018). Jaakko Salminen, *Towards a Genealogy and Typology of Governance Through Contract Beyond Privity*, 16 Eur. Rev. Cont. L. 25 (2020). *But see, e.g.*, Frederick Mayer & Gary Gereffi, *Regulation and Economic Globalization: Prospects and Limits of Private Governance*, *in* Global Value Chains and Development: Redefining the Contours of 21st Century Capitalism 253 (2018) (stressing, through theoretical argumentation and empirical evidence, the "significant limits" of private governance in providing adequate governance capacity for the global economy).
[20] Salminen, *supra* note 19.
[21] *See* Parella, *supra* note 19, at 83 (the classification into "internal to operation" and "externalities" is ours).

Eller's view is that externalities in particular "are outside of the dominant frameworks of contract in its institutional economic reading."[22] Having regard to this understanding, he takes the view that the "normative and behavioural regularities" that underlie G.V.C.s operate in a milieu of political economy that is broader than that under which the centrality of contract law is fostered, the latter being characterised by elements such as *private autonomy* and *privatisation of enforcement* that lack "social embeddedness."[23]

There are reasons to both critique Eller's thesis broadly and justify why, in any case, its scepticism about the analytical importance of contract law is not relevant to our own purpose in this article. Firstly, contract law itself is not impervious to the social environment in which commercial actors generally transact business – whether at micro (relational) or macro (market) level. This is equally applicable to contract law in the context of the G.V.C.. The norm-shaping role of private governance – whether it be in enabling, constituting or regulating the G.V.C.[24] – is only one dimension of the relationship between contract law and the G.V.C.. There is equally a backward loop through which G.V.C. relationships and their milieus become norm-shaping, thus feeding into new ideas of what contract means within the G.V.C. setting. The importance of this second dimension will be underscored in various ways in this article. At relational levels, there is the "course of dealing" principle that is a valuable tool in judicial determination in the area of interpretation of contract.[25] Trade usage or custom plays a similar role in market settings.[26] Meanwhile, rules of the *lex mercatoria* are an example of broad institutional recognition of the norm-shaping acts of commercial actors.[27] At institutional levels, the old English court of equity has been cited as an example of judicial recognition of the commercial, and perforce social context of contract.[28] That these contractual norms are private does not mean that they are not social (or "socially embedded"). It may simply mean that they are not public (yet). In any case, the typical trajectory is for them to mature towards consideration for public recognition through codification[29] or judicial determination.

[22] Eller, *supra* note 15, at 17.
[23] *Id.*
[24] *See* Klaas Hendrik Eller, *Transnational Contract Law*, in Oxford Handbook of Transnational Law (Peer Zumbansen ed., Oxford: OUP 2020) (forthcoming 2020).
[25] *See infra* note 51.
[26] *See infra* text accompanying notes 45, 151 & note 51.
[27] *See infra* text accompanying note 151.
[28] *See infra* note 149 and accompanying text.
[29] *See, e.g.,* Nellie Eunsoo Choi , *Contracts with Open or Missing Terms under the Uniform Commercial Code and the Common Law: A Proposal for Unification,* 103 Columbia L. Rev. 50, 51 (2003). ("[U.C.C. §1-205(3)] also provides that trade usage and the parties' in "course of dealing" may aid in the interpretation of contractual terms", referring to a provision of Uniform Commercial Code, U.C.C. (Am. Law Inst. & Unif. Law Comm'n 1977), a model law that could be adopted as a statute by states in the U.S.).

Secondly, as would have been noted in our above classification of Parella's enumeration of the risks facing G.V.C.s,[30] externalities are but a class, while risks internal to G.V.C. operations are a separate category of risks. It is our view that, regardless of the merit of Eller's broader thesis (to which we do not pretend that our first point above is an exhaustive answer), the centrality of contract law stands unimpeachable in the analysis of the latter category. Covid-19-linked supply chain disruption, which is our own focus, falls in the latter category.

In this article, Part 1 explores economic explanations for the attitude of commercial actors to unplanned, disruptive developments. Following that, it explores evidence in the reality of how exchange partners in supply chain relationships (which are typically structured as long-term and business-to-business [hereinafter B2B] relationships) address what is referred to, in the literature, as supply chain disruption [hereinafter S.C.D.]. We find that the literature on both economics of contract and supply chain management supports the conclusion that the stance of commercial actors tend to be contract- or relationship-saving in such circumstances.

Part 2 is an overview of the doctrinal and contractual regimes of Excuse. While centring on the common law approaches (English and some other countries of the Commonwealth, as well as the U.S.), it draws comparison with the law in key civil law jurisdictions (French and German). It then follows with an insight into how contemporary contract drafting practices have advanced the area, using the examples of the *Force Majeure* and hardship clauses commonly found in international commercial contracts. The comparative analysis adopted in studying the legal regimes complements the interdisciplinary approach adopted in the article broadly by allowing us to explore how the structures and outcomes of these Excuse regimes support what we have established as the contract- and relationship-saving objectives of the parties.

In our analysis, we examine how each regime (i) defines the supervening event and especially the operative consequence (supervening effect) that it must have on performance (or hypothesis, in contract drafting) and (ii) allocates legal consequence to them (or, the regime). On the doctrinal grounds in particular, we find that jurisdictions differ in the flexibility or expansiveness of their approaches to the event-defining exercise and the strictness or restrictiveness of their attitudes to legal consequences. Regimes that tend towards the more flexible or expansive categories – and these are the civil law jurisdictions, doctrinally speaking, as well as contemporary contractual regimes – usually have a dual approach that allocate different consequences to the stricter and the flexible grounds for Excuse. Thus, not only are they more likely to permit events with

[30] *See supra* text accompanying note 19.

operative consequences of a more commercial nature under the flexible grounds, they also offer better opportunity for contract- and relationship-saving through adjustments by courts or the parties. While noting the limitations of the common law tradition in this regard, we are able to comment on an emergent development in the interpretation of contracts by some common law courts – to wit, the multifactorial approach – that appear to be opening up an opportunity for a more flexible outlook on the doctrine of frustration, even if we also draw attention to the current limitations of that approach.

In Part 3, we utilise insights from the foregoing analysis of the doctrinal and contractual grounds to formulate a doctrine-contract complex that captures the broad range of possible supervening effects excusable under the diverse regimes and applicable to a contractual relationship. We then integrate this with other insights – including those from a recent simulative study on the propagation of pandemic risks in the light of Covid-19 and our conceptual iteration of the nature of what we call "operationally-linked (but) legally separate" [hereinafter O.L.L.S.] – to formulate possible scenarios of supply chain contract failures under such dynamic and fast-evolving factual circumstances. In this regard, we match four such scenarios to the contract-doctrine complex to highlight how certain mismatches in the Excuse regimes that are applicable to the O.L.L.S. contracts could render the supply chain more vulnerable to S.C.D.. This framework could be useful in early review of contracts and in managing S.C.D. in a post-event situation such as that arising in the wake of Covid-19. Equally, it could be helpful in enhancing *ex ante* risk management measures in the supply chain – such as those built around resilience and other system safeguard measures against S.C.D.. Additionally, it could illuminate some factors that may come up for consideration by a court applying the multifactorial approach in the peculiar context of supply chain contracts.

In the conclusions, we reiterate the insights gained from our analysis and their significance for supply chain risk management, including in helping to further the closure of the notable gap created by the absence of consideration of the legal regime in the literature on supply chain risk management and G.V.C.s generally.

1. THE ECONOMICS AND COMMERCIAL REALITY OF PARTIES' BEHAVIOUR UNDER DISRUPTIVE CIRCUMSTANCES

1.1. ECONOMICS OF DISRUPTIVE CIRCUMSTANCE

There is sizable literature on the economic explanation of the legal regimes applicable to impossibility cases, especially regarding the optimal allocation of risks under different Excuse regimes.[31] However, our own focus is on the economic explanation of the attitude of commercial actors confronted by disruptive circumstances and how these are reflected in, shaped by or, have in turn shaped legal regimes.

By the very nature of the current crisis, its resolutions will be fundamentally different from that of the last major, global economic crisis. The financial crisis circa 2008, stemming as it did from the financial market, required interventions that are more broadly systemic and centrally coordinated by collective institutions (such as the central banks). Monetary policies through which central banks coordinate the market have historically been in the shadow of Walrasian theory of equilibriums and pricing,[32]or what has been called "monetary Walrasianism".[33] In the circumstance of a crisis that threatens financial stability, responses are more effective when applied on a systemic rather than idiosyncratic basis, even for controversial measures such as a bailout.[34] However, crises precipitated by the current pandemic will be different. The eye of the storm will be the failure of contracts at firm level. Under the circumstance, the bargain of economic actors will be hashed out at bilateral levels.[35] Therefore, post-Walrasian theories of contract offer better insight on the analysis of the nature of the problems and prediction of what those actors and institutions would do. The problems presented by supervening events for which the parties did not, and could not, have prepared emerge in the nature of radical upsets, or what Frank Knight has identified as *uncertainties*, as

[31] *See, e.g.*, Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. L. Stud. 83 (1977). Marta Cenini et al., *Law and economics: The comparative law and economics of frustration in contracts, in* Unexpected Circmustances in European Contract Law 33 (Ewoud Hondius & Hans Christoph Grigoleit eds., 2011). For an economic analysis of the 2016 French reforms on the law of changed circumstance, and a comparison to the English law, see Mitja Kovac, *Frustration of Purpose and the French Contract Law reform: The challenge to the international commercial attractiveness of English law?*, 25 Maastricht J. Eur. L. 288 (2018).

[32] Leon Walras, Elements of Theoretical Economics or The Theory of Social Wealth (Donald A. Walker & Jan van Daal trans. & eds., Cambridge Univ. Press 2014) (1896).

[33] *See* Perry Mehrling, The New Lombard Street: How the Fed Became The Dealer of Last Resort 60 (Princeton Univ. Press 2011).

[34] *See generally* Javier Bianchi, *Efficient Bailout?*, 106 Am. Econ. Rev. 3607 (2016).

[35] This is not to suggest that centralised intervention by way of contract regulation cannot be one of the ultimate outcomes. Examples of current developments along this line are some of those to which reference is made later in this article, including the Chinese "Force majeure certificate" (see *infra* Section 2.2.1.a.), progressive development through the *lex mercatoria* (see *infra* note 46 for some contemporary examples) and even shift in judicial attitudes such as the rise of multifactorial approach to the doctrine of frustration in some common law courts (see *infra* Section 2.1.6).

distinct from ordinary *risks*.[36] The latter contingencies are of a different, simpler degree, for which the parties could make *ex ante* provisions.[37] The problem is also to be distinguished from those explained by *Incentive Theory*, in which the relevant constraint is information asymmetry between the contracting parties (whether with respect to the accuracy of *ex ante* information or hazard of *ex post* behaviour) and that are addressable by relevant incentives.[38] Risks explained by *Incentive Theory* are therefore endogenous to the contracting parties (what we might refer to as the "state of the mind" of the said parties). However, for the cases in concern, the relevant problems emerge in the circumstance of incomplete information about the "state of the world" in which the contract would be performed or enforced. This assumes the bounded rationality of either the contracting parties themselves or the external institution of collective coordination (coordination, that is, by an external institution, such as by the court to determine rights and to enforce performance). In the latter respect, the contract, or a contractual term, is considered "contractible" and therefore enforceable only if it is verifiable by that external institution. In *Incomplete Contract Theory* [hereinafter I.C.T.], which assumes the

[36] Frank Knight, Risk, Uncertainty and Profit (1921).

[37] *Ex ante* provisions could be made for these contingencies because, although often destabilising, they are largely foreseeable and their impacts relatively ascertainable even where they are exogenous and arise from cyclical events in the macroeconomic environment. A typical example is price escalation due to inflation or currency fluctuation. *See* Keith S. Rosenn, Law and Inflation 112 (1982). ("Much of the doctrinal basis for judicial revision of contracts that have become unduly onerous revolves around unforeseeability. But in modern economies inflation is hardly unforeseeable. Indeed, inflation has become the norm, and monetary stability the exception".) Another external trigger may be change in relevant law. Other such contingencies arise out of change in the internal affairs, usually the financial conditions, of the counterparty or the target of a transaction or the ripening of previously envisaged although undetermined fiscal obligations or legal risks. Whatever may be the case, a method may be devised, from an *ex ante* position, to adjust nominal pricing and other parameters of the transaction or to definitively allocate the risks of the event or otherwise bring about some stability and correct the upset. See *infra* note 41 for a highlight of some contractual mechanisms aimed at addressing contingencies of this nature.

[38] Incentive Theory assumes substantial or unbounded rationality (Savage rationality) in favour of the contracting parties, so that they have capability to substantially hazard and provide for all probabilities since relevant information is observable (at least one of them has complete information on each variable and all that is left, in view of possible information asymmetry, is to deploy a system of incentives to forestall opportunism by the parties). Information is equally verifiable since collective institutions of *ex post* resolution are fully informed of all factors that are relevant to the determination of the cases. For a discussion of the key arguments of Incentive Theory, Incomplete Contract Theory and Transaction Cost Theory, see Eric Brousseau, Jean-Michel Glachant & M'Hand Fares, *The economics of contracts and the renewal of economics, in* The Economics of Contract: Theories and Application 3, 3 – 30 (Eric Brousseau & Jean-Michel Glachant eds., 2004). For foundational literature on these theories, see the following: Leonard J. Savage, The Foundation of Statistics (2nd. ed., Dover Publications 1972) (1954) on unbounded rationality, which describes decision-making that assumes the decision-maker to be apprised of the two key variables relevant to decision-making, to wit: (i) the possible states of the world, and (ii) the consequences of each decision for each possible state of the world; George A. Akerlof, *The Market for Lemons: Quality, Uncertainty and the Market Mechanism,* 84 Q. J. ECON. 488 (1970) on adverse selection risks in Incentive Theory; Kenneth J. Arrow, Essays in the Theory of Risk-Bearing (1971) on moral hazard risks in Incentive Theory; Oliver E. Williamson, The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting (1985).(For transaction cost); Oliver Hart & John Moore, *Incomplete Contract and Renegotiation* 56 Econometrica: J. Econ. Soc'Y 755 (1988) for incomplete contract.

bounded rationality of the court, the relevant constraint is that regarding verifiability by the court. The court's ability to verify, *ex post*, relevant variables is impaired because the parties cannot make provisions to cover remote contingencies that impact performance, such contingencies not being predictable with reasonable certainty. Even where such contingencies are foreseeable, their ramifications may be difficult to fully grasp so that, regardless of the observability of their incidence by one or both of the parties, variables based on *ex ante* allocation of risks attendant thereon are not properly verifiable by the court. In *Transaction Cost Theory* [hereinafter T.C.T.], in which bounded rationality of the contracting parties is the assumption, the problem of *ex ante* observability of the contingencies by the parties or *ex post* verifiability by the courts may be possible, but only at a prohibitive cost. Thus, efforts to go at length to make *ex ante* explicit provision in the circumstance, if at all possible, may be prevented by "front-end" costs that are not justified by *ex ante* incentive (such costs including those in rent dissipation, negotiation and measurement).[39] Similarly, "back-end" costs may make economically impractical any effort by the party to prove the relevant contingency to the court for the purpose of verification. These transaction costs have a directly proportional relationship with the level of uncertainty, thus taking on a very significant role in long-term contracts such as those underpinning supply chains.[40] I.C.T. and T.C.T. help illuminate the issues arising from supervening events in, at least, two areas. Firstly, an understanding of the nature of the constraint explains the difficulty that parties face in reducing the supervening events into definitively allocated risks, unlike in other cases of predictable changes for which they are able to make provisions by way of, say stabilisation or review clauses.[41]

[39] Benjamin Klein, *The role of incomplete contracts in self-enforcing relationships, in* The Economics of Contract: Theories and Application 60 - 1 (Eric Brousseau & Jean-Michel Glachant eds., 2002).

[40] *Id.* Robert E. Scott & George G. Triantis, *Incomplete Contract and the Theory of Contract Design*, 56 Case W. Res. L. Rev. 187, 190 – 91 (2005). (for a description of the "front-end" and "back-end" aspects of transaction cost).

[41] *See* Marcel Fontaine & Filip De Ly, Drafting International Contracts: An Analysis of Contract Clauses 457 (2006). "Stabilisation clauses" was a generic term for the diverse contractual methods for "protecting the real value of the parties' bargain from changes in the value of money". *See* Rosenn, *supra* note 37, at 132. However, it is now more commonly restricted to clauses that seek to "freeze" the legal or fiscal regimes under which the contract was negotiated or otherwise correct the economic distortion resulting from any change in the regime. *See* Jenik Radon, *Negotiating the "right" Petroleum Contract*, *in* The Global Petroleum Context: Opportunities and Challenges Facing Developing Countries 48, 53 (UNDP Discussion Paper No. 6, 2009). The now more common "price escalation clauses" use methods that link pricing adjustment to the value of commodities or a more stable foreign currency or an official price index taking account of broader macroeconomic parameters. Clauses that deal with more endogenous contingencies include "earn-out clauses" that make payment of a portion of the purchase price contingent on future performance or (non)-occurrence of a prefigured liability. Another, the "material adverse change" [hereinafter M.A.C.] clause, allows a party to withdraw from the transaction, upon the occurrence of the contingency and before completion. Of course, this termination consequence of the M.A.C. clause makes it distinct from the stabilisation and adjustment clauses. Equally notable is that, the material change could result from the effect of exogenous risks (material adverse effect): *see* Lars Gorton, *The Nordic Tradition: Application of Boilerplate Clauses under Swedish Law, in* Boilerplate Clauses, International Commercial Contracts and the Applicable Laws 276, 293 (Giuditta Cordero-Moss, ed., 2011).

As we will show in Part 2 below, this difficulty explains the dynamism, often verging on aggression, with which contractual mechanisms are evolving to address increasingly complex circumstances, the key relevant examples, for our purpose, which are *Force Majeure* and hardship clauses.[42] A related insight emerges from a key assumption in I.C.T. that institutions of collective coordination, such as the courts, are equally constrained in the ability to "verify relevant variables".[43] This will be demonstrated later in the gradualness by which judicial and statutory interventions master the satisfactory ordering of the economic adjustments necessitated by distortions arising from supervening events.[44] T.C.T. further explains how this institutional weakness spurs certain developments in contract design. We could highlight two of them here. One such development is the increased use of the tools of bilateral coordination, such as renegotiation by the parties themselves, in addressing certain classes of unplanned circumstances that emerge in the life of the contract. Thus, there is an increased balancing of explicit allocation of risks ("commitment constraints") with provisions that are broadly descriptive of how obligations may be ascertained in the future ("flexibility constraints").[45] Another development is the increased private ordering of external resolutions through mechanisms that limit classical collective coordination via the courts. These mechanisms include adoption of dispute resolution clauses that resort to expert reference and commercial arbitral panels or adoption of market-determined contracting tools such as industry-defined terms, model clauses as well as trade customs and usage.[46] Gilson *et al* have articulated how these developments themselves emerge out of an exercise, by contracting parties, of party autonomy that fosters a contextualist approach in the interpretation of contract.[47] In their exposition, the authors explain, in essence, that:

1. At a low level of uncertainty, parties, by clarity and explicitness (the economists' "commitment constraint"), restrict the courts to the express terms (a textualist approach);

[42] *See infra* Part B.
[43] Brousseau & Glachant, *supra* note 38, at 10.
[44] *See infra* Part 2.
[45] Brousseau & Glachant, *supra* note 38, at 13.
[46] These contemporary attitudes, which ultimately weigh in favour of the survival of the contract, are captured in important documents of the *lex mercatoria* such as Principles of International Commercial Contracts, the Principles of European Contract Law and the Draft Common Frame of Reference and has been an influence in municipal contact law reforms as reflected in the 2016 Article 1195 of the French Code Civil. *See also* Kovac, *supra* note 31, at 289. On a significant implication of usage or trade custom for contract interpretation, *see infra* note 51.
[47] *See generally* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 Cornell L. Rev. 23 (2014).

2. At a higher level of uncertainty, the parties adopt wider terms that allow the courts to import commercial standards as interpretative tools; and

3. As uncertainty increases further still, parties repair out of "centralised coordination" mechanisms to a more "collaborative process", or "bilateral coordination", for resolution by the parties themselves, by reducing the role of the "generalist court" ("flexibility constraints").[48]

As we would see in Part 2, contemporary contractual mechanisms reflect these attitudes.

The second area of illumination is very crucial to a prediction of what the parties would do under the circumstances of a global pandemic. Will the attitude of parties be to seek judicial determination or otherwise exercise unilateral rights under current contracts, with the possibility of terminating contracts, ending relationships and obtaining payoffs? Or will they remain under the bilateral coordination mode and take steps to save the relationship and possibly the transaction? The answer is already prefigured by what we have noted on the institutional weakness of centralised coordination and the consequent expansion of scope for bilateral coordination in contemporary contract-making. Bilateral coordination leaves room for parties to fill in the gap in light of improved ability to verify the variables through *ex post* assessment of the changed circumstance, rather than subject parties to hold-up risk wherein one party uses the courts to enforce a conceptually imperfect contract or "non-contractible" term.[49] In this regard, bilateral coordination (or "self-enforcement") supplements centralised coordination (or "court enforcement") as a tool of performance enhancement.[50]

The implication of this insight is that, in circumstances of incomplete contract, the *ex post* attitude of parties to performance is generally contract- and relationship-saving. This is the objective of supplementing mechanisms of centralised coordination or court-enforcement with those of bilateral coordination or self-enforcement in contemporary contract-making. Interestingly, *Incentive Theory* has an insight to contribute in this regard. Since shedding a contracting partner in a

[48] *Id.* at 66–7. Of course, economic considerations guide such exercise of autonomy in the choice of contract design. *See* Eric B. Rasmusen, *Explaining Incomplete Contracts as the Result of Contract-Reading Costs*, 1 Advances in Econ. Analysis & Pol'y (2001) (identifying factors like "unobservability, unverifiability, second-best incentives, fear of signalling undesirable characteristics, contract-writing costs, and legal default rules" as relevant to such consideration); *see also* Sugata Bag, Economic Analysis of Contract Law: Incomplete Contract and Asymmetric Information 7 (2018) (identifying other factors such as whether transaction takes place within "thick" or "thin" market – referring to the number of buyers and sellers – whether the transaction- or relationship-specific investments are to be made – such as with specialised goods – and whether such investment are to be made before performance is due).

[49] *See* Klein, *supra* note 39, at 61.

[50] *Id.* at 60.

long-term relationship would require selecting a replacement, new risks of adverse selection inevitably arise (an aspect of *switching cost*). The new relationship will present new incidence of information asymmetry that the old one has relatively overcome through previous dealings. Institutionally, it also presents new constraints in judicial determination, since one of the tools employed by the courts in interpretation of contracts is " course of dealing".[51]

In view of the foregoing, it is safe to essay that, in light of the potentially global ramifications of the Covid-19 pandemic, regardless of relative rights under the doctrinal grounds or in contract, parties are likely to adopt a bilateral approach aimed at contract-saving, with the possibility of renegotiation and, if relevant, adjustment of terms. The contracts, if well drafted, would be a helpful guide in this regard. The importance of a well-drafted contract should be underscored here, since, as we would demonstrate in Part 2, there has not been consistency across jurisdictions in the development of the doctrinal grounds to support the "self-enforcing" or "bilateral coordination" objectives of contracting parties.

1.2. SUPPLY CHAIN DISRUPTION AND RISK MANAGEMENT

Supply chain relationships are an example of the kind of long-term contractual relationships[52] that are vulnerable to the uncertainties of future variables, thus necessitating the contractual solutions articulated in economic literature. In supply chain management, *supply chain disruptions*. S.C.D. are "unplanned events that impede or stop the flow of materials, information, services or financial resources within and between the organisations of a supply chain involved in producing a good or service."[53]

[51] *See* Guenter H. Treitel, The Law of Contract 220–21, 213 (11th ed., 2003). Course of dealing or, in long-term, repetitive transactions, course of performance, arises in relational settings, whilst trade usage or custom has an analogous interpretative role in market settings. Thus, a court faced by the constraints of the absence of evidence in previous dealings may be benefited by applicable rules of the market as evidenced in trade usage or custom. For the discussions on the roles of "course of dealing" and "trade usage" or custom in the interpretation of contracts [albeit, not setting store on the larger debate about formalism (evidentiary sources for the parties' intention in the interpretation of contract) and the desirability or ranking of "course of dealing" and "trade usage" in the hierarchy of such sources], *see, e.g.*, Eunsoo Choi , *supra* note 29; Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 Columbia L. Rev. 1710 (1997). David Charny, *The New Formalism in Contract,* 66 Univ. Chicago L. Rev. 842 (Summer 1999). Alan Schwartz & Joel Watson, *The Law and Economics of Costly Contracting*, 20 J. L. Econ. & Org. 2 (2004). Ariel Porat, *Enforcing Contracts in Dysfunctional Legal Systems: The Close Relationship between Public and Private Orders: A Reply to McMillan and Woodruff*, 98 Mich L. Rev. 2459 (2000).

[52] *See* Tobin E. Porterfield, John R. Macdonald and Stanley E. Griffis, *An Exploration of the Relational Effects of Supply Chain Disruptions*, 51 Transp. J. 399, 412 (Fall 2012). (ascribing a long-term perspective to B2B supply chain relationships).

[53] *Id.* at 402.

Such events also tend to be unanticipated.[54] In short, they roughly approximate typical *Force Majeure* events in contractual clauses or those held to foist impossibility of performance in the doctrines. These are distinct from mere "risks from coordination of supply and demand".[55] They are also distinct from *supply chain disturbance,*[56] which are events with less severe effects and merely require future adjustment based on some predictable formula or methodology.[57]

In the context of broader discussions on supply chain risk management, S.C.D. highlights issues of supply chain vulnerabilities and how *ex ante* measures sometimes fail to foster system resilience.[58] Such *ex ante* measures are, in part, cognates of economic incentives that parties design to enhance performance in circumstances of Savage rationality and complete information. Failure of such measures and occurrence of S.C.D. raise issues of imperfect information situations occasioned by Knightian uncertainties that are better addressed through incomplete contract mechanisms.[59] For example, the objective of exchange partners to foster stability in a supply chain relationship is accomplished by two broad categories of strategy: *buffering* and *bridging*. Buffering strategies are unilateral steps taken by individual partners to mitigate the effect of S.C.D., for example, putting in place appropriate inventory management (such as maintaining safety stock) and establishing alternative supplier relationships.[60] Bridging strategies, on the other hand, are acts of bilateral coordination by which partners seek, through information exchange (backed by incentives, it might be said), to mitigate the risk of S.C.D..[61] However, it could also have a multilateral effect in the context of value chains underlain by the operational logic of O.L.L.S. contracts.[62] That being said, there is no reason to not combine these two strategies.[63] For example, parties could, in contract-making, express the intention of diversifying the sources of supply or otherwise

[54] *Id.* at 401–02.

[55] Paul R. Kleindorfer & Germaine H. Saad, *Managing Disruption Risks in Supply Chains*, 14 Prod. & Operations Mgmt. 53 (2005).

[56] *See* Porterfield et al., *supra* note 52, at 401.

[57] *See supra* note 41 and accompanying text for the economic analogue of this distinction and its legal cognate in contract drafting.

[58] Resilience itself is only one of the measures of system safeguard discussed in the literature. Others are stability, robustness and, lately, viability. *See* Ivanov & Dolgui, *supra* note 9 (introducing the concept of " viability" in respect of I.S.N.s and discussing the other safeguard measures). Our use of "resilience" in this article is a catch-all for all these measures.

[59] *See supra* Section 1.1.

[60] *See* Christoph Bode et al., *Understanding Responses to Supply Chain Disruptions: Insights from Information Processing and Resource Dependence Perspectives,* 54 Acad. Mgmt. J. 833, 834 (2011).

[61] *See* Dominic Essuman et al., *Operational resilience, disruption, and efficiency: Conceptual and Empirical Analyses*, Int'l J. Prod. Econ., November 2020, at 1, 9.

[62] Jaakko Salminen, *Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities*, 23 Indiana J. Glob. Legal Stud. 709 (2016). *See also infra* Part 3 for our suggestions on how this framework may be adapted to S.C.D. risk management.

[63] *See* Bode et al., *supra* note 60, at 836.

variegating the means of performance. As we will see later, the stipulated method of performance has implications in the Excuse regimes.[64]

Whilst studies have established that S.C.D. holds financial and operational risks for affected firms,[65] the literature has not significantly examined its effect on partner relationships.[66] A useful study has drawn inspiration from service failure literature in business-to-customer setting to develop an expository study on the effect of S.C.D. on supply chain relationships, which tends to be B2B.[67] Our own preliminary observation is that the role of the legal regimes generally – and implications of the structure and content of contracts, in particular – have been ignored in the emerging studies of S.C.D.. This observation is consistent with findings on the general marginalisation of legal regimes in emerging studies of G.V.C.s.[68] For example, in discussing the seven recovery factors that they identified as contributing to the post-S.C.D. recovery process, Porterfield, et al, did not highlight the role of contract provisions in any one of them.[69] Equally absent is the role of legal regime on the enumerated recovery outcomes.

In spite of this notable disciplinary insularity, we are able to draw a number of insights from the relational focus of Porterfield et al that support the hypothesis in contract economics and provide concrete evidence on the attitude of actors in global commerce to failed performance under disrupted circumstances. In the review of existing literature, Porterfield et al, highlighted insights from previous scholarly findings that may be summarised as follows:

- In view of its long-term nature, supply chain relationships tend to have an information-symmetrising dimension. Therefore, a break in the relationship, and consequent partner replacement, entails transaction costs.[70]
- The overriding objective of the partners in S.D.C. management is the restoration of the supply chain to a normal productive state.[71]

Furthermore, results from their own preliminary study came up with propositions that associate a positive relationship outcome, on the one hand, with factors such as a

[64] *See infra* text accompanying note 222 for discussion of the idiosyncratic string of decisions in the so-called Suez Canal cases that buck the general principle in this regard.
[65] *See* Porterfield et al., *supra* note 52, at 402–03, for a review of the literature on the financial and operational impacts of SDC.
[66] *See* Phil Greening & Christine Rutherford, *Disruptions and Supply Networks: A Multi-Level, Multi-Theoretical Relational Perspective,* 22 Int'l J. Logistics Mgmt. 104 (2011).
[67] *See* Porterfield et al., *supra* note 52.
[68] *See* IGLP Law & Global Production Working Group, *The role of Law in Global Value Chains: A Research Manifesto,* 4 London Rev. Int'l L. 57, 59-60 (2016).
[69] *See* Porterfield et al., *supra* note 52, at 418 (enumerating the seven factors as the following: teamwork, process input, responsiveness, accessibility, process fairness, honesty & effort as well as outcome equity).
[70] *See id.* at 403.
[71] *Id.* at 402.

collaborative recovery process, a perception of equitable outcome and, on the other hand, honest dealing. Apart from the importance of the process and teamwork to the partners, another significant finding from the study is that, unlike the case with B2C parties, supply chain partners tend not to be fixated on blame assignment and compensation.[72]

These insights clearly support the hypothesis that economic actors prefer bilateral coordination in the resolution of disruptive circumstances. Nonetheless, the study by Porterfield et al would have been enriched by a consideration of the legal regime as a factor. For example, in contemplating why partners treat blame and compensation as relatively unimportant in the recovery process, the scholars pointed in a number of directions for future scholarly pursuits. Notably absent is the possible role of contractual provisions that stipulate, or fail to stipulate, a protocol for coordinating the resolution of these unplanned circumstances. As we will demonstrate in Part 2.2, such provisions are not just a staple of contemporary contract-making, but are assuming ever-increasing importance.

To conclude this Part, in view of the insight from economic and management studies that transaction and relationship saving is an important objective of commercial actors faced with unplanned and disruptive circumstances, the robustness of a legal regime – doctrinal or contractual – in supporting the said objective should be considered a key attribute of that regime. In fact, that attribute might be considered a key determinant of the resilience of the legal regime in managing a widespread, disruptive development such as the Covid-19 pandemic. Therefore, it forms a key consideration in our analysis of the legal regimes in Part 2 below.

[72] *Id.* at 421.

2. FAILURE TO PERFORM – THE LEGAL REGIMES

2.1. EXCUSE UNDER THE DOCTRINES

Sanctity of contract – the principle that parties should be bound by their promises – *pacta sunt servanda* – is fundamental to the entire law of contract. Nonetheless, the general law in many legal traditions have rules that allow Excuse where a development arising after the making of the contract has a supervening effect on performance. Although such developments arise in the form of events, since the list of possible events could be infinite, they are better expressed in terms of the effect or operational consequence on performance (which we call "supervening effect").[73] The legal doctrines are therefore anchored on two issues: (i) defining the nature of the event, including, if not inherent, its supervening effect on performance, and (ii) the legal consequence. This approximates the two parts of a typical contractual clause: *hypothesis* and *regime*.[74] In this Part of the article, we examine how key jurisdictions of the common law and civil law traditions address these two issues.

As we will show, the supervening effects tend to generally stretch from the stricter ground of *impossibility* to more flexible grounds. Two types of differentiation occur in the legal traditions as the effects taper off towards the flexible end. The first is that of degrees, as the flexible effects in the civil law jurisdictions considered in this article extend as far as mere change of circumstance or commercial hardship. As will become clear presently, common law tends to be much more restrained in availing parties of Excuse as the effect moves in the flexible direction. The other type of differentiation is a corollary of the first and goes to the very structure of the doctrines. Unlike the case under the common law, the civil law jurisdictions tend to treat the law regarding mere change of circumstance as

[73] It is important to emphasise the effect as the animating aspect of the bare, producing event, a view that has been underscored in the emerging "multifactorial" approach to determination of frustration by courts in some common law jurisdictions, in which the *nature of the supervening event* is one of the factors to be considered and the effect of the event on the common purpose of the parties has been determinative of one of the cases. See *infra* Section 3.4.2 for a discussion of the New Zealander case of Planet Kids Ltd. v. Auckland City Council [2013] NZSC 147, [2014] 1 NZLR 159. In the American case of Hoosier Energy Rural Electric Coop. Inc. v. John Hancock Life Ins. 588 F. Supp. 2d 919, (S.D. Ind. 2008), the relative scope and unprecedented nature of the circa 2008 global financial crisis – and the foreseeability of its effect, relative to the insurance industry crisis of the 1980s – was a distinguishing factor between the case before the district court, where an Excuse was hypothetically admitted (hypothetical, since closure in the matter was reached by settlement) and the earlier case of Kel Kim Corp. v. Central Markets Inc. 519 N.E.2d 295 (N.Y. 1987) where an Excuse had been rejected [see, for discussion, Carlos A. Encinas, *Clause Majeure?: Can a Borrower Use an Economic Downturn or Economic Downturn-related Event to Invoke the Force Majeure Clause in Its Commercial Real Estate Loan Documents?*, 45 Real Prop. Tr. & Est. L. J. 731, 760 (2011). . Similarly illuminating, in this regard, is the practice in contractual regimes wherein the hypothesis in hardship clauses are drafted with two parts, namely: (i) the changed circumstance and (ii) its operational consequence, in essence, the effect (see *infra* note 176 and accompanying text [entire paragraph]).

[74] *See* Fontaine & De Ly, *supra* note 41, at 402.

a distinct doctrine and allocate them legal consequences different, in significant respects, from those of impossibility.[75] In this article, we call this a "dual" approach to Excuse.

Allocation of legal consequences include, not just the intervention of the law on the obligations of the parties, but also the much more complex issue of adjustment of any economic distortions that might have been occasioned by the disruption. In principle, the doctrinal grounds for Excuse results in "neutral" consequences. By this is meant that the obliged party is discharged from the affected obligation with the implication, in most cases, of equally discharging the counterparty of any mutual obligation and bringing the contract to an end. This is the case with the impossibility effects and, in jurisdictions where there is no dual approach to the doctrines, to the automatic consequence of Excuse generally. In this regard, the common law is referred to as a "closed" system because of the invariable application of this terminal consequence to all cases of Excuse.[76] In the "open" systems of the civil law, the distinct doctrinal consequence of Excuse for change of circumstance allows a more flexible approach whereby, before consideration of discharge and termination, a number of mechanisms, including bilateral coordination (e.g., renegotiation by the parties) and centralised coordination (i.e., adaptation by the courts) could be employed to attempt a correction of the economic distortion which occasions the Excuse and to keep the contract alive. This procedural approach of the "open" systems to the issue of economic adjustment is therefore different from that of the "closed" system. In the latter, economic adjustment, following discharge and termination, is by way of centralised coordination, albeit *a priori*, through substantive rules on loss adjustment, as developed by the courts and finessed under relevant statutes. These different approaches and outcomes are discussed further below.

[75] Merely recognising the structural differences in the doctrines, as we have done, is sufficient for our purpose here, although there is a rich debate on the relative doctrinal merits of the dual and unified approaches. *See, e.g.*, Tobias Lutzi, *Introducing Imprévision into French Contract Law - A Paradigm Shift in Comparative Perspective, in* The French Contract Law Reform: A Source of Inspiration? 89, 108 (Sophie Stijns & Sanne Jansen eds., 2016). (commending the German dual approach for its doctrinal coherence and its combination of certainty and flexibility based on the nuances of the events). Janwillem (Pim) Oosterhuis, *Commercial Impracticability and the Missed Opportunity of the French Contract Law Reform: Doctrinal, Historical and Law and Economics Arguments - Comment on Lutzi's Introducing Imprévision into French Contract Law, in* The French Contract Law Reform: A Source of Inspiration? 113, 128 (Sophie Stijns & Sanne Jansen eds., 2016).(which, while recognising the doctrinal coherence of the German approach, especially in light of the historical factors of post-W.W.II commercial uncertainties and the importance of the "good faith" principles in civil law tradition, has argued, in essence, that having a separate legal consequence for the more flexible Excuse is not a necessary quality of legal doctrine. He notes: "legal doctrine does not dictate the content of the remedy").

[76] Ewoud Hondius & Hans Christop Grigoleit, *Introduction: An Approach to the Issues and Doctrines Relating to Unexpected Circumstances, in* Unexpected Circumstances in European Contract Law 3–14, 10–12 (Ewoud Hondius & Christoph. Grigoleit eds., 2011). Janwillem Oosterhuis, *Unexpected Circumstances Arising from World War I and its Aftermath: "Open" Versus "Closed" Legal System*, 2 Erasmus L. Rev. 67, 67 (2014).

2.1.1. COMMON LAW: DEFINING THE SUPERVENING EFFECTS UNDER A UNIFIED STRUCTURE

In the common law tradition, the English doctrine of *frustration* developed from the hypothesis that an event has to make performance impossible for it to provide ground for Excuse. Impossibility could arise, for example, from the destruction of the subject of contract,[77] or the death or incapacity of a party in a contract for personal service,[78] or contract otherwise relying on personal skill or experience[79] or a change in the law that makes performance illegal.[80] Supervening *illegality* – has a unique quality, having regard to the public policy dimension to the consideration of the courts in relevant cases.[81]

The English doctrine has since expanded to cover more flexible supervening effects – to wit, *radical difference*.[82] Thus, an obligation would be considered frustrated even where there is no physical impossibility but performance would only be possible where the obliged party would, in essence, be required to perform a contract *radically different* from that undertaken by the parties.[83] *Frustration of purpose* is an example of such radical difference in the context of a contractual bargain to receive good or service whose original purpose has now failed by virtue of the intervening event before the time of delivery. This was the case in some of the "coronation cases". Meanwhile, American courts have developed *commercial impracticability*, a flexible class of supervening effect. A party is discharged of a contractual obligation where the party's performance is made "impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made."[84] It is to be noted, though, that the ground of commercial impracticability in American practice, is not cast as an alternative to, but as a practical restatement of the ground of impossibility since, in

[77] Taylor v. Caldwell (1863) 122 Eng. Rep. 309 (K.B.).
[78] Whincup v. Hughes (1871) L.R. 6 C.P. 78.
[79] Cooper v. Micklefield Coal & Lime Co. (1912) 107 L.T. 457.
[80] *See* Ertel Bieber & Co. v. Rio Tinto Co. [1918] A.C. 260.
[81] *See infra* note 133 for a discussion of the ramification of this public policy dimension on the freedom of the parties to freely allocate the risk of non-performance.
[82] *See* Krell v. Henry [1903] 2 K.B. 740 (one of the so-called "coronation cases" that arose from the postponement of the coronation ceremonies of King Edward VII in 1902, in which the hire of a property for the purpose of gaining a vantage view of the coronation procession was declared frustrated by the postponement since the hirer thereby had no use for the property); *See also* C.T.I. Group v. Transclear S.A. [2008] E.W.C.A. Civ. 856 (C.A.).
[83] *See* Davis Contractors Ltd v. Fareham Urban District Council [1956] AC 696 (Lord Radcliffe, via an *obiter dictum* in this case, articulated the test of "radical difference").
[84] Restatement (Second) of the Law of Contracts, §261 (Am. Law Inst. & Unif. Law Comm'n 1981). Regarding the sale of goods, a provision with similar effect can be found in state-adopted versions of the U.C.C., § 2-615. *See also* Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966). *Cf.* Encinas , *supra* note 73 , at 754 (casting doubt on the existence of *impracticability* outside the context of the U.C.C. and as a general law in some American jurisdictions, for example, under New York law).

any case, supervening events do not always render performance absolutely impossible.[85] In this regard, impracticability could be taken as the American analogue of contemporary English frustration that, in practice, softens the sense of strictness conveyed by the notion of impossibility.[86] These more flexible effects are considered sufficient ground for Excuse since they cause radical transformation of the bargain of the parties into one not intended, although the American laws are bolder in highlighting its basis in the defeat of the economic logic of the bargain.[87]

Lastly, it should be noted that the principle of *sanctity of contract* creates a tension in the application of the above-mentioned supervening effects and holds the courts in check in how they deploy them to relieve parties of their obligations. This tension is best demonstrated in cases involving the more flexible effects. Thus, failure to perform will not be excused on the basis of adverse risks emergent from regular economic cycles or other incidences of normal commercial hardships that merely make the bargain less profitable to a party. For example, a mere change in market conditions such as currency fluctuation or inflation will not be a sound ground for Excuse,[88] nor would bad weather and labour shortages.[89]American doctrine of commercial impracticability also generally rules out these cyclical events with economically distortive effects.[90] Where however, incidents like increased cost and raw material shortage arise from "some unforeseen contingency which alters the essential nature of the performance," it may be considered a sound ground for Excuse on the basis of impracticability.[91]Thus, whilst we might have noted the relative importance of the supervening effect, it appears that, as the effect begins to taper towards these common economic distortions, the contingency of the

[85] *See* Restatement of Contracts §454 (1932) ("impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved"). *See also* Encinas , *supra* note 73 , at 745–46.

[86] *See also* Restatement (Second) of the Law of Contracts § 265 (also covering relief of discharge in cases of "frustration of purpose" where, following the making of the contract, "a principal purpose is substantially frustrated").

[87] An economic analysis of the distinction has also been made. *Compare* Andrew A. Schwartz, *A Standard Clause Analysis of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLA L. Rev. 789, 819-20 (2010) (suggesting that, while "impracticability" covers situations in which performance is frustrated because it can only be accomplished at a prohibitive cost, the English doctrine of frustration applies to situations in which the value to be gained from performance has fallen so far as to make the bargain meaningless), *with* Treitel, *supra* note 51, at 885 (in drawing a similar contrast, additionally suggesting that "impracticability" allows a supplier to avoid the obligation to deliver at prohibitive costs whilst English "frustration of purpose" allows a buyer to similarly demur in taking delivery where it has fallen so far as to be meaningless). *See supra* note 86 for the American analogue on frustration of purpose.

[88] *See* Albert Monichino QC, *Plummeting Market Prices: Frustration*, *Force Majeure or Hardship?*, AMPLA Y.B. (2015) (discussing Excuse in the context of fallen prices in global commodities trade in the 2010s).

[89] See Davis Contractors Ltd v. Fareham Urban District Council at 83.

[90] *See* U.C.C. §2-615 cmt. 4.

[91] *Id.*

event that triggers it takes on a more significant role in the determination of impracticability.

It is easy to see that this position is open to all manners of *ex post* risks, including moral hazard and hold-up that may be exploited by contracting parties. Consideration of those risks, perhaps along with the rigid legal consequences assigned to Excuse,[92] explains why the more flexible supervening effects have been a tough ground upon which to base a case for Excuse under the common law.[93] Evidence suggests that the ground of frustration of purpose in English courts practice tends to be available mostly for consumer contracts, rather than contracts between two parties with relatively balanced power relations.[94]

2.1.2. COMMON LAW: CLOSED APPROACH TO LEGAL CONSEQUENCES

As already noted, in common law, the obliged party is generally discharged from obligation of further performance of the frustrated obligation, without damages being awarded for failure to perform. Of course, such a discharge results in a concomitant discharge of the counterparty from further performance of mutual obligations. Under the English doctrine, depending on the nature of the obligation, this would effectively result in the termination of the entire contract. An exception to that rule would be in respect of an obligation that is severable – either because the contract itself is severable in nature[95] or the parties have by agreement made that obligation severable.[96] In such severable cases, a discharge only affects performance of the specific obligation while the rest of the contract survives.[97] Another exception is found under the doctrine of

[92] *See infra* Section 2.1.5 for a comparison of the legal consequences of Excuse under the common law and the civil law.

[93] *See* Rosenn, *supra* note 37, at 98–109 (analyzing the cases demonstrating the difficulty of justifying Excuse on the more commercial grounds under the common law); *see also* Lutzi, *supra* note 75, at 99.

[94] *See* Egidijus Baranauskas & Paulius Zapolski, *The Effect of Change in Circumstances on the Performance of Contract*, 118 Jurisprudencija 197, 203 (2009).

[95] For example, part performance – which generally is effectively non-performance – could nonetheless, in the context of severable obligations, leave as enforceable the agreed payment for the performed portion of the contract whilst damages lie for the unperformed portion [*see* Ritchie v. Atkinson 10 East 295 (1880) and Atkinson v. Ritchie10 East 530 (1809)]. By analogy, excusing non-performance of a severable obligation on grounds of frustration may nonetheless leave the other portion, if already performed or still performable, enforceable [*see* Stubb v. Holywell L.R. 2 Ex. 311 (1867). We discuss relevant statutory provisions with similar effect in the next two paragraphs of this Section 2.1.2.

[96] *See* Uri Benoliel, *Contract Interpretation Revisited: The Case of Severability Clauses*, 3 Bus. & Fin. L. Rev. 90 (2019).(showing, through empirical study of 500 contracts between "sophisticated parties", that parties include severability clauses to constrain the courts from taking a contextualist approach to determining the consequences of unenforceable contracts, the deliberateness of which attitude is further evidenced by the wide variation – in form and substance – of such clauses, that tend to be non-boilerplate).

[97] Note, however, that in the case of contractual severability clauses, they typically operate to moderate the legal consequence of discharge – usually by saving the clauses that effectuate economic adjustment – rather than keep alive the contract, broadly conceived. *See* Fontaine & De Ly, *supra* note 41, at 168.

temporary impossibility that some American courts have introduced regarding impossibility of brief spells that merely excuse performance "until it subsequently becomes possible to perform rather than excusing performance altogether." This has been applied in circumstances both, where impossibility due to a brief disruption was excused[98] and where obligation was reinstated rather than finally terminated on account of the brief nature of the disruption.[99]

Economic adjustment, following termination, addresses not just the value that has passed from the obliged party to the other in exchange for the discharged obligation. The law of unjust enrichment should be sufficient to enforce recovery in such a simple scenario.[100] However, the situation would typically be more complicated, as value of some sort might have moved either ways or the parties might have incurred costs of varying degrees before the discharge of the contract. In this scenario, termination of the contract without more would, on the balance, leave one of the parties with the short end of the bargain stick.

In the U.K., the approach to these problems has been to create substantive rules, first through the courts and then by legislation. Following an array of court decisions on economic adjustment that do not appear to align on the principles,[101] statutory intervention has brought a level of clarity into the matter. Under Section 1(2) of the U.K. Law Reform (Frustrated Contracts) Act of 1943, the mode of adjustment regarding prior monetary exchange would be as follows: (a) sums payable under the contract before the supervening event will cease to be payable (b) any sums actually paid by a party before the said event will be recoverable from the payee regardless of whether part performance has occurred before the event,[102] and (c) expenses incurred by a party in actuation of the contract may, at the court's discretion, be recovered where there is a prepayment provision in the contract and up to the exact amount expended (regardless of whether a portion of the loss has been covered through insurance proceeds)[103]. Where

[98] *See* Bush v. ProTravel lnt'l, Inc. 192 Misc. 2d 743, 752 (N.Y. Civ. Ct. 2002) (in which brief impossibility due to breakdown of communication facilities in Manhattan following the "9/11" terrorist attack in 2001 was excused). For discussion of this, and the case in *infra* note 99, see Encinas, *supra* note 73, at 746–47.

[99] *See e.g.*, Boston International of Miami v. Arguello Tefel, 644 F. Supp. 1423, 1427 (E.D.N. Y. 1986) (in which payment obligation, briefly disturbed by the obligee's presence in a territory with currency restrictions – impossibility due to illegality – was reinstated after the said obligee left that territory).

[100] *See* Fibrosa Spolka Akeyina v. Fairbairn, Lawson, Combe, Barbour Ltd AC 32 (1943).

[101] *See e.g.*, the decision in Chandler v. Webster 1 K.B. 493 (1904) (another of the "coronation cases" with facts similar to those in Krell v. Henry 2 K.B. 740 (1903)). Here, the hirer under the frustrated contract of hire did not just lose the bid to recover his deposit, but was also ordered to pay the balance of rent to the landlord. An opposite economic adjustment was effected in *Krell v. Henry,* in which the landlord under similar circumstances was ordered to refund the rent paid under the frustrated lease.

[102] This changed the position in a previous House of the Lords decision in which, unlike in *Chandler v. Webster*, *supra* note 101, refund of prior payment was ordered, but on the basis that there was total failure of consideration for the payment. *See* the *Fibrosa case, supra* note 100.

[103] *See* section 1(5) of the same act.

a party has conferred non-monetary benefit on another in actuation of contractual obligations before the supervening event, Section 1(3) of the Act allows the first party to recover a sum representing, in the court's judgment, *quantum meruit*, having regard to other factors such as expenses incurred by the benefited party and the impact of the supervening event on the benefit received.

This U.K. legislation has been influential in many commonwealth jurisdictions, but not uniformly so. In the Nigerian federation, for example, legislations with analogous provisions only apply in a handful of the thirty-six states of the federation,[104] so that the economic adjustment in consequence of frustration in the other states is still determined according to the unsatisfactory positions under common law.[105] Meanwhile, other jurisdictions have recognised the weaknesses of the U.K. legislation in addressing multifarious dimensions that economic distortion take by virtue of a frustrated contract.[106] For example, whereas under the U.K. Act, monetary and non-monetary obligations falling due prior to the frustrating event are treated differently, so that the former ceases to be payable under S. 1(2) whilst the latter remains undischarged under S.1(3),[107]a different treatment is applied under Section 7 of the Frustrated Contracts Act of 1978 of New South Wales, Australia, as both types of obligations would be discharged except as may be necessary to support a breach of contract claim.[108]

2.1.3. CIVIL LAW: DEFINING THE SUPERVENING EFFECTS UNDER A DUAL STRUCTURE

Doctrines roughly analogous to the supervening effects in the doctrine of frustration are found in the civil law tradition. Under German law, a contracting party has two levels of obligations – the principal obligation to perform the contract and the subsidiary one to pay damages for failure to perform.[109] However, by virtue of *unmöglichkeit* under the German civil code, a party is afforded Excuse on impossibility grounds, where there is an obstacle to performance that is both unknown to the said party at the time of contracting and not due to a default of that party.[110] Additionally, there is scope for Excuse on the

[104] These states include Lagos under the Law Reform (Contracts) Law of 1961 and the seven states formerly part of the old Western Region of the country under the Contracts Law of 1961 of that region.
[105] *See* Olaniwun Ajavi, Legal Aspects of Finance in Emerging Markets 301 (2005).
[106] *See e.g.*, *Frustrated Contracts Act 1978*, Ss 10 – 13 (New South Wales, Austl.).
[107] *See* Treitel, *supra* note 51, at 916 (criticising the state of affairs as a "*casus omissus*").
[108] *See* Andrew Stewart, Warren Swain & Karen Fairweather, Contract Law: Principles and Context 285 (2019) (last visited Apr. 2, 2020) (more fully discussing the novelty of the New South Wales statute).
[109] *See*, Bürgerliches Gesetzbuch [BGB][Civil Code], § 241 & 280, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0722 (Ger.).
[110] *See* Code Civil [C.Civ.][Civil Code] artt. 275, 311a(2) (Fr.). Note that these provisions apply equally to obstacles to performance existing both at the time of the contract and afterwards, the former which would be "mistake" under English law while the latter would be "frustration".

much more flexible ground of change of circumstance. The ground of *wegfall der geschäftsgrundlage* (interference with the contractual basis), codified in the German law since 2002, affords Excuse where circumstances or material conceptions that form the basis of the contract changes so significantly that the parties would have entered into a different contact or not entered into it at all, were the change foreseen.[111] The French code civil provides a similar dual basis for Excuse. *Force majeure* provides ground for Excuse where an unavoidable event that could neither be reasonably foreseen nor controlled makes performance impossible.[112] On the other hand, *imprévision* (unforeseen contingency), newly introduced in the 2016 reform to French code civil, provides ground for *Excuse*, where an unforeseeable change of circumstance makes performance "excessively onerous for a party who had not accepted the risk of such a change." [113]

2.1.4. CIVIL LAW – OPEN APPROACH TO LEGAL CONSEQUENCES

The "neutral" consequences of the impossibility grounds under the German law means that the subsidiary obligation of a party to pay damages for failure to perform becomes unenforceable on account of the impossibility.[114] Any mutual obligations of the counterparty will be similarly unenforceable.[115] The French law similarly discharges the obliged party who has been affected by *force majeure* of the obligation of performance "to the extent of that impossibility."[116] The contract is also terminated by operation of the law. However, there will be no automatic discharge where the effect of *force majeure* is temporary, in which case performance is merely suspended for the period unless the delay thereby occasioned would justify proceeding to immediate termination.[117] Although contracts affected by the flexible "change of circumstance" grounds for Excuse in both jurisdictions could be ultimately terminated, they have a distinctive feature. This is the "adaptation" role of the court through which the court may, upon application, adjust the contract to suit the changed circumstance and restore commercial balance.[118]

[111] *See* BgB § 313 (Ger.).
[112] *See* C. Civ. art. 1218 (Fr.).
[113] *Id.* art. 1195. Before 2016, *imprévision* had been developed in the French administrative court and made applicable to contracts involving the government.
[114] *See* BgB § 311a, para. 2 (Ger.).
[115] *See id.* § 326.
[116] C. Civ. art. 1351 (Fr.).
[117] *See id.* art. 1218.
[118] *See* BgB § 313 (Ger.) and C. Civ. art. 1195 (Fr.). The German Civil Code is clear on the test that the court must adopt in setting about the task of adaptation. *See also* BgB § 313, para. 1 (Ger.) states that the court shall take account of "all the circumstances of the specific case, in particular the contractual or statutory distribution of risk" in making an alteration without which one of the parties cannot reasonably be expected to uphold the contract. The French Civil Code does not expressly stipulate any such guidance, although the contextual approach of the courts are to be taken for granted since the administrative courts developed its principles, taking into account the commercial instabilities in the years of the 20th century world wars (*see supra* note 122).

Termination may be ordered where such adaptation fails or, in the case of German *wegfall der geschäftsgrundlage* law, where it is not reasonably acceptable to a party.[119] In French *imprévision* law, the parties may themselves first renegotiate the terms of the contract (during which performance must continue) or, failing that, terminate it, although where such efforts fail or are unduly delayed, one party may apply to court for adaptation or termination. Another doctrinal difference in the laws of "change of circumstance" in these two jurisdictions is that, while under French law, the court has the discretion to order adaptation or termination, a German court must give preference to adaptation first before considering termination.[120]

2.1.5. COMMON LAW – CIVIL LAW COMPARISON

There are significant doctrinal differences between the English and the continental attitudes to *Excuse*. For one, and as should have been noted in the articulation of the laws above, the flexible effect – change of circumstance – under continental laws are not perfect analogues to the more flexible effects under the common law.[121] Radical difference, under the common law, is merely the more flexible effect in a continuum of the single doctrine of frustration that includes the stricter effect of impossibility. The same is the case for commercial impracticability, at one end, and impossibility, on the other, in American law. Being a single doctrine, both strict and flexible effects are assigned the same legal consequences. Commercial hardship will not avail a party of *Excuse* where its effect is not serious enough to constitute a radical alteration of the contract. On the contrary, *imprévision* and *wegfall der geschäftsgrundlage* are considered distinct doctrines from the impossibility grounds under the French and German laws. Therefore, as we have seen above, different legal consequences are assigned to them. Additionally, their "change of circumstance" basis more properly approximates what would be considered, in the common law courts, mere commercial hardship: i.e. impacts of events such as currency fluctuation, price escalation, etc. In fact, their historical development is linked to efforts at correcting the commercial impacts of economic distortions caused by major twentieth century events that disrupted Europe, including the two world wars.[122]

[119] *See* BgB § 313, para. 3 (Ger.).
[120] *See* Kovac, *supra* note 31, at 301 (for a consideration of the efficiency consequences of these two approaches).
[121] *Id.* at 304.
[122] The relative recentness of these "change of circumstance" provisions in French and German laws belies their longer history of development. In the case of French *imprivision*, its principles had long applied to government contracts in the administrative courts before the extension to commercial contracts under the 2016 code. In Germany, the 2002 codification of *Wegfall der Geschäftsgrundlage* follows years of the development of its principles by the courts. *See* Oosterhuis, *supra* note 75, Rosenn *supra* note 37, at 4 (for historical accounts).

Another doctrinal difference relates to the factor of foreseeability of the supervening event or its effect. Whether an event is foreseen or (reasonably) foreseeable could be tied to two separate, though connected, determinations: (i) as an inherent part of determining the supervening event or its effect, without more, or (ii) as an important factor in determining if risk of *Excuse* has been allocated. Continental systems tend to take these as separate determinations, so that whereas unforeseeability has to be present as well as other ingredients (uncontrollability/unavoidability and impossibility) for the relevant supervening effect to be established, *Excuse* may be denied if in any case, from the wordings or circumstances of the contract, the obliged party has undertaken the risk of failure. It cannot be assumed that by the mere fact of their being foreseeable, risks are automatically undertaken or assumed by one party or the other without a separate determination in that regard. There is an economic explanation for why a foreseeable risk is not necessarily allocated or assumed. It is postulated that an optimal rule for Excuse is that "the risk in concern must be an unforeseeable one, *where ex ante processing/description costs exceed expected benefits of having processed/described for such a contingency*."[123] Therefore, where the risk, though foreseeable, is very remote – in the sense of Knightian uncertainty – provision for it and therefore its allocation may present a cost that none of the parties was expected to undertake. A separate determination would show if it was indeed allocated to, or assumed by, one of the parties.

In their application of the provisions of Uniform Commercial Code,[124] the American courts tend to adopt an approach similar to civil law courts in this regard. They similarly require that the relevant event that would provide basis for *Excuse* should not have been foreseen or reasonably foreseeable.[125] However, in the three-step approach to availing a party of Excuse on the ground of commercial impracticability, the court, in *Transatlantic Financing Corp. v. United States,*[126] one in the first set of cases to interpret the provisions of U.C.C. § 2-615, treated determination of foreseeability ("contingency") separately from that of allocation of the risk of that contingency as well as that of the impracticability effect on performance.[127]

[123] Kovac, *supra* note 31, at 292 n. 13 and accompanying text (emphasis added).
[124] *See, e.g.* U.C.C. § 2-615.
[125] *See* McWilliams v. Masterson, 112 S.W.3d 314, 320 (Tex. App. 2003*); see* Kel Kim Corp v. Central Markets, Inc., *supra* note 73.
[126] Transatlantic Financing Corp. v. United States, *supra* note 84.
[127] *Id.* at 315.

The position in the English courts is not so clear. The decision in the case *WJ Tatem Ltd v Gamboa*[128] to the effect that the foreseeability of the event does not preclude the availability of frustration unless the parties expressly provide for it appears, on a cursory look, to be identical to that of the continental jurisdictions. However, this masks the confusing situation in the English courts where the two determinations stated above sometimes appear fudged so that, in some cases, enquiry as to the existence of the conditions for frustration might be the same as whether its risks are allocated with the foreseeability of the event playing a determinative role in that regard. Thus, a rash of *obiter dicta* have stated the position with inconsistency, with some affirming that foreseeability of the risk would preclude frustration[129] and others stating the contrary.[130] However, as we discuss later in this article a recent development in some common law courts – to wit, the multifactorial approach to cases of frustration – appears to be separating the two determinations as well as it is altering other aspects of the traditional common law approach to the doctrine of frustration.

Other significant factors tend to be influential on the decisions. For example, a plea of frustration was rejected because the risk was reasonably foreseeable only to the party making the plea and not to the other party.[131] However, the parties may, foreseeing the risk, agree expressly to preclude the application of the doctrine of frustration.[132] No such agreement would however be upheld where performance is affected by some forms of supervening illegality.[133] What is clear in the array of court decisions in this area is that they are bookended by two fundamental principles of contract in common law, namely: *freedom of contract* (by which it is sound reasoning that general doctrine should defer to the express intention of the parties to allocate the risks of failure to perform) and *ex turpi*

[128] [1939] 1 K.B. 132.

[129] Davis Contractors Ltd v. Fareham Urban District Council AC 696 (1956).

[130] Ocean Tramp Tankers Corporation v. V.O. Sovfracht *(The Eugenia)* 2 Q.B. 226 (1964) (taking the approach that foreseeability is irrelevant if the parties do not expressly provide for it, which is in tandem with the principle of freedom of contract).

[131] Walton Harvey Ltd v. Walker & Homfrays Ltd 1 Ch. 274 (1931).

[132] *See* Lord Denning's obiter dictum in *The Eugenia*, *supra* note 130, at 239 (stating that "[i]t has often been said that the doctrine of frustration only applies where the new situation is "unforeseen" or "unexpected" or "uncontemplated" as if that is an essential feature.... The only thing that is essential is that the parties should have made no provision for it in the contract.").

[133] *See* Ertel Bieber & Co v. Rio Tinto Co Ltd A.C. 260 (1918) (for a case of trading with enemy aliens). However, unlike the case in trading with enemy aliens, it is possible to exclude the doctrine and allocate the risk of non-performance in some cases. This is possible in some prohibition cases, where, on interpretation, the intention of the parties is not to subvert a legal prohibition, but some other clearly legal means of saving the transaction, such as temporary suspension, has been adopted and the allocated risk, say some form of payment, merely serves as economic adjustment for avoiding the immediate illegality. *See* Treitel, *supra* note 51, at 887–88 (expressing the view that the unrelieved frustration of trading with an enemy alien, unlike some other cases of prohibition, is a *suis generis* case and especially based on strong public policy consideration).

causa non oritur actio (by which reasoning no express allocation of risk should be enforced so as to aid an illegality even where it arises *ex post*).[134]

As the above shows, the approach in the "closed" systems of the common law has had some troubled outcomes. The creation of *a priori* substantive rules on economic adjustment demonstrates what we have noted as the weakness of centralised coordination in cases of Knightian "uncertainties". Automatic discharge and termination of the contract itself bucks what we know about the contract-saving attitude of parties in such circumstances and the preference for bilateral coordination in that regard.

The "open" system of the French and the Germans creates protocols by which economic distortions arising out of Excuse could be adjusted and the contract saved.[135] This is accomplished through the adaptation powers of the court or, before that in French *imprévision* law, renegotiation by the parties. In the English closed system under which discharge and, in most cases, termination of the entire contract is the invariable consequence, solutions to economic distortions have turned on development of elaborate substantive rules first by the courts and later by statute.

2.1.6. MULTIFACTORIAL APPROACH: A CONTEXTUAL TURN IN COMMON LAW EXCUSE?

Finally, recent developments in the law of frustration in some common law jurisdictions should be noted. The introduction of the "multifactorial" approach to the test by which a case of frustration may be determined departs from the now classical *radical difference* test. In the English case of *The Sea Angel*,[136] Rix L.J. laid down the multiplicity of factors that the court should evaluate while considering whether a case of frustration has been established. These are:

1. Terms of the contract;

[134] The maxim meaning, in précis: "the courts will not aid an act founded on illegality", encapsulates a doctrine that, admittedly, is better developed in *ex ante* illegality of contract as well as in the Law of Tort. *See* Dov Goldberg, *Does the Doctrine of Not Enforcing "Illegal Contracts' Really Work? A Comparative Law Study* (November 10, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707005 (last visited Mar. 27, 2020) (for an analysis of its application in contract and tort laws). However, application of the maxim to cases at both the making and the performance phases of contracts is encapsulated in the American Restatement (Second) of the Law of Contracts § 178.

[135] *See* Oosterhuis, *supra* note 76 for a comparative analysis of the closed and open systems in Europe. It is to be noted that the article was published before the 2016 reform that now makes the French system an "open" one. Before then, only the administrative court applied the doctrine of imprévision to justify adaptation of government contracts that are disturbed by change of circumstance or commercial hardship (*see* Oosterhuis, *supra* note 76).

[136] *Edwinton Comm. Corp. v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* 2 All ER (Comm) 634 (2007); or EWCA Civ. 547 (2007); 2 Lloyd's Rep 517(2007).

2. Its matrix or context of the contract;

3. The parties' knowledge, expectations, assumptions and contemplations as to risk at the time of the contract insofar as could be ascribed mutually and objectively;

4. The nature of the supervening event; and

5. The parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.

Although this approach has been developed for application at the first of the two levels of determination by the court – that is, on whether the event put forward has frustrated the contract – it is motivated by the same impetus as that which guides civil law judges in making adaptation decisions (adaptation, it should be recalled, is a second level decision that deals with the consequence of the initial determination). Judges applying the multifactorial approach have stated factors like "fairness and justice" and "demands of justice" as the motivating force for the emergent approach.[137] It helps forestall the possibility that contractually allocated risks between the parties are inadvertently reversed and the cause of justice thereby defeated.[138]

This approach holds some significance for the development of this area of law in the common law tradition. Firstly, it has brought some clarity to the two determinations regarding foreseeability and risk allocation or assumption as discussed earlier.[139] In the enumeration of the multiple factors stated above, factor number (*v*) deals with foreseeability while factor number (iii) deals with risk allocation.[140] To illustrate this point, in the New Zealand case of *Planet Kids*,[141] one of those in which the approach was meticulously applied and the factors considered *in extenso*, the court had distinct considerations, *inter alia*, of: (a) the contractual clause on allocation of risks (b) foreseeability of the event and (c) establishment of frustration. In that case, the questions revolved around whether a settlement agreement between the respondent city council and the appellant institution (wherein the appellant was to be compensated for surrender of a property leased from the council under an extant lease agreement) was frustrated by the destruction of the property by fire before the date of surrender. By its provision, the lease agreement was to be terminated upon destruction of the property.

[137] *Id.* ¶ 113 .
[138] Lawtext.com, *Analysis and Comment: The Sea Angel*, Journal of International Maritime Law 13, 388, 390 – 391 (2007), http://www.lawtext.com/pdfs/sampleArticles/jiml13-6AnalysisDRT260208.pdf (last visited May 15, 2020).
[139] *See supra* Section 2.1.5.
[140] *See* Monichino, *supra* note 88, text accompanying n. 56.
[141] *Planet Kids Ltd v. Auckland City Council* NZSC 147 (N.Z.) (2013).

The council canvassed this to mean that, having regard to the fire incident, there was no leasehold to surrender and the obligation to pay compensation under the settlement agreement was thereby frustrated since such a payment would now be radically different from what was contracted for. Of relevance was that the settlement was effectively hashed out in lieu of an alternative procedure for the acquisition of the property under the relevant legislation.

On the issue of risk allocation, the court, whilst holding that contractual allocation of risk could preclude the doctrine of frustration in respect of the concerned risk, stated that other material factors could nonetheless frustrate the contract. Ultimately, the court came to the conclusion that no determination on risk allocation was required by the circumstances of the instant case, since the risk concerned in the case was different from that for which provision was made in the settlement. On the issue of foreseeability, whilst the court accepted the interpretation that the destruction of the property being included as a ground for termination of the lease agreement made that event a foreseeable risk, it was merely one of the relevant factors to be considered in a multifactorial analysis aimed at ultimately determining the question of frustration. Glazebrook J. stated the position of the Supreme Court of New Zealand thus:

> A foreseen event will generally exclude the operation of the doctrine, but the inference that a foreseen event is not a frustrating event can be excluded by evidence of contrary intention. When an event is foreseeable but not foreseen by the parties, it is less likely that the doctrine of frustration will be held to be inapplicable. The degree of foreseeability required to exclude frustration is high. The supervening event must be one that any person of ordinary intelligence would regard as likely to occur. Further, not only must the supervening event be foreseeable but its consequences or effects on the contract must also be foreseeable. The inference that an event that is foreseeable may exclude frustration can also be displaced by evidence of contrary intention.[142]

The ultimate determination, on the balance of factors, was that the settlement agreement was not frustrated. Relevant to that determination were the following factors:

1. The ultimate achievement of the common purpose of the settlement agreement, having regard to the objectives of the individual parties, the said purpose being "to settle the Public Works Act dispute and thus to achieve certainty that Planet Kids'

[142] *Id.* ¶ 158. The court's exposition conforms to economic analysis that remoteness of a risk may defeat any presumption that risk is assumed by the fact of its foreseeability. See *supra* text accompanying note 123.

lease would be terminated, to identify the timing of that termination and to set the amount of compensation payable for the consequential closure of Planet Kids' business";[143]

2. The balance of hardships that would be against the appellant, which would lose both possession and compensation for such loss if the settlement was declared frustrated; and

3. The foreseeability of the risk of termination of the lease.[144]

The multifactorial approach would appear to be turning a contextualist bend in the common law of contract. The faithfulness of common law courts to the bargain of the parties – based on a rhetorical commitment to the principle of sanctity of contract – is also reflected in the textualist commitment to the express provisions of the contract.[145] This general approach of not taking liberties with the expressed intention of the parties is one key reason why judicial attitude has not moved towards the adaptation practices similar to the civil law courts.[146] Adaptation allows courts to take exogenous matters (to wit, the altered economic balance) into consideration to re-balance the bargain of the parties. The approach, in common law, of terminating the contract first, before proceeding on loss adjustment would seem to have avoided such "intrusion" on the bargain of the parties. The courts applying the multifactorial approach now appear to have imported the contextualist position. Of course, the courts have always recognised that the "special exception which justice demands"[147] is a rationale for the doctrine of frustration. The new approach merely now recognises that the said demand requires not just the true construction of the contract but also a consideration of all the relevant circumstances that justice demands.[148]

In our view however, application of contextualism at the first level of determination misses the additional benefit of adaptation and the opportunity to save the contract. If the multifactorial approach is to succeed and become widely influential across the common law world, there needs to be a reconsideration of the half-hearted

[143] *Id.* ¶ 96.

[144] *See supra* note 141, at 164 – 167; *see* David MacLauchlan, *"Frustration" in the Court of Appeal*, (June 21, 2013), https://ssrn.com/abstract=2283094 (last visited June 12, 2020) (for a criticism of the prior judgment of the New Zealand Court of Appeal that was reversed in this case, with the writer's argument essentially anticipating the reasoning in the later Supreme Court decision).

[145] *See* Gilson et al., *supra* note 47, at 34–36.

[146] *See* Baranauskas & Zapolskis, *supra* note 94, at 203.

[147] Per Lord Summer in Hirji Mulji v. Cheong Yue Steamship Co Ltd AC 497, 510 (1926), as cited in the *Sea Angel's* case, supra note 136.

[148] *See also* Jamil Mustafa, *Frustration: A New Approach for the 21st Century?* (12.00, July 25, 2017) http://www.keepcalmtalklaw.co.uk/frustration-a-new-approach-for-the-21st-century-/ (last visited June 6, 2020)

contextualism implicated in its outcome. Could legal reforms allow a fuller embrace of the contextualist implication of this approach by permitting the courts to utilise it, not just in establishing a frustrating event for the purpose of terminating the contract, but to correct the distortive effect of such an event in deserving circumstances with the aim of keeping the contract alive? After all, as we have shown already, the contract-saving objective is supported by insights from contract economics and the reality of commercial attitudes. What is more, it has been argued by some scholars that contextualism is not such a strange animal in the terrain of common law after all, having regard to the roles of the old English courts of equity.[149]

2.2. EXCUSE IN CONTRACTUAL CLAUSES

There are a host of reasons for commercial actors not to be wholly satisfied with the doctrinal basis for Excuse. Tensions between the fundamental principles of *freedom of contract* and *sanctity of contract* continue to reflect on the uncertainty in this area. This is especially so with the flexible effects and their legal consequences, regarding which the doctrinal distinction between the legal traditions tend to be much starker both in the degree of flexibility permissible and the structure of the doctrines. Furthermore, the "neutral" consequences of the doctrinal grounds deny the parties a variety of other options for controlling outcomes. In this regard, the civil law admittedly offers more flexibility than the common law system. While it could be argued that parties should exercise autonomy in choosing the "better" law to govern their contract, the single factor of flexibility cannot be wholly determinative of the overall choice of law. For example, English law, for a variety of reasons, is still the most frequently selected as governing law in international transactions.[150] In this circumstance, it appears a better use of party autonomy to go *in extenso*, in the contract, to state the substantive rules that would govern unplanned events and their supervening effects.

For these and other reasons, commercial practices have evolved solutions by way of contractual clauses that give the parties control over the hypothesis and legal consequences of such events. These clauses are so commonly utilised and well-developed that many of them are fairly standardised in trade custom and usage, thus forming part

[149] *See* Gilson et al., *supra* note 47, at 49 & 50 [note, however, that the authors are careful to argue that contemporary courts that would play an analogous role to those of fifteenth century equity courts must, per force, upgrade to the level of sophistication that would enable them properly contextualise the range and complexities of modern economic activities (*see id.* at 46)].

[150] *See* Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 Nw. J. Int'l L. & Bus. 455, 475 (2014) (demonstrating, through empirical study, that the factors that privilege English law are not always intrinsic to the quality of its rules).

of the *lex mercatoria.*[151] The two notable clauses in this regard are *Force Majeure* and hardship clauses.

Although the method for drafting *Force Majeure* or hardship clauses is continuously evolving, there is a two-phased structure to them similar to the doctrinal grounds for Excuse. The two phases are: (a) defining the events or circumstance, or otherwise identifying conditions under which performance, in the manner agreed, would be impossible or commercially hard (*hypothesis*) and (b) stating the legal consequence, including stating the protocols for saving the transaction by adjusting the mode of performance through future renegotiation and, failing that, an orderly termination and, if necessary, allocation of losses (*regime*).[152]

2.2.1 *FORCE MAJEURE* AND HARDSHIP CLAUSES: THE HYPOTHESIS

2.2.1.A. *FORCE MAJEURE* CLAUSES - "EPIDEMIC" ITEM AND PROBLEM OF INDETERMINACY

Force Majeure and hardship clauses are close analogues, respectively, of the stricter and the flexible ends of supervening effects in the doctrines. In fact, as the name suggests, *Force Majeure* in contractual practice developed from the *force majeure* in French doctrine.[153] The hypothesis of *Force Majeure* clauses is stated in terms of defining the applicable disruptive events (*Force Majeure* events). *Force Majeure* events are either (a) broadly defined by reference to the classical doctrinal elements of the event such as supervening impossibility, unforeseeability and uncontrollability (or unavoidability), or (b) by enumeration of the nature or categories of events that are to be regarded as *Force Majeure* event. In applying the definition technique, parties have been known to

[151] *See* Peter Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2012 Nordic J. Com. L. (Issue 2011 #2) 1, at 54. https://www.researchgate.net/publication/228204507_Force_Majeure_Impossibility_Frustration_the_Like_Excuses_for_Non-Performance_the_Historical_Origins_and_Development_of_an_Autonomous_Commercial_Norm_in_the_CISG/citations (last visited June 17, 2020)

[152] Stating these two parts clearly is important as a mere inclusion of, say, the term *Force Majeure* as a hypothesis without stating the regime could lead to *déceçage* (incompatibility) if the governing law of the contract does not have *force majeure* as a general doctrine. In such a circumstance, the court cannot fill the gap by allocating a legal consequence under the general law. *See* Fontaine & De Ly, *supra* note 41, at 407. *See* British Electrical and Associated Industries (Cardiff) Ld. v. Patley Pressings Ltd. 1 WLR 280 (1953) [where a clause stating the contract to be subject to "force majeure conditions" (a term that was not defined) was declared void for uncertainty). *See Kel Kim, supra* note 73, at 296 (where a New York court stated that no "expansive meaning" would be given to a *Force Majeure* clause so as to give recognition to an event that is not specifically enumerated therein).

[153] For purposes of clarity, we have used the italicised *force majeure* for the doctrinal concept, the capitalised *Force Majeure* in the context of contractual clauses and the quoted "force majeure" in contexts which refer to both or either of the two senses.

sometimes omit or attenuate one or more of the three elements highlighted above. The typical events listed in the enumeration techniques are those that foist legal or physical impossibility on the parties' ability to perform.[154] Meanwhile, either technique could be used solely or in combination with the other. Where they are used in combination, the enumerated events usually serve to illustrate the broad definition, but it could be drafted to limit it in some cases.[155]

While critiques have been developed on the different techniques and approaches to the hypothesis of *Force Majeure* clauses,[156] it is useful to highlight here how the case of "epidemic" (or, rarely, "pandemic")[157] as a *Force Majeure* event illustrates some of the complications entailed in enumeration-involved approaches, even while underscoring some peculiarities of its own. For example, when considering a list that appears definitive, does the absence of an actual event on the list obviate the determination of a *Force Majeure* event otherwise? In a review of the over twenty *Force Majeure* clauses produced in an influential book of precedents,[158] "epidemic" is specifically listed as a *Force majeure* event in only six of them. In the circumstances of Covid-19, failure to have specifically listed "epidemic" as a *Force Majeure* event may, generally speaking, limit the ability of affected parties to invoke *Force Majeure* on the basis of the pandemic, especially where an outbreak has not (yet) directly affected their location – perhaps due to the fortune of location or time. Nonetheless, this would not be solely determinative of the question whether a *Force Majeure* event has actually occurred. Other connected events could arise. An example would be where an outbreak of the pandemic elsewhere has triggered government containment actions or S.C.D. that directly affected the relevant party.[159] In addition to the possibility of relying on the item of the *Force Majeure* clause enumerating governmental action, affected parties, it has been argued, also stand a good chance of being covered by the item "Act of God", one of the most common items in the enumeration approach to *Force Majeure* clauses.[160]

[154] For an extensive overview of *Force Majeure* events that have been found in an array of international contracts, see Fontaine & De Ly, *supra* note 41, at 408–13.

[155] *See id.* at 414.

[156] *See id.* at 402–18 for an analysis of diverse techniques and approaches to developing hypotheses for *Force Majeure* clauses, and a critique.

[157] Andrew A. Schwartz, *Contracts and Covid-19*, 73 Stan. L. Rev. Online 48, 56-57 (2020). (in supporting the assertion that the term "pandemic" is virtually absent in the documentation of *Force Majeure* clauses, outlining the following result from an empirical survey: (i) a zero return was recorded from a search conducted on the platform Westlaw in April 2020 for cases on *Force Majeure* containing the term "pandemic" (ii) by comparison, a search for "epidemic" along with the term "Force Majeure" returned 77 results, and (iii) finally, to put the foregoing in full context, a search for the term "Force Majeure" alone returned over 2,000 results).

[158] Rodney D. Ryder, Drafting Corporate and Commercial Agreements: Legal Drafting Guidelines, Forms and Precedents (2005). *see* Schwartz, *supra* note 157.

[159] *See* Section 3.3. *infra.,* for an articulation of possible scenarios in the context of Covid-19.

[160] *See* Schwartz, *supra* note 157, at 57.

There is an outstanding problem, nonetheless. Even where "epidemic" is listed as a *Force Majeure* event, there arises the problem of indeterminacy regarding the exact time the event commenced. This has implications for determining the timelines for protocols that, as would be noted later, are entailed in aspects of the typical regimes applicable to *Force Majeure.* In the circumstances of Covid-19, the date of declaration of a pandemic by W.H.O., or epidemic by the concerned national public health authority, could be relevant. However, considering that some governments in the worst affected countries dithered, for varying reasons, in taking such indicative actions, the risk of indeterminacy persists. In this regard, determination will have to turn on the relevant facts of each situation, such as when factories actually shut down, or transportation systems went epileptic, or upstream contracts began to fail, etc.

For comparison, a similar indeterminacy exists regarding the war-related provisions in commercial contracts (for example, *Force Majeure* clauses and "war cancellation clauses"[161] in charterparties). Successfully invoking these clauses depends on the answer to the two questions: does a state of war exist and if so, when did it begin? This should ordinarily be possible with a proper definition of a state of war. However, conclusive proof of the existence of a state of war, or lack thereof, cannot be gathered from key markers such as, in the international setting, formal declaration (whether unilateral or unanimous),[162] or other official communications.[163] Meanwhile, repairing to the reality on the ground is never easy, considering that hostilities with disruptive portents for commercial activities include initial manoeuvring and "belligerent noises" that may or may not end in armed conflicts.[164] Well-drafted *Force Majeure* clauses have apprehended this problem of indeterminacy regarding war situations (thus, the famous "war and hostilities, whether war be declared or not" or similarly worded clauses). For most practical purposes, risks of disruption in an epidemic tend to be propagated in a similarly not-easily determinable manner as in a state of war.[165]

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[161] A war cancellation clause allows a party to terminate the charterparty where the flag state of the subject ship enters into a state of war. The rationale for this clause is to limit exposure to typical liabilities to which a ship flying the flags of a state at war is subjected, including seizure as "prize" by combatants of the opposing state and liability of nationals of the said opposing state and their transaction to alien enemy laws, where applicable.

[162] *See* D.J. Harris, Cases and Materials on International Law 887 (6th ed. 2004). (citing provisions of international instruments such as Article 2(4) of United Nations Charter as well as the 1949 Geneva Red Cross Convention and its 1977 Protocols to support the view that international law has moved from concern with the formality of war declaration to a functional approach that recognizes all uses of force or armed conflicts).

[163] *See* Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Company Ltd. (No. 2) 2 K.B. 544 (1939).

[164] *See* BRIAN DAVENPORT, *War Clauses in Time Charterparties, in* Force Majeure and Frustration of Contract 157-58 (Ewan McKendrick & Andrew Rogers eds., 2013). *See also* Harris, *supra* note 161 ("[I]t is now exceptional for parties to hostilities to regard themselves as legally at war").

[165] *See infra* Section 2.1.3. for discussion of a simulated account of risk propagation in a pandemic.

Perhaps, the experience of Covid-19 would help move the drafting of clauses enumerating "epidemics" as a *Force Majeure* event towards similar nuance in the future.

China has adopted a regulatory approach to bringing a level of certainty to the issue of determining the incidence of an epidemic. The quasi-official China Council for the Promotion of International Trade (C.C.P.I.T.) now issues a force majeure factual certificate (*Force majeure* certificate) to parties who desire a proof of event that constitutes *Force majeure* under their contract.[166] The *Force majeure* certificate merely provides a confirmation of the relevant event – including on connected details such as the nature, extent, date and length of the event, as well as any governmental order in regard thereof – and is not conclusive on a finding whether it then constitutes *Force Majeure* .[167] A tribunal seised of the matter will have to determine if, having regard to the stated facts, a case for *Force Majeure* has been established as envisaged in the agreement of the parties or otherwise in accordance with the doctrinal basis for *force majeure* or change of circumstance under relevant Chinese legislations.[168] Thus, while the role of the *Force majeure* certificate may be limited, its suitability for addressing the risk in concern before Chinese tribunals is not in doubt.

What remains to be determined is the willingness of other national courts or international tribunals to give the same evidential weight that Chinese tribunals would, to the *Force majeure* certificate. In other words, having regard to the international character of the current pandemic risks, will the issuance of the *Force majeure* certificate be widely recognised in complex international transactions as a backstop or bookend to the problem of indeterminacy in *Force Majeure* clauses? That Chinese law is the governing law of the contract will be of little moment where a Chinese tribunal is not the forum.

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[166] *See* Alan Schwartz, *Contract Theory and Theories of Contract Regulation, in* THE ECONOMICS OF CONTRACTS: THEORIES AND APPLICATION 102 (Eric Brousseau & Jean-Michel Glachant eds., 2004). Supra note 38, 116, at 116 [stating, as one of the four substantive aspects of proper state role in contract regulation, the supply to the parties of "governance modes for the conduct of transactions or the resolution of disputes," the other three being (i) contract enforcement (ii) policing of the parties and (ii)supply of common vocabularies]. Although Alan Schwartz identified the legislature as the appropriate state organ for performing this particular governance role, we consider this the fitting category for contract regulation represented by the *Force majeure* certificate, having regard to the quasi-official, rule-making status of C.C.P.I.T. as well as the recognition of the certificate by Chinese tribunals faced with fact finding and application of rules on "force majeure" cases.

[167] *See* Sophia Tang, *Coronavirus, force majeure certificate and private international law*, CONFLICT OF LAWS (March 1, 2020), https://conflictoflaws.net/2020/coronavirus-force-majeure-certificate-and-private-international-law/ .

[168] There are provisions analogous to *force majeure* and change of circumstance doctrines under Chinese law. *See*, respectively, Interpretation of the Supreme People's Court on Issues Concerning the Application of the Contract Law of the People's Republic of China (II) (promulgated by Judicial Committee of the Supreme People's Court, Feb. 9, 2009, effective May 13, 2009), art. 26, CLI.3.116926(EN)(lawinfochina.com) and Contract Law of the People's Republic of China (promulgated by Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 117, CLI.1.21651(EN) (lawinfochina.com) [the latter provision on *force majeure* will now be replaced by the newly promulgated Civil Code of the People's Republic of China (promulgated by Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), arts. 180 & 194, CLI.1.342411(EN) (lawinfochina.com)].

This is because, it is a well-established rule of private international law that matters of procedure – including, in this regard, evidence – are determined in accordance with the law of the forum (*lex fori*).[169]Therefore, a foreign court before which the *Force majeure* certificate is adduced as evidence may set only little store by Chinese practice regarding the document. Potentially, there is also a political dimension to the prospect of this document in attaining global acceptability. Therefore, much may depend on the general perception of the *Force majeure* certificate as fairly and evenly issued to all parties that are involved and not as a mere convenient shield for Chinese parties.

Covid-19 has been described as a "black swan" "because its worldwide consequences were extremely uncommon, consequential, and hard to predict".[170] However, recent trends indicate an increase in the frequency of pandemics generally,[171] thus portending the increasing significance of the problem of indeterminacy as we go forward. In this regard, the practice of issuing an instrument in the nature of the *Force majeure* certificate could be a welcome practice in international commercial transactions. Coordinating institutions of the *lex mercatoria* have a role to play in standardising it through development of principles for its issuance and its acceptability.

2.2.1.B. HARDSHIP CLAUSES

Hardship clauses, for their part, address typical developments in change of circumstance and not those that necessarily make performance impossible. Hardship arises "where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished".[172] Although the foregoing definition roughly approximates, in economic terms, the analysis that has been applied to some of the doctrinal grounds for Excuse,[173]this does not clarify the variety of circumstances that may foist hardship on performance. Suffice to say that hardship

[169] *See generally* Trevor C. Hartley, International Commercial Litigation: Text, Cases and Materials on Private International Law 505 (2009). Richard F. Oppong, Private International Law in Commonwealth Africa 10 (2013). Geert van Calster, European Private International Law 3, 270 (2d ed. 2016). *But cf.*Guangjian Tu, Private International Law in China 44 (2016). (suggesting that this principle itself is not an explicit one in Chinese conflict of law rules, although that is not relevant to the point in concern here).

[170] Luis A. Perez-Batres & Len J. Treviño, *Global Supply Chains in Response to COVID-19: Adopting a Real Options Mindset,* 20 AIB Insights 1 (2013).

[171] *See* Rayan Morard, *Global Health Security Overview – 2019*, World Economic Forum https://weforum.ent.box.com/v/HealthSecurity-2017(last visited Sept. 7, 2020) (last visited Oct. 4, 2021). (stating that the "number and diversity of epidemic events has been increasing over the past 30 years [a trend that] is expected to intensify").

[172] Art. 6.2.2 Unidroit Principles 2016 (this broad definition is subject to typical conditions such as, that the event (*a*) occurs post-contract (*b*) is reasonable unforeseeability (*c*) is uncontrollable and (*d*) its risk has not been otherwise assumed).

[173] *See* Schwartz, *supra* note 87.

clauses being typical in long-term contracts wherein performance is a series of exchanges or deliveries over a sustained period of time,[174] the relevant events are usually those changes that could be expected to interpose within such long timeframes or repetitive cycles.[175]

A typical hypothesis has two parts viz: (i) *definition* of the nature of the operative change in circumstance, and (ii) *consequences* that the change must have on the contractual relationship. In some cases, these two parts are preceded by a *preamble* articulating the understanding that underlie the provision. The *definition*, in addition to the typical elements of supervening events such as unforeseeability, uncontrollability or unavoidability, may encapsulate the nature of the circumstances in specific or general terms. General circumstances could be expressed regarding whether they are of an economic or political nature while specific circumstances are a rough analogue for enumeration in a *Force Majeure* clause. They detail the operative circumstances in practice such as whether it is in respect of price, pricing and exchange rate, change in law or regulation or other disruption to market access, as well as market developments such as technology obsolescence or diminution in downstream market or off-take. The level of details in the articulation of specific circumstances varies by practice.[176] There is also the possibility of expressly excluding specific circumstances from the hardship clause, especially those already covered by definitive review or amendment clauses.[177]

The operative *consequence* specifies the effect – to wit, the nature or degree of hardship – of the circumstances on the contract or performance, based on criteria that could be objective or subjective. The consequence may also be articulated broadly or with diverse levels of specificity.

[174] *See* Comment 5 to Art. 6.2.2 Unidroit Principles 2016 (without excluding other circumstances, emphasizing that "hardship will normally be of relevance to long-term contracts"); *see also* Fontaine & De Ly, *supra* note 41, at 453 & 455 (emphasizing the particular relevance of hardship clauses to "long-term contracts" and "middle or long-term undertakings").

[175] Broad categories would include, say, change to fiscal factors such as price, pricing and exchange rate, changes of a legal or political nature including change in law or prohibition that disrupt market access, as well as market developments such as technology obsolescence. *See* Fontaine & De Ly, *supra* note 41.

[176] For an analysis of diverse techniques and approaches to developing hypotheses for *Force Majeure* clauses, and a critique, see *id.* at 402–18.

[177] Such exclusion may not be conclusive in a determination whether doctrinal Excuse applies, since such clauses are themselves subject to doctrinal grounds, such as frustration. *See* Treitel, *supra* note 51, at 899–900.

2.2.2. *FORCE MAJEURE* AND HARDSHIP CLAUSES: THE REGIME

Under simple *Force Majeure* clauses, the legal consequences that typically follow an effective declaration of *Force Majeure* event are, in the case of a temporary event, *suspension* of performance, and *termination* of the contract where the event or its effect does not cease or sufficiently abate within the period of suspension. Of course, there may be termination without need for suspension where the *Force Majeure* event concerned is of such a nature as to make such cessation or abatement unlikely to occur anytime in the reasonable future. There are also protocols such as issuance of notices in respect of the declaration of the *Force Majeure* event or of the suspension or the termination, as the case may be.

- Epidemic occurrence with disruption localised in the upstream of the supply chain: Disruption is proportional to the duration of the disruption.
- Simultaneous occurrences with disruption propagated by ripple effect and pandemic effect: Disruption depends on the timing and scale of disruption propagation (the ripple effect) as well as the sequence of facility closing and reopening at different nodes rather than on the duration of disruption upstream.
- Simultaneous occurrences with synchronous disruptive effects on both supply and demand end of the supply chain: The more synchronised the recovery timing of facilities, the less likely there will be disruption. In terms of duration of disruption, this is more material downstream so that a positive outcome of this scenario is more dependent on the quickness in restoration of operations and demand in that node of the supply chain.

2.2.3. DOES AVAILABILITY OF A CONTRACTUAL GROUND OBVIATE APPLICATION OF DOCTRINAL GROUNDS FOR EXCUSE?

To round off this part of the article, we should summarise the relationship between the doctrinal and contractual grounds for Excuse. Does the inclusion of a *Force Majeure* clause in a contract obviate the application of the general law, say, the doctrine of frustration? Of course, this question is irrelevant where the supervening event or changed circumstance in concern is specifically enumerated in the *Force Majeure* clause or hardship clause. However, circumstances arise in which such actual event or circumstance does not appear to have been covered by contractual ground for Excuse. Does the bare existence of such a contractual ground evince the intention of the parties

to limit the grounds to only those specifically stated, so that no other grounds may be admitted even under the general law?

An analysis of the array of cases suggests the following principles:

- Parties could by the express agreement exclude the application of the doctrinal grounds to supervening events.[178] This is because, in principle, the parties could by agreement allocate risks arising from such events;[179]
- However, where on true construction, the court finds that the supervening event at issue before the court is out of scope of the express exclusion in the contract (such as when "risk materialises in some overwhelming form"[180]), the courts would excuse performance on doctrinal grounds, where available[181] or under any alternative provision of the contract wherein termination may be effected on "neutral" grounds;[182]
- Furthermore, regardless of how the parties spell it out, no agreement of the parties may be read to exclude, say, frustration of a contract regarding an obligation that would be illegal at the time of performance, unless the agreement itself is worded so that the objective is purely the allocation of economic risk rather than mandating performance at the risk of illegality.[183]As previously stated, this rule has a public policy dimension to it.[184]

Finally, on this point, it should be reiterated that the mere fact of the alternative application of a doctrinal ground for Excuse, in the absence or upon the failure of contractual grounds, does not mean that these two grounds have the same consequence. It should be recalled, for example, that the invariable consequence of the doctrine of frustration is generally "neutral" – discharge of the obligations and, except in cases of severability, termination of the contract as well as adjustment of losses in accordance with the law.[185] Contractual grounds, on the other hand, offer the parties more latitude for control of the consequence. It has been suggested, for example, that severability clauses could be influential on judicial determination of the consequences of termination

[178] Rafal Zakrzewski, *Material Adverse Change and Material Adverse Effect Provisions: Construction and Application,* 5 L. & Fin. Mkt. Rev. 344, 349 (2011).
[179] *See* Kuwait Supply Co v. Oyster Marine Management (The Safeer) 1 Lloyd's Rep 637 (1994).
[180] Per Rix J., *id.* at 643.
[181] *See* Metropolitan Water Board v. Dick, Kerr & Co AC 119 (1918), HL; Jackson v. Union Marine Insurance Co. L.R. 10 C.P. 125 (1874).
[182] *See* Bank Line Ltd. v Arthur Capel & Co A.C. 435 (1919).
[183] *See* Ertel Bieber & Co v. Rio Tinto Co Ltd A.C. 260 (1918); *Metropolitan Water Board v. Dick, Kerr & Co Ltd* , *supra* note 186;
[184] *See supra* note 81.
[185] *See supra* Section 2.1.2.

of an unenforceable contract.[186] Controlling, at a minimum, the regime of effective consequences, even if the bare protocols if not the substantive loss adjustment, is reflective of party autonomy and brings the outcome as close as possible to what commercial bargainers might desire under the circumstance.

3. PRACTICAL APPLICATION IN THE CIRCUMSTANCES OF PANDEMIC-INDUCED SCD

3.1. BASES OF OUR FRAMEWORK OF ANALYSIS

Our framework draws from understanding distilled from three streams of insight: (i) our above analysis of the doctrinal and contractual grounds for Excuse (ii) the nature of O.L.L.S. contracts that govern supply chains, and (iii) the unique patterns of risk propagation in pandemic outbreaks. The first two streams enable us to apply the framework to the analysis of situations of a global pandemic, having regard to the insight gained from the third stream. We therefore proceed to briefly discuss the understanding from these streams of insight below.

3.1.1. THE DOCTRINE-CONTRACT COMPLEX

There are two key insights from our analysis of the doctrinal and contractual regimes that are important for developing a framework for examining impact on global supply chain contracts. Firstly, the two regimes have a mutually reinforcing relationship in the development of this area of law. Whilst the lawmakers and the courts have been concerned with delimiting the grounds for Excuse, commercial actors continually seek, through party autonomy, to give similar effect to developments emergent from continually evolving commercial reality.[187] In the process, model clauses have evolved in commercial contracts that, in many cases, capture the doctrinal grounds, while, in others, supplement them or alter their effects or, where possible, even exclude them outright. In consonance with the rule-producing roles of commercial actors,[188] legislators have, in turn, taken inspiration from commercial reality, to varying degrees, in legal reforms across the jurisdictions. This system-level insight shows a

[186] *See* Fontaine & De Ly, *supra* note 41, at 175–76.
[187] *See supra* Section 1.1. (for economic explanation of these behaviors).
[188] *See* IGLP, *supra* note 68, at 77.

two-directional, mutually-reinforcing pattern and is therefore different from the "contracting in the shadow of the law" thesis propounded by Mnookin and Korhausert[189] and adopted by Schwartz in the field of contract law.[190]

This leads us to the other insight, which is at firm or transaction level. It is possible, and is often the case, that the two regimes apply to the same contractual relationship, with the doctrinal grounds providing the default rules whilst rules from the contractual regime could be introduced to affect the default rules in the manner described above regarding model contracts. The parties could, of course, make their own peculiar terms or otherwise adopt, or incorporate by reference, some existing model clause.[191]

These insights make it possible to develop a doctrine-contract complex as an analytical framework for illuminating the potentially systemic risks that a disruptive event, with such dynamic impact (both spatial and temporal) as a pandemic, could pose to a global supply chain. This could be achieved by combining these insights with an understanding of the nature of contacts governing the supply chain, or what we have called O.L.L.S. contracts.

3.1.2. THE NATURE OF "OPERATIONALLY-LINKED (BUT) LEGALLY SEPARATE" [OLLS]

In our framework, the unit of analysis are the G.V.C.s, which have operational logic that is underlain by O.L.L.S. contracts. O.L.L.S. contracts, at base, underlie a set (chain) of dyadic relationships in which the success or failure of one contract (*determinant contract*) has implication for the ability or inability of a party in that contract to perform its obligation to another party in a separate contract (dependent contract). Now, the area of tension[192] is between the economic reality of G.V.C.s and the legal doctrine of privity of contract. Generally, by that doctrine, a party cannot acquire rights or be saddled with obligations under a contract to which it is not a party.[193]

[189] *See* Robert H. Mnookin & Lewis Korhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 968 (1979).
[190] Schwartz, *supra* note 165 , at 116–25.
[191] This constant presence of the doctrinal rules that have to be dealt with one way or another is the proper Mnookin and Korhausert "shadow". Schwartz, *supra* note 87, at 8 (ed. 2009), treats "standard" contracts as midway between two other approaches: the first being to allow the default rules under the governing law to determine the terms, and the other being to design bespoke terms. All three approaches have economic rationale.
[192] *See* Eller, *supra* note 24.
[193] TREITEL, *supra* note 51, at 606–07.

G.V.C.s are conceived as a single, if complex, set of operations aimed at producing and/or delivering a good or service to the end user, using spatially and/or organisationally dispersed resources. Thus the failure of one of the nodes could disrupt the entire chain and, with it, the ability to deliver the good or service. Besides, the good or service may have an "owner" in the eyes of the end user or other external participants in the market. In fact, it is usually the case that an "owner" has configured the entire chain either from the ground up or, more usually, by consummating the final link in the chain that consolidates existing operations for the purpose of delivering a specific good or service.[194] Such an "owner" will usually be the lead firm in a supply chain.[195] Therefore, these lead firms have an incentive to ensure the performance of all the relevant operations. However, where they have no direct contract with some of the participants in the chains, the classical remedies in breach of contract, which may come in handy for relief at individual dyadic levels, will not be suitable to remedy the overall economic failure.

Salminen has considered this type of limitation in the context of chain-wide compliance programs. In his study of models of G.V.C. governance, he has distilled some "contract boundary-spanning" governance mechanisms by which lead firms may reach beyond the limitations of privity to control other participants in their value chains over which they have no direct contractual relationship.[196]

[194] In more complex systems such as an I.S.N., such links or nodes would be consolidating smaller chains or networks into a single system for the purpose of delivering the good or service. *See supra* note 9. It should be noted that these are different from the so-called "spiderless networks" that are "formally independent but functionally interdependent firms" employing logic of spatial contiguity or strategic alliances to externalize and share infrastructure of resources and capabilities. Spiderless networks tend to be proximate rather than dispersed (although in the tech industry, less contiguous firms may form strategic alliances) and, unlike supply chains, are typically not directed at bringing a single product or service to the customer. *See* Ariel Porat & Robert E. Scott, *Can Restitution Save Fragile Spiderless Networks?* 8 Harv. Bus. L. Rev. 1 (2018). (for differences between Spiderless networks and "collaborative supply chains").

[195] It may also be a parent company in a corporate group (the head office of an M.N.C., for example). Because corporate groups are governed through ownership and managerial control, the economic-legal tension is less but admittedly not completely eliminated. *See* Kurt A. Strasser and Philip I. Blumberg, *Legal Models and Business Realities of Corporate Groups: Mismatch and Change*, 5 CLPE Research Paper Series 3, (2009). In the cross-border context, M.N.C.s are subject to additional tensions between the "separate entity" and "enterprise" approaches to corporate groups, that may affect, for good or ill, the ability of a parent company to effect extraterritorial coordination. *See* Phillip I. Blumberg, The Multinational Challenge to Corporate Law: The Search for a New Corporate Personality 168-01 (1993). 168 – 201. There are also operational risks arising from spatially dispersed operations or, as has increasingly been the case, the increasing delivery of their outputs through contract-based strategies embracing third-party suppliers (*see supra* note 11 and accompanying text).

[196] *See* Salminen, *supra* note 62. *See also infra* Section 3.5.1. where we make suggestions on how Salminen's model may benefit discussions on control of supply chains for risks arising out of Excuses.

3.1.3. PECULIAR PATTERNS OF RISK PROPAGATION IN A PANDEMIC

To utilise our framework in the context of the current Covid-19 pandemic, it is important to underscore the dynamism of the impacts that will be created by the crisis *vis-à-vis* global supply chain activities. For insight, we rely on an early study of the Covid-19 pandemic by Dmitry Ivanov, who aptly describes the nature of pandemic-related supply chain risks in the following manner:

> [U]nlike other disruption risks, the epidemic outbreaks start small but scale fast and disperse over many geographic regions creating a lot of unknowns which makes it difficult to fully determine the impact of the epidemic outbreak on the [supply chain] and the right measures to react. Overall, the epidemic outbreaks create a lot of uncertainty and companies need a guided framework in developing their pandemic plans for [the supply chain].[197]

Having regard to the kind of difficulty described above, Ivanov has simulated possible disruptive outcomes of the pandemic for the supply chain, based on scenarios that vary the interplay of spatial and temporal occurrences of the pandemic events. The three scenarios considered are as follows:[198]

- Epidemic occurrence with disruption localised in the upstream of the supply chain: Disruption is proportional to the duration of the disruption.

- Simultaneous occurrences with disruption propagated by ripple effect and pandemic effect: Disruption depends on the timing and scale of disruption propagation (the ripple effect) as well as the sequence of facility closing and reopening at different nodes rather than on the duration of disruption upstream.

- Simultaneous occurrences with synchronous disruptive effects on both supply and demand end of the supply chain: The more synchronised the recovery timing of facilities, the less likely there will be disruption. In terms of duration of disruption, this is more material downstream so that a positive outcome of this scenario is more dependent on the quickness in restoration of operations and demand in that node of the supply chain.

[197] Dmitry Ivanov, *Predicting the impacts of epidemic outbreaks on global supply chains: A simulation-based analysis on the coronavirus outbreak (COVID-19/SARS-CoV-2) case*, Transportation Research Part E: 136 Logistics & Transp. Rev. (2020), (manuscript at 9), *available at* https://europepmc.org/article/pmc/pmc7147532 .

[198] *Id.* at 6–9 (discussing the result of the study).

3.2. DEVELOPING THE FRAMEWORK

The possible supervening effects that a globally pervasive event might have on performance obligations in O.L.L.S. contracts range from the stricter effects of illegality and impossibility to the relaxed effect of commercial hardships.[199] We illustrate that range in Figure 1 below:

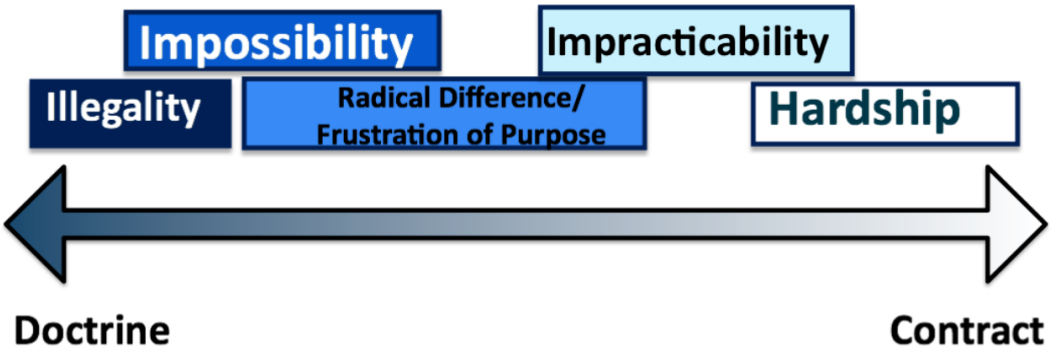

Figure 1: The Doctrine-Contract Complex and the range of supervening effects

Utilising the above framework, we understand that aspects of the same complex event, for example Covid-19, could have, on the same contractual obligation but at different times, the effects of the forms named in the boxes. It could also have a different effect drawn from that range on different contracts in an O.L.L.S. complex. The understanding is that the more leftwards an effect is in the continuum, the better is the chance that it would be covered by one of the traditional doctrinal grounds, whilst the more rightwards effects are likely to be covered by contractual regimes. Also, the more rightwards the effects are, the more sophisticated the clauses would have to have been to provide a ground for Excuse. The central area is the zone of uncertainty regarding the doctrinal grounds. Outcomes here requires deft understanding of the approach of the governing law and relevant courts in order to determine the reasonable success of the doctrinal grounds or to decide if reliance is better placed on contractual clauses, where available. In this regard, the civil law jurisdictions with dual and open approaches to Excuse offer more doctrinal certainty than the common law jurisdictions. Within the common law tradition, whilst American courts are more likely to make Excuse available under the doctrine of *commercial impracticability* than, say the English courts under frustration, we also have insight that the latter is likely to be more available in a consumer contract than contracts entered into by presumably sophisticated parties such as supply chain

[199] It is understood that supervening illegality is often considered a type of impossibility, however, we have decided to separate it in this framework, having regard to its public policy dimension (*see supra* note 133).

contracts are likely to be.[200] Whatever may be the case, well-drafted international commercial contracts should cover the entire field with reasonable certainty and are also more likely to give the parties wider latitude for bilateral coordination in determining the outcomes. Practical application of this framework to the Covid-19 scenario is discussed below.

3.3. DIMENSIONING THE SCD IMPACTS OF A PANDEMIC: FOUR SCENARIOS

In light of the insights previously discussed, and as we will show presently, the impact of Covid-19 will travel in waves that would result in diverse forms of supervening effects on businesses operations in different regions at different times. Thus, even in the same business, the scaling effect could result in Excuse grounds being invoked at increasing levels of disruptiveness as the supervening effects become more and more crippling. Some of the Excuse grounds will be available in doctrine and others in contract.

There are other points to make before formulating the scenarios. Firstly, for the sake of simplicity, we have excluded significant factors such as the impact of system safeguard strategies like resilience measures, as well as other factors such as sector- or transaction-specific lead-time for order fulfilment that would normally be taken into account in specific cases. The other point is that our scenario assumes a supply chain contract relationship that falls in any of the median classes in the five typologies of G.V.C. coordination identified by Gereffi, et al.[201] This would be anything between modular and captive typologies. This is because these models have a dynamic middle with supply chain participants that are freer in their agency than, say subsidiaries of corporate groups or M.N.C.s in the hierarchical model, but are nonetheless not easily substitutable as in the market-based model.

There are four broad scenarios in which performance of obligations under current contracts is open to disruption. Three of them could be referred to as primary scenarios, while the fourth is some sort of secondary scenario. These are:

- *Scenario A:* Shutdown of business operations could be due to direct impact of the pandemic. This will be the case for a firm in a location that has experienced the most virulent outbreak of Covid-19, as would for a firm that, even though based in a location with less widespread cases, has experienced even one case of the disease

[200] *See supra* note 94 and accompanying text.
[201] *See infra* Section 3.5.2.

or has a direct contact recorded amongst its people (which often leads to shutdown of facilities).

- *Scenario B:* Shutdown could be due to governmental action aimed at containment of the pandemic, including proclamations and deployment of military or paramilitary units to enforce such orders. It should be noted, however, that a proclamation does not always directly order the shutdown of business activities. Sometimes, it merely entails official declaration of an epidemic by public health authorities and issuance of advisory guidelines that allow firms to determine how normal activities are to be adjusted, based on the nature of their operations.[202] Sometimes, the nature of the business dictates how seriously the advisory is taken. For example, consideration of potential tortious liability, reputation risk and corporate responsibility policies may provide motivation for relatively early shutdown.

- *Scenario C:* S.C.D. could adversely impact production or sales operations. Such impacts could include inability to source raw materials due to shutdown by an upstream supplier or disruption to global logistics or local transport system, or a similar disruption to downstream activities of distributors and customers. Sometimes, these impacts may manifest as commercial hardships occasioned by worsening macroeconomic conditions such as price inflation, currency fluctuation or shortage of supply.

- *Scenario D:* It goes without saying, in the light of our understanding of O.L.L.S. contracts, that a combination of the above scenarios could have a stacked effect. A "stacked effect" occurs where failure to perform by a counterparty under the *determinant contract* adversely affects the ability of the focal firm to fulfil its obligations to a different counterparty in the *dependent contract*, and on and on. This scenario of "stacked effect" is likely to be rife in the circumstances of Covid-19 pandemic and could be exacerbated where there is a mismatch between the operative supervening effect in the Excuse regime applicable to the determinant contract, on the one hand, and that applicable to the dependent contracts, on the other. Two dimensions of such mismatches are discussed below.

[202] E.g. the "state of emergency" declared by Japanese government in April 2020 under the New Influenza Special Measures Act stipulates measures that are not mandatory and contains no penalties for violations, although a mandatory law may be made under Article 41 of the Japanese constitution. *See* Lawrence Repata, *The coronavirus and Japan's constitution*, The Japan Times (Apr. 14, 2020), https://www.japantimes.co.jp/opinion/2020/04/14/commentary/japan-commentary/coronavirus-japans-constitution/ .

3.4. DIMENSIONING THE SCD IMPACTS OF A PANDEMIC: TWO MISMATCHES

There are two possible dimensions to mismatches that may arise from scenarios with stacked effects. The first – *mismatch of standards* – occurs where failure to perform the determinant contract is excusable under one of the more relaxed supervening effects whilst such failure regarding the dependent contract is only excusable under one of the stricter effects. The other – *mismatch of time* – is due to time lag between the effects of a widespread disruptive event on the performance of both contracts, thus creating disparity in degrees as a matter of fact, even where there is no mismatch of standards in regimes of Excuse under the two contracts.

3.4.1. MISMATCH OF STANDARDS

Mismatch of standards is the simpler of the two mismatches and may be illustrated with the following scenario:

- The determinant contract is one for the supply of raw material input (Raw Material Supply Contract, or simply Raw Material Contract) which has been entered into between an intermediate manufacture supplier (Intermediate Supplier) and the raw material producer/distributor (Raw Material Supplier).
- The dependent contract is between the Intermediate Supplier and an equipment manufacturer (Original Equipment Manufacturer) for procurement of the intermediate manufacture, which is an input in the Original Equipment Manufacturer's finished product (Intermediate Input Procurement Contract, Intermediate Input Contract).
- The Raw Material Contract, in addition to the traditional *Force Majeure* clause, contains a hardship clause that excuses failure to deliver, as well as allows delivery to be postponed, renegotiated and/or ultimately terminated without damages, on the ground of some commercial difficulty such as currency fluctuation or labour shortage, or shortage of raw materials.
- On the other hand, the Intermediate Input Contract contains only the *Force Majeure* clause that excuses obligations on the stricter impossibility ground, or – to vary the scenario while achieving a similar effect – does not expressly provide for supervening events, so that performance may only be excused on the applicable doctrinal grounds. The governing law, by choice or conflict of law rules, is English.

- The Raw Material Supplier calls for suspension and renegotiation of supply obligations under the Raw Material Contract due to currency fluctuation in its local market. While the renegotiation is being worked out, valuable time passes. Worse still, agreement cannot be reached eventually, so that the contract is terminated without fault.

- There occurs a scenario with stacked effect, as there foregoing developments lead to the failure of the Intermediate Supplier to meet its obligation to deliver intermediate manufacture to the Original Equipment Manufacturer under the Intermediate Input Contract. Yet, failure of procurement is not one of the grounds on which the Intermediate Supplier's own obligation to the Original Equipment Manufacturer can be excused under that contract. The traditional impossibility ground in the *Force Majeure* clause, or reliance on the doctrine of frustration, is unlikely to excuse the Intermediate Supplier's failure as illustrated in *Figure 2*.

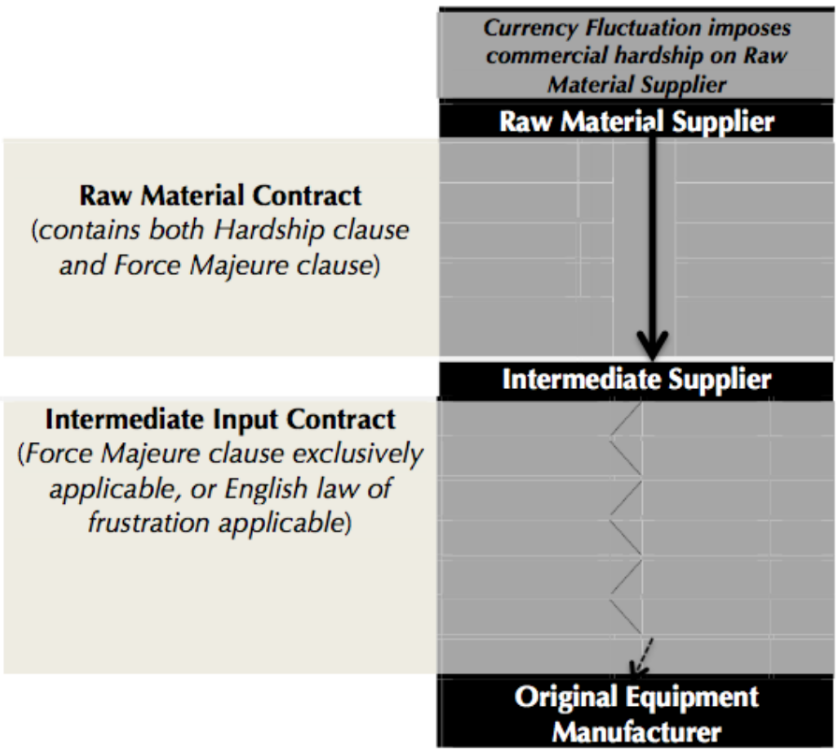

Figure 2: Simple Mismatch of Standard

Straight bold lines: Failure to perform excused
Zigzag broken lines: Failure to peform not excused

3.4.2. MISMATCH OF TIME

Mismatch of time is more complicated and entails an additional element of time. In this case, mismatch of standards may occur, but is not necessary. The standards for the applicable Excuse regimes under both determinant and dependent contracts may align in principle. For example, the Excuse applicable to both contracts may be the stricter impossibility grounds.[203] In the scenario of a gradually spreading widespread event, the time lag between the full propagation of the disruptive effects on both contracts, thus creating disparity in the fulfilment of the standard required of the relevant Excuse. This disparity is more likely to occur in scenarios where the more heightened effect is propagated in the more upstream contracts of the chain – which, by that positioning, are more determinant – thus creating a legitimate Excuse with disruptive effect on the downstream, determinant contracts, even if the latter effect is not yet itself considered to be of such standard as to provide ground for Excuse. Let us illustrate this mismatch with the following scenario:

- The parties and the contracts remain the same as in the last scenario, with the minor adjustment that all contracts in the supply chain contain similar *Force Majeure* provisions excusing performance only on the stricter illegality and impossibility grounds.
- The relevant disruptive event is a global pandemic.
- A consistent factor is that the country of location of the Raw Material Supplier, being "ground zero" of the pandemic, means failure to deliver under the Raw Material Contract would always be treated as excusable under doctrine or contract.
- The key variable in this scenario is the timeline for the spread of the pandemic to the other relevant locations and the propagation of its S.D.C. risk on the other contracts.
- The pandemic is localised in the "ground zero" country for the first two months before spreading to neighbouring countries from which alternative raw materials could be sourced. The pandemic, again, is contained in that region (Raw Material Supplier country and contiguous sources of alternative supply) for another two months before spreading to the location of the Intermediate Supplier where it

[203] Admittedly, there could be a mismatch of time based on an initial mismatch of standards that may be corrected in time. This is possible where the Excuse regime applicable to the determinant contact, unlike that applicable to the dependent contract, is of the flexible kind, so that even if the effect of the disruptive event on both contracts is simultaneously commercial at the moment, Excuse may be made only under the determinant contract. In time, if the disruptive effect heightens generally (or specifically in the place of performance of the dependent contract), the mismatch would be corrected and Excuse would be possible.

takes another two months before spreading to the rest of the world, including the location of the Original Equipment Manufacturer.

- In the circumstances, the Raw Material Supplier shuts down operations in month one due to the direct impact of the pandemic on its operations or in response to government containment orders. The shutdown leads to a failure to perform its supply obligations under the Raw Material Contract. Because Raw Material Supplier is duly excused under the *Force Majeure* clause in the procurement contract, it appropriately declares *Force Majeure* .

- At this point, even though the operation of the Intermediate Supplier is now disrupted by the failure of its Raw Material Supplier, there is no direct impact of the pandemic on its own operations yet. Therefore, its obligations under the Intermediate Input Contract cannot yet be excused since disruption to its procurement is not a class of supervening event typically recognised in most traditional *Force Majeure* clauses. At best, within the first two months, its effect is merely commercial hardship requiring it to change its source of supply, which would admittedly be at an inflated price due to decimation of the sources of raw material.

- After two months, when the pandemic spreads to the other sources of supply in contiguous territories in the region and there is shutdown by alternative raw material producers or suppliers, the obligation of the Intermediate Supplier to deliver intermediate manufacture to the Original Equipment Manufacturer is still not excused under a traditional *Force Majeure* clause that usually requires direct impact making performance impossible.

- As illustrated in *Figure 3*, it is only after the fourth month that a direct impact of the pandemic on the operations of the Intermediate Supplier or the containment actions of its national government would clearly give rise to a situation of impossibility that would avail it of Excuse under the *Force Majeure* clause in the Intermediate Input Contract.

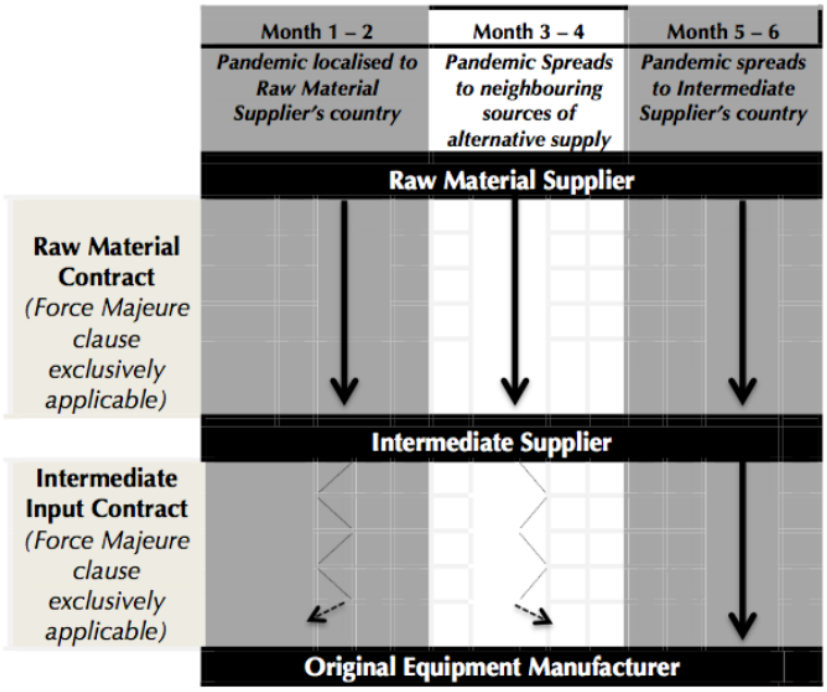

Figure 3: Scenario where contractual Force Majeure is applicable to both Determinant and Dependent contracts

Straight bold lines: Failure to perform excused
Zigzag broken lines: Failure to peform not excused

Now, to enrich the analysis, let us hypothesise this scenario a little differently , with the doctrinal grounds being the applicable regime:

- Such a prospect would turn on whether the Intermediate Input Contract had been drafted to clearly exclude the application of the doctrinal grounds. If that is the case, the doctrine would be excluded accordingly and the risk of failure to perform would lie with the Intermediate Supplier. If not, it is possible that the obligation of the Intermediate Supplier could be excused on one of the more relaxed doctrinal grounds from month one. This would be possible, for example, under the French and German "change of circumstance" laws, assuming any of these was the governing law.

- Furthermore, where the U.C.C. is applicable in one of the American states, it is possible that commercial impracticability would also avail Excuse from month one, depending on the relevant factual circumstances. This would be the case if it could be successfully argued that seeking an alternative source for the input from a

different country, with additional costs and perhaps at an inflated price, is not just a mere commercial inconvenience, but an alteration of the "essential nature of the performance" and has been occasioned by the "unforeseen contingency" of the pandemic.

- Also, a case of frustration of the delivery contract could be made after month two when operations in alternative sources are shut down so that raw material could not be procured anyway. Whether a case could be made for frustration from month one would turn on further nuance in the factual circumstances. It is arguable that, in the jurisdictions that have adopted the "multifactorial" approach to the doctrine of frustration, diverse elements of the factual circumstances could be combined to make a case for frustration of the purpose of the intermediate input contract. We have seen that, although frustration of purpose is theoretically meant to benefit the buyer that could no longer take delivery, it has sometimes been allowed to benefit the supplier that could no longer deliver.[204] An argument may however be made that, since this is a supply chain relationship with presumably sophisticated parties involved, the relevant factors to be considered in a multifactorial analysis will have to be so strong as to rule out the predilection of, say English courts, to deny parties of this more relaxed ground for Excuse in a non-consumer contract relationship.[205] However, it is our view that supply chain relationships in fact disclose unique features of their own that make them *sui generis*. This is having regard to the nature of the O.L.L.S.contracts undergirding them, which nature makes the remote failure of a determinant contract a significant factor to consider in a multifactorial analysis of the frustration of the dependent contract.[206] The implication of the diverse variants of the scenario is *Figure 4*.

[204] *See, e.g., Planet Kids'* case, *supra* note 141.
[205] *See supra* note 94 and accompanying text.
[206] *See infra* Section 3.5.2. for a prefatory consideration of factors arising from G.V.C. coordination models that may come up for consideration in such multifactorial analysis.

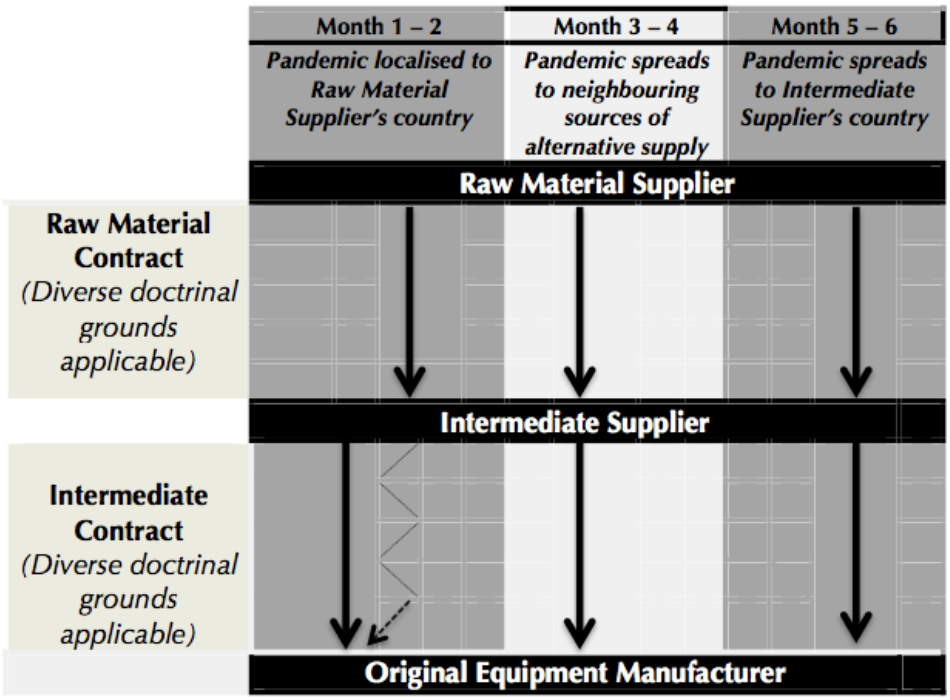

Figure 4: Scenario in which diverse doctrinal grounds are applicable

Straight bold lines: Failure to perform excused
Zigzag broken lines: Failure to peform not excused

Hypothesising even further, what about a scenario in which the Intermediate Input Contract contains a robust hardship clause?

- As illustrated in *Figure 5*, in such a scenario, it would have been possible for the Intermediate Supplier to be excused from month one, where the said clause contains some of the typical grounds such as price inflation, shortage of supply, etc.

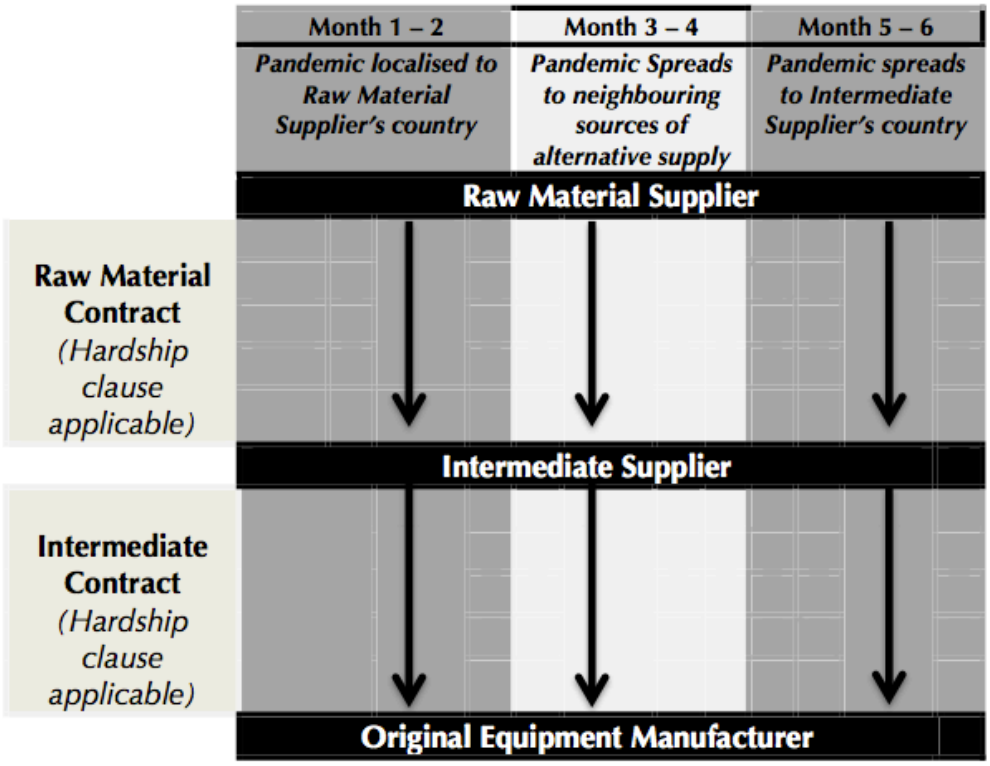

Figure 5: Scenario in which a Hardship clause is applicable across board

Straight bold lines: Failure to perform excused
Zigzag broken lines: Failure to peform not excused

The relative disadvantage of Excuse under the American impracticability doctrine or common law frustration should however be noted, since these, unlike the French and German "change of circumstance" doctrines or even contractual hardship clauses, do not provide scope for keeping the contract alive under adjusted terms. Thus, any opportunity they may appear to provide for softening the impact of a mismatch in some of their construal – say, as explained in the text introducing *Figure 4* above, under the provisions of the U.C.C. or arguably through the multifactorial approach – will not totally match the opportunity afforded by those other regimes in the overall legal consequence.

3.5. ESSAYING USE CASES FOR THE FRAMEWORK

Our framework should find use case in diverse circumstances in which the unit of analysis is a supply chain with operational logic underlain by O.L.L.S. contracts. It could be useful in a post-S.C.D. scenario where there is need to scan for existing mismatches of standards, with a view to guiding quick renegotiation, or to apprehend potential mismatches of time, with a view to taking pre-emptive steps ahead of the actual or full propagation of S.C.D. risks. It could also be useful as an *ex ante* tool for testing and addressing elements of resilience measures in the supply chain. In this case, it could feed into the design of the O.L.L.S. contract that would govern the supply chain or its redesign. Yet another use case would be its possible contribution to the matrix of factors that may be considered in judicial determination of cases of frustration, where an O.L.L.S. contract is in concern. While this article does not propose to dive deep into these last two potential use cases, let us explore their possibilities to some degree.

3.5.1. MANAGING EXCUSE MISMATCHES IN O.L.L.S. CONTRACTS: BORROWING FROM "CONTRACT BOUNDARY- SPANNING" GOVERNANCE MECHANISMS

An understanding of the vulnerability of supply chain relationships to S.C.D. arising out of Excuse mismatches in constituent O.L.L.S. contracts could illuminate the contribution of contract design to the resilience of the supply chain. Mitigating the risks attendant thereon requires coordination, which is constrained by tensions between economic logic and legal doctrine.[207] The two promising models distilled by Salminen in his case study on "contract boundary-spanning" governance mechanism, are (i) voluntary industry accord, based on a study of the Bangladesh Accord on Fire and Building Safety and (ii) open book accounting in German automotive industry.[208] As we will highlight shortly, the object of Salminen's enquiry belongs to the "externalities" class of G.V.C. risks and how they might be addressed through private governance mechanisms. For example, in the case of the Bangladeshi Accord, the concern of the lead firms is compliance with fire safety standards across the apparel/garment supply chain to stave off legal and reputational risks. It is not concerned with the implication of fire disasters for order placement and fulfilment (in other words, contractual performance). The latter is in the class of our own problem of focus.[209]

[207] *See supra* text accompanying note 199.
[208] Salminen, *supra* note 62, at 722–26.
[209] Note our classification of G.V.C. risks into two types, *supra* text accompanying note 21.

The question may be asked then: how adaptable are these approaches to removing, say, the risk of Excuse mismatches in the G.V.C.s? To answer that question, we consider the two above-stated governance models in Salminen's study and take a preliminary view that the more promising for our purpose is the "open-book accounting' method. That method refers to "practices where actors involved in the same production chain share with one another production-related cost information," with a requirement for such sharing to cascade down the chain.[210] We consider this model more suitable than the voluntary accord model for a number of reasons, including that: (i) it is designed for specific supply chains rather than for entire industries and thus fits the context of O.L.L.S. contracts (ii) it mirrors the bridging strategies already in use as a resilience measure, albeit on a grander scale that looks at information sharing beyond dyadic relationships, and (iii) although an independent instrument, its terms cascade down the chain through the individual bilateral contracts, thus removing the risk that the system might be breached through an inadvertent interposition of a non-party to an industry instrument.[211]

In our view, coordinating to remove risks of Excuse mismatch in the O.L.L.S. contracts is highly dependent on the coordination typology adopted for the supply chain. Our preliminary view is that such measures are likely to be more successful in those designs – per the five models of Gereffi et al – that give the lead firms a relatively strong control of the entire chain.[212] A future study might consider the relative suitability of the different models for achieving effective "contract boundary-spanning" control to remove risks of Excuse mismatches.

Finally, as previously noted, Salminen's study concerns mainly chain-wide control for externalities that have potential legal or reputational consequences for the supply chain operation or the lead firm. In this regard, there is ample scope for interaction (tension, really) between private governance, on the one hand, and public law, on the other. Our focus remains solidly within the terrain of private law, in this case the law of contract. A more relatable example of "contract boundary-spanning" in the context of contract law could be drawn from the asset management field, whereat contractual clauses often establish an extended fiduciary duty of certain professionals in respect of their advice even in the absence of direct contract with the asset owners or beneficiaries of the fund under management. The fiduciary duty of the trustee itself is usually a matter of public law. Furthermore, some jurisdictions statutorily extend such

[210] Salminen, *supra* note 62, at 725.
[211] This is a risk that Salminen, *supra* note 62, has noted regarding the voluntary accord model ("Problems may arise where not all value-chain members are party to the governance contract"). *Id.* at 738.
[212] *See supra* text accompanying notes 237 & 238 for an overview of the typologies.

fiduciary duties to certain categories of advisors to the trustee, such as asset managers and consultants.[213] However, in jurisdictions where the latter is not the case, fiduciary may be extended by the contract of appointment between the trustee and such an advisor.[214] This inevitably expands the contractual boundary of the asset owners. As an exception to the doctrine of privity, certain jurisdictions allow a third party for whom the contractual duty provides a benefit to enforce it, regardless of the lack of privity.[215]

3.5.2. MULTIFACTORIAL ANALYSIS IN CASES OF FRUSTRATION: PECULIARITIES OF O.L.L.S. CONTRACTS AS POSSIBLE FACTOR

Could the peculiar operational logic of G.V.C.s form a relevant factor in a multifactorial analysis of cases involving the frustration of any of the undergirding O.L.L.S. contracts? Such a factor would be relevant for consideration in light of the traditional reticence of common law courts to make out Excuse purely on the doctrinal grounds as the supervening effect tends towards the flexible end. In the context of supply chain contracts, we have already formulated dynamic scenarios in which an excusable failure of the determinant O.L.L.S. contract could initially affect a party's performance in the dependent contract by way of commercial hardship (shortage of supply, inflation of price, etc.). At such a stage, making a case for frustration of the latter contract may prove difficult on purely doctrinal grounds in a common law court with a traditional view of the subject. Whilst a robust hardship clause may provide alternative scope for Excuse in such a case, it is worth exploring how the context of G.V.C.s and O.L.L.S. contracts may contribute to an expansive interpretation of the contract for the purpose of determining frustration.

It is notable that occasional developments in industries embedded in global supply chains – such as shipping – have sometimes given rise to judicial decisions that take after the peculiarities of the industry or those developments. An example is in the string of *Suez Canal cases*[216] that buck the general principle that a contract is frustrated where an impossibility makes it incapable of being performed *in the manner stipulated* – for example,

[213] *See, e.g.*,James Hawley, Keith Johnson & Ed Waitzer, *Reclaiming Fiduciary Duty Balance*, ROTMAN INT'L J. PENSION MGMT., Fall 2011, at 4, 10. (arguing this third-party fiduciary was the implication of the provision of Employees Retirement Income Security Act of 1974 29 U.S.C. § 3(38) that defines "investment manager" as "anyone exercising discretion over plan assets," thus extending the duty of "governing fiduciaries", or trustees, to their delegates – in this case, the trustees" advisors).

[214] *Id.*

[215] UK's Contracts (Rights of Third Parties) Act of 1999 provides such an exception in cases where the contract expressly allows the beneficiary to enforce the right or clearly confers the benefit without explicitly evincing the intention of the parties to exclude the beneficiary's right of enforcement.

[216] These cases are a fallout of the closure of the Suez Canal on shipping and sale of goods contracts following hostilities between Israel and some Arab states in 1956 and 1967.

stipulation as to the port and time of shipment[217] or *as contemplated* – for example, as per the technical method.[218] In the *Suez Canal* cases, English courts[219] and American courts[220] were largely consistent in holding that the closure of the eponymous canal, which had necessitated that ships took the much longer route of the Cape of Good Hope, did not constitute, as the case may be, an event of frustration or commercial impracticability. In the English courts, the decision disregarded whether the Suez Canal route was merely envisaged[221] or expressly stipulated by the parties.[222] Similarly, the increase in time of delivery by about a third of the time, in one case,[223] or by two and a half times, coupled with the doubling of cost of carriage, in another,[224] were immaterial to the outcome. The American courts similarly denied commercial impracticability in spite of cost overruns to various degrees, including in one case where the overrun was over one-quarter of the original cost.[225]

Analysing some of these cases, Treitel has made the suggestion that the courts were influenced by a consideration of the balance of the overall market situation at the time performance was called for.[226] On the balance, economic upside from some of the emergent market conditions more than paid for the increased cost of sail or hire. In such an event, automatic termination on the ground of frustration would have opened the transaction to opportunistic behaviour by the party making the Excuse. Treitel did note the theoretical distortions inherent in these idiosyncratic decisions, considering that, in some earlier cases with similar risk in the outcome, the courts had nonetheless stuck with principle and made out frustration and the consequent termination. Treitel's proposal by way of remedy is to make termination optional to the party that may be prejudiced by the supervening event.[227] Of course, there are other solutions. One, admittedly more radical, is to enable contract-saving renegotiation or court-ordered adaptation similar to civil law jurisdictions. Another is to consider both the onerousness effect of the supervening event and other economic net-outcome in the market as part of the factors to be balanced in a multifactorial analysis. This second solution faces less challenge in path dependency, considering the emerging development of common law

[217] *See, e.g.*, Nicholl & Knight v. Ashton Edridge & Co. [1901] 2 K.B. 126.
[218] *See, e.g.*, Florida Power & Light Company v. Westinghouse Electric Corp. 826 F.2d 239 (1987).
[219] *See* Tsakiroglu & Co. v. Noble Thorl GmbH [1962] A.C. 93; *see also The Eugenia, supra* note 130.
[220] *See, e.g.*, Transatlantic Financing Corp. v. United States, *supra* note 84; *see also* American Trading & Prod. Corp. v. Shell Int'l Marine Ltd. 183. 453 F.2d 939 (2d Cir. 1972).
[221] *See* Tsakiroglu & Co. Ltd. v. Noble Thorl GmbH, *supra* note 224.
[222] *See* The Washington Trade [1972] 1 Lloyd's Rep. 463.
[223] *See The Eugenia, supra* note 130.
[224] *See* Tsakiroglu & Co. Ltd. v. Noble Thorl GmbH, *supra* note 224.
[225] *See* American Trading & Prod. Corp. v. Shell Int'l Marine Ltd., *supra* note 225.
[226] *See* Treitel, *supra* note 51, at 909.
[227] *Id.* at 910.

jurisprudence in this area, as discussed earlier in this article. What we attempt below is a preliminary exploration of how the nature of G.V.C.s and the O.L.L.S. contracts throw up factors that the courts may consider useful in such multifactorial analysis.

Among the five factors for consideration in a multifactorial analysis as established in the *Sea Angel's case*, the second, third and fifth factors outlined earlier in this article[228] appear to be the more relevant ones in cases of frustration concerning an O.L.L.S. contract. To single out "matrix or context of the contract' for the purpose of the current discussion, the *Planet Kids' case* demonstrates how a court may, having regard to the context, formulate the main purpose of the contract in order to determine if such a purpose has been frustrated. In that case, some of the relevant facts of which have already been stated,[229] in determining whether the relevant event – the destruction of the property – had frustrated the main purpose of the settlement agreement, the court took the view that such a purpose ought to be the common purpose of the parties in respect of the contract. Discerning the common purpose from the contract entailed objectively ascertaining the purposes of each party from the contract and from the context of its making. In the end, the court determined that the relevant context to the making of the settlement agreement was the inconvenience of the available alternative (compulsory acquisition of the property by the council and uncertainties as to timeliness and quantum of compensation under the governing law of such acquisition). Thus, the court stated:

> We consider the main common purpose of the contract was to settle the Public Works Act dispute and thus to achieve certainty that Planet Kids' lease would be terminated, to identify the timing of that termination and to set the amount of compensation payable for the consequential closure of Planet Kids' business.[230]

It was that common purpose that the court considered in reaching the determination that the contract had not been frustrated since the parties' objective of certainty and timeliness had been achieved by the settlement itself. The subsequent destruction of the property, with the consequent termination of the leasehold, was considered mere technicality that, having regard to the dictate of justice, was of no moment to the ultimate determination.

G.V.C.s are context-rich in the nature of the interdependency of the O.L.L.S. contracts that undergird them. This interdependent nature could provide illumination on the common purpose of the parties. In highly coordinated supply chains, partners in

[228] *See supra* Section 2.1.6.
[229] *See id.*
[230] *Planet Kids' case*, *supra* note 141, ¶ 96.

the chain understand that they are collaborators in a series of operations with the purpose of bringing a service or good to the end user. Also, the long-term nature of many of these contracts signalises the understanding that security of a series of exchanges (placement and fulfilment of orders) is a significant factor in the success of the operations. For a prefatory comment on how the typologies may provide such illumination, let us consider the three determinants of the typologies according to Gereffi et al. These are:

- C*omplexity* of the transaction reflected in the level of information and knowledge transfer required, particularly with respect to product and process specifications [hereinafter Complexity];
- Extent to which said information and knowledge can be *codified* and, therefore, transmitted efficiently and without transaction-specific investment between the parties to the transaction [hereinafter Codification]; and
- C*apabilities* of supply base (actual and potential) in relation to the requirements of the transaction [hereinafter Capabilities].[231]

Assigning a "high" and "low" value to a combination of these factors, eight governance typologies are possible, although the authors found only five in reality. We set out below the five typologies, ranging from that which requires the lowest degree of explicit coordination to that which requires the highest, while noting the factors in the behaviour of each that could contribute to the illumination of the common purpose of the G.V.C. actors:[232]

- *Markets*: These have the least need for explicit coordination, due to high-level Codification and Capabilities, but low-level Complexity. However, they are distinguished from mere transitory, spot markets by the repetition or repeatability of transactions therein. This last factor may establish a "course of dealing" modality that, although not explicit in the documented contracts, imports a context that may be useful in establishing common purpose.[233]
- *Modular chains:* These have high degrees of Complexity, Codification and Capabilities. Thus, while maintaining a relatively high degree of supplier independence, just as in the *Markets*, they are brought under control of the lead

[231] Gereffi et al., *supra* note 8, at 115.
[232] *See id.* at 113–16.
[233] *See supra* note 51 (for discussion of the impact of "cause of dealing" on interpretation of contract).

firm (buyer) through the high degree of specification in the order-making, even if still generic enough to reasonably dispense with the risk of transaction specificity in input investment.[234] Such order specification could provide a context through which common purpose may be established.

- *Relational chains:* Here, only Codification is low. Relational chains create complex interaction through which mutual dependency between the parties and asset specificity in input investment is established. In our view, these two factors create a scope to establish common purpose.
- *Captive chains:* Here, only the Capabilities of the suppliers are low. Relationships present a high degree of dependency on the buyer, thus subjecting the supplier to a relatively high switching cost. The buyer, on the other hand, bears a high cost in explicit control and monitoring. Again, these factors could provide a possible scope to establish common purpose.
- *Hierarchical chains:* It goes without saying that hierarchical relationships operate solidly in the context of a common purpose, since parties belong to the same corporate group that is linked through ownership and managerial control.

These typologies are, of course, conceptual categories within purely commercial contexts. The factors we have highlighted are those that show promise in establishing common purpose. Conferring them with legal consequence will have to turn on the factual circumstances of the cases. From these, over time and by inductive reasoning, legal principles may evolve which redefine the O.L.L.S. contracts broadly by conferring legal meaning on their varying operational nexus.

[234] A combination of high input specificity and supplier independence is a factor to be carefully considered, since it may leave room for hold-up risk against the buyer, as was the case with G.M. Motors and one of its suppliers (*see* Klein, *supra* note 39, at 61 & 70 n. 5).

CONCLUSION

Our analysis in this article and insights therefrom are useful in the narrow context of pandemic risks as well as generally, in the wider context of disruptive risks with global spread and dynamic propagation. Evidence suggests that occurrences of epidemics have become more frequent in the last few years and the prediction is that this trend is unlikely to abate any time soon. In this regard, we have reflected on the current approach to the draft of the "epidemic" item in the contractual enumeration of *Force Majeure* events and highlighted how this may now be insufficient in addressing the nature of the risk. In particular, the current style of drafting the *Force Majeure* clause portends a problem of indeterminacy due to the failure to apprehend the dynamic nature of pandemic risk and associated disruptions. In making suggestions for addressing the problem, we have called attention to the standard draft of the "war and hostilities" item in *Force Majeure* clauses as an example of a provision that better captures a risk of similar dynamism. While recognising the role that the *Force majeure* certificate issued by the Chinese authorities could play in formally bookending the fact of a pandemic and alleviating the problem of indeterminacy, we have noted some of the problems that may arise from the current practice.

The bigger fish in our pan is the insight that could be gained from an interplay of the aforesaid risk, on the one hand, and the nature of global supply chain contracts, or O.L.L.S. contract, on the other. At the core of this interplay is the disparity in the standards that applicable doctrinal and contractual regimes require, to make out Excuse for failure to perform a contract. Our starting point was the evidence from economics and supply chain management literature that commercial actors faced with such disruptions tend to seek contract- and relationship-saving solutions. The insight from our analysis is that doctrinal regimes of Excuse with dual structure – such as under the civil law – provide wider scope for readjustment to achieve contract saving than doctrines with a unified approach – such as common law frustration. Under the dual structure of the civil law, the more commercial grounds for Excuse are a separate doctrine and have separate consequences from the practical impossibility grounds. The unified approach generally has a stricter standard for making out Excuses on the more commercial grounds that, in any case, merely form a continuum with the stricter impossibility grounds under the frustration doctrine.

However, this insight commends little by way of guide to commercial actors on choice of law decisions. Firstly, this cannot be the sole basis for choosing the civil law regimes as the governing law of a contract. Empirical evidence on the overall preference

for English law in international transactions justifies our caution. Furthermore, utility of party autonomy in the development of the contractual regime of Excuse – through which standard *Force Majeure* and hardship clauses have continued to be developed – has created a dynamic interplay of the regimes in which parties could contract in and out of aspects of the applicable law of the contract.

In a global supply chain situation that is underlain by O.L.L.S. contracts, this dynamic could lead to mismatches in the Excuse regimes of the contractual chain. A mismatch occurs where failure to perform a determinant contract is more easily or much earlier excusable than a dependent contract within the same chain. This heightens the risk of supply chain disruption in the context of an event of the scale and dynamism of Covid-19. The doctrine-contract complex, which we developed in this article, provides a framework by which parties may test the contractual chain against a broad range of Excuse standards so that mismatches harboured therein may be spotted more easily. This is useful both in a post-event scenario, as an aid to negotiations aimed at contract saving. Similarly, it could be useful in an *ex ante* scenario as an additional tool of supply chain risk management. Our framework also contributes to the emerging area of scholarship exploring the role of legal regimes in G.V.C.s, of which global supply chains are a feature.

Volume 6 Issue 2 Articles & Essays

University of Bologna Law Review

https://doi.org/10.6092/issn.2531-6133/14144

Received: 18 Jan. 2021 | Accepted: 12 Mar. 2021 | Published: 27 Dec. 2021

The Conflict of International Agreements in Air Law: A Reasonable Plea for Conventional Uniform Rules

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The authors would like to thank Luigi Russi, Ph.D., from Peerwith, for the English language editing.

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ABSTRACT

This note surveys the roots of a phenomenon called "conflict of international agreements", which forms a distinctive source of legal uncertainty in trans-border disputes, with a particularly high incidence in the field of air law. The authors suggest that the conflict of international agreements should be understood as an added layer of legal complexity in trans-border air law disputes, beyond the customary questions around applicable law and jurisdictional competence that are commonplace in private international law. The first part of this study maps the main factors that have led to the emergence of this peculiar conflict in the domain of air law. Among them are the following: the fact that national air law legislations have typically been developed by catching up with prior international regulatory initiatives (to the point of inserting, in national provisions, named references to specific treaties); the development of international air law through different generations of treaties with non-overlapping memberships; the possibility for different degrees of membership within the same treaty, and the succession of states. All these factors contribute to the possibility that a judge, tasked with a trans-border air law dispute, might first need to determine the international agreement under which the dispute falls, to settle preliminary questions of applicable law or jurisdiction. Or that he or she might end up—after following the trail of foreign legislation when settling a conflict of laws—having to apply treaties that might not be compatible with the international obligations of his or her jurisdiction of belonging.

The second part of this study then looks at a sample of existing strategies for resolving such uncertainty, by looking at the Vienna Convention on the Law of Treaties, the jurisprudence of the French Conseil d'État, and doctrinal commentary. As a result, the study finds that the horizontality of international law and the difficulty posed by non-overlapping treaty memberships (so that different rules apply to different sets of states) is, at present, insurmountable. This leaves the possibility open, for instance, that a competent court might have to choose between (i) deferring to private international law norms that might lead to the application of incompatible treaties binding in a foreign legal system, and (ii) applying the different treaties ratified by the state of the competent court. This is what case-by-case decision-making at the point of adjudication might entail, in the absence of a renewed impetus for harmonisation. It is on this basis that the authors conclude with a reasoned plea for new initiatives aiming at greater uniformity in international air law.

KEYWORDS

Air law; Conflict of International Agreements; Conflict of Laws; Legal Harmonisation; Uniform Rules

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INTRODUCTION

A dealer in Morocco buys a commodity from another dealer in the United Arab Emirates [hereinafter U.A.E.], the commodity is shipped on a French plane, and it suffers damage in the process. Which law will apply to this tripartite relationship? Will it be the law of U.A.E.(the seller's law), Moroccan law (the buyer's law), or French law (the carrier's law)? This is an oft-recurring uncertainty in private international law, and it exemplifies what happens when a legal relationship includes a foreign element ("*élément d'extranéité*"). Whatever its nature, an element of connection to a foreign legal system makes it harder to ascertain the law that ought to apply to solve a dispute—its impact will also be highly dependent on the facts of each case and the foreign elements at play.[1] For example, national air laws typically acknowledge a connection between an aeroplane and its country of registration, introducing a recurring foreign element peculiar to the domain of aviation.[2] Moreover, cases involving air transport also raise another difficulty: besides conflict at the level of applicable laws, there might also arise conflicts of jurisdiction. That is: one needs to distinguish between cases where adjudication might be undertaken by the national court of state A, and others where the case will need to be brought before a court in state B. This is what conflict of jurisdiction entails.

Now, these two elements alone would not warrant special attention towards conflicts of laws in international aviation, since they ordinarily apply to all other cases involving private international law—including beyond the domain of aviation. What's unique about the domain of civil aviation, however, is that it has come into being primarily on the impulse of international agreements. That is, a large part of the rules governing air law are drawn from international agreements. What's more is that national aviation legislation might simply contain references to this or that treaty, so that a court deciding an air law dispute from state A might end up with the text of an international treaty or protocol called up by the laws of state B. In such cases, the conflict of laws will often boil down to having to apply different treaties, or different versions or protocols of the same treaty, and leave the national judge with the question of having to sort out which treaty to apply in the case at hand. A related uncertainty might arise when a judge would first need to ascertain the applicable treaty, in order to decide on questions of applicable law or jurisdiction (as will be seen in the jurisprudence

[1] *See* Georges Van Hecke, *Principes et Méthodes de Solution des Conflits de Lois* [Principles and Methods for Solving Conflicts of Laws], *in* 126 Recueil des Cours Académie de Droit International de la Haye [Collected Courses of the Hague Academy of International Law] 399, 409 (1969).

[2] *See* Fernand de Visscher, *Les Conflits de Lois en Matière de Droit Aérien* [Conflicts of Law in Air Law] , *in* 1934 Recueil des Cours Académie de Droit International de la Haye [Collected Courses of the Hague Academy of International Law] 297, 306; M. Aboud, Concise Introduction to Moroccan Private International Law 10 (1994); S. Ghannam, Civil Aviation Law 17 (2d ed. 2016).

of the French *Cour de Cassation* in Section 1.3 below). These situations arise because it is not uncommon, in the domain of aviation law, for different countries to not have ratified the same international instruments. Some might have failed to ratify the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air [hereinafter Warsaw Convention],[3] while others might have only ratified its original version. Subsequently, certain countries might have subscribed to the Hague Protocol amending the Warsaw Convention [hereinafter Hague Protocol][4] and to the Montreal Convention for the Unification of Certain Rules for International Carriage by Air [hereinafter Montreal Convention].[5] Other prominent international agreements related to air law would be the Chicago Convention on International Civil Aviation [hereinafter Chicago Convention],[6] with its attendant annexes and amending protocols, and the Rome Convention on Surface Damage Caused by Foreign Aircraft to Third Parties on the Surface [hereinafter Rome Convention].[7] This small sample demonstrates that there is a multiplicity of different agreements in international air law, which might carry non-overlapping memberships. As will be discussed further in the article, this multiplicity has been attenuated only in part by the system put in place through the Chicago Convention.[8] Namely, through the establishment of the International Civil Aviation Organization [hereinafter I.C.A.O.], the said convention has come to play a constitutional role in aviation law,[9] with quasi-legislative powers for I.C.A.O. to issue rules that take on the status of annexes to the convention.[10]

This multiplicity creates a distinctive layer of uncertainty, beyond the existence of conflicts of applicable law and of jurisdiction. We suggest naming this as "conflict of international agreements". There are different approaches that may be adopted for resolving such a conflict. Some have their source in international treaties, while others have been devised through judicial precedent or doctrinal elaboration. Moreover, some

[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12th, 1929, 49 Star. 3000, 137 L.N.T.S. 11, reprinted in 49 U.S.C.A. app. at 430 (West Supp. 1976) (entered into force February 13th, 1933) [hereinafter Warsaw Convention].

[4] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, September 28th, 1955, 478 U.N.T.S. 371 (entered into force August 1st, 1963) [hereinafter Hague Protocol].

[5] Convention for the Unification of Certain Rules for International Carriage by Air, May 28th, 1999, 2242 U.N.T.S. 309 (entered into force November 4th, 2003) [hereinafter Montreal Convention].

[6] International Civil Aviation Organization Convention on Civil Aviation, December 7th, 1944, 15 U.N.T.S. 295 (entered into force April 4th, 1947) [hereinafter Chicago Convention].

[7] Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, October 7th, 1952, 310 U.N.T.S. 181 (entered into force February 4th, 1958) [hereinafter Rome Convention].

[8] *See* Maria Jose Morillas Jarillo et al., Derecho Aéreo y del Espacio [Air and Space Law] 25 (2014).

[9] *See* Paul S. Dempsey, *The Future of International Air Law in the 21st Century*, 64 German J. Air & Space L. 215 (2015). *See also* Brian Havel & John Q. Mulligan, *International Aviation's Living Constitution: A Commentary on the Chicago Convention's Past, Present, and Future*, 15 Issues Aviation L. & Pol'y 7 (2015).

[10] *See* Paul S. Dempsey, *Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 N.C. J. Int'l L. & Com. Regul. 1, 5 (2004).

of these approaches would apply generally, while others are limited to specific sets of conflicting provisions in international air law. In this article, we endeavour to penetrate some of this complexity, in order to make a reasonable plea for the adoption of uniform rules as—still—the most promising way out.

Conflict between sources of international law is not a new question in private and public international law, with the earliest such instance dating back to the 17th century.[11] With specific reference to air law, aviation is one of those domains where the historical sedimentation of treaties has not been followed up by a harmonised legal regime. Hence, the conflict of international treaties remains a significant variable to reckon with. This article surveys the most recurring reasons that give rise to a conflict of international agreements in air law, whilst also charting the (patchwork) solutions that might be available to address those instances of conflict in the absence of uniform rules.

In giving examples of possible solutions, we adopt a holistic approach that looks at different sources: international agreements, pronouncements of national courts, doctrinal commentary based on the air transport legislation of the North African and the Middle Eastern jurisdictions with which the authors are most conversant—specifically Morocco and the U.A.E.. In this way, we chart different proposed solutions for resolving the conflict of international agreements, in the absence of a unified international legal regime applying to air law. With this goal in mind, Section 1 makes the case for considering the conflict between international agreements as an added layer of complexity beyond conflicts of (national) laws, and describes some of the roots of this difficulty. Instead, Section 2 looks at a sample of solutions that exemplify different possible ways of approaching the problem. These are drawn from the Vienna Convention on the Law of Treaties, from the jurisprudence of the French *Conseil d'État*, and from doctrinal commentary to the relevant laws of Morocco and the U.A.E.. Finally, the conclusion draws together these different strands, composing a global picture of the combined difficulties raised by the conflict of international agreements in air law—a picture that motivates our reasonable plea for a renewed effort at harmonisation of this province of international law.

[11] Ana G. López Martín, *Conflicto entre Tratados: Tempestad o Calma en el Derecho del Mar? [Conflict Between Treaties: Storm or Calm Ahead for the Law of the Sea?]*, 3 Nueva Época [New Era] 241, 243 (2006).

1. CONFLICT OF INTERNATIONAL AGREEMENTS VERSUS CONFLICT OF LAWS

Traditionally, conflict of laws arise when the case at hand presents one or more elements that connect it to a foreign legal system. The conflict of international agreements in connection to aviation law—the focus of this paper—arises from two specific sources of complications, examined below. The first is the recurring reference of national legal texts to international treaties (which is only moderated by countervailing police rules and public order reasons). This point is explored in the first sub-section. The section after that focuses instead on the incongruences stemming from the proliferation of international agreements and protocols in air law, and the unevenness in their membership and degrees of possible accession.

1.1. DEFERENCE OF NATIONAL AIR LAWS TO INTERNATIONAL AGREEMENTS

One might be excused for assuming that subjecting a matter to national regulation will cover it more or less comprehensively. This observation, however, does not apply to national air laws, since most of them defer to international agreements for the interpretation and understanding of multiple crucial concepts. In this section, we look at the laws of Morocco and the U.A.E. as an illustration of a phenomenon, which we suggest points to a structural feature of this particular specialist regulatory domain.

In Morocco, air law matters have fallen—between 1962 and 2016—under the purview of Law No. 2.61.161 on the Regulation of Civil Navigation. Since 2016, they have been transposed to the new Law No. 40.13 on Civil Aviation of June 16, 2016 [hereinafter Civil Aviation Code]. Still, the remit of the Code is restricted by the scope of international agreements related to civil aviation. This limitation can be noticed on three levels. First, at the level of the interpretation of concepts. Indeed, all aviation-related terms in the Civil Aviation Code and in any implementation instruments are to be interpreted in conformity with the definitions found in international agreements. This is what Article 2(1) of the Civil Aviation Code states, to the point of embedding a direct reference to the 1944 Chicago Convention, with its attached annexes and protocols, and its subsequent amendments. Secondly, another evidence of subordination can be found in the statement, contained in Article 2(2) of the Civil Aviation Code, which "inserts" relevant international agreements (the 1944 Chicago Convention, the 1952 Rome Convention, the

Geneva Convention on the International Recognition of Rights in Aircraft;[12] the Montreal Convention, each with their respective amending protocols) by deeming mentions of a convention in the national legal text, akin to reference to the substantive norms found in that convention. Third, one final point relates to the prevalence of international agreements over national law. As stated in Article 3 of the Moroccan Civil Aviation Law, national law only applies in matters of aviation insofar as it isn't in contradiction with applicable international norms.

Since air transport has become one of the most common means of passenger mobility, as well as a vector for export goods of significant value,[13] it has gained economic importance. This creates a demand for states to take interest and issue national provisions. Yet, the objectively transnational character of this activity usually results in cross-border disputes. [14] If international investments are to be regulated preferentially through international agreements,[15] this rationale applies *a fortiori* to air law. This reveals all the limits of a nation-by-nation regulatory approach, and has made it so that this sector—more than others—has deferred authority to international legal sources since its inception.

If the internationalisation of civil aviation demonstrates the limits of national air laws, Article 310 of the Moroccan Civil Aviation Code explicitly acknowledges this by stating as follows: "Any other procedure necessary for the proper application of this law *and its compatibility with international agreements* may be decided by a regulatory provision, if needed" . The Emirati legal system also follows the same approach in Federal Law No. 20 of 1991 [hereinafter U.A.E. Civil Aviation Law]. There, at Article 19, it states: "The provisions of the Chicago Convention and all protocols and agreements relating to civil aviation, to which the State is a party, shall be considered to be complementary to the provisions of this Law in a manner consistent with its provisions".

Moderating this picture of unfettered dominance of international legal sources, one needs to, nevertheless, remind oneself of the existence of "police rules" ("*règles de police*").[16] These would be rules pertaining to matters of security that are, in their essence, *jus cogens* of the national legal system where they are found.[17] These rules are

[12] Convention on the International Recognition of Rights in Aircraft, June 19th, 1948, 310 U.N.T.S. 151 (entered into force September 17th, 1953).

[13] *See*Barthélemy Mercadal, *Transports Aériens* [Transport By Air], Repértoire De Droit Commercial [Com. L. Collection] 1 (2015).

[14] *See, e.g.*, Jean-Pierre Tosi, *Transports Aériens* [Transport By Air], *in* [Vol. T] Répertoire de Droit International [International Law Collection] 1 (2015).

[15] *See* Dominique Carreau, *Investissements* [Investments], *in* [Vol. I] Répertoire de Droit International [International Law Collection] 1, 46 (2020).

[16] *See* Michel Redon, *Aviation Civile* [Civil Aviation] *in* [Vol. A] Répertoire de Droit Pénal et de Procédure Pénale 1 [Criminal Law and Criminal Procedure Collection] (2012).

[17] *See* A. A. Salama, U.A.E. Private International Law: A Comparative Study 93 (2002).

susceptible of enforcement, regardless of the law that conflict of law rules might otherwise indicate,[18] and they also apply to all situations falling within their purview, irrespective of considerations concerning their national or international nature. As an example, the Moroccan Civil Aviation Code contemplates a number of such police rules susceptible of immediate application. These are the rules related to aircrafts, airports, air navigation, employment in the aviation sector, and civil aviation accidents.

Additionally, any foreign law that might be deemed applicable pursuant to conflict of law rules ought to be set aside, whenever its application would contradict non-negotiable social arrangements and legal concepts defining the "public order" of the country in which the court is located, and which the court cannot therefore overlook.[19] There is a subtle difference between public order and police rules. When police rules change between the trial and the occurrence of an incident, from which a dispute originates, courts are bound to apply the police rules in force at the time of the incident. On the contrary, if public order shifts (for example, through the enactment of a new law that marks such a shift), the new notion of public order will also apply retroactively.[20] It should be noted that public order is, in fact, the most used exception to justify non-compliance with international agreements.[21] This is a concept that is significantly based on the preponderant considerations at any given time, and which is to be constantly adapted to the economic, social, and political checks enacted in the concerned state.

1.2. PROLIFERATION OF INTERNATIONAL CIVIL AVIATION AGREEMENTS

International agreements have been significantly expanding the scope of international law.[22] This trend has been even more marked in the field of air transport. In this field, internationally agreed rules have been necessary since the beginning of activity in this field, to discipline the liability of air carriers and to establish common protocols relating to transport documents. The 1919 Paris Convention[23] was the first international agreement on air navigation, incorporating a set of principles that were conceived at the

[18] *See, e.g.*, M. Pierre Mayer, *Lois de Police* [Police Laws], *in* [Vol. L] Répertoire de Droit International 1 (2009).
[19] *See* Paul Lagarde, Ordre Public [Public Order], *in* [Vol. O] Répertoire de Droit International 1 (1998).
[20] *Id.* at 53.
[21] *See e.g.*, Yves Gautier, Ordre Public [Public Order], *in* [Vol. O] Répertoire de Droit Européen 2 (2004).
[22] *See* Emmanuel Roucounas, *Engagements Parallèles et Contradictoires* [Parallel and Contradictory Ratifications], *in* 206 Recueil des Cours Académie de Droit International de la Haye [Collected Courses the Hague Acad. Int'l l.] 9, 21 (1987) (Fr.).
[23] *See* Convention Relating to the Regulation of Aerial Navigation, October 13th, 1919, 297 L.N.T.S. 173 (entered into force on April 9th, 1920).

International Aviation Law Conference.[24] This was followed by the 1929 Warsaw Convention,[25] which was adopted ten years on from the first regular aerial route between Paris and London.[26] This convention, and its amending Hague protocol,[27] formed for a long time the foundational international legal documents disciplining air transportation. These were expanded upon through the four Montreal protocols of 1975.[28] The approach adopted in the Warsaw Convention (limited liability for damage suffered by passengers, and exceptions in favour of air carriers) later came to be seen as skewed against air travellers: they were thus found to be inconsistent with the needs of victims of air accidents and with the development of the aviation industry.[29] The piecemeal development of an international framework for aviation law continued with the 1944 Chicago Convention,[30] the 1963 Tokyo Convention,[31] the 1970 Hague Convention[32] and the 1971 Montreal Convention,[33] to name but a few.[34] While the constitutive role played by the Chicago Convention has been mentioned already, with its bestowal of quasi-legislative powers upon I.C.A.O., it also needs to be mentioned that the Chicago system is itself marred by a degree of unevenness of application that is not dissimilar to that of other treaties. Different jurisprudential positions have been advanced, concerning the extent of enforceability of the annexes to the Chicago Convention towards the entirety of its membership.[35] This means that while the Chicago

[24] *See* Carmen Pardo Zaragoza, *Análisis de la Evolución Jurídica del Derecho Aeronáutico Desde 1911 a 1955 a Través de las Organizaciones Aéreas Internacionales* [A Study of the Legal Evolution of Air Law Between 1911 and 1955 Through International Air Organizations], 33 Revista Europea de Derecho de la Navegación Marítima y Aeronáutica [Eur. J. Aviation and Mar. Navigation L.] 31, 38 (2016) (Spain.).

[25] *See* Warsaw Convention, *supra* note 3.

[26] Mercadal, *supra* note 13, at 8.

[27] Hague Protocol, *supra* note 4.

[28] Respectively: Additional Protocol No. 1, I.C.A.O. Doc. 9145 (1975); Additional Protocol No. 2, I.C.A.O. Doc. 9146 (1975); Additional Protocol No. 3, I.C.A.O. Doc. 9147 (1975); Montreal Protocol No. 4, I.C.A.O. Doc. 9148 (1975). See A. Hernández Rodríguez, *El Contrato de Transporte Aéreo de Pasajeros: Algunas Consideraciones Sobre Competencia Judicial Internacional y Derecho Aplicable* [*The Contract of Passenger Air Transport: Considerations on International Jurisdiction and Applicable Law*], 3 Cuadernos de Derecho Transnacional [Transnat'l L. Notebooks] 179, 181 (2011).

[29] M. R. Pickelman, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time*, 64 Journal of Air Law and Commerce 273, 274 (1998).

[30] Redon, *supra* note 16, at 14.

[31] Convention on Offences and Certain Other Acts Committed on Board Aircraft, September 14th 1963, I.C.A.O. Doc. No. 8364 (entered into force December 4th, 1969).

[32] *See generally* Convention for the Suppression of Unlawful Seizure of Aircraft, December 16th, 1970, 860 U.N.T.S. 105 (entered into force October 14th, 1971).

[33] *See generally* Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, January 26th, 1971, 974 U.N.T.S. 177 (entered into force September 23rd, 1973).

[34] A further passage in the regulation of international air transport was the so-called "Montreal Agreement" of 1966 which, however, was not a multilateral treaty, but rather an agreement between the US and international air carriers, in light of American dissatisfaction with the low liability limits established in the 1955 Hague protocol to the Warsaw Convention. As such, it only applied to U.S. citizens. See J. C. Batra, *Modernization of the Warsaw System - Montreal 1999*, 65 Journal of Air Law and Commerce 429, 431 (2000).

[35] M. Folchi, Tratado de Derecho Aeronáutico y Política de la Aeronáutica Civil [Treatise of Air Law and Politics of Civil Aviation] (2011).

Convention has centralised the production of norms to an extent, it hasn't conclusively addressed the conflict of international agreements stemming from non-overlapping membership across treaties or within the same treaty.

In an attempt to consolidate and update international air law, the Montreal Diplomatic Conference led to a new agreement on 28 May 1999, which sought to take over the regulation of those aspects of international transport that had hitherto fallen within the scope of the 1929 Warsaw Convention.[36] Besides consolidating the existing regime, the 1999 Montreal Convention[37] also amended the Warsaw system both in form and in substance, notably by removing liability ceilings in the case of death or bodily injury (for accidents due to the carrier's fault), which had earlier been regarded as something of a problematic legacy of the Warsaw system.[38] The Montreal Convention currently enjoys broad international adoption with the notable accession of the Russian Federation in 2017, and only a few remaining gaps on the African continent and in East Asia. This does create a degree of uniformity in the specific areas taken on by this Treaty, albeit without conclusively removing the unevenness of the international air law regime as a whole.

In general, every stage in the development of international aviation law testifies to the predominant international pressures of each period.[39] This means, both, that aviation law has come into being predominantly through international conventions, and also that those conventions have often taken a sectoral approach. For instance, while some seek to harmonise the rules relating to international air transport with a view to reducing conflicts of laws, others discipline a range of different subjects, such as: rules and protocols pertaining to international civil aviation, offences and other dangerous acts committed on board of an aircraft, combating the unlawful seizure of aircrafts and other harmful acts that would threaten the safety of civil aviation. This multiplicity has engendered a phenomenon, which has started to be named by doctrinal contributors the "conflict of international agreements".[40]

Quite apart from the subject differences between different treaties are the different degrees of ratification undertaken by different countries, especially when taking into consideration the role played by "flexibility devices" such as reservations

[36] M. Camenale Pinto, *Reflexiones Sobre la Nueva Convencion de Montreal de 1999 Sobre el Transporte Aereo* [Reflections on the New 1999 Montreal Convention on Air Transport] 6 Revista Derecho Privado 183, 188 (2000).
[37] *See* Montreal Convention, *supra* note 5.
[38] Tosi, *supra* note 14, at 2.
[39] J. W. Salacuse, *The Little Prince and the Businessman: Conflicts and Tensions in Public International Air Law*, 45 Journal of Air Law and Commerce 807, 809 (1980).
[40] C. Briere, Les Conflits de Conventions en Droit International Privé [The Conflict of International Agreements in private International Law] 419 (LGDJ, 2001).

("*reserves*") and options ("*faculties*"). While reservations allow a country to limit the scope of application of a convention, options afford signatory states alternative degrees of compliance for the purpose of giving implementation to a treaty regime.[41] An increase in the number of reservations, and an expansion of options, have also increased the unevenness of implementation of international treaties, and have therefore contributed to the conflict of international agreements in air law.[42]

Last, but not least, is the factor consisting in the succession of states: when a state is separated from another state, a special situation may arise when the original state had ratified an initial version, while the newly formed state might have acceded to the amended version of the international agreement.[43] This type of hypothesis adds another layer of possible complexity to the conflict of international agreements on air law.

1.3 CONFLICTS OF INTERNATIONAL AGREEMENTS ON AIR LAW: EXAMPLES FROM THE FRENCH COUR DE CASSATION

The proliferation of international agreements that has just been described has its counterpart in the difficulties that arise at the stage of adjudicating disputes related to air law. In this respect, it is useful to examine a sample of jurisprudential decisions that testify to the added layer of deliberation—determining the applicable treaty—that this proliferation demands of national judges.

Here, it is useful to begin from the precedent set by a French Court, in connection to the crash of an airborne Airbus plane on 23 August 2000. The plane was registered in the Sultanate of Oman, it had been manufactured by Airbus, and it was being used by Gulf Air to undertake a journey between Cairo and Bahrain. The crash resulted in the loss of life of anyone on board the plane, crew and passengers alike. Compensation was subsequently sought from entitled parties both from Airbus, with headquarters in Paris, and from Gulf Air, which is based in Bahrain. In the case at hand, the *Cour de Cassation* referred to the 1929 Warsaw Convention, to sort out competing elements of connection (the law of the airplane manufacturer versus the law of the carrier). The Court took notice of competing lawsuits having been filed against the

[41] *See* W. Paul Gormley, *The Modification of Multilateral Conventions by Means of "Negotiated Reservations" and Other "Alternatives": A Comparative Study of the I.L.O. and Council of Europe—Part One*, 39 Fordham Law Review 59 (1970).

[42] M. H. Van Hoogstraten, *La Codification par Traités en Droit International Privé Dans le Cadre de la Conférence de la Haye* [Treaty-Based Codification in private international Law in the Hague Conference Framework] 122 Recueil des Cours Académie de Droit International de la Haye 337, 398 (1967).

[43] *See* R. H. Mankiewicz, *Les Nouveaux États et les Conventions de Droit Aérien* [Newly-Formed States and International Air Conventions], 7 Annuaire Français de Droit International 752, 754 (1961).

manufacturer and the air carrier and clarified that "after inspecting that the air carrier does not belong to the European Union, the Warsaw Convention dated 12 October 1929 mandates, as *jus cogens*, the jurisdiction of the air carrier, regardless of other connections". [44] In another case, the *Cour de Cassation* deemed it legitimate, for parties entitled to compensation after an air crash, to ask a lower French Court to declare its lack of competence on the basis of the 1999 Montréal Convention—so that those parties could protect their right to choice of forum under that convention:

> Since the parties are compelled [by the American judge they initially approached] to bring the dispute before a court that is not chosen by them, the parties to such dispute may, within the framework of the Montreal Convention, have a current and legitimate interest to examine the right to choose the jurisdiction determined by the said Convention.[45]

In yet another case, an air carrier had mishandled certain medical goods, which had been irreparably damaged. While the carrier claimed the jurisdiction of the country where it had its business headquarters, the *Cour de Cassation* affirmed French jurisdiction on the basis that the transportation contract had been entered into by a French subsidiary of the carrier. In so doing, it explicitly referred to "the Montreal Convention dated 29 May 1999, [which affirms] the territorial jurisdiction of the subsidiary by whom the transport contract has been concluded".[46]

Finally, the same court, in a pronouncement issued on 21 November 2012, had to decide on the applicability of either a European regulation or the Warsaw Convention of 1929 to a case of damages due to an air passenger who had suffered a delayed flight, inbound from Algeria, and operated by an Algerian carrier. Having determined that the Warsaw Convention was applicable, it quashed the lower court's decision for not having made explicit how it was applying the criteria for assessing damages set out in the Warsaw Convention, whereby "the carrier remains liable for the damage resulting from the delay in the air transportation of passengers, luggage and goods, unless the carrier proves, together with its subsidiaries, that it took the necessary measures in order to avoid the damage, or that it was impossible to take such measures".[47]

[44] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 12, 2009, R.C.D.I.P. 2010, 2, at 372 (note H. Muir-Watt) (Fr.).
[45] Cour de cassation [Cass.] [supreme court for judicial matters] civ., Dec. 8, 2011, R.C.D.I.P. 2012, 1, at 138 (note A. Maitrepierre) (Fr.).
[46] Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 8, 2011, R.C.D.I.P. 2012, 3,, at 607 (note C. Legros) (Fr.).
[47] Cour de cassation [Cass.] [supreme court for judicial matters] civ., Nov. 21, 2012, R.C.D.I.P. 2013, 4, at 916 (note J. M. Jude) (Fr.).

This small sample of cases, all drawn from the jurisprudence of the French *Cour de Cassation*, offers an example of how national judges are routinely faced with the task of first having to sort out the applicable treaty—and not only with respect substantive matters (such as the calculation of damages), but also on questions of competent jurisdiction or applicable law. [48]

2. PATCHWORK SOLUTIONS FOR ADDRESSING THE ABSENCE OF UNIFORM RULES

When cases have points of contact with more than one legal system, national conflict of laws rules merely provide an indirect solution, because the problem they address is the immediate question met by the court being approached in a particular jurisdiction, namely: figuring out the prevailing connection and resolving on the applicable legal provisions. When a judge determines to hold jurisdiction over a case, he or she is only bound to apply the conflict of law rules from his or her legal system.[49] And yet, conflict of laws rules can be different for each legal system—based on the rules of attribution they enact, to claim jurisdiction in different situations when a foreign element might also be present.[50]

In the case of air law, the uncertainty does not merely involve questions of jurisdiction or applicable law that can be sorted through national norms of private international law. Instead, national judges have to refer back to treaties, which may suffer from uneven implementation because of the reasons elucidated in Section 1: overlap of different treaties, multiple treaty amendments, reservations and options, and succession of states. In view of the foregoing, this section examines closely the conflict between international agreements, as disciplined in the Vienna Convention on the Law of Treaties [hereinafter Vienna Convention].[51] It also presents various examples of judicial practice and doctrinal elaboration, which show possible solutions that might be applicable in the field of international air law—with varying degrees of generality—in the absence of wider harmonisation at the level of international treaty sources.

[48] *See generally* Cour d'Appel [C.A.] [regional court of appeals] Orléeans, Dec. 14, 2007, R.C.D.I.P. 2008, 4, at 311 (note H. Gaudemet-Tallon) (Fr.).
[49] *See* Cour d'Appel [C.A.] [regional court of appeals], Oct. 3, 1984, R.C.D.I.P.. 1985, 3, at 526 (note H. Synvet) (Fr.).
[50] *See* Aboud, *supra* note 2, at 187.
[51] *See* Vienna Convention on the Law of Treaties, May 23rd, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27th, 1980) [hereinafter Vienna Convention].

2.1. THE CONFLICT OF INTERNATIONAL AGREEMENTS IN THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention applies to treaties among states (Article 1). Even though a distinction is sometimes made between "conventions" (issue-specific) and "treaties" (general matters of international law), this distinction makes no difference to the scope of application of the Vienna Convention. Indeed, Article 2 describes a treaty as: "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

For our purposes, Article 30 is the one that addresses the issue of application of different treaties to the same subject matter. The article lays down a number of rules. First, when a later treaty states that it is subject to—or not to be considered incompatible with—a previous one, then the previous treaty prevails. Second, when all the signatories of an earlier treaty have signed a subsequent treaty, without terminating or suspending the earlier one, the earlier treaty remains in force only insofar as it does not contradict the subsequent treaty. Third, when two successive treaties regulate the same subject matter, but have non-overlapping memberships, various scenarios arise. When two states are signatories to both the first and the subsequent treaty, then the later treaty applies, with the earlier treaty being effective only insofar as it is not incompatible with the later one. Instead, when a state has subscribed to both the earlier and the later agreement, and another state has subscribed only to the earlier—or only to the subsequent—agreement, then their reciprocal relationship is to be governed by the treaty to which both states are members.

2.2 THE CONFLICT OF INTERNATIONAL AGREEMENTS IN THE JURISPRUDENCE OF THE CONSEIL D'ÉTAT

The rules we have just described are in place to address the conflict of international agreements. However, because not all states are signatories to the Vienna Convention, then their value *vis-à-vis* non-signatories is most likely that of rules of customary international law. This is the case of France, which is not a signatory to this convention. For this reason, it belongs to a discussion of the status of existing international law norms on the conflict of international agreements, to see how the question has been addressed just in one such case by the *Conseil d'État*, the highest judicial authority of

France for solving administrative disputes. This court put forth, in December 2011,[52] a three-stage approach, which describes how a French Administrative Court ought to address the situation in which it is asked to apply conflicting provisions from different treaties. It is relevant to note that this decision (which discusses conflicting treaty commitments ratified by the same state) also bears relevance to the topic discussed here—the conflict of international agreements in air law, where different states are not signatories to the same agreements—because the situation could arise when a dispute in the domain of aviation presented elements of connection to different national legal systems and these, as it would often happen in air law, simply contained a second-order reference to treaty norms—except, not the same ones!—without a clear priority between those norms. [53] Alternatively, the question of which treaty to apply might also arise in order to establish the applicable law or jurisdiction, as has been seen in Section 1.3 above.

In such cases, according to the *Conseil d'État*, French courts ought first to ascertain whether a conflict of international agreements is indeed actual, and not just hypothetical. This means determining whether the uncertainty relates to rules that have the same scope of application. In addition, the judge must ascertain whether the provisions of competing agreements might both take effect in the domestic legal system. If that were the case, the second-stage question would then arise: which agreement should prevail? The *Conseil d'État* mandates that lower judges should seek to address the conflict by relying on customary rules of international law, with a concern to interpret the provisions of different treaties so as to ensure their mutual accommodation and, when applicable, their harmony with constitutional integrity and public order. It is worthwhile noticing here that the *Conseil d'État* was likely suggesting to apply Article 30 of the Vienna Convention by classifying it as a customary principle of international law (since France is not a signatory, the binding character of such a provision had to be justified otherwise than as a treaty norm): this is why custom is raised here as a rule for solving a conflict between international agreements.

The third stage scenario arises when it has not been possible to find mutual accommodation between the conflicting treaties. In this case, a French administrative judge would have to only apply the provisions of the treaty in view of which the administrative body—whose decision is being brought before the judge—reached its decision, and leave out the conflicting treaty. To bring this back to our main topic—the conflict of international agreements in air law—the *Conseil d'État* decision means that a

[52] Conseil d'Etat [C.E.] [highest administrative court], Dec. 23 2011, 303678, Revue Constitutions 2012, 2, at 295 (note A. Levarde) (Fr.).

[53] The *Conseil d'État* suggested that conflict of international agreements is a widespread problem, beyond the domain of administrative law. It mentioned, for instance, international economic law, where conflicts might exist between conventions establishing a preferential economic system and separate bilateral agreements.

national judge is ultimately responsible for choosing only one of the conflicting rules from different treaties that might apply to a particular dispute. The decision equally clarifies, however, that the consequence of having to make one such decision might be—in the third-stage scenario when the conflict between two conventions is unresolvable—that the state will become liable under international law for failing to comply with a treaty that has been left out by the court's decision.[54] Hence, when there is a conflict between mutually exclusive rules set down in international agreements, the international responsibility of the concerned state arises as a result of the choice made, as the case may be, by either the judge or the government[55]—this is because the provisions of international agreements ought generally to be applied in a manner that is clear and unconditional.[56]

2.3. DOCTRINAL PROPOSALS ON THE CONFLICT OF INTERNATIONAL AGREEMENTS IN AIR LAW

Because many of the rules concerning air law are founded on international agreements, in many cases, this leads to the emergence of a conflict due to the uneven regulatory landscape resulting from the proliferation of treaties. It is useful to remind oneself that it is not uncommon for state constitutions to give international law a place in the hierarchy of sources that prevails over national legislation, either immediately upon ratification (monist systems) or upon implementation via legislation (dualist systems).[57]

At the same time, when we enlarge the gaze beyond the (vertical) relationship between national law and international legal sources, to look at the (horizontal) conflict of laws of different states—each possibly informed by a different treaty (or a different version of the same treaty)—then hierarchical criteria are of limited guidance.[58] Hierarchy in a traditional sense merely describes the internal legal structure of one state, taken as the focus of observation. This explains why private international law has

[54] Incidentally, it is worth noticing that this approach entails that the internal division of powers between the executive (who normally has the authority for making decisions concerning treaty obligations) and the judiciary (which is another state body) isn't relevant in the face of international law: a judge setting aside the provisions of a treaty on grounds of incompatibility with another treaty will still attract the state's liability under the misapplied treaty.

[55] *See* G. Guillaume, *Le Juge Administratif et la Combinaison des Conventions Internationales* [Administrative Courts and the Combination of International Conventions] [2012] Revue Française de Droit Administratif 19 (2012).

[56] *See, e.g.*, Conseil d'État [C.E.] [highest administrative court], Apr. 11, 2012, 322326, Revue constitutions 2012, 2 at 297 (note A. Levarde) (Fr.).

[57] For a contextualisation of this observation to a sample of Arab constitutions, see G. P. Parolin, *The Constitutional Framework of International Law in the Gulf: Ratification and Implementation of International Treaties in G.C.C. Constitutions*, 34 Arab Law Quarterly 34 (2020).

[58] *See* R. Encinas de Munagorri, *Droit International Privé et Hiérarchie des Normes* [Private International Law and the Hierarchy of Norms], 21 Revue de Théorie Constitutionnelle et Philosophie du Droit 71 (2013).

been a long-standing topic of controversy and doctrinal scepticism, as familiar hierarchies of sources do not hold much sway.[59] (last visited Oct. 16, 2021). In connection to the specific issue examined in this paper—the conflict of international agreements in air law—it is also worthwhile noticing that rarely do international treaties establish a hierarchy among themselves (except in the first case contemplated at Article 30 of the Vienna Convention, where a treaty expressly states its subordination to a previous one).[60] This is precisely why conflicts of international agreements arise! In the light of this, it is useful to look at some doctrinal proposals to navigate this predicament.

Let us assume, if we go back to the hypothetical case with which we opened this article, that a judge had to consider the application of Moroccan law. This is where the inextricability of national law from international agreements in the field of aviation comes home to roost. Article 443 of Law No. 15-95 of 1996 [hereinafter Moroccan Commercial Code] defines the contract of carriage and already contains a clause that demands "observing the provisions of special regulations in the field of transport and international conventions to which the Kingdom of Morocco is a party". Embedded in national law, a judge would already find there a first reference to international treaties. In the field of aviation, Moroccan Law No. 40.13 on Civil Aviation contains additional references to international conventions. The following quotations from this law help give a sense of just how pervasive and literal the embeddedness of international agreements in a national system might be. First, let us consider Article 96(1):

> The conditions for establishing the liability of the operator of an aircraft [. . .] are subject to the provisions of the Rome Convention. The limits of liability stipulated in the Convention, and any other convention ratified by the Kingdom of Morocco that amends or supplements it, shall also be applied to aircraft registered in Morocco

.

Next, we might consider Article 206(2): "Air transport contracts must be drawn up in accordance with the provisions of the Montreal Convention [. . .] related to the unification of certain international air transport rules."

[59] *See* J. G. Castel, *Les Approches des Systèmes de Droit International Privé et les Conventions Internationales* [The Approaches of Private International Law Systems and International Agreements], AHJUCAF, Les approches des systèmes de droit international privé et les conventions internationales

[60] *See, e.g.*, Conseil d'État [C.E.] [highest administrative court], Dec. 23, 2011, 303678, Revue trimestrielle de droit européen 2012, 1, at 929 (note D. Ritleng) (Fr.).

Article 223 makes another indirect reference to international agreements: "In the event that a flight from Morocco is cancelled or delayed, passengers are entitled to obtain assistance according to the conditions and methods specified under a regulatory provision, taking into account the provisions of *international agreements* applicable in this field."

Last, but not least, Article 38(1):

> The provisions agreed upon under this Article shall be the subject of conventions between the Kingdom and the countries concerned. These conventions shall be legally filed with the International Civil Aviation Organization (I.C.A.O.) in order to be registered in accordance with the provisions of the Chicago Convention on International Civil Aviation.

In the space of a few articles, it can easily be appreciated how, embedded in Moroccan Law No. 40.13, are several references to conventions on civil aviation, such as the Rome Convention, the Montreal Convention, and the Chicago Convention. This form of external reference also recurs in the legislation of another Arab country, like the U.A.E., where the U.A.E. Civil Aviation Law for instance contemplates a clause (Art. 19) to save the provisions of any bilateral agreements, thereby multiplying the sources of potential conflicts of international agreements.

These cases exemplify how a judge tasked with a dispute in air law will be referred—by national legislations—to international agreements, and this may lead to him or her applying the provision of treaties, which might be in conflict with the international treaty obligations of his or her own state of belonging. Hence, this is why private international law norms might, in this case, conflict with the international legislation in force in the state to which the competent judge belongs. Some commentators have candidly admitted that this is a possibility that grows exponentially, the greater the accumulation of agreements in a particular regulatory domain.[61]

In the context of aviation law, this exponential growth follows from the piecemeal accumulation of an international regulatory architecture. As new trans-boundary legal problems were encountered with respect to international air transport, a number of sectoral conventions and protocols were adopted to address them, even though the wider systemic effect has been a weakening of national air laws and the emergence of conflict at the level of international agreements. An honest appreciation of the origin of this problem, and of the fact that its solution is currently

[61] *E.g.*, D. Bureau, *Les Conflits de Conventions* [The Conflicts of International Agreements], 14 Droit International Privé 201 (2001).

left to the point of application by national judges, should help create an awareness that the solution of the problem likely lies at the same level where it originated: namely at the level of international treaty-making. Particularly so, when existing international agreements haven't really been awake to the potential for conflict between them, and have therefore refrained from including any provisions to manage potential conflicts.

One immediate way to address this shortcoming is by agreeing on explicit provisions regulating only the conflict of agreements—separating the issue of conflict from the substantive regulation enacted in each agreement.[62] Another solution, different from a centralised codification of conflict rules, would be the inclusion of "conflict of agreement" rules in each separate agreement.[63] At the same time, this would still suffer from the same problems of uneven ratification and implementation across the international community: logically the rules for conflict of agreements included in one agreement could not bind non-signatory countries. This difficulty is compounded by the fact that, for example in connection with the Warsaw Convention, some countries have ratified only the original version, but not the subsequent ones, like the Hague or the Montréal Protocols, [64] So even within the membership of the same agreement there are different degrees of participation. If the countries involved in an air dispute are more than just two, the problem can quickly appear unmanageable through an approach seeking to include "conflict of agreement" provisions separately in each treaty.

At an even more granular level, some commentators have focused on suggesting solutions for each separate hypothesis of conflict of agreements in international air law. It is useful—as an example—to consider Mercadal's examination of the different possible scenarios arising from the entry into force of the 1975 Montreal Protocols amending the 1929 Warsaw Convention.[65] It is useful to report the different possible scenarios as a list, in order to provide a flavour for the granularity of the approach proposed by Mercadal:

1. The relations of a state that is a signatory to one of the protocols with a non-signatory state cannot be governed by the protocol(s) accepted by only one of the states involved.

2. Montreal Protocol No. 1 amended the original Warsaw Convention, while Protocol No. 2 amended the Warsaw Convention as supplemented in the Hague. Hence, an air transport case involving a state that has ratified the original Warsaw Convention

[62] *See* V. Goesel, *Codification du Droit International Privé et Droit des Traités* [Codification of Private International Law and the Law of Treaties], 38 Annuaire Français de Droit International 358, 360 (1992).
[63] *See* H. V. Houtte, *La Réciprocité des Règles de Conflits dans les Conventions de la Haye* [The reciprocity of Conflict of Law provisions in the Hague Convention], 1991 Revue Belge de Droit International 491, 492 (1991).
[64] *See, e.g.*, Mercadal, *supra* note 13, at 12.
[65] *Id.*

and its amending Protocol (Montreal Protocol No. 1), on the one hand, and a state that has ratified the Convention as amended in the Hague (Montreal Protocol No. 2), on the other hand: this dispute will then be solved by only applying any common provisions to which both states are bound.

3. A dispute between a state acceding to the Warsaw Convention, as amended in the Hague, on the one hand, and a state acceding to the Convention amended in the Hague and also to its amending Protocol (Montreal Protocol No. 2), on the other hand, shall be subject to the common version (i.e. the Hague Protocol).

4. In the case of two states acceding to the Warsaw Convention as amended in the Hague, but which have subsequently implemented different protocols (respectively, say, Protocol No. 2 and Protocol No. 4), a dispute with elements of connection to their respective systems ought to be solved by applying once again the common version, i.e. the Warsaw Convention amended in the Hague, without its later Montréal Protocols.

Mercadal's solutions seem to suggest that a case-by-case approach could then be that of seeking, for each specific instance of conflict, whether a common version of an air law convention exists—to which both states have subscribed—and then use that, excluding any provision ratified by only one of the countries involved. Nevertheless, despite the precision of Mercadal's suggestion to focus on each case separately, this still leaves a large burden on judges, and it doesn't necessarily offer a broader set of criteria on which a judge may rely in unforeseen cases.

CONCLUSION

In this note, we have charted a recurring type of uncertainty that surfaces in international disputes on air law, when the legislation of different countries comes into play, and that legislation—in turn—refers back to incompatible international agreements, or different versions thereof. This means that, if the competent judge were simply to enforce the international agreements referred to in the foreign legislation—applicable according to the rules of private international law—this would simultaneously clash with the lack of assent given by the judge's state of belonging, either to the agreement in question, or to the specific version implemented in the foreign state with which the dispute at hand has elements of connection. Conflicts of international agreements also arise when questions of applicable law or jurisdiction need to be sorted after figuring out whether the states involved are privy to the same convention, since only this would settle any questions of attribution.

In earlier sections, we have traced the source of such a conflict in the gradual sedimentation of an international legal framework for air law (hence, the proliferation of agreements). This multiplies the unevenness within international air law, due to states' decisions to join, or refrain from joining, different rounds of international rule-making. Moreover, because national legislation has often developed under the impulse of international agreements, its scope is often directly limited by applicable treaty provisions.

Because of these factors, the conflict we have focused on in this article is not just a conflict that can be assimilated to any odd matter of private international law. While the latter is often concerned with determining the applicable law or the competent court, this is not the matter of competition between two or more national laws belonging to different countries. Instead, we suggest it is a matter of conflict between international agreements that are not issued by a legislative authority, but are ratified according to the rules of international law. When different states have ratified mutually incompatible agreements, the resulting uncertainty is compounded by the fact that international law does not come with a set of generally applicable conflict rules. In this respect, there seem to be few alternatives to the international codification of uniform conflict rules, with the caveat that their broadest possible ratification by the international community ought to be ensured (thereby disqualifying the approach of including separate conflict provisions in each of the existing agreements, as discussed in Section 2).

In the absence of one such initiative, there is no way around individual instances of conflict being sorted on a case-by-case basis at the point of judicial application. In this respect, we find that the pronouncement of the French *Conseil d'État* discussed in Section 2 offers useful guidance to regulate the discretionary power of the competent judge. For instance, this ought always to be exercised within the framework of any applicable rules of private international law, and—if one follows the French *Conseil d'État*—also with reference to the customary rules of international law. In this respect, in its 2011 decision discussed earlier (Section 2), this French Court acknowledged that the rules of the Vienna Convention (especially Article 30) might not apply—as treaty norms—but that they might count as customary international law to help address conflicting treaty norms. Eventually, however, the Court also recognised the risk—that is omnipresent without a harmonisation effort—that the judge's decision to solve in isolation a conflict of international agreements in an air law dispute might involve setting aside treaty provisions to which the state, to which the Court belongs, is bound—and therefore activate its international responsibility for failing to give implementation to binding treaty norms.

Without a doubt, the concerted effort to build an international air law framework is laudable. However, the multiplicity and succession of international conventions related to air law, compounded by the specificity of national conflict of laws rules, has widened the scope of conflict between international agreements, without univocal solutions that would contribute to legal certainty. On this basis, we deem it reasonable to end with a plea for international efforts, directed specifically at the harmonisation of international air law.

VOLUME 6 ISSUE 2 ARTICLES & ESSAYS

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/14253

Received: 18 Jan. 2021 | Accepted: 23 Mar. 2021 | Published: 24 Jan. 2022

The Right to Dignity of the Surrogate Mother

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ABSTRACT

This article explores a different perspective on the right to dignity of the surrogate mother in commercial surrogacy arrangements under international human rights norms and philosophical principles. Here, I examine the concept of human dignity under the lenses of contemporary legal theory reflecting on the right to self-determination of the surrogate mother. This dignity-based approach serves for analysing how International Human Rights Law enables women to enter commercial surrogacy agreements on the basis of their contractual freedom, their reproductive rights, on the prohibition of non-discrimination and their labour rights. Under the lenses of economics and law, I examine how this practice carries the potential to empower the economic emancipation of women and their access to the labour market. Dignity as rights-constraining will reflect on the other side of surrogacy. I investigate the exploitative character of this practice and how it could present human rights abuses for the surrogate mother. Specifically, I focus my analysis on how surrogacy contracts could violate the bodily autonomy of the surrogate and potentially maintain gender inequality and reinforce gender stereotypes. After recognizing certain concerning aspects of individual surrogacy arrangements, I question whether outlawing surrogacy is the right response to this practice.

KEYWORDS

Human Dignity; Self-Determination; Contractual Freedom; Non-Discrimination; Exploitation

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INTRODUCTION

International commercial surrogacy has shaped a new branch of tourism.[1] Methods of baby-making have expanded rapidly through technological advances and globalization. Women worldwide offer themselves to carry a child for another couple who might suffer from infertility or prefer to use this service because of other reasons.[2] The 2030 Agenda for Sustainable Development in Sustainable Development Goal 5 [hereinafter S.D.G. 5] aims to achieve gender equality and empower all women and girls. This provision puts into conflict the two sides of S.D.G. 5 namely, on the one side ending trafficking, sexual and other forms of exploitation of women and girls and on the other side empowering them. In the practice of surrogate motherhood, this tension is clearly visible as there exists a conflict between values of protection and freedom.

The aim of this article is to confront the arguments in favour of and against the participation of potential surrogate mothers in international commercial surrogacy. This article concerns only the practice of commercial surrogacy whereby a woman is compensated to carry the child. The focus of this analysis is the concept of human dignity. Dignity constitutes a central element in International Human Rights Law and has been integrated into various legal instruments.[3]

[1] *See* April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 Univ. Pa. J. L. & Soc. Change 257 (2014).
[2] *See* Claire Fenton-Glynn, *Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements,* 24 Med. L. Rev. 59 (2016).
[3] *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 Eur. J. Int'l L. 655 (2008).

Contemporary legal theory associates human dignity with the philosopher Immanuel Kant.[4] The idea behind his concept is to equalize dignity with autonomy. In other words, treating people with dignity means to treat them as autonomous individuals able to choose their destiny.[5] In this sense, scholars have found coherence with the theory of contractual autonomy, meaning that surrogate mothers should be able to choose freely to exchange their bodily services in the practice of commercial surrogacy.[6]

On the other side, Kantian dignity prohibits commodification of the human body. As a person, a human being "cannot give himself away for any price".[7] The argument of non-commodification establishes a limit to the contractual autonomy of the person. By contextualizing surrogacy, serious concerns of exploitation are raised for surrogate mothers participating in surrogacy from the Third World.[8] Financially and socially vulnerable women present a target group with a high risk of exploitation and commodification. According to Judge Dedov in his dissenting opinion in the Grand Chamber judgement of the European Court of Human Rights [hereinafter E.Ct.H.R.] in *Paradiso and Campanelli v. Italy* (Appl. No. 25358/12) judgement of 24 January 2017, "it is extremely hypocritical to prohibit surrogacy in one's own country in order to protect local women, but simultaneously to permit the use of surrogacy abroad". Paradoxically, even in states like the United States [hereinafter U.S.] where surrogacy laws are liberal, U.S. citizens still prefer to enter into surrogacy arrangements with women from other lower-resource nations.[9] This reflects another assumption that individuals seek to conduct surrogacy arrangements in developing countries where the offer is cheaper. Ultimately, surrogacy raises decisive questions about the protection of the surrogate mother and her rights in this practice. The methodology for addressing issues concerning international surrogacy in this contribution will take place through the prism of international human rights.

In the first chapter, I will start off by explaining the role of human dignity in the jurisprudence of the European Courts. Human dignity is a fundamental and constitutional value of the European Union, a juridically protected good and the essence of the European Convention on Human Rights. The case-law of the Courts determines

[4] *See* James Rachels, *Kantian Theory: The Idea of Human Dignity*, in Computers, Ethics, & Society 45 (M. David Ermann, Mary B. Williams, Michele S. Shauf eds., 1990).

[5] *See* Immanuel Kant, *Metaphysical first Principles of the Doctrine of Virtue §38*, *in* The Metaphysics of Morals 375, 463 (6 Ak. 1900).

[6] *See* Jamie Cooperman, *International Mother of Mystery: Protecting Surrogate Mothers' Participation in International Surrogacy Contracts*, 48 Golden Gate Univ. L. Rev. 161 (2018).

[7] Martha C. Nussbaum, Women and Human Development: The Capabilities Approach 73 (2000). By contrast, "the core of what exploitation is, [is] to treat a person as a mere object for the use of others".

[8] *See* Donna Dickenson, Property in the Body: Feminist Perspectives (2007).

[9] *See* Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 Univ. Pa. J. Int'l L. 1429 (2009).

the recognized elements of human dignity: self-determination, freedom and autonomy, identity, equality, and liberty.

In the second chapter, I want to compare the two sides of the right to dignity. In the first part of the chapter, I will examine how the international human rights framework protects the participation of the surrogate mother in commercial surrogacy. Women's participation in the role of surrogate mother is guaranteed by their contractual freedom, on the basis of their reproductive rights, on the prohibition of non-discrimination and their labour rights. Firstly, Article 8 of the European Convention on Human Rights [hereinafter E.C.H.R.] entitles women to the right of privacy and self-determination. Surrogacy involves the importance of women's autonomy, the guarantee that women should be allowed to exercise their right to contract with anyone, for anything, even for their reproductive abilities.[10] The decision to enter into a commercial surrogacy agreement is protected *prima facie* by her right to privacy.[11] The International Covenant on Civil and Political Rights [hereinafter I.C.C.P.R.] holds that all individuals have the fundamental "right of self-determination".[12] This right establishes the ability for individuals to "freely determine their political status and freely pursue their economic, social, and cultural development. The Convention on the Elimination of all Forms of Discrimination Against Women [hereinafter C.E.D.A.W.] requires that countries do not discriminate against women in their laws and policies, including restrictions or regulations of women's choices of labour and reproductive choices and activities. In addition, the E.C.H.R. and the International Covenant on Economic, Social, and Cultural Rights [hereinafter I.C.E.S.C.R.] also require states to ensure non-discrimination in the context of laws and policies around reproductive rights and choices. This obligation includes ensuring laws and policies on reproductive choices which are not based on gender stereotypes such as traditional conceptions of motherhood and maternity.[13]

In the second part of this chapter, I will deal with the question whether commercial surrogacy arrangements could lead to a violation of the right to dignity of the surrogate mother. Authors fear the vulnerability of women in low-resource nations, specifically their risk to exploitation and commodification by not holding an equal

[10] *See e.g.*, Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 Mich. J. Int'l L. 259 (2011).

[11] *See generally* John Tobin, *To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?*, 63 Int'l & Compar. L. Q. 317 (2014).

[12] G.A. Res. 34/180, annex, Convention on the Elimination of All Forms of Discrimination against Women, pt. 1 (art. 1) (Dec. 18, 1979).

[13] *See e.g.*, Liiri Oja & Alicia Ely Yaminc, *"Woman" in the European Human Rights System: How is the Reproductive Rights Jurisprudence of the European Court of Human Rights Constructing Narratives of Women's Citizenship?*, 32 Colum. J. Gender & L. 62 (2016).

bargaining power in this arrangement.[14] The unequal bargaining power between the commissioning parents and the surrogate mother is implicated by issues such as the disparity in social class, ethnicity and gender hierarchy.[15] It is doubtful whether the power of consent is truly available for them when recognizing that there may not be other reasonable occupational alternatives with fair compensation.[16] Informed consent can be compromised by various factors, coercion, such as financial pressure, lack of knowledge about pregnancy complications, uncertainty as to health impacts on the surrogate mother. To add on, it must be determined if surrogacy arrangements could amount to slavery or forced labour based on Article 4 of the E.C.H.R. Lastly, their physical integrity could be at risk based on the high rate of maternal mortality and the pregnancy risks that they are exposed to.[17]

This article presents a comprehensive review of the right to be a surrogate under the international human rights norms and philosophical principles. It recognizes certain concerning aspects of individual surrogacy arrangements and questions whether outlawing of surrogacy is the correct response to this practice.

1. HUMAN DIGNITY IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE

European constitutionalism recognizes human dignity as a "fully European concept".[18] It is known for its high complexity, as it can be seen as a fundamental constitutional value of the European Union [hereinafter E.U.] (Article 2 of the Treaty of the E.U.), as a means to frame conflicts, as a tool for interpretation and as a symbol of the European legal order.[19] The European Court of Justice [hereinafter E.C.J.] and E.Ct.H.R. give another function to this concept when resolving conflicts. With the principle of proportionality, the Courts "weigh" or "balance" rights, values and interests and use human dignity as a tool for resolving the clash of rights.[20] In front of the European Court of Human Rights,

[14] *See e.g.*, Nicole F. Bromfield & Karen Smith Rotabi, *Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations*, 1 Glob. Soc. Welfare 123 (2014).
[15] *See generally* Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 Harv. J. L.& Pub. Pol'Y 139 (1990).
[16] *See generally* Tobin, *supra* note 11.
[17] *See* Jeffrey Kirby, *Transnational Gestational Surrogacy: Does It Have to Be Exploitative?*, Am. J. Bioethics, 25 Apr. 2014, at 24.
[18] Catherine Dupré, The Age of Dignity: Human Rights and Constitutionalism in Europe 91 (2003).
[19] *See, e.g.*, Davor Petrić, *"Different faces of dignity": A Functionalist Account of the Institutional Use of the Concept of Dignity in the European Union*, 26 Maastricht J. Eur. & Compar. L. 792 (2019).
[20] *See* McCrudden, *supra* note 3.

the concept of human dignity is represented by three layers of protection. An absolute protection is given to human dignity by Article 3 E.C.H.R. In a second step, human dignity serves for the concretization of other human rights that are granted only relative protection. Hereby the proportionality test will test the severity of the interference. Thirdly, the Court uses the concept of human dignity in a political matter for reflecting a desirable outcome for human rights protection without imposing a legally binding consequence for the contracting states.[21]

Article 1 of the Universal Declaration of Human Rights [hereinafter U.D.H.R.] of 1948 states that all human beings are born free and equal in dignity and rights. The Preamble of the International Covenant on Civil and Political Rights of 1966 recognizes human dignity as the source of natural human rights. The European Convention on Human Rights in 1950 and its additional protocols give a pivotal role to human dignity. Respect for human dignity is not articulated in any of the substantive rights guaranteed under the Convention.[22] This concept appears in Protocol no.13 to the European Convention which emphasises that the abolition of the death penalty is "essential" for the protection of right to life and for "the full recognition of the inherent dignity of all human beings".[23] However, it underpins guaranteed rights such as the right to life, the right to respect for private life, the prohibition on inhuman and degrading treatment, in the context of the right to a fair hearing and the right not to be punished in the absence of a legal prohibition. Based on the interpretation of the European Court of Human Rights on Article 3 of the Convention, life and human dignity are fundamental values of a democratic society. The duty of the state is to protect dignity under all conditions.

The preamble of the Charter of Fundamental Rights mentions human dignity as the first value among the "indivisible and universal values on which the European Union is founded". The Charter provides for a prioritisation of the concept "human dignity" as it holds the heading of Title I (before Title II "Freedoms" and Title III "Equality"). Article 1 states that "Human dignity is inviolable. It must be respected and protected". In other words, human dignity is not seen as a right, but as a general clause implying the recognition of an inviolable juridically protected good.[24] Article 3 of the Charter refers to the "right to integrity of the person" and in para 2 it mandates respect for the free and informed consent of the person concerned, according to the procedures laid down by

[21] *See, e.g.*, Sebastian Heselhaus & Ralph Hemsley, *Human Dignity and the European Convention on Human Rights*, *in* Handbook of Human Dignity in EuropE 969 (Paolo Becchi, Klaus Mathis eds., 2019).
[22] *See* Susan Millns, *Death, Dignity and Discrimination: The Case of Pretty v. United Kingdom*, 3 GER. L. J. (2019).
[23] Protocol no. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all circumstances, Vilnius, 3.V.2002.
[24] *See generally* Millns, *supra* note 22.

law. In *Omega*,[25] the Court of Justice handed down a landmark judgement that the concept of dignity represents a fundamental right in the E.U. Charter, a general principle of E.U. law and a constitutional value of the Union. Advocate General Stix-Hackl, in her Opinion in *Omega,* stated that human dignity is attributed to every human being solely based on their human nature.[26] She emphasised that human dignity is inherent and inalienable to humans who are endowed with reason and represents the "substance" of mankind. In her opinion, human dignity is what distinguishes every person from other living beings.[27] It contains elements of self-determination, freedom and autonomy, individual's personality, and identity. It subsumes the concept of equality of people. Lastly, she reflected on dignity as being the foundation for all other human rights and yardstick for their interpretation.[28] In conclusion, Advocate General Stix-Hackl recognized the high importance of this concept in the E.U. legal order by stating that it cannot be subject to any restriction nor weighed against other values or interests.

The substance of human dignity has been defended by Advocate General Maduro in the *Coleman* case.[29] In his opinion in *Coleman*, Advocate General Maduro expressed that dignity corresponds to the principle of equality. According to his opinion, dignity has an intrinsic value and is possessed merely by being human. As a consequence, every human being is worth the same.[30] Based on the opinions of Advocate General Stix-Hackl and Maduro, the concept of dignity is built upon liberty and equality. However, in both opinions there is a clear tendency that human dignity in E.U. has a stronger link to liberty.[31] Advocate General Stix-Hackl concentrates on the self-determination of the individual. Advocate General Maduro reflects on autonomy as an underlying value of dignity.

The notion of personal autonomy is connected to the concept of "private life" as the European Court of Human Rights expressed that: "although no previous case has been established as such any right to self-determination as being contained in Article 8 of the Convention [. . .] the notion of personal autonomy is an important principle underlying the interpretation of its guarantees".[32] "Private life" protects a right to personal development and the right to establish and develop relationships with other

[25] Case C-36/02, Omega v. Oberbürgermeisterin der Bundesstadt Bonn, ECLI:EU:C:2004:162 (Mar. 18, 2004).
[26] *See* Opinion of Advocate General Stix-Hackl in Case C-36/02 Omega, EU:C:2004:162, para. 75.
[27] *Id.* paras. 75-76.
[28] *Id.* paras. 76-81.
[29] Case C-303/06, Coleman v. Attridge Law, EU:C:2008:61 (July 17, 2008).
[30] *See* Opinion of Advocate General Maduro in Case C-303/06 Coleman, para. 9.
[31] *See e.g.*, Petrić, *supra* note 19.
[32] *Id.* para. 66.

human beings.[33] It recognizes an inviolable sphere of privacy.[34] The structure of Article 8 E.C.H.R. does not grant absolute protection to human dignity, but it establishes a two-tier approach.[35] First, a core of human dignity is granted absolute protection; in a second step the Court is then required to balance conflicting rights. The interference can be justified. In *Haas v. Switzerland*,[36] the Court outlines that it is the choice of the applicant to avoid what she perceives to constitute an undignified and painful end to her life. The European Court of Human Rights acknowledged that the choice of how one ends his life falls in the ambit of Article 8 E.C.H.R.. By doing this, the Court modifies the grounds of dignity: it is not seen any more as inherent to human nature but linked to the perception of each individual on the concept of dignity.[37] The measure of human rights is no longer human, but each individual.[38]

In *Pretty v. the United Kingdom*,[39] the Strasbourg-based Court refers to respect for human dignity as the "very essence of the Convention".[40] The Court recognizes that the notion of dignity is composed of a social component that relates to issues of the quality of life and is not simply limited to a consideration of life per se. The interpretation of the Court concentrates on the concept of dignity as the need of the individual for self-respect. The European Court of Human Rights emphasises the importance of self and personal identity by admitting that: it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.[41] In *Christine Goodwin v. United Kingdom*, the Grand Chamber specified personal autonomy as an element of both the freedom and the dignity central to the Convention.[42] This case dealt with the recognition of the rights of transsexual people in the light of Article 8 E.C.H.R..

[33] *Id.* para. 61. There was no previous Strasbourg case law which explicitly recognised a right to self-determination as being contained in Article 8 of the Convention; the Court now held that *the notion of personal autonomy is an important principle underlying the interpretation of its guarantees*.

[34] On the ambit of Article 8 E.C.H.R. *see, e.g.*, Cesare Pitea & Laura Tomasi, *Art. 8 - Diritto al rispetto della vita privata e familiare, in* Commentario breve alla Convenzione dei diritti dell'uomo 297 (Sergio Bartole et al. eds., 2012).

[35] Anne Peters & Tilmann Altwicker, Europäische Menschenrechtskonvention: Mit rechtsvergleichenden Bezügen zum deutschen Grundgesetz (2012).

[36] *Haas v. Switzerland,* App. No. 31322/07, First Section, 2011, Eur. Ct. H.R. para. 50.

[37] *See* Gregor Puppinck & Claire de La Hougue, *The right to assisted suicide in the case law of the European Court of Human Rights*, 18 Int'l J. Hum. Rts. 735, 755 (2014).

[38] *See* Grégor Puppinck, *Les droits de l'homme, nouvelle religion d'État*, 31 La Nouvelle Revue Universelle (2013).

[39] *See, e.g., Pretty v. the United Kingdom,* App. No. 2346/02, Fourth Section, 2002, Eur. Ct. H.R.

[40] *Id.* para. 65.

[41] *Id.*

[42] *See* , *Christine Goodwin v. United Kingdom*, App. No. 28957/96, Grand Chamber Judgement, 2002, Eur. Ct. H.R. para. 90.

The Court concluded that "the right to establish details of identity is in immediate proximity to the respect for human dignity".[43]

In matters of prostitution, the European Court of Human Rights has clearly concluded that forced prostitution is incompatible with the dignity of the person. This was stated in the judgement of September 11, 2007 in *Tremblay v. France*.[44] On the other side, prostitution based on the free choice of the person that is free from any form of coercion is not incompatible with the right to dignity. In matters of biomedicine, the Court has followed the interpretative doctrine of considering the convention as a "living instrument" when reflecting on the repercussions of social and technological progress on human rights.[45] In the field of reproductive rights, the Court has generally recognized a particular need for restraint and remained hesitant in interfering with national politics concerning issues of bioethics.[46] In this specific matter, the European Court of Human Rights has sometimes used the concept of human dignity to defend tradition and morality based on Article 8 E.C.H.R..

In *Evans v. United Kingdom*, a cancer survivor asked for the in vitro embryos to be returned to her for the purpose of procreation.[47] This was rejected by her ex-partner. The E.Ct.H.R. refused the request of the distressed woman by asserting that the legal provision requiring the consent of both members for the *in vitro* fertilisation [hereinafter I.V.F.] procedure was not in violation with the right to respect for her private and family life.[48] This provision protects the person donating gametes for the purposes of *in vitro* activation in order for them to be certain that their material cannot be used against their consent. According to the Court, this provision protects human dignity, free will and the desire to maintain a fair balance between the parties to the I.V.F. treatment. By invoking human dignity, the Court justifies a conservative limitation on the right of the woman to become a mother by the use of assisted reproductive technologies and emphasizes the personal autonomy of the man, who could not be forced to become a father in a situation where the procreation required medical intervention.[49]

[43] *Id.* para. 92.
[44] *See*, *Tremblay v. France,* App. No. 37194/02, Second Section, 2007, Eur. Ct. H.R.
[45] *See*, *Knecht v. Romania,* App. No 10048/10, Third Section, 2012, Eur. Ct. H.R., para. 59.
[46] *See generally* Alice Margaria, *Parenthood and Cross-border Surrogacy: What is "New"? The ECtHR's First Advisory Opinion*, 28 Med. L. Rev., Issue 2 (2020).
[47] *See*, *Evans v. United Kingdom,* App. No. 6339/05, Grand Chamber Judgement, 2007, Eur. Ct. H.R.
[48] *Id.* para. 92.
[49] *See* Jean-Pierre Marguénaud, *The Principle of Dignity, and the European Court of Human Rights in the reality of Human Dignity in Law and Bioethics, in* 71 The Reality of Human Body and Dignity in Law and Bioethics 141 (Brigitte Feuillet-Liger & Kristina Orfali eds., 2018).

The E.Ct.H.R. refers to the practice of surrogacy not as a rights issue, but as an ethical issue that must be left to the discretion of the state. In *Mennesson v. France*,[50] a case concerning a surrogacy arrangement of a French couple and their children born from surrogacy in the state of California, the Court found no violation of Article 8 E.C.H.R. for the parents of the children. On the contrary, regarding the children, the Court found a violation as the measure undermines the identity of the children and concluded that "the interests of the minors should always prevail, since they cannot be denied their right to a private life or to adopt the nationality of their biological parent". The Court makes no reference to the dignity of the surrogate mother and missed the opportunity to engage with constructions of gender and family roles set in the national legislations.

2. SURROGACY, BETWEEN VALUES OF FREEDOM AND PROTECTION: THE RIGHT TO SELF-DETERMINATION OF THE SURROGATE MOTHER

2.1. WOMEN'S CONTRACTUAL FREEDOM AS A SOURCE FOR EMPOWERMENT

Women are the individuals who provide the service of surrogacy. Some refer to the role of the surrogate mother as the "gestational carrier", whilst others see her as having rented out her womb.[51] The reasons women choose to work as surrogates are various. Some women become surrogates based on altruistic motivations, others see surrogacy as an additional source of income. A common motivation is improving their financial situation, providing for their children, to renovate, build, or buy their own home, to start a business, to pay debt. They may also enter surrogacy contracts when they do not have other professional options as there is no available employment. The payment received for the surrogacy arrangement enables them to contribute towards the achievement of these goals that would not have been possible otherwise. The right of the woman to dispose of her bodily parts or bodily services should not be effectively subject to governmental control.[52] Prohibiting women from entering commercial surrogacy contracts could potentially deprive them of engaging in contractual labor. Their right to surrogacy is derived from their contractual freedom. The right to surrogacy protects the interests of the contractual parties involved to enter a contract freely.

[50] *See e.g. Mennesson v. France* App. No. 65192/11, Fifth Section, 2014, Eur. Ct. H.R. together with *Labassee v. France*, App. No. 65941/11, Fifth Section, 2014, Eur. Ct. H.R.
[51] *See* Lauren Andrew Hudgeons, *Gestational Agreements in Texas: A Brave New World*, 57 Baylor L. Rev. 863 (2005).
[52] *See generally* Carmel Shalev, Birth Power: The Case for Surrogacy (2009).

Based on self-determination and freedom of contract, women have the right to enter into a surrogacy contract. The I.C.C.P.R. holds that all individuals have the fundamental "right of self-determination".[53] This right establishes the ability for individuals to "freely determine their political status and freely pursue their economic, social, and cultural development". On the basis of I.C.C.P.R., women can demonstrate their right of using the resource of their bodies to enter into surrogacy agreements by fulfilling the conditions of the right of self-determination.[54]

Surrogacy reflects the guarantee that women should be allowed to exercise their freedom of contract with anyone, even on the basis of reproductive abilities.[55] Pregnancy contracts do show differences to other types of contracts as long as they are voluntarily accepted by the surrogate mother. The surrogate mother provides a service that does not entitle her to direct ownership, nor does she represent an identity interest in the embryo/fetus, nor a parental/maternal interest in the child she is carrying.[56] Both parties, the surrogate mother and the intended parents, enter the commercial surrogacy agreement on the basis of an exchange: the surrogate mother agrees to engage in reproductive labor and the intended parents agree to compensate her for this service.[57] This contract has the nature of an employment contract. The surrogate mother is compensated for her service, not for relinquishing parental rights. Under the lenses of economics and law, a contract should be enforced when it makes two people better off.[58] The parties are the best judges of their own welfare and their desire to enter a surrogacy contract should only be interfered by paternalistic intervention in exceptional circumstances.[59] Under legal paternalism we understand the view that it is permissible for the state to legislate against self-regarding actions when necessary to prevent individuals from inflicting physical or severe emotional harm on themselves.[60] It is to be assumed that the parties would not have entered the contract if they did not wish for it to become enforceable. In the case of surrogacy, the intended parents wish to have a child from this practice and the surrogate mother aims at being paid for her service. By prohibiting the practice of commercial surrogacy, it is questionable whether the freedom of contract of the surrogate mother is paternalistically encroached.

[53] G.A. Res. 34/180, | Annex, The International Covenant on Civil and Political Rights, art. 1 (1), (Dec. 18, 1979).
[54] *Id.* art. 1 (2).
[55] *See* Choudhury, *supra* note 10.
[56] Yasmine Ergas, *Babies without borders: Human Rights, Human dignity, and the regulation of international commercial surrogacy*, 27 Emory Int'l L. Rev. 117 (2013).
[57] *See* Christine Staele, *Is There a Right to Surrogacy?* 33 J. Applied Phil. 146 (2015).
[58] *See e.g.*, Louis Kaplow & Steven Shavell, Fairness versus welfare (2002).
[59] *See e.g.*, Aristides N. Hatzis, *From soft to hard Paternalism and back: The Regulation of Surrogate Motherhood in Greece, Portuguese Economic Journal*, 8 Port. Econ. J. 205 (2009).
[60] Rolf Sartorius, Paternalism (1983).

The gestational mother in this case is making a trade-off, offering her uterus to obtain a goal that is more important to her. She might opt for surrogacy and prioritize this choice in her life. The regulatory framework based on C.E.D.A.W. enables women to access their contractual and economic rights.[61] States which have adopted the treaty are mandated by C.E.D.A.W. to provide equal rights for women to conclude contracts. The treaty demands that contracts that limit the legal capacity of women shall be deemed null and void.[62] Contractual autonomy in surrogacy is supported by the theory of possessive individualism.[63] This theory differentiates between the property of the person in his or her capacity to labor and the property in "his own person". The theory of Macpherson used in surrogacy matters entitles the women to be paid for the work of gestation (her capacity to labor) and not for the pregnancy itself (personhood of the woman).[64] This idea emphasizes individual determination. Parental roles and their content are subject to individual determination as a source of self-determination.

In terms of human dignity, the Kantian argument dignity as autonomy can form the basis of the right to enter in a surrogacy agreement. According to Kant, treating people with dignity means to treat them as autonomous individuals who are able to choose their destiny.[65] Human beings should be able to choose freely to exchange their own bodily goods and services as this represents a fundamental right to make a decision regarding the own person. Dignity is attributed to the individual because of his/her self-determination and the ability to make rational choices. The concept of autonomy based on the theory of Kant includes autonomy as self-defining, self-interested and self-protecting.[66] Autonomy is reflected by having a choice, as a fundamental value in reproductive rights. This argument is protected by the theory of liberalism. The protection of the autonomy of individuals is central for liberalism as it reflects the main duty of the state to protect.[67] Under reproductive liberalism, the freedom of choice and contract opens the path to the practice of surrogacy.

In this regard, wealthy individuals have the option to exercise their freedom of choice by contracting surrogate mothers and compensating them. On the other side, poorer women have the freedom of choice and contract to enter into such agreements. The theory of Kant establishes that dignity is correlated to duty.In this sense, individuals

[61] G. A. Res. 34/180, Annex, Convention on the Elimination of all Forms of Discrimination Against Women (Dec. 18, 1979), at art. 15.
[62] *Id.* art. 15 (3).
[63] *See* C. B. Macpherson, The political Theory of Possessive Individualism: Hobbes to Locke 263-77 (1962).
[64] *Id.* at 263-64.
[65] *See* McCrudden, *supra* note 3.
[66] *See e.g.*, Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics 58 (5th ed. 2001).
[67] *See e.g.*, Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 Ky. L. J. 1197, 1198-99 (1996).

have the duty to respect the autonomy of others.[68] Nevertheless, the Kantian dignity is limited by the arguments of non-commodification of the human being. Kant emphasizes that human beings "cannot give themselves away for any price". For this reason, surrogacy is regarded as an attack on human dignity. The surrogate mother is seen as an instrument and not as an end to herself. Hence, the stereotype is reinforced that the gestational capacity of a woman is identified as her best contribution to humankind.[69] Other elements of her right to dignity, such as the ability to take decisions freely about her reproductive autonomy, her body, her own life and self-determination are disregarded.

2.2. PROVIDING SURROGACY ON THE BASIS OF REPRODUCTIVE RIGHTS

The Council of Europe Commissioner for Human Rights has published an issue paper on women's sexual and reproductive health and rights. This document established that the fulfilment of the right to sexual and reproductive health requires states to provide universal access to diagnosis and treatment of infertility.[70] Reproductive rights are internationally recognized in human rights law. Women have a right to control their own bodies and decide their own reproductive choices. The basis for women choosing their reproductive choices and bodily autonomy is the right to privacy, the right to health and reproductive rights. Women are protected against arbitrary and unlawful interferences under their right to privacy under Article 8 of the E.C.H.R., Article 12 of the U.D.H.R., Article 17 of the I.C.C.P.R. and Principle 21 of the Association of Southeast Asian Nations Human Rights Declaration. To add on, women have the right to the highest attainable standard of health based on Article 12 of the I.C.E.S.C.R. and Article 25 U.D.H.R. This right includes a right to reproductive health on the basis of which

> women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that

[68] *See* Jacob Dahl Rendtorff, *Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity, and Vulnerability - Towards a Foundation of Bioethics and Biolaw,* 5 Med., Medical Care & Phil. 235 (2002).

[69] *See* Noelia Igareda González, *Regulating surrogacy in Europe: Common problems, diverse national laws*, 26 Eur. J. Women's Stud. 435 (2019).

[70] *See* Council of Europe, December 2017: *Women's sexual and reproductive health and rights in Europe - Issue paper published by the Council of Europe Commissioner for Human Rights*. Available at: https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead.

> will, for example, enable women to go safely through pregnancy and childbirth.[71]

Article 16 (1) (e) of the C.E.D.A.W. reaffirms the right of women to decide autonomously and responsibly on the number and spacing of their children and to have access to the information, education and means to do so. This is clearly seen in cases of access to contraception, now provided widely by states as a free public health benefit.[72]

The right to privacy and the right to health have been interpreted as a guarantee for the protection of physical integrity. It covers the protection of women against external interference with their bodies. Hereby women are protected from physical assault, forced sterilization or inhuman and degrading treatment. Additionally, the United Nations Committees on Civil and Political Rights and on Economic, Social and Cultural Rights have recognized as components of the rights to health and privacy a right to bodily autonomy.[73] This right establishes the framework of protection for women to make their own informed decisions about their bodies, taking under consideration also reproductive choices. In surrogacy, a complete prohibition of this practice would introduce the infringement of women's reproductive rights and freedoms. A ban would leave women without a choice of participating legally in surrogacy and could raise their vulnerability for being abused in illegal markets. Their right to bodily autonomy and reproductive freedom is threatened by criminalizing surrogacy.

2.3. PROVIDING SURROGACY ON THE BASIS OF NON-DISCRIMINATION AND GENDER JUSTICE

The prohibition of surrogacy is directed only to women, based on the fact that they are the only ones who can provide this service. Laws restricting, criminalizing, or prohibiting surrogacy restrict only the rights of women. States are required to ensure non-discrimination in their laws and policies about reproductive rights and choices and to safeguard that these laws are not based on gender stereotypes.[74] The payment for

[71] Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4 (2000), para 14.

[72] *See, e.g.* , D.Marianne Blair et al., Family Law in the world community: Cases, Materials, and Problems in Comparative and International Family Law 819-20 (2009).

[73] *See* M.T. v. Uzbekistan, CCPR/C/114/D/2234/2013 Committee on Civil and Political Rights | (2015), para 2.1 - 2.14; I.V. v. Bolivia, Petition 270-07, Inter-Am. Comm'n H.R., Report No. 40/08, OCEA/Ser.L/V/II.134, doc. 5 rev | (2008),para 1-2 and 80; Szijjarto v. Hungary, CEDAW/C/36/D/4/2004, Committee on the Elimination of Discrimination Against Women | (2006), para 2.2 -2.3.

[74] *See* Council of Europe, European Convention on Human Rights, Nov. 4 1950, Art. 14; Office of the High Commissioner (UN), International Covenant on Civil and Political Rights, Mar. 23 1976, Art. 3; Office of the High Commissioner, Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, Art. 1, 16. See generally L.C. v. Peru, CEDAW/C/50/D/22/2009, para. 8.15; K.L. v. Peru, CCPR/C/85/D/1153/2003, para. 6.4; V.D.A. v. Argentina, CCPR/C/101/D/1608/2007, para. 9.3.

surrogacy is prohibited by the state, reproductive activity is framed the same as the domestic labor of women. Traditionally, domestic labor of women has been seen as noneconomic acts of love and nurturing, rather than as work and real economic contributions to family life.[75] It is additionally questionable why the risks of exploitation are disregarded when permitting other altruistic acts such as donation of organs. Based on the Kantian principle "treating others as a means to their own",[76] not only surrogacy but also other acts such as sperm donation, egg donation, embryo donation should be made unlawful.

The matter of surrogacy reflects a battle towards gender stereotypes. Motherhood is dependent on cultural notions and gender stereotypes. Doubting the power of the free consent of the surrogate mother in entering into a surrogacy agreement leads to the reinforcement of gender stereotypes about the inconsistency of women's decisions and their inevitable biological destiny.[77] The doubts about the capacity of the woman to give her free consent are often raised in matters of her reproductive autonomy, such as abortion. This capacity includes a minimal level of rationality, consideration of risks and alternative options and awareness of the consequences of this choice. The exercise of autonomy of an individual will be limited by the autonomy of others. For this reason, it requires a balancing of choices between individuals. The question stands: Under which conditions is paternalism justified in surrogacy? In cases when the individual is unable to give free, informed consent to the action, paternalism is justified as a response to the lack of capacity.[78] The choice in this case is non-autonomous. Factors that must be taken under consideration for the restriction of autonomy through paternalism are social, economic, or educational elements that might represent threats to autonomy.[79] In surrogacy arrangements the surrogate mother suffers not only a loss of control over her body but also psychological harm. The risks connected to this practice for the surrogate might include long-term health problems due to medical interventions.

The capability of informed consent is not doubted in other medical procedures for a woman, but in cases of her decision to become or not to become a mother state intervention is justified. Abortion and surrogacy challenge the constructed notion of maternity, namely the social identity of women as natural nurturers. Similarly to surrogacy, in matters of abortion, gender stereotypes are found in national laws in which women are allowed to opt for abortion in cases of rape, incest, or serious medical risks

[75] *See* Mary Lyndon Shanley, *"Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction*, 18 Signs 618, 623 (1993).
[76] Immanuel Kant, Theoretical Philosophy After 1781 (Cambridge Univ. Press ed. 2002).
[77] *See, e.g.*, Eleonora Lamm, *Gestational Surrogacy - Reality and Law*, 3 InDret 1 (2012).
[78] *See* Karen Jones & Susan Dodds, *Surrogacy and Autonomy*, 3 Bioethics 1 (1989).
[79] *Id.* at 12.

for the woman.[80] These laws protect at any cost prenatal life and present the cases in which a woman can be excused from practicing her maternal role. The practice of surrogacy grants women the chance to have control over the biological processes that historically have defined them.[81]

By separating the responsibilities of parenthood from gestational surrogacy, childbearing can be seen as a thing a woman can choose to do, independent of her social role or her legal rights. Surrogacy can represent a method of making income to women who have limited options. The risk of exploitation of vulnerable women is not unknown in the labor world. Many other activities in which vulnerable women involve themselves raise their risk of exploitation.[82] Prohibiting surrogacy based on exploitation arguments only can create higher potential of the exploitation of women in black markets. Risks associated with surrogacy do not exist based solely on the existence of this practice. They are the fruit of social inequality and poor state infrastructure. The obligation of the state is to protect human rights by addressing issues of social inequality and not by limiting women's choices of pursuing surrogacy.

2.4. PROVIDING SURROGACY BASED ON LABOR RIGHTS

Commercial surrogacy has not been recognized as "labor" under international law. Nevertheless, the conditions of surrogacy could fulfill the requirements to be classified as "work" or "labor". The service performed by the surrogate has the nature of a process: becoming pregnant, pregnancy itself and giving birth. Intended parents also compensate the surrogate mother for her services. Article 3 and 5 of C.E.D.A.W. require states to work towards eliminating such stereotypical assumptions and to adopt appropriate measures to ensure full and equal enjoyment of social, political, and economic rights for women. Surrogacy reflects a practice that is laden by stereotypical assumptions about women and their roles. This has brought to an under-evaluation of their capacities and autonomy.[83] Based on the assumption that surrogacy can constitute "work", Articles 23 U.D.H.R. and 7 I.C.E.S.C.R. entitle women to just and favorable working conditions. These provisions cover fair wages that ensure a decent living for workers and their families as

[80] *See* T. W. Smith and J. Son, Trends in Public Attitudes towards Abortion, NORC Fin. Rep. (2013).

[81] *See generally* Alexus Williams, *State Regulatory Efforts in Protecting a Surrogate's Bodily Autonomy*, 49 Seton Hall L. Rev. 205 (2019).

[82] *See* Martha C. Nussbaum, *"Whether From Reason or Prejudice": Taking Money for Bodily Services*, 27 J. Legal Stud. 693 (1998).

[83] United Nations, Women's autonomy, equality, and reproductive health in International Human Rights: Between recognition, backlash and regressive trends, October 2017. Found in https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf.

well as safe and healthy working conditions.[84] Additionally, C.E.D.A.W. recognizes that *the right to work is an inalienable right of all human beings*.

The right to free choice of profession and employment is guaranteed for women. This also includes the choice to become a surrogate mother. C.E.D.A.W. acknowledged that in countries such as India, rural and poor women frequently serve as surrogates.[85] For this reason, it is suggested that surrogacy should be regulated in a way that does not make it impossible for women to make a living.[86] It supports the right of rural and poor women to become surrogate mothers as this is an important method for these women to give their contribution to the economic survival of their families.[87] The I.C.E.S.C.R. protects a woman's right to work, which covers the opportunity to gain her living by work which she freely chooses or accepts.[88]

3. VIOLATION OF THE RIGHT TO DIGNITY OF THE SURROGATE MOTHER IN COMMERCIAL SURROGACY

3.1. EXPLOITATION

In the 2015 Annual Report on Human Rights and Democracy in the World, the European Parliament concluded that it

> condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and reproductive functions are used as a commodity, considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments.

[84] Committee on Economic, Social and Cultural Rights, General Comment No 23 (2016) on the right to just and favorable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights) *See also* para. 47 (j) (2016).
[85] *See, e.g.,* G.A. Res. 34/180, Annex, Convention on the Elimination of all Forms of Discrimination Against Women (Dec. 18, 1979), at art.11 (1) (c).
[86] *Id.* art.14 (1).
[87] *Id.*
[88] *See generally* G.A. Res. 2200A (XXI), Int'l Covenant on Econ., Soc. & Cultural Rights, (Dec. 16, 1966), at art. 6 (1).

The Hague Conference on Private International Law has addressed some concerns on cross-border surrogacy contracts.[89] In a Hague study of 2014 it was emphasized that the legal parentage and the nationality of the child must be as having paramount importance rather than the rights of surrogate mothers.[90] Similarly, the European Court of Human Rights in its first Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother recognized that whenever the situation of a child was at issue, the best interests of that child were paramount.[91]

Some gestational mothers in Europe and the U.S. have autonomy and legal rights in making healthcare decisions (for example abortion), however women from poor countries do not enjoy such guarantees. The role of the surrogate mother in the market of surrogacy has been highly contested by scholars and institutions. Due to the view that surrogate mothers are used as a "means of production" in order to maximize the number of babies, surrogacy arrangements raise questions on the argument of exploitation of women. Often gestational mothers are referred to as glorified incubators participating in industrialized reproduction. To treat a woman as a simple incubator undermines her dignity and worth as an individual person. Exploitation is to be understood as taking unfair advantage, such that one individual or party gains at another's expense.[92] Dignity prohibits the use of another person merely as a means to one's own ends. According to the Kantian concept of dignity, human beings have no price and must not be considered for commercialization.[93] It is to be determined if the practice of surrogacy undermines the human dignity of the surrogate mother. Some authors fear that the commercialization of reproductive services could undermine personhood as it turns unique individuals into entities with monetary values.[94]

The risk of exploitation is highlighted when considering the effect of compensation in commercial surrogacy. Surrogates are compensated in amounts that are well above the average living wage within their communities.[95] A Californian surrogate is paid around 55,000 dollars whilst a surrogate from India makes the

[89] Hague Conference on Private International Law, A preliminary report on the issues arising from International surrogacy arrangements 1, 3 (Mar. 2012).

[90] Hague Conference on Private International Law and Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, para. 122, Preliminary. Doc. No. 3C (Mar. 2014).

[91] Grand Chamber Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, P16-2018-001(2019).

[92] *See* Kirby, *supra* note 17.

[93] *See* Adam Schulman, *Bioethics and the Question of Human Dignity, in* Human Dignity and Bioethics: Essay Commissioned by the President's Council on Bioethics (2008).

[94] *See* Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MarshalL. Rev. 1009 (2010).

[95] *See* Raywat Deonandan, Samantha Green & Amanda van Beinum, *Ethical Concerns for Maternal Surrogacy and Reproductive Tourism*, 38 J. Med. Ethics 742 (2012).

equivalent of ten years of salary in one surrogacy.[96] Considering that thirty-five percent of Indians live on less than one dollar per day, many Indian women take the decision to become surrogates.[97] The possibility of financial coercion can create the conditions of putting some women in involuntary servitude. Surrogacy might constitute an option for last resort for financially desperate women.[98] Additionally, between the surrogate mother and the intended parents there exists the potential for an unequal bargaining power.[99] In most cases, the intended parents reflect a higher economic privilege than the surrogate. The bargaining process between the parties can become compromised due to absence of regulation for this practice and the vulnerability of the gestational mothers.[100] Surrogacy agreements are based on a financial advantage given by the wealthy individuals who participate as intended parents, however it should be noted that they are vulnerable to exploitation too. Intended parents might be overcharged by surrogacy agencies, which leverage the desperation of the intended parents to have a child.[101] Nevertheless, the high difference in financial power shows that the practice of surrogacy is overwhelmed by the presence of class hierarchy. It must be taken into account that the compensation in commercial surrogacy does not take place in a neutral market environment but one in which there is a clear subordination between men and women in the shape of gender hierarchy.

3.2. REINFORCEMENT OF GENDER INEQUALITIES

Various authors support the argument that surrogate motherhood maintains gender inequality of women as they are perceived as belonging to a "breeder"-class, defined by their reproductive capabilities. Due to the view that surrogate mothers are used as a "means of production" in order to maximize the number of babies, surrogacy arrangements facilitate the increased control over women's bodies, as surrogate mothers are often required to take various tests and maintain a certain lifestyle. Additionally, racial hierarchies are found in the process of choosing the surrogate mother as the

[96] See Nicola Smith, *Inside India's International Baby Farm*, Center for Genetics and Society (May 9th, 2010), http://www.geneticsandsociety.org/article.php?id=5192.

[97] Thirty-five percent of Indians live on less than one dollar per day, while a surrogate mother earns between six and ten thousand dollars. See in: Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies,* 66 Wash. & Lee L. Rev. 203, 203-05 (2009).

[98] *See* Sara Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States,* 89 Wash. L. Rev. 1077 (2014).

[99] *See* Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate,* 36 Suffolk Transnat'l L. Rev. 671, 679 (2013).

[100] *See generally* Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 Annals Health L. 191 (2012).

[101] *See* Stephen Wilkinson, *Exploitation in International Paid Surrogacy Arrangements*, 33(2) J. Applied Phil. 125 (2015).

dominant choice of the intended parents in global surrogacy is "lighter-skinned women". The choice of the intended parents marks lighter-skinned women as good mothers and stigmatizes darker-skinned women as bad mothers, which presents a violation of dignity.[102] This leads to the argument that the practice of surrogacy might lead to race-based and class-based discrimination due to fact that the intended parents have more access to greater resources than the surrogate mothers.[103] The intended parents have the choice of using the market of surrogacy to make the child as similar as possible to the non-biological family. It can be assumed that this action can perpetuate racial hierarchies and lead to the commodification of genetic material. As this practice is mostly used by white colored people, the dominant genetic material chosen by them is mostly white material.[104] To reflect this situation, there is the example of individuals from China who are keen on choosing the United States as the destination for surrogacy not only for the genetic characteristics of the surrogate mother but also out of the attraction of the U.S. citizenship that the child would receive.[105]

Secondly, these factors present concerns on the existence of informed consent. Exploitation is existent when there is a defect in consent. Informed consent relates to the clear communication of medical risks and benefits in order to avoid coercion. It enhances the rights of self-determination and privacy. The difference in power between the parties, the high demand in the market, the multi-million dollar industry based on surrogacy and the limited options for sufficiently paid work in low-resource states create the conditions for not having a truly available power of consent.[106] It is doubtful whether surrogate mothers are aware of their rights in terms of their own health. This concern is valid when taking under consideration the circumstances in which women from poor states find themselves, such as extreme poverty, limited education, high complexity of the surrogacy process, low socio-economic background of the surrogate and linguistic obstacles.[107] The majority of surrogacy contracts are in English and the only access to information the surrogate has is what is communicated to her orally.[108] Many of the contracts given to surrogate mothers are inadequate.

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[102] *See* Cherry, *supra* note 1.

[103] *See* Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 150-201 (1st ed. 1997).

[104] *See* Dov Fox, *Racial Classification in Assisted Reproduction*, 118 Yale L. J. 1844, 1846 (2009).

[105] *See* Kalee Thompson, *Whoa, Baby! Why American Surrogates are in demand for Chinese Families*, The Hollywood Reporter (Nov. 4, 2016), https://www.hollywoodreporter.com/news/general-news/whoa-baby-why-american-surrogates-are-demand-chinese-families-942832/.

[106] *See* Nicole F. Bromfield & Karen S. Rotabi: *Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations*, 1 Glob. Soc. Welfare 123, 123-35 (2014).

[107] *See* Aneeta A. Minocha, *The Socio-Cultural Context of Informed Consent in Medical Practice*, *in*Understanding Indian Society: Past and Present, New Delhi 231-53 (Orient Blackswan ed., 2010).

[108] *See* Mohapatra, *supra* note 100.

Nevertheless, even if the surrogate mother as a patient cannot fully understand all the information, she still has a right to information that allows her to make an informed choice.[109] For a choice to be informed, the individual must be aware of all the risks that are connected to his/her action and the longer and more involved the arrangement, the greater the risk is. Due to the lack of information, surrogate mothers often agree to sign contracts in which protection of the fetus prevails over their own life, by admitting that in serious cases, they will be "sustained with life-support equipment to protect the fetus".[110] Furthermore, surrogates find pressure and potentially conflicting interests coming from the environment and community around them. In various cases surrogate mothers find themselves being exploited by their families, as at times it is the spouse or other family member that pushes the surrogate mother in taking the decision to carry a child for others.[111] Surrogates may be coerced by their husband, with them thus exercising control over their bodies. Often, they have no say in deciding about the number of embryos to be implanted nor on the number of children to be born. Concerns about the exploitation of surrogate mothers are based on the debatable access to legal representation. It is doubtful whether they have access to legal consultation to become aware of the terms of the contract and to be advised for protecting their individual rights.[112]

The tension arising between the surrogate mother and the intended parents, based on the fact that the intended parents are concentrated on the health of the fetus as opposed to the health of the woman who is carrying them is concerning. Her informed consent could be compromised due to various reasons: her vulnerability and responsibility for the health of the fetus, the contract, the doctors and the intended parents could present some of the reasons that could push the surrogate in taking decisions that prioritize the well-being of the fetus and not herself.[113] Surrogacy establishes the challenge of balancing the interests of the intended parents with the surrogate mother. On the one side the interests of the surrogate mother such as her right to personal health, human dignity and financial interest that can only be accomplished by delivering a baby and on the other side the interests of the intended parents for obtaining a healthy baby that overcomes the health of the surrogate mother as well as

[109] *See* Pamela Laufer-Ukeles, *The disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood*, N. C. J. Int'l L. Comm.l Regul., July 2018, at 96.

[110] *Neeta Lal Pitfalls of Surrogacy in India Exposed*, Asia Times (May 24, 2012), http://www.atimes.com/atimes/South_Asia/NE24Df02.html.

[111] *See, e.g.*, Ryznar, *supra* note 94.

[112] *See* Eric A. Feldman, *Baby M Turns 30: The Law and Policy of Surrogate Motherhood*, Faculty Scholarship at Penn Law 2000 18, 26 (2018), https://scholarship.law.upenn.edu/faculty_scholarship/2000.

[113] *See* Katherine Drabiak-Syed, Currents in Contemporary Bioethics: *Waiving Informed Consent to Prenatal Screening and Diagnosis? Problems with Paradoxical Negotiation in Surrogacy Contracts*, 39 J. L. Med. & Ethics 559 (2011).

financial interests in minimizing costs.[114] In International Surrogacy, it is likely that the intended parents are disconnected from the surrogate mother as they might not even meet her once.[115] The surrogate mother might be pressured into complying with the decisions of the other parties by compromising her own human dignity.

CONCLUSIONS

The practice of surrogacy can promote important rights of women pertaining to their self-determination, reproductive choice, bodily autonomy, and non-discrimination. Certain aspects of surrogacy can, in specific situations, impair the rights of surrogate women. Women have the right to be free from abusive surrogacy arrangements that violate their autonomy, endanger their health, or target them to unjust working conditions. The conflict of values of protection and freedoms is confronted based on the argument of the right to dignity of the surrogate mother.

Dignity as rights-supporting presents arguments in favor of the participation of surrogate mothers in surrogacy based on women's right to self-determination and freedom of contract. As fewer discussions and restrictions have taken place in the cases of men selling their sperm, it is questionable whether this regulation is differentiated by gender.[116] The resistance to international surrogacy could be based on the paternalistic assumption that women must be protected from their own decision-making ability.[117] The hypocrisy of paternalism is clearly seen when large fees are allowed for other assisted reproductive services, but denied for surrogate mothers under the claim that this is for "the own benefit of the woman".[118] Therefore, the right to enter surrogacy should not be subject to governmental control. The market of surrogacy is not constituted by human beings, namely "baby-selling". Surrogate mothers establish a market in their rights to body products and labor and the practice is therefore an arrangement in which the surrogate is paid for her gestational services and reproductive labor. Commercial surrogacy implicates the rights of the intended parents and the bodily integrity of the surrogate to contract freely.[119] Framing commercial surrogacy as an exploitative practice in difference to altruistic surrogacy violates women's right to

[114] *See* Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 Fordham Int'l L. J. 666 (2012).
[115] *See generally* Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption,* 88 Ind. L. J. 1223 (2013).
[116] *See* Ergas, *supra* note 56.
[117] *See* Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 2 Wis. L. Rev. 297 (1990).
[118] Ronli Sifris, *Commercial Surrogacy and the Human Right to Autonomy*, 23 J. L. & Med. 365 (2015).
[119] *See generally* Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 Ind. L. J. (1992).

bodily autonomy and reproductive self-determination. It leads to reinforcing the gender stereotype that the role of the woman should be that of a "natural selfless mother".[120]

Women have the right to autonomously make decisions about their reproductive life. This right has been established in the international human rights treaties grounded in the rights to dignity, health, privacy, equality, and non-discrimination, among others.[121] During their role as surrogate mothers, women hold their fundamental right to autonomy and decision-making.

Surrogacy laws must not discriminate against the participants of surrogacy, specifically surrogate mothers.[122] They must protect the right to equality and

[120] Rep. of the Working Group on the issue of discrimination against women in law and in practice, U.N. Doc. A/HRC/32/44 (2016), para. 76. These stereotypes operate to deny women information to make informed decisions about their reproductive health, substitutes the decisions of others for their own, and deprives them of control over their own bodies. Working Group on discrimination against women has recognized, *patriarchal negation of women's autonomy in decision-making leads to violation of women's rights to health, privacy, reproductive and sexual self-determination, physical integrity and even to life* (para. 63).

[121] *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, art. 8, 213 U.N.T.S. 222, Eur. T.S. No. 5, entered into force Sept. 3, 1953: *Everyone has the right to respect for his private and family life...there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law e.g.*, International Covenant on Civil and Political Rights adopted Dec. 16, 1966, arts. 3, 17, G.A. Res. 2200A (XXI), U.N. GOAR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976:

> The States Parties ... undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant; No one shall be subjected to arbitrary or unlawful interference with his privacy, family ... everyone has the right to the protection of the law against such interference;

e.g., International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, art. 1, G.A. Res. 2200A (XXI), U.N. GOAR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976: *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*; *e.g.*, C.E.D.A.W. Committee, General Recommendation No. 24: Article 12 of the Convention - Women and Health, (20th Sess., 1999), para. 31(e), U.N. Doc. A/54/38/Rev.1, chap.1 (1999) [hereinafter C.E.D.A.W. Committee, *Gen. Recommendation No. 24*], urging that States parties should *require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice*; *e.g.*, C.E.D.A.W. Committee, Concluding Observations: Sierra Leone, para. 32, U.N. Doc. CEDAW/C/SLE/CO/6 (2014): *The right to autonomy [for women] requires measures to guarantee the right to decide freely and responsibly on the number and spacing of their children... and that reproductive rights include "the right of women to autonomous decision-making about their health."*

[122] *See* C.E.D.A.W., arts. 1, 2, 12(1):

> [t]he term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field; States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women;

I.C.C.P.R., arts. 2(1), 3, and 26:

> The States Parties...undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant; All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination;

E.C.H.R., art.14 (Prohibition of discrimination).

non-discrimination of all parties to a surrogacy contract including persons acting as surrogates. Nationality-based discrimination under Article 14 E.C.H.R. in surrogacy is clearly seen when in the domestic level this practice is prohibited for the protection of women, but recognized when it takes place cross-border, leaving foreign women exposed to the risks of exploitation from which domestic women are protected from.[123]

Dignity as rights-constraining frames international surrogacy as a risky process for its participants, specifically for the surrogate mother. The practice of surrogacy undermines internationally protected rights and violates the integrity of the surrogate mother.[124] This practice is in violation with Article 3 of the E.U. Charter of Fundamental Rights and Article 21 of the Council of Europe Convention on Human Rights and Biomedicine, which forbids making the human body and its parts as a source of financial gain. When contextualized, surrogacy reflects concerns for the commodification of women's bodies, particularly women from poor countries.[125] The practice of surrogacy is seen as a last resort for desperate women who are economically disempowered. Surrogacy contracts reflect heavy regulations for the body of surrogate mothers and her conduct, including her mobility, diet, medication, and the ability to end the pregnancy. This constant surveillance is a threat of the loss of control which will be placed in the hands of the intended parents and third parties.[126] Opportunities for abuse rise in cases when women are isolated in surrogacy hostels and controlled by third parties. As such, these contracts violate the personal autonomy of the surrogate mother and commodify women for their reproductive abilities.

Arguments relating to exploitation are strengthened by the existence of an unequal power-balance between the parties. The wealth of the intended parents can motivate the third parties or other actors to prioritize the interests of the intended parents for having a healthy baby and not those of the surrogate mother (compromising her right to physical integrity). The impact of surrogacy arrangements could be the propagation of inequality. It is assumed that women who work as surrogate mothers

[123] *See* Jens M. Scherpe, The Present and Future of European Family Law (2016).Nila Bala, The Hidden Costs of the European Court of Human Rights' Surrogacy Decision, 40 Yale J. Int'l L. Online 11.

[124] *See* International Covenant on Economic, Social, and Cultural Rights recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, art 12, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, (entered into force Jan.3, 1976, in accordance with article 27; *see also* Article 3 of the European Convention on Human Rights, Article 5 of the U.D.H.R. and Article 16 of the United Nations Convention against Torture, are absolute rights which prohibit acts of cruel, inhuman, or degrading treatment; Article 4 of the E.C.H.R. prohibits slavery, servitude, and forced labor; Convention on the Elimination of all Forms of Discrimination Against Women (C.E.D.A.W.), art 6 obliges state parties to *take all appropriate measures, including legislation, to suppress all forms of trafficking in women.*

[125] *See* Joanne Ramsey, *Regulating Surrogacy - A Contravention of Human Rights?* 5 Med. L. Int'l 5 (2000).

[126] *See* Karen Busby & Delaney Vun, *Revisiting the Handmaids Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 Can. J. Fam. L. 13 (2010).

would not be able to afford the service of surrogacy themselves. Couples in the role of intended parents who enjoy an economic privilege are likely to have access to this service. These arrangements could lead to the exploitation of lower income women by wealthy couples. In this context, international surrogacy is seen as particularly problematic when wealthy couples perform at "bargain prices" which exploit women with poor backgrounds.[127] This reinforces the idea of fertility tourism, in which poor women serve as child breeders for wealthy couples.

Additionally, the practice of surrogacy raises concerns about human trafficking of surrogate mothers. Due to the fact that international surrogacy often takes place in unregulated environments and affects vulnerable women, these concerns are especially salient. Most importantly, context that makes women of this practice potentially exploitative and exposed to human trafficking is connected to the ability of the surrogate to enter freely in such arrangements.[128] This ability could be undermined by force, coercion, or other forms of deception. Similarly, women with high vulnerability could be pressured into surrogacy or forced to continue this practice against their will. Concerns of forced or compelled labor are heightened due to the required long time in which they serve as surrogates (nine months of pregnancy).[129] Human trafficking of women and their forced labor are prohibited by many international and human rights instruments.[130] The Council of Europe refers to human trafficking as "an offense to the dignity and integrity of the human being" and therefore violates the human rights of the victims.[131]

Legal clarity is essential in surrogacy matters. A legal vacuum in the national level for surrogacy matters means that surrogate mothers have no guarantee that their reproductive rights will be protected. The potential for exploitation of surrogate mothers raises due to legal uncertainty.[132]

[127] *See* Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429 (2009).

[128] *See Sex Workers at Risk: A Research Summary of Human Rights Abuses Against Sex Workers*, AMNESTY INTERNATIONAL (May 26, 2016), https://www.amnesty.org/en/documents/pol40/4061/2016/en/.

[129] *See What Is Forced Labor, Modern Slavery, and Human Trafficking*, I.L.O., https://www.ilo.org/global/topics/forced-labour/definition/lang–en/index.htm (last visited Oct. 30, 2021).

[130] I.C.C.P.R., art 8, I.L.O. Forced Labor Convention, and regional treaties such as E.C.H.R., art 4, Charter of Fundamental Rights of the E.U., art 5, American Convention on Human Rights, art 6, Principle 13 of the Association of Southeast Asian Nations Human Rights Declaration.

[131] The Council of Europe Convention on Action against Trafficking in Human Beings entered into force on 1 February 2008, following its 10th ratification: Its Preamble defines trafficking in human beings as a violation of human rights and an offence to the dignity and integrity of the human being.

[132] *See* Vida Panitch, *Global Surrogacy: Exploitation to Empowerment*, JOURNAL OF GLOBAL ETHICS, 9:3, 329-343 (2013).

Criminalizing surrogacy violates the rights of surrogate mothers to life, privacy, health, and autonomy.[133]

This might lead to compromising legal protection for women acting as surrogates due to the creation of underground markets, making them more vulnerable to exploitation. This means that those women who are most vulnerable to society, will most likely be subjected to infringements of their human rights. Human trafficking concerns will raise with the criminalization of surrogacy, as surrogate mothers will not undertake the risk of coming forward after suffering abuses in the underground markets in fear of being prosecuted.

Surrogate motherhood is full of legal complexities. Until now, jurisprudence has been built on the doctrine of prioritising "the best interests of the child", disregarding the role of the surrogate mother. The international community should not have to choose between protecting children or women. An efficient answer to the current reality of surrogacy must take under consideration the potential of this practice to empower women and at the same time, to harm them.

[133] *See* Working Group on the Issue of Discrimination Against Women in Law and in Practice, *Rep. of the Working Group on the Issue of Discrimination Against Women in Law and in Practice*, para. 32, U.N. Doc. A/HRC/38/46 (May 14, 2018) [hereinafter Rep. W.G.D.A.W.] ("Criminalization of behavior this is attributed only to women is inherently discriminatory. So is denying women's autonomous decision-making and access to services that only women require and failing to address their specific health and safety, including their reproductive and sexual health needs.").

VOLUME 6 ISSUE 2 ARTICLES & ESSAYS

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/14434

Received: 6 Febr. 2021 | Accepted: 11 Mar. 2021 | Published: 22 Febr. 2022

The Banality of Evil (?): The Strange(ly Quiet) Careers of Korematsu and Hirabayashi in the Federal Circuit Courts, 1943-2016

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ABSTRACT

Korematsu v. United States (1944) and *Hirabayashi v. United States* (1943), the most famous Supreme Court cases associated with the tragic internment of Japanese Americans during World War II, now "live in infamy", along with the likes of *Plessy v. Ferguson* and *Scott v. Sandford*, among the worst constitutional law train-wrecks of American legal history. Ironically, American courts and judges also used the two towering internment cases for their resounding language supporting racial equality and non-discrimination. In either guise, the cases came to cast a long shadow over America's legal landscape. Thus, it may be somewhat surprising to discover that these two cases long led rather mundane and limited precedential lives in the federal circuit courts, serving repeatedly as precedents in ordinary cases concerning everyday applications of criminal procedure doctrines and displaying little of the brightly hopeful or darkly ominous power for which they would later be known. Whatever greater potential the two cases held, a careful tracking of all uses of the cases in court opinions shows that federal circuit courts mostly did not explore that potential until after it was "safe" to do so. In particular, although the Japanese Internment was fundamentally a legal and constitutional problem, federal courts proved to be largely unable to confront that problem meaningfully until after some sort of political "solution" was offered by Congress through formal apology and reparations to internment survivors in 1988. Only later did federal circuit judges use the two cases more aggressively, with *Korematsu* suddenly serving as a dire warning of the dangers of judicial reticence in resisting constitutional overreaching by the legislative or executive branches, while *Hirabayashi* was brandished to support strict, color-blind racial equality—long after civil rights progress was already waning.

KEYWORDS

Korematsu; Hirabayashi; Law of the United States; United States Federal Courts; Japanese American Internment

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INTRODUCTION

Korematsu v. United States[2] and *Hirabayashi v. United States*,[3] the best-known, most salient court cases and opinions associated with the tragic and unnecessary internment of 120,000 Japanese Americans during World War II, loom large over America's legal landscape. To paraphrase President Franklin Roosevelt's famous description of the Pearl Harbor attack of December 7, 1941 that initially set the internment tragedy in motion, *Korematsu* and *Hirabayashi* now live in infamy.[4] They are mostly mentioned for rhetorical purposes, often in conjunction with the likes of *Plessy v. Ferguson*[5] and *Scott v. Sandford* (the *Dred Scott* case),[6] as grave warnings to present-day judges against perpetuating the sorts of constitutional law train-wrecks of which the nation and its legal profession are now ashamed.

That dark vision of the internment cases is a relatively new development, though, dating mostly to the period after the United States Congress made its formal apology and reparations to internment survivors in 1988.[7] Earlier, and perhaps somewhat ironically, the cases had a seemingly brighter, nobler role as the sources of resounding language that was used to batter down the walls of segregation and was woven into the Supreme Court's doctrine of strict scrutiny of racial and other constitutionally suspect classifications.

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[*]Readers familiar with the history and historiography of the 1950s may readily recognize "The Strange Career" as a reference to a brief but classic study by the long-time "dean" of U.S. Southern History, C. Vann Woodward, The Strange Career of Jim Crow (1955)—a study that Woodward initially prepared as a series of lectures to challenge the historical basis of de jure segregation in the wake of the 1954 Brown v. Board decision. [And before that, Woodward and other like-minded historical scholars offered similar analysis to the U.S. Supreme Court as a brief in support of the Brown litigation, but that research was largely ignored by the Court]. Woodward set out to demonstrate how, contrary to entrenched assumptions of the 1940s-50s that Jim Crow racial segregation (in the U.S. South and elsewhere) always had been natural and inevitable, it was, instead, very much a product of particular historical developments that could have been avoided. For brief background on the "strange career" of The Strange Career of Jim Crow see, e.g., Howard N. Rabinowitz, More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow, 75 J. AM. HIST. 842 (1988); Jack Pole, On C. Vann Woodward, 32 J. AM. STUD. 503 (1998).

[2] Korematsu v. United States, 323 U.S. 214 (1944).

[3] Hirabayashi v. United States, 320 U.S. 81 (1943).

[4] Although a crucial part of the same massive and tragic course of events, *Hirabayashi* has never yet acquired quite the same symbolic status and name recognition as *Korematsu*—which is why, throughout this study, even though *Hirabayashi* came earlier in time and in the alphabet than the main *Korematsu* opinion of 1944, *Korematsu* is usually listed first. Notably, Microsoft Word recognizes *Korematsu* and leaves it unchallenged as a possible spelling error, unlike *Hirabayashi*.

[5] Plessy v. Ferguson, 163 U.S. 537 (1896).

[6] Dred Scott v. Sandford, 60 U.S. 393 (1857).

[7] *See* Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989b–1989b9 (current version as amended at 50 U.S.C. §§ 4211–4220 (2012 & Supp. III 2015).

To the extent that the federal courts' by now extensive edifice of strict scrutiny law is a positive outcome, *Korematsu* and *Hirabayashi*, and their numerous precedential progeny, necessarily deserve substantial credit.[8]

That *Korematsu* and *Hirabayashi* ultimately have been harnessed to such powerful if contrasting rhetorical and legal purposes suggests that the potential was always there for them to be so used—they held those possibilities within them.[9] That in turn makes it potentially interesting to explore all the various ways the cases were in fact used, and when, and why the already existing potential uses with which we are now familiar long lay dormant before suddenly switching on and becoming active at particular moments in time.

The following study thus traces all identifiable uses of the two best-known internment cases by the various federal circuit courts of appeal from the 1940s, when the opinions in question first appeared, through the 2010s. It seeks to trace any recognizable and potentially interesting patterns and relationships regarding the several hundred circuit opinions that have cited *Korematsu*, *Hirabayashi*, or both, and thereby to illuminate the entire precedential life cycles of these important and tragic cases at the intermediate appellate level. This study builds upon an earlier, detailed study of all identifiable uses of the cases at the Supreme Court level,[10] the full results of which mostly need not be repeated here, other than to point out ways in which activity at the Supreme Court level appeared to drive or otherwise interact with activity at the circuit level. The overall timing and nature of uses of the opinions also are tracked in close conjunction with wider trends and changes in the evolution of United States political and social history during the post-World War II decades. Among other things, the study monitors whether and to what extent the circuit courts and judges may have taken a lead over the Supreme Court in exploring the potential uses of the cases.

The detailed analysis of just what was happening with the major internment cases in the federal circuit courts, and when, is based upon three relatively large and

[8] Although to the extent that strict scrutiny has gone beyond the appropriate protection of civil rights to be used to systematically suffocate efforts toward addressing systemic structural racism, as some scholars have argued, any such credit is substantially diminished. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 Stan. L. Rev. 1, 2–3 (1991); Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough*, 47 Ga. L. Rev. 301, 303–07 (2013). ; *See e.g.*, Tanya Washington, *Jurisprudential Ties That Blind: The Means to End Affirmative Action*, 31 Harv. J. Racial & Ethnic Just. Online 1. (2015); *see also* David Schraub, *Unsuspecting*, 96 B.U. L. Rev. 361 (2016).

[9] To quote an ancient, allegedly Zen Buddhist (or perhaps Theosophist?) saying that reflects on why wisdom or meaning that was always already there is suddenly discovered: "When the student is ready, the teacher will come". The origins of this pithy observation, sometimes attributed to the Buddha himself, are shrouded in the mists of time and remain discussed and debated on the Internet, as a quick search reveals.

[10] *See* Scott Hamilton Dewey, *Of Loaded Weapons and Legal Alchemy, Great Cases and Bad Law: Korematsu and Strict Scrutiny, 1944-2017*, 3 L. Info. Rev. 43 (2017-2018).

complex spreadsheets[11] that track data from *Korematsu v. United States* (1943),[12] the first iteration of the *Korematsu* litigation to reach the Supreme Court, along with the better-remembered *Korematsu* (1944) and *Hirabayashi*. In addition to the names and citation information of later federal circuit court opinions citing any of these three Supreme Court opinions, the spreadsheets include other information, such as: the date of the citing opinion; which circuit it came from; which judge wrote the opinion; which judges were other members of the panel that issued the opinion; what, generally, the cases that produced citing opinions were about; what particular purposes the *Korematsu* or *Hirabayashi* opinions were used for; whether the internment cases were quoted or not; what depth of use they were given (whether only brief, passing references or more extensive use); whether these uses appeared in main opinions or concurring or dissenting opinions in the later citing cases; whether the citing opinions cited the main opinions or concurrences or dissents from the Supreme Court opinions; and whether the citing opinions also co-cited any from a group of conceptually related cases involving civil rights or the denial thereof or other notable cases involving Japanese Americans from the 1940s. These various categories were tracked to see what, if any, results and patterns they produced over time among several hundred citing opinions. This monitoring of a range of data categories seeks to try to replace an otherwise impressionistic, sporadic, anecdotal overview of the major cases and their circuit-court life-cycles with one potentially revealing larger patterns supported by quantitative evidence. As with various "harder" sciences—such as biological or pharmaceutical research where large and repeated batteries of tests and countless test tubes often only show no noteworthy results—this laborious approach is designed to show when things are not happening as well as when they are, under the reasoning that non-events, or relatively mundane or unexpected developments, are potentially significant parts of the overall story along with those that fit more established legal-historical narratives.

Thereafter, the study turns to the case-specific data. Section 1 concerns the relatively little-remembered *Korematsu* (1943)—the *Korematsu* litigation's first appearance at the United States [hereinafter U.S.] Supreme Court—which never gained the rhetorical clout or notoriety of its better-known companions but wound up being frequently cited on general issues of criminal procedure related to probation as an appealable final judgment. Section 2 discusses *Hirabayashi* (1943), which like *Korematsu* (1943) actually spent most of its life and did the overwhelming majority of its work as a routine opinion involving criminal procedure and concurrent sentences before being discovered for other purposes rather later. During the entire period from 1950-1980, *Hirabayashi* was

[11] [These spreadsheets are available on request].
[12] Korematsu v. United States, 319 U.S. 432 (1943).

only very rarely used for its non-discrimination potential and almost never received more than a very brief, passing reference, instead mostly living in comfortable anonymity. Section 3 follows the best-known of the internment cases, *Korematsu* (1944) [hereinafter simply *Korematsu* unless otherwise specified], which, after appearing in a small flurry of cases cleaning up bits and pieces of the aftermath of the Second World War from 1945-1950, lay entirely dormant in the federal circuits until 1966, when it was mentioned briefly in passing and was confused with *Hirabayashi*. [Notably, the circuits for twelve years ignored the Supreme Court's key invocation of *Korematsu* in the crucial case of *Bolling v. Sharpe* (1954), which represented *Korematsu*'s big debut as a civil rights precedent in the high Court]. From 1966 through 1980, *Korematsu* appeared, usually only in a very brief, passing reference, in a long list of cases usually reciting one or more aspects of the Supreme Court's gradually evolving new strict scrutiny standard. There was almost no whisper of criticism of *Korematsu* or *Hirabayashi* or exploration of their dark rhetorical potential until well into the 1980s, when it (rather suddenly) became safe and fashionable to do so. Section 4 then matches the wider historical timeline with those of the various cases to consider the specific patterns and trajectories associated with the three interment cases in the context of wider observable trends in America's political, social, and cultural history and legal evolution during the postwar era.

The long strings of relatively mundane and briefly passing uses of *Korematsu* and *Hirabayashi*, together with the overall obliviousness to their darker meaning and rhetorical potential before the 1980s, is the basis for the title of this study, which borrows philosopher Hannah Arendt's famous observation about captured fugitive Nazi Adolf Eichmann, principal architect of Nazi Germany's program to exterminate Jews and other "social undesirables" in death camps such as Auschwitz, at his 1961 trial for crimes against humanity in Israel: "The banality of evil"[13] [Or in other words, and to admittedly oversimplify Arendt's much more complex message: Eichmann, who helped to perpetrate so much darkness and horror upon the world, far from being a towering, evil demon, was really just quite a common, unimpressive little man who saw himself as just "doing his job"]. Given all the more recent judicial statements of horror and warning regarding *Korematsu* and *Hirabayashi*, it is perhaps a little surprising and ironic that they

[13] Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil(1963). Full-length biographies of Eichmann are available, including Bettina Stangneth, Eichmann Before Jerusalem: The Unexamined Life of a Mass Murderer(Ruth Martin transl., Alfred A. Knopf ed. 2014). And David Cesarani, Becoming Eichmann : Rethinking the Life, Crimes, and Trial of a "Desk Murderer" (Da Capo Press 1st ed. 2007) (2004). For a very brief, accessible discussion of both the life of Eichmann and Arendt's thoughts regarding the banality of evil, Stephen J. Whitfield, *Hannah Arendt and the Banality of Evil*, 14 Hist. Tchr. 469 (1981). Arendt's book, undertaken as a reporter for the *New Yorker*, is considered an important work of twentieth century philosophy, still much discussed and debated—making it that much more dangerous (and foolhardy?) to try to summarize it in a brief, simple sentence.

so long led relatively commonplace precedential lives, drawing comparatively little specific attention, and almost no attention to the dark potential meaning they represented. The ordinary processes of the law tended to turn them into ordinary-looking, garden-variety cases, so one might not have been especially aware that they were in fact the sorts of "great" cases that make "bad" law.[14]

This study admittedly was undertaken in hopes that there might be more of dramatic interest to discuss earlier in the lives of the cases—but mostly, that was not the case. Yet perhaps this conspicuous absence is a story in itself. In particular, at its outset, this study was partly motivated by curiosity as to whether circuit judges might have shown some degree of leadership in harnessing either or both of the cases to more powerful rhetorical purposes, either on behalf of the forward march of civil rights or as dark warnings regarding the denial of civil rights. Basically, they did not, and instead mostly followed the lead of either the Supreme Court or, later, of Congress at a relatively safe distance—saying what had become the "right" things to say about the cases only after it had become safe to do so. This may be a relatively unsurprising performance from a generally well-disciplined judiciary that mostly expects to receive and follow signals and orders from above and views that as its proper institutional mission. Yet the same sort of professional reticence (or selective blindness?) ironically may also help to illuminate how the whole tragic mess surrounding the internment cases arose in the first place, with first lower federal judges and then ultimately even the Supreme Court marching mostly in step with legislative and executive authority and with the prevailing political mood of the times—in precisely the manner that the present-day rhetoric of *Korematsu* and *Hirabayashi* as constitutional train-wrecks so vociferously warns against.

In short: if the original federal district, circuit, and Supreme Court decisions regarding *Korematsu* and *Hirabayashi* were terrible mistakes, then they were not the only mistakes; so were the prolonged judicial silence and effective sweeping of the matters under the carpet for the next forty years. The historical record suggests that the American judiciary had a chronic inability to fix, or even to confront, any of these mistakes. Much later rhetorical fulminations, long after the fact, against *Korematsu* and *Hirabayashi*—either with or without rhetorical invocations of possibly even heavier rhetorical bludgeons such as *Plessy* and *Dred Scott*—do little to change that record.

[14] A reference to Justice Oliver Wendell Holmes, Jr.'s famous quote in Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

1. *KOREMATSU* (1943): PROBATION AS A FINAL, APPEALABLE JUDGMENT

The first iteration of *Korematsu* at the Supreme Court—in which Fred Korematsu initially was found guilty of remaining in the California Bay Area city of San Leandro in violation of the internment-related executive orders and was given five years' probation[15]—is the briefest and most mundane of the trio of internment opinions addressed in this study and may be of less interest to modern readers who already are aware how the life stories of the cases ultimately turned out. It was cited by federal circuit courts a total of forty-four times between March 1944 and July 2014. The first batch of these uses came when one might usually expect to see most use of a new authority: when the opinion was fresh and had not yet been supplanted by later decisions making similar holdings on related issues (the ongoing process of earlier precedents often becoming buried and invisible in the sediment of later precedents).[16] Of the ten citations of *Korematsu* (1943) during 1944-1950, five of the citing cases appeared in 1944 alone, the other five scattered fairly evenly from 1945-1950. With the sole exception of the first use, which mentioned both *Korematsu* (1943) and *Hirabayashi* as supporting federal war powers, the others all cited *Korematsu* (1943) briefly in passing regarding probation, final judgments, or (more often) both. The case was cited eight more times for the same purposes between 1954 and 1968, with five of those from 1954-1957, the other three, 1960-1968. The 1960 use was the only one to go beyond the usual brief passing reference to offer a substantial quotation from *Korematsu* (1943) regarding the issue at hand. The gradually dwindling visible use of *Korematsu* (1943) from 1944 to 1968 tended to suggest that it was headed toward having a relatively conventional precedential life cycle of being gradually supplanted and forgotten.[17]

But *Korematsu* (1943) had a second act between 1971 and 1985, probably as a result of the visible surges in crime rates and drug use brought by Baby Boomers

[15] *See* Korematsu v. United States, 319 U.S. 432, 432-435 (June 1, 1943). Authored by Justice Hugo Black like the later, main *Korematsu* opinion (1944), *Korematsu* (1943) did not address wider constitutional issues and stayed quite close to the immediate issues of conviction and probation. The exclusion and internment orders at issue are only cited and alluded to and are not discussed at any length.

[16] For examples of the origins of legal doctrines getting buried under later precedents repeating the same or similar points, see, e.g., Scott Hamilton Dewey, *The Case of the Missing Holding: The Misreading of Zafiro v. United States, the Misreplication of Precedent, and the Misfiring of Judicial Process in Federal Jurisprudence on the Doctrine of Mutually Exclusive Defenses*, 41 Valparaiso Univ. L. Rev. 149, 216-18 (2006) [hereinafter Dewey, *The Case of the Missing Holding*]. ; Scott Hamilton Dewey, *How Judges Don't Think: The Inadvertent Misuse of Precedent in the Strange Career of the Illinois Doctrine of Antagonistic Defenses, 1876-1985*, 9 J. Juris. 59 (2011) [hereinafter Dewey, *How Judges Don't Think*].

[17] An earlier example of an authority with a related holding, which appeared in conjunction with *Korematsu* (1943) more than once, is Berman v. United States, 302 U.S. 211 (1937). Examples of various later opinions available to replace *Korematsu* (1943) include Oksanen v. United States, 362 F.2d 74, 80 (8th Cir. 1966); United States v. Stephens, 449 F.2d 103 (9th Cir. 1971); United States v. Bynoe, 562 F.2d 126, 128 (1st Cir. 1977).

approaching (if in some cases perhaps never quite attaining?) adulthood.[18] *Korematsu* (1943) was cited an additional twenty times between 1971 and 1985, eight of those just from 1971-1973. Six of the cases from 1971 to 1980 were federal drug prosecutions, back then known as "narcotics" cases, suggesting that federal courts may have been encountering and experimenting with expanded use of probation in addressing the new wave of drug use. This period also saw some deeper discussion of the issues and considerations involved, with some courts and cases finding situations where the earlier standard brief judicial rubber stamp—probation = final appealable judgment—might not apply so neatly. Particularly in the latter part of that period, from 1977 to 1984, *Korematsu* (1943) saw five out of the nine more substantial quotations it would receive from federal circuits (while three out of the remaining four came from the post-2001 period).

Korematsu (1943) notably vanished from federal circuit court opinions entirely from mid-1985 through mid-2001, likely due to heightened judicial and general public awareness of the whole process that led to both the official exoneration of famous former defendants such as Fred Korematsu and Gordon Hirabayashi and ultimately the formal Congressional apology and reparations to Japanese American internment survivors in 1988.[19] For a time at least, the very name "Korematsu" may have been recognized as sufficiently toxic, even radioactive, that both judges and lawyers may have avoided using it in any form for any normal legal purpose. Yet, perhaps after the novelty of the dramatic developments in the 1980s started to wear off, *Korematsu* (1943) nevertheless began to reappear and was again routinely cited as authority in its usual role regarding probation and/or final judgment six more times from 2001-2014 before again vanishing from federal circuit jurisprudence, perhaps forever.[20]

[18] For discussion and statistics regarding the general and violent crime surges of the 1960s-70s, *See* THOMAS BYRNE EDSALL Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes On American Politics 110-13 (1991).

[19] For a brief overview of these developments, see Dewey, *supra* note 10, at 91-94. A fuller discussion of these matters may be found, among other places, in the major cases of the exoneration/reparations era: Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986); Hohri v. United States, 793 F.2d 304 (D.C. Cir. 1986); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Hohri v. United States, 847 F.2d 779 (Fed. Cir. 1988).

[20] *Korematsu* (1943) has continued to have a quite active career in state courts since 2000, however, as a Westlaw search for citations of the opinion readily shows. Korematsu (1943) appears frequently in briefs as well as in state court opinions. *See, e.g.*, People v. Henriques, 828 N.Y.S.2d 86, 88 (N.Y.S. Ap. Div. 2006); State v. Whittle, 145 P.3d 211, Idaho 49, 53 (Idaho Ap. Ct. 2007); Sena v. State, 233 P.2d 993, 999 (Wyoming Sup. Ct. 2010); Arizona v. Watson, 248 Ariz. 208, 218 (Ariz. Ct. Ap. 2020); State v. Craig, 159 Ohio St.3d 398, 409 (Ohio Sup. Ct. 2020) (Kennedy, J., conc.).

1.1. *KOREMATSU* (1943): USE PATTERNS

In the end, *Korematsu* (1943) was used by federal circuits twenty-one times to support the proposition that probation represents an appealable final judgment,[21] along with various other related permutations of the same overall concept (probation alone, fourteen times;[22] final judgment alone, five times;[23] probation = final judgment (without "appealable"), one time[24]). One other opinion used *Korematsu* (1943) in debating the whole issue,[25] while another used *Korematsu* (1943) in finding that probation did not constitute a final judgment, at least not in that case.[26] Only the very first use in 1944 invoked *Korematsu* (1943) for federal war powers.[27]

No particularly clear or distinctive patterns emerge regarding use of *Korematsu* (1943) by particular circuits or individual judges. All circuits that typically review standard federal crime cases (so, all but the Federal Circuit) used *Korematsu* (1943) as precedent, mostly scattered fairly even through time.[28] The Ninth and Third Circuits used *Korematsu* (1943) relatively more (nine times and seven times, respectively); the Sixth and Tenth Circuits barely at all (one time each). The northeastern circuits all used *Korematsu* (1943) more frequently overall than the more "Heartland" circuits, with the exception of the Seventh (five times); this could indicate a greater concentration of uses (and perhaps of drug cases?) in more heavily urban regions, or perhaps a greater openness to making probation available in certain jurisdictions, but it also might just

[21] *See, e.g*, Arbuckle v. United States, 146 F.2d 657, 660 (D.C. Cir. 1945); United States v. Lombardo, 174 F.2d 575 (7th Cir. 1949); Tanzer v. United States, 278 F.2d 137, 139 (9th Cir. 1960); United States v. Corson, 449 F.2d 544, 550 (3d Cir. 1971); United States v. Stine, 646 F.2d 839, 846 n.15 (3d Cir. 1981).

[22] *See generally* Boufford v. United States, 239 F.2d 841, 844 (1st Cir. 1956); United States v. Birnbaum, 402 F.2d 24, 29 (2d Cir. 1968); United States v. Carson, 669 F.2d 216, 217 (5th Cir. 1982).

[23] *See generally* U.S. ex rel. Randall v. U.S. Marshall for Eastern Dist. of New York, 143 F.2d 830, 831 (2d Cir. 1944); James v. United States, 348 F.2d 430, 432 (10th Cir. 1965); United States v. Elkin, 731 F.2d 1005, 1010 n.4 (2d Cir. 1984).

[24] *See* Phillips v. United States, 212 F.2d 327, 335 (8th Cir. 1954).

[25] *See*Jenkins v. United States, 555 F.2d 1188, 1189-91 (4th Cir. 1977) (discussion includes both main opinion and Bryan, J., diss.) (the issue here was complicated by involving a conviction under the Youth Corrections Act and the main opinion's interpretation of statutory language and legislative history in that particular context to contradict the holding in *Korematsu* (1943); the dissent disagreed). Other fuller discussions of the significance of probation in the context of a suspended sentence, and the implications for double jeopardy, multiple probationary periods, and other issues when probation is revoked, appear in United States v. Fultz, 482 F.2d 1 (8th Cir. 1973) and United States v. Lancer, 508 F.2d 719, 737-42 (3d Cir. 1975) (Hunter, J., and Forman, J., separately dissenting).

[26] *See generally* United States v. Gras, 446 F.2d 7, 9 (5th Cir. 1971) (citing in support United States v. Lecato, 29 F2d 694, 695 (2d Cir. 1928), which was expressly disapproved of by the Supreme Court in Korematsu (1943)). [Judge Learned Hand, no less, was the opinion-writer in *Lecato*].

[27] *See* Alexander v. De Witt, 141 F.2d 573, 574 n.2 (9th Cir. 1944).

[28] Cumulative usage rates of *Korematsu* (1943) among the various circuits were as follows: First Circuit: five times; Second Circuit: four times; Third Circuit: seven times; Fourth Circuit: two times; Fifth Circuit: three times; Sixth Circuit: one time; Seventh Circuit: five times; Eighth Circuit: three times; Ninth Circuit: nine times; Tenth Circuit: one time; Eleventh Circuit: two times; D.C. Circuit: two times.

mean that the other circuits were using other authorities for the same purpose. Four of the Ninth Circuit's nine uses came just during 1944-45, when *Korematsu* (1943) was a quite fresh authority that recently had emerged from that circuit, and three of those four opinions were authored by Judge Mathews, while the fourth came from a panel that included Mathews. Five of the Third Circuit's seven total uses all came between 1971 and 1981, two of them authored by Judge Adams (1972, 1980) and one from a panel on which Adams was the senior judge (1981). Two of the First Circuit's five uses involved immigration/deportation cases in the mid-1950s, both authored by Judge Magruder. Judge Tjoflat used the case twice in 1982, first as a member of the Fifth Circuit, later as a new member of the newly established Eleventh Circuit.[29] Only two other judges used *Korematsu* (1943) twice, in both cases widely separated in time (Judge Sloviter, Third Circuit, 1981, 2005; Judge Merrill, Ninth Circuit, 1960, 1971). Six different circuits were among those that belatedly rediscovered *Korematsu* (1943) between 2001-2015 (the First, Third, Sixth, Seventh, Ninth, and Eleventh). Such limited, weak relationships are the closest the data comes to indicating any wider patterns in use of *Korematsu* (1943) between various judges and jurisdictions.

1.2. KOREMATSU (1943): QUOTES

Korematsu (1943) was quoted a total of thirteen times out of the forty-four uses, four of those only brief, passing references, the others more substantial. Only the First Circuit quoted it three times, two of those only quite briefly; the Third and Ninth Circuits twice; the Seventh, Tenth, and District of Columbia [hereinafter D.C.] Circuits never. The most popular quote, appearing six times, characterized probation as "an authorized mode of mild and ambulatory punishment"; three of those opinions added, "intended as a reforming discipline". Two such quotations came relatively early (1950, 1954); four of them appeared later (1982, 1984, 2004, 2005); all were scattered among various different circuits. That particular quote generally was used to establish that probation is indeed a form of punishment, which justifies treating a suspended sentence, with probation, as nevertheless a final, appealable judgment—in other words, no differently from formal imposition of a sentence followed by probation.[30] Three other opinions quoted *Korematsu* (1943)'s language regarding "certainly when discipline has been imposed, the defendant is entitled to review" (1984, 2001, 2014).[31]

[29] On the history of the creation of the Eleventh Circuit out of the former, larger "old" Fifth Circuit, see, e.g., Thomas E. Baker, *A Legislative History of the Creation of the Eleventh Circuit*, 8 Ga. State Univ. L. Rev. 457 (1992).
[30] *See*, e.g., Kennick v. Superior Court of State of Cal., Los Angeles County, 736 F.2d 1277, 1282 (9th Cir. 1984).
[31] *See*, e.g., United States v. Elkin, 731 F.2d 1005, 1010 n.4 (2d Cir. 1984).

Two circuits quoted *Korematsu* (1943) for "the difference to the probationer between imposition of sentence followed by probation [. . .] and suspension of the imposition of sentence [. . .] is one of trifling degree" (1977, 1980).[32] Only three quotations, two quite brief, appeared between 1950 and 1960, while nine surfaced from 1977 onward; this might only tend to reflect the vast overall lengthening of court opinions between the early postwar years and more recent decades.[33]

1.3. KOREMATSU (1943): ISSUES

Regarding issues addressed in the various cases citing *Korematsu* (1943), aside from eight narcotics cases (one in 1960, one in 2014, and the other six from 1971-1980), few patterns are discernable among a wide array of relatively ordinary criminal prosecutions. Next closest to a "cluster" were three bank robbery cases; otherwise, there were various cases involving mail fraud, wire fraud, bank fraud, embezzlement, interstate transportation of stolen cars or other stolen goods known to be stolen, tax evasion, tax bribery, and at least one moonshine liquor case.[34] There were relatively few other, more serious cases, such as a 2005 case concerning the rape/murder of an underage female,[35] or a 1981 case involving illegal receipt of a firearm by a felon.[36] Some cases reflect their particular times: for instance, two cases involved illegal sale of meat contrary to rationing established by the wartime Office of Price Administration to prevent runaway price inflation on scarce commodities during wartime;[37] and one defendant who was convicted under Federal Prohibition laws before the Twenty-First Amendment repealed the Eighteenth Amendment in 1933, and who fled the United States before being sent to prison, was held to still be liable for his Prohibition prison time when he returned years later, notwithstanding his argument that Prohibition had since been repealed.[38] The earliest case, from March 1944, involved violation of the War Department's wartime exclusion order by a non-Japanese American, apparently an Anglo suspected of

[32] United States v. Bynoe, 562 F.2d 126, 128 (1st Cir. 1977); United States v. Johnson, 634 F.2d 94, 95-96 n.4 (3d Cir. 1980).

[33] For a (commendably concise) commentary on this issue, including various lengthening-related statistics, see, e.g., Gerald Lebovits, *Short Judicial Opinions: The Weight of Authority*, 76 N.Y. STATE BAR J. 64 (2004). As Lebovits notes, there were also complaints about this process since 1899 if not earlier. See, e.g., Herbert B. Gregory, *Shorter Judicial Opinions*, 34 Va. L. Rev. 362 (Apr. 1948). To paraphrase "Jazz Singer" Al Jolson: They hadn't seen nothin' yet.

[34] *See* Martin v. United States, 183 F.2d 436, 439 (4th Cir. 1950).

[35] *See* Mickens-Thomas v. Martinez, 2005 WL 1586212 (Slip Copy) (3d Cir. 2005) (Sloviter, J.).

[36] *See* United States v. Stine, 646 F.2d 839, 846 n.15 (3d Cir. 1981) (Sloviter, J.).

[37] *See* Rosensweig v. United States, 144 F.2d 30, 33 (9th Cir. 1944); United States v. Beekman, 155 F.2d 580, 583 (2d Cir. 1946).

[38] *See* United States ex rel. Randall v. U. S. Marshall for Eastern Dist. of New York, 143 F.2d 830, 831 (2d Cir. 1944) (Augustus N. Hand, J.).

radicalism who lived near the various important U.S. naval stations at San Diego and the Marine base at Camp Pendleton.[39] A 1973 case involved a Vietnam draft-dodger.[40] Two cases, both from the mid-1950s and from the First Circuit, involved immigration, one concerning a false statement made under oath to immigration authorities, the other the deportation of an Italian national with a criminal record.[41]

Viewing this laundry list of mostly unrelated and relatively insignificant cases and opinions, readers might (appropriately) be inclined to dismiss it as much ado about nothing,[42] or perhaps as the dog that didn't bark.[43] Whatever its wider possible legal and rhetorical potential, *Korematsu* (1943) basically remained narrowly limited in its precedential role as a relatively routine judicial rubber stamp regarding the specific criminal procedure issues of probation and final judgment. Grinding through the (perhaps unnecessary and unwelcome) details of quantitative analysis on *Korematsu* (1943), however, provides a preliminary illustration of the same processes that were used on its more "interesting" relatives, *Korematsu* and *Hirabayashi.*

[39] *See* Alexander v. De Witt, 141 F.2d 573, 574 n.2 (9th Cir. 1944).
[40] *See* United States v. Teresi, 484 F.2d 894, 899 (7th Cir. 1973).
[41] *See generally* Pino v. Nicolls, 215 F.2d 237, 242 (1st Cir. 1954); Boufford v. United States, 239 F.2d 841, 844 (1st Cir. 1956). Judge Magruder wrote both these opinions.
[42] William Shakespeare, Much Ado About Nothing (written in 1598 or 1599, first published in 1623).
[43] Arthur Conan Doyle, *Silver Blaze*, in The Memoirs of Sherlock Holmes (Penguin, 2011).

2. *HIRABAYASHI*: JUST ANOTHER ROUTINE CRIMINAL PROCEDURE PRECEDENT (?)

With more than 300 citations,[44] *Hirabayashi*—concerning Gordon Hirabayashi's deliberate (civil disobedience) violation of early wartime exclusion and internment orders[45]—has been cited by the federal circuit courts substantially more often than both *Korematsu* (1943) and *Korematsu* (and probably all other 1940s Japanese American cases) put together.[46] However, more than two thirds of these were usually brief, passing citations used to rubber-stamp a tool for judicial efficiency in criminal procedure: the doctrine of concurrent sentences, holding that an appellate court may generally ignore arguments on appeal regarding particular counts and sentences in multi-count criminal prosecutions, if other, equal or greater sentences would remain standing regardless.[47] This doctrine was increasingly called into question during the 1970s-80s as being perhaps too quick and facile in dismissing or ignoring the issues that might still remain significant for appeals, criminal records, and potential collateral adverse impacts on defendants.[48] Yet from 1949 through 1981, out of 229 citations of *Hirabayashi* during that

[44] Cases citing *Hirabayashi* include some historically special cases that, by their very nature, were likely to address the case and holding at much greater length in a manner quite different from most "ordinary" citing cases. These include Toyosaburo Korematsu v. United States, 140 F.2d 289 (9th Cir. 1943), the circuit-court iteration of what would become *Korematsu* (1944), and the various major cases of the 1980s relating to Japanese American official exoneration and reparations: Hohri v. United States, 782 F.2d 227 (D.C. Cir., January 1986); Hohri v. United States, 793 F.2d 304 (D.C. Cir., May 1986); Hohri v. United States, 847 F.2d 779 (Fed. Cir. 1988); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987). Because these fall in a rather special category, they, and similar cases that cite *Korematsu* (1944), have been excluded from the statistical data concerning more "ordinary" cases. That leaves 301 separate citing cases, with five of those including situations where both the majority opinion and a dissent or a concurrence/dissent cite Hirabayashi.

[45] *See* Hirabayashi v. United States, 320 U.S. 81.

[46] Although this data likely would be better communicated in a chart or graphic, the annual usage rate of *Hirabayashi*, in cases, is as follows: 6x, 1943; 8x 1944, 10x 1945, 7x 1946, 3x 1947 & 1948 & 1950, 7x 1949, 5x 1951 & 1952, 2x 1953 & 1955, 3x 1954, 6x 1956, 4x 1957, 9x 1958, 10x 1959, 3x 1960, 8x 1961, 12x 1962, 5x 1963, 11 x 1964, 9x 1965, 3x 1966, 8x 1967, 11x 1968, 16x 1969, 15x 1970, 10x 1971, 13x 1972, 11x 1973, 5x 1974, 6x 1975, 9x 1976, 3x 1977 & 1979, 8x 1978, 5x 1980, 2x 1981, 1x 1983, 0x 1982 & 1984 & 1986 & 1988 & 1992, 2x 1985 & 1989 & 1991, 1x 1987 & 1990 & 1993 & 1994 & 1995 & 1996 & 1997, 2x 1998, 1x 1999, 0x 2000, 3x 2001 & 2002 & 2003, 2x 2004 & 2006, 0x 2005 & 2007-2014, 1x 2015 & 2016. Because of the five situations where there were two opinions citing *Hirabayashi* in the same case, in 1949, 1957, 1964, 1967, and 1978, to count opinions per year, each of those years should be elevated by one: i.e., 8x 1949, 5x 1957, 12x 1964, 9x 1967, and 9x 1978. Again, because the original Ninth Circuit iteration of Korematsu (1944) and the various reparations/exoneration cases of the 1980s are in a somewhat different category, those five cases and seven opinions are excluded from these statistics.

[47] The doctrine of concurrent sentences continues to exist today, though only in a diminished state and in particular jurisdictions, while other jurisdictions have rejected the doctrine. *See* Wayne R. LaFave et al., *The Concurrent Sentence Doctrine, in* Criminal Procedure (2003). Regarding the doctrine as it stood through much of the period under discussion, see *The Federal Concurrent Sentence Doctrine*, 70 Colum. L. Rev. 1099 (1970). For the history of the doctrine, see Anne S. Emanuel, *The Concurrent Sentence Doctrine Dies a Quiet Death—Or Are Reports Greatly Exaggerated?*, 16 Florida St. U. L. Rev. 269 (Summer 1988).

[48] See LaFave et al., *supra* note 47 ; Emanuel, *supra* note 47, regarding this reconsideration of the doctrine, which began with a Supreme Court opinion from the heyday of Supreme Court liberalism—Benton v. Maryland, 395 U.S. 784, 789-90 (1969).

period, 202 concerned concurrent sentences—a nearly unbroken string, with other issues appearing only sporadically. After early inklings in 1950 and 1956, *Hirabayashi* established a comparatively modest presence as a cited authority regarding civil rights and non-discrimination arguments starting in 1968, with ten additional such citations, usually brief and in passing, through 1979.

The nature of use of *Hirabayashi* changed abruptly during the 1980s and after. Of thirty-six total circuit opinions mentioning *Hirabayashi* from 1983-2016, four were reparations-related (including four of the five uses from 1986-88), and thus were in a different category from the other cases due to being inherently more likely to discuss the facts and issues associated with the Japanese American internment at greater length and depth and are excluded from the general population of cases and opinions for analysis as such. Of the remaining thirty-two cases, twenty-seven either invoked the ringing anti-discrimination language in *Hirabayashi* that federal circuit courts mostly had ignored before 1983 or included ostentatious hand-wringing over the constitutional train-wreck *Hirabayashi* and *Korematsu* had finally been recognized to be. The vast majority of these latter uses came after the Congress issued its apology and reparations to the Japanese American internment survivors in 1988.

2.1. HIRABAYASHI: USE IN GENERAL

In the first phase of H's life, from July 1943 through May 1949, out of forty-one citations of the case, thirty (73.2% of forty-one) largely or entirely concerned the federal government's power to wage war. Six other citations concerned the general federal powers or delegation of legislative or executive authority outside the strict military/wartime context and typically construed those powers liberally (1943, 1944, 1945, twice in 1948, 1949). Concurrent sentences doctrine made a tentative appearance during these early years, either alone (twice in 1945, once in 1946) or associated with federal power to wage war (1946, twice in 1947). The question of the constitutional relationship between the Fifth and the Fourteenth Amendments with regard to the issues of equal protection under the Fourteenth, versus due process and quasi-equal protection under the Fifth Amendment—arguably among the most significant legal/constitutional issues raised by the *Hirabayashi* and *Korematsu* litigation, especially in light of later developments in civil rights law during the 1950s-60s—made a first brief appearance in December 1947. During the later years of U.S. participation in the Second World War as well as the rest of the 1940s, the nation and its judiciary were still busy with mopping up after the vast and often horrific international and domestic mess that

remained, and use of *Hirabayashi* was primarily associated with such purposes—such as disciplining or punishing those who had cheated on wartime rationing, those who had been disloyal, those who had challenged federal defense material procurement on traditional (non-wartime) business contract grounds, those who claimed to be conscientious objectors but failed to report for alternate duty, and so on.

As already noted, during the main period of its precedential life cycle, *Hirabayashi* was used overwhelmingly regarding the criminal procedure doctrine of concurrent sentences, which accounted for 214 out of 306 total uses (nearly 70%). Starting in February 1945, and especially from June 1949 to December 1981, use of *Hirabayashi* for that purpose was almost unbroken: out of 229 federal circuit cases citing *Hirabayashi*, 1949-1981, 202 (88.2%, or roughly seven-eight of the 1949-1981 total) concerned concurrent sentences; five concerned federal power to wage war (three of those between 1949-1951, others in 1959 and 1969); twelve (5.2%) concerned non-discrimination and/or civil rights (1950, 1956, two in 1968, 1969, 1971, two in 1972, 1975, two in 1976, 1979); three concerned nationality (1951, 1979, 1980); only four additional cases concerned the still uncertain relationship between the Fifth and the Fourteenth Amendments (1956, 1958, 1962, 1968) after the first discussion of that issue came in December 1947; and others concerned other such matters as the warrant requirement for search and seizure (1975), restrictions on travel during emergencies (1971), and preventive detention (1969).

Again, and after a brief gap in uses between 1981 and 1983 which (non-coincidentally?) happened to coincide with the 1982 release of the initial Congress-commissioned study first officially finding that the Japanese American internment had been a huge and tragic mistake based largely upon racial animus,[49] there were an additional thirty-six uses of *Hirabayashi* from 1983-2016 (11.8% of 306). Subtracting the three different versions of the *Hohri* reparations litigation (two in 1986, one in 1988) and the reappearance of *Hirabayashi* as a reparations case in 1987 leaves thirty-two uses, 1983-2016. Of these, one concerned general judicial efficiency (1991),[50] two addressed the old topic of concurrent sentences for the last times (1991, 1994),[51] and two others involved the even older topic of the federal power to wage war, this time in the context of the post-2001 "War on Terror" (2003, 2004).[52] All others were sanctimonious hand-wringing of one sort or another: two regarding nondiscrimination

[49] Comm'n On Wartime Relocation and Internment of Civilians, Personal Justice Denied 18 (1982), https://www.archives.gov/research/ japanese-americans/justice-denied [readers accessing the website from a country different than the U.S.A. might experience automatic redirection to the homepage of the National Archives website].

[50] *See* Hing Tin Ngai v. U.S.I.N.S., 937 F.2d 612 (9th Cir. 1991).

[51] *See* United States v. Barel, 939 F.2d 26 (3d Cir. 1991); United States v. McHatton, 16 F.3d 401 (1st Cir. 1994).

[52] *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003); El-Shifa Pharmaceutical Industries Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004).

generally,[53] two bemoaning the Constitutional train wreck,[54] one using the somewhat famous "loaded weapon" quote and passage from Justice Jackson's *Korematsu* dissent in conjunction with *Hirabayashi* to similar effect,[55] and twenty-two others all repeating what became a kind of standard mantra making use of ringing language from *Hirabayashi* regarding strictly color-blind non-discrimination—what rather suddenly became the widely used and oft-repeated, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality".[56] The latter twenty-two opinions accounted for 68.8% of cases citing *Hirabayashi* from 1983 onward; the expanded group of twenty-seven represented 84.4%. The "distinctions/odious" quote was used only a total of five times before 1983 (two early appearances in 1949 and 1950, both from Judge Edgerton of the D.C. Circuit, then 1972, 1975, and 1979). By contrast, either the full quote or recognizable fragments of it appeared twenty-three times between 1983 and 2016. To further rhetorically buttress the hand-wringing/odious distinctions theme, *Plessy v. Ferguson* (another rather famous constitutional train-wreck) increasingly was rolled out as a companion for *Hirabayashi*, appearing five times in the period from 1998-2015 (after only four sporadic earlier appearances from 1950-1971).[57]

That *Plessy* was used three times within four years (1998, 1999, 2001), then once in 2006 and in 2015, suggests that at a certain point, there may have been a sense that the *Plessy* rhetorical meme was being overused. Similarly, after a long run from 1993 through 2006 in which *Hirabayashi* and the "odious distinctions quote" appeared at least once in almost every year (and two or three times each year from 2001-2003), after 2006 there was a notable lull before their re-emergence in 2015 and 2016.

[53] *See* Scott v. Pasadena Unified School Dist., 306 F.3d 646 (9th Cir. 2002); Rothe Development, Inc. v. United States Department of Defense, 836 F.3d 57 (D.C. Cir. 2016).

[54] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./diss.); Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).

[55] *See* Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003) (Motz, J., diss.) ("As Justice Jackson recounted, despite the Supreme Court's careful efforts to limit the scope of its holding in *Hirabayashi*, to the specific facts of that case, the Court later determined that *Hirabayashi* dictated the holding in *Korematsu*". See *id.* at 247 (Jackson, J., dissenting) ("The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding").

[56] See, *e.g.*, Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983) (Engel, J., diss.); Steele v. F.C.C., 770 F.2d 1192 (D.C. Cir. 1985); United States v. Borrero-Isaza, 887 F.2d 1349 (9th Cir. 1989); Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810 (4th Cir. 1995); Morrison v. Garraghty, 239 F.3d 648 (4th Cir. 2001); Kohlbek v. City of Omaha, Neb., 447 F.3d 552 (8th Cir. 2006); Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006).

[57] The even more infamous Dred Scott v. Sandford, 60 U.S. 393 (1856) made only two appearances, both before 1981 (1969, 1980).

2.2. *HIRABAYASHI*: USE PATTERNS BY JURISDICTION

Out of curiosity, this study checked uses of *Hirabayashi* by both jurisdiction, court panel, and opinion-writing judge over time, in detail. Particular jurisdictions—the Fifth, Ninth, and D.C. Circuits—accounted for more than half of all the citation "traffic" concerning *Hirabayashi.* Perhaps one of the more interesting findings, observable sometimes among lesser as well as heavier users, was a pattern of "pulses" of higher use activity at certain moments in time separated by periods of non-use or sporadic use; these periods did not always exactly coincide from one circuit to another. Certain circuits also tended to mostly abandon use of *Hirabayashi* earlier than others—some even before the events of the 1980s.

- First Circuit: The First used *Hirabayashi* less than most other circuits, only eight times (2.8% of the total of 306 opinions) between 1943 and 1994. The first five uses all occurred 1943-50 (so, chiefly clean-up after the war); the latter three were spaced widely apart and show little if any pattern in time (1967, 1980, 1994). The latter three cases were all standard crime/concurrent sentences cases, so the First Circuit avoided the reparations and hand-wringing eras entirely, at least regarding use of *Hirabayashi*.

- Second Circuit: The Second used *Hirabayashi* a substantial number of times (twenty-four, or 7.8%), though less than half the uses in either the Fifth, Ninth, or D.C. Circuits. The Second saw ten uses spaced fairly evenly during the wartime and early Cold War years from 1944-1952. There were separate small clusters of five cases from 1956-59, three cases (one per year) from 1962-64, four cases spaced almost evenly and yearly from 1967-71, a case in 1975, and a late stray in 2003. All ten cases from 1958-71, and three of the four from 1951-56, were the usual concurrent sentences cases. The late case, *Padilla v. Rumsfeld* (2003),[58] was an enemy combatants case in the "War on Terror". The Second mostly stopped citing *Hirabayashi* already in 1975 after dwindling use long before then, and, at least regarding *Hirabayashi*, largely missed the whole flurry of hand-wringing from the 1980s onward.

- Third Circuit: The Third used *Hirabayashi* modestly (15, 4.9%), with a pronounced pulsing pattern in various decades: five uses, 1943-45; three uses, 1953-55; two uses, 1965 and 1967; three uses, 1977-79, plus late strays in 1991 and 2015. All seven cases from 1953 to 1978 were standard concurrent sentences cases, as was the 1991 case; the very late 2015 case arose from the "War on Terror" and targeted the

[58] *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).

surveillance of Muslims, and included significant hand-wringing. With limited exceptions, similarly to the Second Circuit, the Third already had largely ended its use of *Hirabayashi* in the 1970s.

- Fourth Circuit: The Fourth was another modest user (eleven, 3.6%) that featured a pulsing pattern tilted towards later decades. After a single initial use in 1945, there were no more until four during the Civil Rights period from 1967-71, another in 1980, then two from 1993-95 and another three from 2001-2003. Unlike the First, Second, and Third Circuits, the Fourth was a relatively active participant in the hand-wringing of the post-1980s.

- Fifth Circuit: The Fifth was a heavy user of *Hirabayashi* (59, 19.3%). Like the (originally) neighboring Fourth Circuit, it had one initial early use in 1945, then did not rediscover the opinion until fourteen years later. Judges of the Fifth Circuit used *Hirabayashi* eight times already from 1959-1965, roughly once a year, already including some early civil rights exposure,[59] but then vastly expanded that use during the late Civil Rights era, with forty-five uses from 1968-1978, including a peak of eight uses in 1969 alone and notable concentrations of five uses in 1972, 1976, and 1978. Then the Fifth saw one use a year from 1979-1981, and two final uses in 1996 and 1998—both penned by Jerry E. Smith, a conservative judge and Reagan appointee who used the color-blind rhetoric of *Hirabayashi* against affirmative action or equal protection claims. Aside from those two late strays, the Fifth's use of *Hirabayashi* basically already had ended before the sea change of the 1980s.

  Here it may be worth mentioning the special and peculiar history of the Fifth Circuit in the postwar era. Prior to the creation of the Eleventh Circuit in 1981,[60] carved out of territory formerly in the Fifth, the Fifth Circuit had included most of the original Confederate South and basically the entire Deep South, including hard-core segregationist states such as Georgia, Alabama, and Mississippi that became the particular "problem children" of the desegregation era (though that's not to let other states, including Arkansas, Texas, Louisiana, Virginia, the Carolinas, and many others, North, South, and West, off the hook).[61] Some judges of the Fifth Circuit were perceived, and respected, as relatively bold national

[59] *See e.g.*, Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959) (Brown, J., diss.); Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960) (Rives, C.J.) (an early school desegregation case involving plans for a gradual desegregation of the public schools of Dallas, Texas).

[60] *See* Baker, *supra* note 29.

[61] For a disturbing, tastefully done, partly fictionalized but largely accurate historical vignette of Mississippi, the worst of the problem children, during the tumultuous Freedom Summer of 1964, see, e.g., *Mississippi Burning* (1988), a feature film starring Willem Dafoe and Gene Hackman and directed by Alan Parker.

leaders on civil rights and desegregation, partly due to the Eisenhower administration's appointment of various Republican federal judges[62] who were not political prisoners of the traditional, post-Confederate, pro-segregationist southern wing of the Democratic Party that effectively controlled nearly all other state or federal elective or appointive offices throughout what was traditionally labeled the "Solid South".[63] At any rate, judges such as Elbert Tuttle, John Brown, and John Minor Wisdom, among others, periodically issued pro-civil rights opinions that were closer in outlook to that of the Warren Court than to that of most of their neighbors within the old Fifth Circuit. They also received death threats for their efforts. For the same reason, Judge J. Skelly Wright, a federal district judge in Louisiana who issued locally unpopular opinions regarding school desegregation and other matters, was given a safer seat on the D.C. Circuit.[64] This peculiar and somewhat heroic role of the federal judges of the Fifth Circuit likely accounts for some of its particularly heavy traffic in *Hirabayashi* during the Civil Rights years. However, as with most other circuits, the vast majority of uses of *Hirabayashi* in the Fifth Circuit (forty-nine of fifty-nine) involved the usual concurrent sentences doctrine—although many of these criminal cases also involved civil rights/equal protection arguments, and the Fifth was fairly prominent in starting to call aspects of the concurrent sentences doctrine into question during the 1970s.[65]

- Sixth Circuit: The Sixth used *Hirabayashi* twenty times (6.5%), with some notable pulsing or clustering: four times, 1944-47; five times, 1958-62; three times in 1965 and another four times, 1966-68; plus sporadic later uses in 1974, 1978, 1983, and

[62] Conservative Fifth Circuit Judge Jerry E. Smith, mentioned earlier, was a post-Nixon Republican appointed by President Reagan, unlike the moderate and pro-civil rights Eisenhower Republican appointees of the Old Fifth.

[63] Regarding the Fifth Circuit judges, sometimes called the "Fifth Circuit Four," who often took a stand for civil rights in what were then relatively hostile surroundings, *See*, e.g., Jack Bass, Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit who Translated the Supreme Court's Brown Decision Into a Revolution for Equality (1981); Jack Bass, *The "Fifth Circuit Four": How Four Federal Judges Brought the Rule of Reason to the South*, Nation, May 3, 2004, *available at* https://www.thenation.com/article/archive/fifth-circuit-four/ [hereinafter Bass, *The "Fifth Circuit Four"*]; Joel W. Friedman, *John Minor Wisdom: The Noblest Tulanian of Them All,* 74 Tul. L. Rev. 1, 24 (1999). Regarding the history of the recognition of the phenomenon of the one-party Democratic "Solid South," *See*, e.g., Marian D. Irish, *The Southern One-Party System and National Politics*, 4 J. Pol. 80 (1942). *See also* Gerald R. Webster, *Demise of the Solid South*, 82 Geographical Rev. 43 (1992). For longer, book-length treatments of the overall topic, see, e.g., Kari Frederickson, The Dixiecrat Revolt and the End of the Solid South 1932-1968 (2001).

[64] *See* Marjorie Hunter, *Judge J. Skelly Wright, Segregation Foe, Dies at 77*, N.Y. Times, Aug. 8, 1988, available at https://www.nytimes.com/1988/08/08/obituaries/judge-j-skelly-wright-segregation-foe-dies-at-77.html.

[65] *See, e.g.*, United States v. Carter, 491 F.2d 625 (5th Cir. 1974); United States v. Windom, 510 F.2d 989 (5th Cir. 1975) (Rosenn, J., conc.); United States v. Crockett, 534 F.2d 589 (5th Cir. 1976); United States v. Evans, 572 F.2d 455 (5th Cir. 1978).

2006. All twelve uses from 1960 to 1978 involved concurrent sentences; the final two, post-1980 hand-wringing.

- Seventh Circuit: The Seventh used *Hirabayashi* relatively little and briefly (only sixteen uses, 5.3%, all between 1943 and 1980) with some degree of pulsing: after an early initial use in 1943, there were five uses during the early Cold War years (1948-52), two uses, 1958-59; three uses in 1964 alone; four uses from 1970-75; and a final use in 1980. All the eleven cases from 1949-73 involved ordinary crimes and concurrent sentences.

- Eighth Circuit: The Eighth used *Hirabayashi* even less (thirteen, 4.2%). There were three uses, 1945-46, one use in 1952, five uses from 1956-64, then sporadic later strays in 1970, 1980, 1987, and 2006. All eight cases from 1952-1980 involved crimes/concurrent sentences; the final two, hand-wringing.

- Ninth Circuit: The Ninth, with sixty-two uses of *Hirabayashi*, accounts for 20.3% of the total 306 uses. That the *Hirabayashi* litigation originated in the Ninth likely increased that level of traffic; federal circuit and district courts often tend to favor Supreme Court opinions arising from their own circuits, even though they apply to everybody.[66] The Ninth saw very high use levels during the late wartime and early Cold War years as wartime messes were being cleaned up—nine uses from 1943-47 (four in 1946 alone), with another five from 1949-51. Despite an overall high use level, the Ninth saw some pulsing activity, with eleven uses from 1958-1966 (over half of those just in 1962 and 1963), twenty-two uses from 1969-73 (sixteen of those just from 1970-72), then a dwindling level of activity, with two uses in 1976 and single uses in 1978 and 1981. Thirty-eight of the Ninth Circuit uses of *Hirabayashi* involved crimes and concurrent sentences. Perhaps predictably, given that the majority of Japanese Americans continued to live along the West Coast in the 1980s as they had in the 1940s,[67] the Ninth was a particularly active user in the post-1980 reparations era, with *Hirabayashi* reappearing in 1985, 1987, 1989, and 1991 plus seven additional uses just between 1997 and 2004. Except for one immigration case in which a *per curiam* panel used *Hirabayashi* for general judicial efficiency[68] and

[66] Although this claim admittedly may be impressionistic and anecdotal, it is based upon extensive observations over many years. Possibly the most striking example of this phenomenon is federal circuit courts citing cases from their home circuit on which the Supreme Court denied certiorari, sometimes where the certiorari decision was based on issues entirely separate from those for which the case later is being cited.

[67] According to the 2010 U.S. census, Japanese Americans remain by far most heavily concentrated in the states of California and Hawaii—as was also true in the 1940s—with an additional substantial community in Washington State. *Japanese Americans*, Wikipedia,https://en.wikipedia.org/wiki/Japanese_Americans (accessed December 23, 2020).

[68] *See e.g.*, Hing Tin Ngai v. U.S.I.N.S., 937 F.2d 612 (9th Cir. 1991).

another affirmative action/education case where it was used for general non-discrimination,[69] all other later uses involved hand-wringing, mostly by conservative judges on behalf of strict color-blindness.

- Tenth Circuit: The Tenth made little use of *Hirabayashi* (ten, 3.3%), with two uses from 1950-51, one in 1954, two in 1958-59, then sporadic uses in 1965, 1968, 1973, and two in 1976. The Tenth sat out the reparations era and the hand-wringing flurry, at least as far as *Hirabayashi* was concerned.

- Eleventh Circuit: The Eleventh didn't even exist for most of the time before the 1980s reparations era began, and it used *Hirabayashi* only once, in a 2001 hand-wringing opinion.[70]

- District of Columbia Circuit: The D.C. Circuit joined the Ninth as the heaviest user of *Hirabayashi* (sixty-two, 20.3%), with somewhat lighter use in the earlier years followed by very heavy use between 1956 and 1972 in particular. After an initial use in 1946 and six uses from 1949-54, the D.C. Circuit saw thirty uses from 1956-66, including four uses each in 1957, 1959, and 1961, and five in 1964, followed by seventeen additional uses between 1967 and 1972 (including five just in 1969). Activity then dwindled, with one use in 1975, but picked up again in the 1980s, with three uses from 1985-86 (including the first two mid-appellate-level iterations of *Hohri*, the key reparations case, in 1986), two more from 1989-90, and, after a twenty-six-year gap, a very late stray affirmative action case in 2016. Like the Fifth Circuit, and even more than the Ninth, the D.C. Circuit made very heavy use of *Hirabayashi* as a precedent regarding the concurrent sentences—forty-seven of the sixty-two cases. It is possible that D.C. judges might have used *Hirabayashi* somewhat more heavily as a local authority for the District of Columbia, whereas some other jurisdictions, even if they invoked the concurrent sentences doctrine, might have turned to some later, local circuit opinion on the same issue for authority—though that would not explain the Fifth Circuit's relatively heavy use of *Hirabayashi* for the same purpose.[71]

[69] *See e.g.*, Scott v. Pasadena Unified School Dist., 306 F.3d 646 (9th Cir. 2002).
[70] *See, e.g.*, Johnson v. Board of Regents of University of Georgia, 263 F.3d 1234 (11th Cir. 2001).
[71] As examples of potential alternate authorities addressing the same issue, see, e.g., United States v. Darnell, 545 F.2d 595, 598-99 (8th Cir. 1976) (including a relatively eloquent notice that, although they would have liked to consider all the merits of any claim submitted to them, "[t]he luxury of time is denied us. We are, even now, overdrawn on this resource"); United States v. Moore, 452 F.2d 576 (9th Cir. 1971); United States v. Gaines, 460 F2d 176 (2d Cir. 1972). For an example of where the U.S. Supreme Court called the doctrine of concurrent sentences more into question—and a dissent sharply challenged the majority for doing so—see, e.g., Benton v. Maryland, 395 U.S. 784 (1969).

- Federal Circuit: The Federal Circuit got into the act, also, late and in a limited way, not usually having to hear the sorts of cases that produced citations of *Hirabayashi* in other circuits. The Federal Circuit heard the last iteration of *Hohri* before Congress's apology and reparations in 1988, followed by cases in 2002 and 2004 involving a U.S. Air Force gender affirmative action program[72] and extra-territorial designation of enemy property,[73] respectively.

- United States Emergency Court of Appeals: Most readers, like the author, may have been previously unaware that there ever was such an entity, but it existed from 1942 onward[74] and is yet another reminder that in 1942, the nation found itself in the worst national crisis since the American Civil War. The Emergency Court, which sat nationwide to hear cases concerning the wartime Office of Price Administration, saw Judge Calvert Magruder of the First Circuit working with Fred Vinson, later Chief Justice of the Supreme Court, along with Judge Albert Maris of the Third Circuit among others. The Emergency Court cited *Hirabayashi* in two July 1943 opinions, both concerning rent control under the Emergency Price Control Act of 1942.[75]

[72] *See, e.g.*, Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002).

[73] *See also* El-Shifa Pharmaceutical Industries Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004).

[74] An obituary tribute to Third Circuit Judge Albert Branson Maris, who was for a time Chief Judge of the Emergency Court of Appeals, suggests that said court, which had "exclusive jurisdiction to review orders and regulations of the Office of Price Administration," continued to sit all the way until 1962, though that's somewhat hard to imagine (but may well be true and correct, and the Second World War was big enough to produce a lot of major, potentially long-lasting messes to clean up). *See* Dolores K. Sloviter, *Memorial Tribute to the Honorable Albert Branson Maris* 1983-1989, 62 Temp. L. Rev. 471 (1989). In September 1945, shortly after the Second World War (though not its aftermath and clean-up) were officially over, it was noted:

> The United States Emergency Court of Appeals, which reviews determinations of prices by the Office of Price Administration, received appeals in 93 cases during the year and had 52 cases pending at the close of the year. The average time required by the court for disposing of cases (exclusive of any time required for submitting additional evidence) was 6.8 months. In order to meet the convenience of the parties the court traveled constantly so as to hold hearings where the cases were, and sat in twenty-two places scattered all over the country.

Henry P. Chandler, *Administrative Office of the United States Courts*, 4. F.R.D. 488.

[75] *See, e.g.*, Taylor v. Brown, 137 F.2d 654 (U.S. Emergency Ct. Ap. 1943); Wilson v. Brown, 137 F.2d 348 (U.S. Emergency Ct. Ap. 1943).

2.3. *HIRABAYASHI*: ISSUES

2.3.1. CRIMINAL CASES

As noted already, the vast majority of the citations of *Hirabayashi* were routine passing references concerning concurrent sentences in criminal procedure. Some jurisdictions—especially the First, Second, Third, and Ninth Circuits (which, probably not coincidentally, included most of the nation's major port cities as well as major immigrant populations), though not others, also had significant numbers of early cases from the 1940s and early 1950s trying to clean up the wartime messes, along with cases from the early Cold War that soon followed. Other categories of the cases associated with *Hirabayashi* are relatively limited, at least until the post-1980s hand-wringing.

More than 200 cases citing *Hirabayashi* involved ordinary criminal acts of one sort or the other. These included fifty-five narcotics cases, spanning 1951-1990, with nine in the 1950s, eighteen in the 1960s, and twenty-six in the 1970s, with a spike of seven in 1970 alone, followed by two late strays in 1989 and 1990. Most of the later narcotics cases from 1971 onward—seventeen—also included civil rights arguments, such as denial of equal protection to African American defendants. This injection of equal protection claims was a trend for other criminal cases in the 1970s, also. The next largest batch was thirteen cases of tax evasion—a rather distant second, but far ahead of all other crime categories, including various varieties of bank fraud, mail fraud, wire fraud, armed robbery, bank robbery, and transporting stolen cars or other stolen goods in interstate commerce, among others.

Just as overall use of *Hirabayashi* featured more prominently in certain jurisdictions, use of *Hirabayashi* in drug prosecutions also featured more prominently, mostly in the same jurisdictions. It is hard to imagine that other jurisdictions were not experiencing the same overall surge in drug use, drug trafficking, and drug prosecutions during the 1960s and 1970s as the heaviest users of *Hirabayashi*, which implies that the other jurisdictions may have been turning to other authorities to justify whatever crackdowns on drug activity were happening within their respective jurisdictions.[76] At any rate, of the 55 drug cases, the Ninth Circuit accounted for seventeen, and the Fifth and D.C. Circuits each accounted for thirteen (between the three jurisdictions, 78.2% of the total). The Second, Eighth, and Tenth Circuits cited *Hirabayashi* in narcotics cases

[76] Particularly during the heroin epidemic of the 1960s-early 1970s, when the "French Connection" was importing heroin to East Coast cities for distribution by the Mafia, cities and circuits along the East Coast were not without drug problems—particularly New York City. *See, e.g.*, John Bacon, *Is the French Connection Really Dead?*, 8 Drug Enf't 19 (1981). Michael Agar & Heather Schacht Reisinger, *A Tale of Two Policies: The French Connection, Methadone, and Heroin Epidemics*, 26 Culture, Med. & Psychiatry 371 (2002).

each two times, the Seventh Circuit three times, and the First, Third, Fourth, and Sixth Circuits never cited *Hirabayashi* even once in the narcotics cases. Presumably these jurisdictions were mostly using authorities other than *Hirabayashi* for similar purposes—or perhaps made significantly less use of the concurrent sentences doctrine.

Among other categories of issues that show up among federal circuit cases that cite Hirabayashi, the potentially quite interesting Fifth/Fourteenth Amendment Due Process/Equal Protection issue only showed up five times in four jurisdictions: the Second (1947 and rather precocious); the Fifth (1962); the Sixth (1958); and the D.C. Circuit (1956, 1968).[77] General federal power/delegation of power surfaced only a few times, almost entirely in the 1940s plus a few more from the 1950s, with only the Seventh Circuit showing two of these, while single uses in the First, Fifth, D.C., and U.S. Emergency Circuits represented the rest. Federal power to wage war appeared in various circuits, primarily in the 1940s and 1950s, with a few late manifestations concerning the Vietnam era and the much later "War on Terror". The First Circuit saw four of these cases; the Second six cases; the Third five; the Ninth nine; the Sixth two; and all other circuits, only one or zero. Before the "War on Terror", such cases often concerned conscientious objectors or other draft resistance. There were ten conscientious objector cases that cited *Hirabayashi*, 1943-1949, with two such cases in both the Second and Third Circuits, only one in the First, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits, plus two later failures to report for service in Vietnam from the Fifth and Sixth Circuits.[78]

[77] *See* United States v. Josephson, 165 F.2d 82 (2d Cir. 1947); Kendrick v. United States, 238 F.2d 34 (D.C. Cir. 1956); Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 262 F.2d 359 (6th Cir. 1958); Employing Lithographers of Greater Miami, Fla. v. N. L. R. B., 301 F.2d 20 (5th Cir. 1962); Washington v. United States, 401 F.2d 915 (D.C. Cir. 1968).

[78] *See* United States v. Irons, 369 F.2d 557 (6th Cir. 1966); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969).

2.3.2. DISLOYALTY

Disloyalty represented another recurring theme during the 1940s-1950s.

- Refusal to Answer Questions/False Statements Regarding Communist Affiliations: a classic expression of Cold War culture and the McCarthy Era in America. Authors and intellectuals were more likely to get nailed for refusing to answer the questions about party membership; union officials were more likely to face prosecution for falsifying mandatory affidavits of non-Communist activity, then required by the federal law.[79] There were two such cases citing *Hirabayashi* from the Second Circuit (1947, 1951),[80] including the prosecution of novelist Dashiell Hammett, of Sam Spade/*The Maltese Falcon* fame, among others for refusing to answer questions; one case in the Sixth Circuit (1959, union official);[81] two in the Ninth Circuit (1949, refusal to answer; 1959, union official);[82] and two cases in the Tenth Circuit (1958, 1959, both involving union officials).[83]

- Treason: although these cases typically involved American citizens who were captured either in Germany, Austria, or Japan after the war, and mostly involved radio broadcasters who had assisted Axis nations, the two European cases were both tried in the First Circuit (1948, 1950),[84] the two Japanese cases both in the Ninth Circuit (both 1951).[85] Among the other, lesser-known cases, the Ninth Circuit cases included the in/famous prosecution of "Tokyo Rose".

[79] The Taft-Hartley Act of 1947 added this new requirement. *See* Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law*, 47 Cath. Univ. L. Rev. 763, 782-85 (1998). For more flavor of the times, see, e.g., 4 U.S. Attys' Bull. No. 25 (December 7, 1956) at p. 777 (describing prosecutions of various union officials).

[80] *See, e.g.*, United States v. Josephson, 165 F.2d 82 (2d Cir. 1947); United States v. Field, 193 F.2d 92 (2d Cir. 1951) (the Hammett case).

[81] *See, e.g.*, Davis v. United States, 269 F.2d 357 (6th Cir. 1959).

[82] *See* Alexander v. United States, 173 F.2d 867 (9th Cir. 1949) (Denman, J., diss.); Fisher v. United States, 254 F.2d 302 (9th Cir. 1958).

[83] *See* Sells v. United States, 262 F.2d 815 (10th Cir. 1958); Travis v. United States, 269 F.2d 928 (10th Cir. 1958).

[84] *See* Chandler v. United States, 171 F.2d 921 (1st Cir. 1948); *see also* Best v. United States, 184 F.2d 131 (1st Cir. 1950). Both opinions also came from Judge Magruder.

[85] *See* Tomoya Kawakita v. United States, 190 F.2d 506 (9th Cir. 1951); Iva Ikuko Toguri D'Aquino v. U. S., 192 F.2d 338 (9th Cir. 1951) (the "Tokyo Rose" case).

2.3.3. CIVIL RIGHTS CASES

Only fourteen cases involving civil rights in general cited *Hirabayashi* in the period before the wartime Japanese internment cases regained major public, judicial, and Congressional attention in the 1980s.[86] The first of these, an early (and unsuccessful) challenge to segregated public schools in 1950 in the D.C. Circuit,[87] was followed by a Second Circuit immigration case concerning civil rights in 1956,[88] a Sixth Circuit equal employment case challenging a segregated labor union in 1958,[89] a Fifth Circuit redistricting/voting rights case in 1959,[90] and a second school segregation case in the Fifth Circuit in 1960.[91] There then was a gap in use of *Hirabayashi* in the civil rights context until the major civil rights surge of the late 1960s-1970s, which saw a Fifth Circuit case in 1968 concerning prisoners' reading materials[92] along with a Fifth Circuit case in 1968 involving equal employment of minority police officers,[93] a Fifth Circuit case in 1969 regarding the closing of public swimming pools in a southern county,[94] three more school desegregation cases in 1971-1972 (4th Circuit, 1971,[95] D.C. Circuit, 1972,[96] 5th Circuit, 1972[97]), another redistricting case in 1975 (2nd Circuit),[98] and two cases involving American Indian tribal membership in 1975-1976 (7th Circuit, 1975,[99] 10th Circuit, 1976[100]). These fourteen cases thus represented only 5.2% of the 270 uses of *Hirabayashi* in circuit court opinions through the end of 1981 (4.6% of the total of 306 opinions); more ordinary crime- and criminal procedure-related cases accounted for more than 80%. Six of these fourteen civil rights came from the Fifth Circuit; another two apiece from the Second and D.C. Circuits; the Fourth, Sixth, Seventh, and Tenth Circuits supplied the rest.

[86] Such cases emerged in these years, from these circuits and raising these issues: *See generally* 1950 (D.C., school desegregation), 1956 (Second, immigration), 1958 (Sixth, segregated labor union), 1959 (Fifth, redistricting/racial gerrymandering), 1960 (Fifth, school desegregation); 1968 (Fifth, prison reading materials), 1968 (Fifth, equal employment/unequal treatment of minority police officers), 1969 (Fifth, equal accommodations/closing of public swimming pools), 1971 (Fourth, school desegregation), 1972 (D.C., school desegregation), 1972 (Fifth, school desegregation), 1975 (Second, redistricting), 1975 (Seventh, Indian tribal membership), 1976 (Tenth, Indian tribal membership).
[87] *See* Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950) (Edgerton, J., diss.).
[88] *See* United States ex rel. Lee Kum Hoy v. Shaughnessy, 237 F.2d 307 (2d Cir. 1956).
[89] *See* Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 262 F.2d 359 (6th Cir. 1958).
[90] *See* Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959) (Brown, J., diss.).
[91] *See* Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960).
[92] *See* Jackson v. Godwin, 400 F.2d 529, 537.
[93] *See* Baker v. City of St. Petersburg, 400 F.2d 294, 295, 297-298.
[94] *See* Palmer v. Thompson, 419 F.2d 1222 (5th Cir. 1969).
[95] *See* Wright v. Council of City of Emporia, 442 F.2d 588, 595 (4th Cir. 1971) (Winter, J., diss.).
[96] *See* Bulluck v. Washington, 468 F.2d 1096, 1116 (D.C. Cir. 1972).
[97] *See* Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972).
[98] United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 528 (2d Cir. 1975).
[99] *See* Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975).
[100] *See* Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976).

2.3.4. IMMIGRATION AND NATURALIZATION

There were also a handful of immigration and naturalization-related cases citing *Hirabayashi* during the period from the 1940s-1990s, including two deportation cases from very different chapters of U.S. immigration history, the former a deportation under the Alien Enemy Act (1946, D.C. Circuit),[101] the latter a deportation of an undocumented Asian immigrant (1991, 9th Circuit).[102] Plus there was a 1956 case involving immigrant blood tests, criminal procedure, and civil rights (2nd Circuit),[103] and three criminal cases all from the Ninth Circuit in the early 1970s concerning fake immigration papers (1970),[104] immigrant smuggling (1971),[105] and immigration bribery (1973),[106] as well as a naturalization and expatriation case (1949, D.C. Circuit), the requirement that Iranian students prove immigration status to the American authorities during the Iranian Hostage Crisis that helped bring down the ill-fated Carter Administration (1979, D.C. Circuit),[107] a war bride denied entry (1949, 2nd Circuit),[108] passport restrictions during a national emergency (1957, D.C. Circuit),[109] and a case considering a Japanese American citizen's renunciation of citizenship under duress (1949, 9th Circuit).[110] These eleven cases represent 3.6% of the total of 306 circuit opinions citing *Hirabayashi.*

Many of the civil rights and immigration cases cited *Hirabayashi* for the larger legal concept of non-discrimination. Non-discrimination (without the rhetorical flourish of "odious") mostly dates to the earlier years and appeared four times in the Old Fifth Circuit (twice in 1968, 1969, 1972), with additional cases from the Fourth (1971), Ninth (2002), Tenth, and D.C. (2016) Circuits. Non-discrimination, with the added flourish of "odious," was mostly a feature of later, post-1980s judicial rhetoric, although the D.C. Circuit pioneered this terrain relatively early (1949, 1950, 1972, 1979), followed by the Seventh Circuit in 1975. Thereafter, the "odious"-embellished version was used in both the specifically national origin context and the more general context by the Third (2015); Fourth (1993, 1995, and twice in 2001); Fifth (1996 & 1998); Sixth (1983, 2006); Eighth (2006); Ninth (eight times, including 1985, 1989, 1997, 1998, 1999, 2002, 2003, 2004); Eleventh (2001); D.C. (1985, 1989, 1990); and Federal Circuit (2002).

[101] *See* Citizens Protective League v. Clark, 155 F.2d 290 (D.C. Cir. 1946).
[102] *See* Hing Tin Ngai v. U.S.I.N.S., 937 F.2d 612 (9th Cir. 1991).
[103] *See* United States ex rel. Lee Kum Hoy v. Shaughnessy, 237 F.2d 307 (2d Cir. 1956).
[104] *See* United States v. Tamayo, 427 F.2d 1072 (9th Cir. 1970).
[105] *See* United States v. Lucero, 443 F.2d 64 (9th Cir. 1971).
[106] *See* United States v. Castro, 476 F.2d 750 (9th Cir. 1973).
[107] *See* Narenji v. Civiletti, 617 F.2d 745, 754 (D.C. Cir. 1979) (joint statement dissenting against decision not to rehear case en banc).
[108] *See* United States ex rel. Knauff v. Watkins, 173 F.2d 599 (2d Cir. 1949).
[109] *See* Briehl v. Dulles, 248 F.2d 561 (D.C. Cir. 1957) (Edgerton, J., maj'y; Fahy, J., diss.).
[110] *See* Acheson v. Murakami, 176 F.2d 953, 953 n.1 (9th Cir. 1949).

Notably, the First, Second, and Tenth Circuits never used the "odious" flourish, the Third, Seventh, Eighth, Eleventh, and Federal Circuits only a single time, and the Fifth and Sixth Circuits only twice; so that the particular rhetorical flourish was mostly a product of the Fourth, Ninth, and D.C. Circuits. The full-bore Constitutional Train-Wreck rhetorical flourish only appeared in the Third (2015) and the Eighth (1987) Circuits, though it was conceptually a close relative to the "odious" cluster.[111]

Affirmative Action was a relatively new concept that emerged in the 1970s and appeared in court cases and opinions mostly later.[112] There were seventeen affirmative action cases citing *Hirabayashi*, 1983-2016, with eight from the 1980s-90s—four of those appearing one per year from 1996-1999—and another eight just from 2001-2006. *Hirabayashi* was associated with affirmative action twice in the Fourth and the Sixth Circuits, once in the Fifth and the Eighth Circuits, six times in the Ninth Circuit, three times in the D.C. Circuit, and once in the Federal Circuit.

2.4. HIRABAYASHI: JUDGES/OPINION WRITERS

Forty nine judges cited *Hirabayashi* at least two or more times. Of those, twenty four cited *Hirabayashi* only twice, another twelve did so three times, and the remaining eight judges cited *Hirabayashi* four times; only five cited the opinion more than four times. Generally, judges citing *Hirabayashi* twice don't show much of a discernible pattern, and many of the judges who cited *Hirabayashi* three or four times either did so all within the postwar clean-up period, or so widely spaced in time as to reveal little by way of a broader pattern. Judges who possibly selected *Hirabayashi* more deliberately and repeatedly over a more concentrated time period include Judge Craven on the Third Circuit (three uses, 1968-71), Judge Goldberg on the Fifth Circuit (three times, 1974-76), Judge Rives on the Fifth Circuit (four times, including two civil rights cases, 1960-70), Judge Simpson on the Fifth Circuit (three times, 1969-73), Judge Tuttle on the Fifth Circuit (four times, including one civil rights case, 1968-74), Judge Wisdom on the Fifth Circuit, (three times, 1961-74; four times, counting a quote of *Hirabayashi* misattributed to *Korematsu*), Judge Weick on the Sixth Circuit (three times, 1965-68), Judge O'Scannlain on the Ninth Circuit

[111] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./diss.); Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).

[112] Although the wider concept of "affirmative action" on civil rights issues has longer roots, dating back at least to *Brown v. Board of Education* (1954) and a 1961 executive order by President John F. Kennedy, affirmative action as a deliberate governmental effort and policy to increase educational and employment opportunities for specific under-represented minority communities mostly first emerged during the early 1970s under the Nixon administration. *See, e.g.*, Anthony M. Platt, *The Rise and Fall of Affirmative Action*, 11 Notre Dame J. L. Ethics & Pub. Pol'y 67, 72 (1997); Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 Cal. L. Rev. 893, 896-97 (1994).

(four times, 1997-2004), Judge Doyle on the Tenth Circuit (three times, 1973-76), and Judge MacKinnon on the D.C. Circuit (four times, including a civil rights case and the Iranian students case, 1970-79).[113] Although his four uses were spread over seventeen years (1949-65), Judge Edgerton of the D.C. Circuit might also represent a somewhat more interesting pattern than most, given that one of his uses was both the first school segregation case and the first use of the "odious distinctions" quote (1950), plus the same quote even earlier in 1949, while a later case involved passport restrictions (1957). Only a small handful of judges ever cited *Hirabayashi* more than four times: Judge Magruder of the First and Emergency Circuits, five times (1943-50, basically all wartime/postwar clean-up, one of those while on the Emergency Circuit); Judge Gewin of the Fifth Circuit, nine times (1969-78, eight standard criminal cases, one case concerning surveillance); Judge Carter of the Ninth Circuit, seven times (1970-73, six of these drug cases, one an immigration case, though three had some civil rights overtones); Judge Bazelon of the D.C. Circuit, seven times (1956-64, all criminal cases/concurrent sentences); and Judge Fahy of the D.C. Circuit, five times (1952-67, four criminal cases plus a passport restriction case). Notable repeat performers from circuits that produced relatively large numbers of *per curiam* opinions also showed up repeatedly among these opinions: for instance, Judges Gewinn (two times), Simpson (three times), and Tuttle (three times) among the Fifth Circuit's nine *per curiam* opinions citing *Hirabayashi.* The D.C. Circuit, which had an uncommonly large number (twenty) of *per curiam* opinions and apparently something of a preference for them, found Judge Bazelon in an additional eleven of them, Judge Fahy in six, Judge Edgerton in three, and Judge MacKinnon in two—along with recurring appearances of other D.C. Circuit judges such as Judge Wilbur K. Miller, Judge Washington, and (then) Judge Warren Burger (who used Hirabayashi three times in his own name, but was a member of six *per curiam* panels, usually as a relatively junior member). Judge Browning of the Ninth Circuit provided no opinions in his own name citing *Hirabayashi*, but was on the panel in four of the Ninth Circuit's twelve *per curiam* opinions, as the senior judge or chief judge in three of those. The *per curiam* format inherently tends to hide whichever panel member, if any, had a special fondness for *Hirabayashi* (or any other case).

Because of the predominance of criminal/concurrent sentences, the relatively few cases involving issues such as civil rights, and the comparative rarity of judges citing *Hirabayashi* more than once for a purpose other than concurrent sentences, it is difficult to track or claim much evidence of judges displaying persistent or repeated interest in *Hirabayashi* for less conventional purposes, although the examples of Judges Rives,

[113] Notably, two of the "Fifth Circuit Four"—Judges Tuttle and Rives—appear on this list. *See* Bass, *The "Fifth Circuit Four"*, *supra* note 63.

MacKinnon, and Edgerton might represent exceptions from the earlier years of *Hirabayashi*'s career. There are also two exceptions of note from the later, post-1980s years. Although there were relatively few repeat performers from the hand-wringing/odious distinctions era, conservative Judge Diarmuid O'Scannlain of the Ninth Circuit cited *Hirabayashi* four times in eight years (three of those in just three years) and used the "odious distinctions" quote each time to call for perfect color-blindness regarding racial and other classifications,[114] and conservative Judge Jerry E. Smith of the Fifth Circuit used *Hirabayashi* similarly twice, in 1996 and 1998.[115]

2.5. HIRABAYASHI: QUOTES

This raises one of the more clearly visible and interesting patterns in the use of *Hirabayashi*: the wholesale embrace of the "odious distinctions" quoted by conservative judges to resist affirmative action programs or initiatives to confront structural racism in the post-1980 period. Although O'Scannlain and Smith, both Reagan judicial appointees, are relatively prominent as repeat performers, they were only salient representatives of a larger trend. Among the many uses of the "odious distinctions" quote for color-blind purposes by the Ninth Circuit from the 1990s onward, O'Scannlain was joined by fellow Reagan appointees Judges Beezer and Noonan, as well as a *per curiam* decision from Judges Hall and Leavy (both Reagan appointees) plus a district judge sitting pro tem. Other Reagan appointees joined in from other circuits: Judge Wollman (Eighth Circuit) and Judge Williams (D.C. Circuit). Other color-blind users of the "odious distinctions" quote from other circuits showed other conservative lineages. On the Fourth Circuit were Judge Niemeyer, appointed a district judge by Reagan, later elevated by Bush (Sr.); Judge Williams, appointed by Bush (Sr.); and Judge Traxler, appointed a district judge by Bush (Sr.) but later elevated to the Fourth Circuit by Clinton. [The Fourth Circuit also produced a full en banc *per curiam* opinion that also recycled the "odious distinctions" quote]. On the Sixth Circuit, Judge Sutton was appointed by Bush (Jr.) and Judge Engel was appointed by Nixon, while Judge Marcus on the Eleventh Circuit was appointed a district judge by Reagan long before being elevated by Clinton.

[114] *See* Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997); *see also* Parents Involved in Community Schools v. Seattle School Dist., No. 1, 285 F.3d 1236 (9th Cir. 2002); *see also* Johnson v. State of California, 321 F.3d 791 (9th Cir. 2003); *see also* Parents Involved in Community Schools v. Seattle School Dist., No. 1, 377 F.3d 949 (9th Cir. 2004).

[115] *See* Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996); United States v. Webster, 162 F.3d 308 (5th Cir. 1998).

Thus, seventeen of the twenty-two clear uses of the "odious distinctions" quote in the post-1980 period, all of them for color-blind purposes, came from partly or entirely Republican-appointed and/or -elevated judges.

The "odious distinctions" quote was also used by some Democratic judicial appointees, sometimes also for color-blind purposes. Judge Tamm, elevated to the D.C. Circuit by Lyndon Johnson but first appointed a district judge by Harry Truman in 1948, invoked the color-blind quote in striking down an affirmative action program not long before he died of old age; it is easy to imagine that an elderly judge whose experiences with civil rights ideas dated back to the strictly color-blind ideology of the late 1940s-early 1960s might have had particular difficulty accepting the concept of affirmative action programs.[116] Judge Robinson, also of the D.C. Circuit, likely represented a different story. Robinson, himself originally a notable African American civil rights attorney like Thurgood Marshall, used the color-blind language of *Hirabayashi* in aid of the defendants in a case involving both racial and national origin profiling of alleged Jamaican drug dealers;[117] it would be interesting to know what he thought of the use of the same language to strike down affirmative action programs. Ninth Circuit Carter appointees (and early female circuit judges) Judges Nelson[118] and Fletcher[119] each respectively used either a partial odious quote in a non-color-blind civil rights case, or issued a color-blind opinion without the quote. Third Circuit Judge Ambro, a Clinton appointee, used a partial odious quote in bemoaning the overall constitutional train-wreck associated with *Hirabayashi* and *Korematsu* in 2015;[120] Eighth Circuit Judge Lay, another Johnson appointee, bemoaned the train-wreck without using the quote in 1987,[121] while the reparations litigation was ongoing and the reparations movement was gathering steam. Judge Prost, a Bush (Jr.) appointee to the Federal Circuit, and Judge Pillard, an Obama appointee to the D.C. Circuit, both used fragments of the quote without the trademark term "odious" in color-blind opinions (2002, 2016).[122]

[116] *See* Steele v. F.C.C., 770 F.2d 1192 (D.C. Cir. 1985).
[117] *See* United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990).
[118] *See* Olagues v. Russoniello, 770 F.2d 791 (9th Cir. 1985).
[119] *See* Scott v. Pasadena Unified School Dist., 306 F.3d 646 (9th Cir. 2002).
[120] *See* Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).
[121] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./diss.).
[122] *See* Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002); Rothe Development Inc. v. United States Department of Defense, 836 F.3d 57 (D.C. Cir. 2016).

For comparison, the five pre-1980 uses of the quote came from three judges, two of them Nixon appointees but perhaps reflecting how Republican judicial appointees of the 1970s and earlier were typically less conservative than Republican judicial appointees from Reagan onward.[123] The very first uses of the entire "odious distinctions" quote came in a 1949 dissent in a naturalization and expatriation case and in a 1950 dissent in an early (and unsuccessful) school desegregation case,[124] both written by D.C. Circuit Judge Edgerton, appointed by Franklin Roosevelt in 1937. Two other pre-1980 uses both came from D.C. Circuit Judge MacKinnon, a Nixon appointee who was once described as being politically to the right of Barry Goldwater,[125] who used the full quote both in a majority opinion in an unsuccessful 1972 school desegregation case and in a dissent to the non-rehearing of the Iranian students case in 1979.[126] The fourth pre-1980 use came in 1975 from a Seventh Circuit Nixon appointee who went on to bigger things: John Paul Stevens.[127]

The twenty-eight complete or partial iterations of the "odious distinctions" quote represented the majority (nearly 61%) of the forty-six opinions (15% of the total 306) that included any quotes from *Hirabayashi.* Next most popular, used nine times, was the "federal power to wage war [successfully]" quote, which appeared almost entirely from 1943 to 1949, but did reappear once much later in 2004. "In most circumstances irrelevant", describing racial/ethnic/national origin classifications, was used four times; "The Constitution [. . .]does not demand the impossible or the impractical", twice; and Justice Douglas' concurrence in *Hirabayashi*, favoring government power in that particular context, also twice. Ten quotes came from the Ninth Circuit, eight from the

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[123] *Compare* Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections,* 64 OHIO ST. L.J. 221, 244 (2003).

> Nixon trial judges are significantly more conservative on economic matters and defendants' rights than their predecessors. Reagan appointees are even more conservative than Nixon as well as Carter judges on criminal issues. And, the relationship is more than simply a party relationship: The particular policy goals of a president are reflected in the decisions of his appointees.

with Robert A. Carp et al., *The Decision-Making Behavior of George W. Bush's Judicial Appointees*, JUDICATURE, July-Aug. 2004, at 20.

> These numbers do not suggest that the decisions of the W. Bush cohort are "off the charts" in terms of their conservative character, but it is fair to say that they are distinctly the most right of center group of judges on record and that they seem to be growing more conservative over time.

[124] *See e.g.*, Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949) (Edgerton, J., diss.); *see also* Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950) (Edgerton, J., diss.).

[125] See generally George MacKinnon,WIKIPEDIA(Jan. 3, 2021, 10:33 PM (UTC)),https://en.wikipedia.org/wiki/George_MacKinnon. Judge MacKinnon was also the father of feminist scholar and theorist Catharine MacKinnon; *see generally Catherine A. MacKinnon,* WIKIPEDIA(Dec. 28, 2021 03:07 AM (UTC))https://en.wikipedia.org/wiki/Catharine_A._MacKinnon

[126] *See* Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (MacKinnon, J., diss.).

[127] *See* Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975).

D.C. Circuit, six from the Fourth and five from the Fifth Circuits, four from the Third and three from the Sixth Circuits, while the First, Eighth, and Federal Circuits quoted *Hirabayashi* twice, the Seventh, Eleventh, and Emergency Circuits once, and the Tenth, never. Aside from Judges O'Scannlain, Smith, and MacKinnon, mentioned above, few judges ever quoted *Hirabayashi* more than once: Third Circuit Judge Goodrich used the federal power to wage war quote twice from 1943-45, and First/Emergency Circuit Judge Magruder made both uses of the constitution not impractical quote in 1943.

2.6. HIRABAYASHI: USE IN CONCURRENCES OR DISSENTS

Judges used *Hirabayashi* in concurrences or dissenting opinions a total of twenty-three times, with sixteen dissents, four concurrences, and three partial concurrences/partial dissents.[128] Twelve of these twenty-three alternate opinions (52.2%) came from the D.C. Circuit alone, including nine dissents, two concurrences, and one partial concurrence/dissent. The Ninth Circuit produced three dissents, two in 1946 and 1949, one much later in 1999. The Fourth and Fifth Circuits each produced two alternate opinions, the Sixth, Seventh, Eighth, and Federal Circuits only one apiece. Five such opinions emerged by 1950 (one Seventh Circuit, two Ninth Circuit, two D.C. Circuit), another fourteen between 1957 and 1980 (nine from the D.C. Circuit, two each from the Fourth and Fifth Circuits, one from the Third Circuit), and four more reflecting the changed understanding of *Hirabayashi* from 1983 onward (one each from the Sixth, Eighth, Ninth, and D.C. Circuits). Only three judges dissented or concurred more than once, all of them from the D.C. Circuit: Judge Edgerton, with two dissents and one concurrence (1949, 1950, 1965), Judge Bazelon (1957, 1969), and Judge Fahy (1957, 1967). Although ten of the alternate opinions were in standard criminal cases involving concurrent sentences, more "interesting" cases were somewhat likelier to draw dissents or concurrences, so the list also includes four civil rights cases, three affirmative action/color-blind cases, two Cold War cases involving passport restrictions or refusal to answer questions regarding Communist affiliations, and two immigration and naturalization cases, among others.

[128] Notably, there were also dissents in two of the reparations cases, both iterations of *Hohri v. United States*, which are not included in the general statistics for reasons explained above. *See supra* note 44.

2.7. HIRABAYASHI: CO-CITING OF OTHER CASES

The citing of other cases involving civil rights or the Japanese American experience were likely to indicate different use of *Hirabayashi* from the standard crime/concurrent sentences context. As usual, circuits that were more active in use of *Hirabayashi* were also more active in using such other cases. Thus, of the cases also citing major civil rights (or constitutional train-wreck) cases such as *Scott v. Sandford*,[129] *Plessy v. Ferguson*,[130] *Bolling v. Sharpe*,[131] *McLaughlin v. State of Florida*,[132] or *Loving v. Virginia*,[133] or other notable Japanese American precedents such as *Ex parte Endo*,[134] *Yasui v. United States*,[135] *Oyama v. California*,[136] or *Takahashi v. Fish & Game Comm'n*,[137] ten such cases were in the D.C. Circuit, twelve in the Fifth, nine in the Ninth, six in the Fourth, three in the Second and Sixth, two in the Third and Seventh, one in the Eighth and Federal Circuits, and none in the First, Tenth, or Eleventh Circuits. Of the forty-eight opinions using any of these other cases, twelve were dissents, and eighteen also invoked the "odious distinctions" quote. *Korematsu* was predictably most popular and closely related to *Hirabayashi*, appearing in twenty-five cases; *Bolling* appeared in thirteen; *Loving* in eleven; *McLaughlin* in six; *Plessy* in nine; *Dred Scott* in two; *Endo* in seven; *Yasui* in three; *Oyama* in two; and *Takahashi* in one case also citing *Hirabayashi.* Twenty-two (45.8%) of these co-citations come in the period after 1983, and many are associated with hand-wringing. Of the nine total invocations of *Plessy*, an especially powerful rhetorical tool, from 1950 to 2015 (1950, 1960, 1969, 1971, 1998, 1999, 2001, 2006, 2015), five came after the 1990s, four of those in a cluster from 1998 to 2006. There was relatively little clustering of such additional cited cases by an opinion-writing judge, though certain judges relatively more concerned with civil rights or writing opinions on more such cases used more co-citations, such as Fifth Circuit Judge Rives, who used *Plessy* in 1960 and *Loving*, *Plessy*, and *Dred Scott* in 1969; D.C. Circuit Judge Robinson, who used *Bolling*, *Loving*, and *McLaughlin* in 1968 and *Korematsu*, *Oyama*, and *Takahashi* in 1990 (the Jamaican drug dealers case); and D.C. Circuit Judge MacKinnon, who used *Korematsu*, *Bolling*, and *McLaughlin* in 1972 and *Korematsu*, *Bolling*, and *Endo* in 1979 (the Iranian students case).

[129] Scott v. Sandford, 60 U.S. 393 (1857).
[130] Plessy v. Furgson, 163 U.S. 537 (1896).
[131] Bolling v. Sharpe, 347 U.S. 497 (1954).
[132] McLaughlin v. State of Florida, 379 U.S. 184 (1964).
[133] Loving v. Virginia, 388 U.S. 1 (1967).
[134] Ex parte Endo, 323 U.S. 283 (1944).
[135] Yasui V. United States, 320 U.S. 115 (1943).
[136] Oyama v. California, 332 U.S. 633 (1948).
[137] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

3. *KOREMATSU* (1944): MIND THE GAP!

3.1. KOREMATSU: USE IN GENERAL, 1945-1980

Leaving aside several reparations-related cases that necessarily included much fuller discussion of the legal and historical background of the Japanese American internment than most other cases, as well as one Ninth Circuit case from early 1944 that discussed only earlier developments in the *Korematsu* litigation before *Korematsu* (1944) was decided, there were 111 federal circuit court cases that included citations of *Korematsu*, four of those including dissents that invoked *Korematsu* along with the majority opinions, for a total of 115 opinions citing *Korematsu* outside the reparations/exoneration context from March 1945 through October 2016.[138] Of these, the First Circuit accounted for five opinions (4.3% of the total of 115), from 1970 to 2014; the Second Circuit produced ten citing cases and twelve citing opinions (10.4%), mostly from 1972-2002, but with a late straggler in 2014; the Third Circuit issued eleven citing opinions (9.6%), 1976-2002, plus a late straggler in 2015; the Fourth Circuit saw eight cases and nine citing opinions (7.8%) between 1970 and 2003; the Fifth Circuit produced seventeen opinions (14.8%), mostly between 1966 and 2001 but with early or late outliers in 1945 and 2011; the Sixth Circuit wrote seven citing opinions (6.1%), all between 1990 and 1998 but for a late straggler in 2014; the Seventh Circuit accounted for five opinions (4.3%), mostly from 1973-1994 with a late outlier in 2008; the Eighth Circuit saw eight citing opinions (7.0%), mostly from 1971 to 1991 but with a late straggler in 2010; the Ninth Circuit produced nineteen cases and twenty citing opinions (17.4%) in clusters from 1946-1950, 1967-75, 1990-2001, and 2014-15; the Tenth Circuit issued three opinions (2.6%) in 1985, 1989, and 2004; the young Eleventh Circuit saw only a single opinion (0.9%) in 1996; the D.C. Circuit wrote sixteen citing opinions (13.9%) in clusters from 1972-79, 1984-1998, and 2010-2016; and the Federal Circuit produced a single opinion in 1989.

[138] The annual usage rate of *Korematsu* (1944), in cases and opinions, is as follows (numbers in parentheses indicating years when cases with multiple citing opinions appeared): 1x 1945 & 1947 & 1949, 2x 1946 & 1950, 0x 1951-1965, 1x 1966 & 1967 & 1969, 2x 1968, 3x 1970, 4x 1971, 6x 1972, 4x 1973, 3x 1974 & 1975 & 1976 & 1977 & 1978 & 1980, 2x 1979 & 1981 & 1982, 0x 1983, 1x 1984 & 1985, 4(5)x 1986, 2x 1987, 1x 1988, 2x 1989, 5(6)x 1990, 1x 1991, 4(5)x 1992, 1x 1993, 3x 1994, 3(4)x 1995, 4x 1996, 1x 1997 & 1999, 2x 1998 & 2000 & 2001 & 2002, 2(3)x 2003, 1x 2004 & 2007 & 2008, 0x 2005 & 2006 & 2009, 2x 2010, 1x 2011 & 2012, 0x 2013, 4x 2014, 2(3)x 2015, 1x 2016.

Perhaps, unlike *Hirabayashi* (1943), which gave only a tentative Supreme Court legal/constitutional stamp of approval to an early phase of the whole internment process (although the case was decided well after the whole internment program was already well underway and was effectively unstoppable)[139]—and which also avoided any outright dissents, largely due to Chief Justice Stone's successful cajoling of an already uneasy Justice Murphy[140]—*Korematsu* (1944), which gave a more final stamp of approval to the proceedings,[141] and which included three ringing, stinging dissents, may have been tacitly recognized by the rest of the American judiciary from an earlier date as something fundamentally heavier, darker, more solemn, and better to avoid. At any rate, unlike *Hirabayashi*, with its active career as an authority justifying federal wartime and general powers even before its primary role as a criminal procedure authority, which saw *Hirabayashi* cited forty-eight times by 1950 and 145 times by the end of 1966, *Korematsu* was cited only seven times (6.1 % of the total 115 opinions) through the end of 1950, then was entirely forgotten by the federal circuits until December 1966—a rather lengthy gap of sixteen years at a time when American civil rights law and issues were developing rapidly, and notwithstanding the U.S. Supreme Court's prominent invocations of *Korematsu* in both *Bolling v. Sharpe* (1954, the companion to the better-known *Brown v. Board*) and *McLaughlin v. Florida* (1964).

All but one of the seven pre-1951 uses of *Korematsu* were in the Ninth Circuit—the original home circuit for the *Korematsu* litigation that also included all previous mid-level appellate activity, and where (possibly earlier-anxious, later perhaps relieved-feeling) local circuit judges likely perceived the Supreme Court's opinion to have justified their earlier actions in the already controversial case. The Ninth Circuit thus had more than

[139] Concerning the historical and political realities confronted by the Supreme Court justices regarding both *Hirabayashi* and *Korematsu*—in particular, the fact that the most the Court could have hoped to accomplish, practically, by reversing either case would have been a largely ineffectual, politically unpopular empty gesture that would have left the Japanese Americans stuck in internment camps through the end of the war, regardless—see, e.g., Dewey, *supra* note 10, at 83-90. Another of history's greatest demonstrations of the actual powerlessness of the U.S. Supreme Court in the face of a tide of public opinion involved another historic mass violation of human rights, the federal government's forcible removal of the Cherokee Nation and neighboring tribes from their ancestral homelands in the southeastern United States in the 1830s, notwithstanding the Court's upholding of the Cherokees' rights in Worcester v. Georgia, 31 U.S. 515 (1832).

[140] Murphy, a former Governor General of the Philippines who was unusually racially progressive and aware for his times regarding Asians and Asian Americans, initially considered dissenting in *Hirabayashi*. Regarding this episode, see Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 Wash. U. L. Rev. 99, 128 (2006). [Murphy, interestingly, also apparently spent much of his adult life in an unofficial, secret, but committed early-day gay marriage to his lifelong partner. This may have given him additional insight and sensitivity regarding marginalized minorities—though if so, the same process apparently didn't happen with his contemporary, the F.B.I.'s J. Edgar Hoover].

[141] Emphasizing the more tentative nature of *Hirabayashi* as against the permanence of *Korematsu*, Justice Jackson, in his *Korematsu* dissent, accused his fellow "brethren" in the majority of having pulled a legal-constitutional bait-and-switch: "The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding". Korematsu, 323 U.S. at 247 (Jackson, J., diss.).

usual reason to wave *Korematsu* around. Four cases from the 1940s (two in 1946, one in 1947 and 1949) all concerned federal war powers and the validity of the relocation orders leading to the internment, in cases involving Japanese Americans who failed to report for military service[142] or sought to renounce their U.S. citizenship,[143] an Anglo radical who violated an order excluding him from the West Coast,[144] and the wartime Alien Property Custodian (in a case involving German- rather than Japanese-owned property that raised questions regarding federal preemption of California state law).[145] Two early Cold War cases that followed in 1950 involved false swearing or refusal to answer questions regarding Communist affiliations.[146] The last of these latter two cases, perhaps somewhat ironically, involved (selective) use of Justice Jackson's dissent to support federal power and judicial restraint in attempting to oversee military authorities: "In the very nature of things, military decisions are not susceptible to intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved".[147] The only other very early use of *Korematsu* came from the Fifth Circuit in 1945 and involved the tamer issues of wartime gasoline rationing and the general federal power to delegate regulatory authority.[148] After its prolonged dormant period from 1950-1966, *Korematsu* finally reappeared and made its initial debut as a civil rights precedent in federal circuit jurisprudence in a December 1966 opinion in a Fifth Circuit case involving school desegregation, *United States v. Jefferson County Board of Education*.[149] The opinion, by Judge John Minor Wisdom, one of the civil rights heroes of the Old Fifth Circuit, ironically confused *Korematsu* with *Hirabayashi*, citing the former for the latter's signal quote: "Classifications based upon race are especially suspect, since they are «odius to a free people»".[150] Notwithstanding this early hiccup, after another early rediscovery of *Korematsu* in a 1967 Ninth Circuit dissenting opinion questioning racial segregation in prisons,[151] the Fifth Circuit provided the next three uses of *Korematsu* through early 1969,[152] in two (successful) civil rights cases involving prison reading materials and equal

[142] *See* Hideichi Takeguma v. United States, 156 F.2d 437, 439 (9th Cir. 1946).
[143] *See e.g.*, Acheson v. Murakami, 176 F.2d 953, 953 n.1 (9th Cir. 1949).
[144] *See e.g.*, DeWitt v. Wilcox, 161 F.2d 785, 787-788, 790-791 (9th Cir. 1947).
[145] *See e.g.*, Allen v. Markham, 156 F.2d 653, 650-660 (9th Cir. 1946).
[146] *See* Alexander v. United States, 181 F.2d 480, 487 n.1 (9th Cir. 1950); Bridges v. United States, 184 F.2d 881, 887 (9th Cir. 1950).
[147] Bridges 184 F.2d at 887, quoting *Korematsu* at 245 (Jackson, diss.).
[148] *See* Randall v. United States, 148 F.2d 234, 235 (5th Cir. 1945).
[149] United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966). The case is sometimes referred to as a 1967 case because it could not have any effective impact until 1967, but the opinion issued on December 29, 1966.
[150] *Id.* at 871 (citing only *Korematsu* at 216, meaning to also cite *Hirabayashi* at 100).
[151] Toles v. Katzenbach, 385 F.2d 107, 110 (Browning, J., diss.).
[152] Regarding the Fifth Circuit's early and visible leadership on civil rights issues even in relatively hostile territory, see *supra* note 63.

employment,[153] along with a Vietnam draft resister's (unsuccessful) case.[154] The latter two civil rights cases basically recited the "*McLaughlin* mantra", from the 1964 Supreme Court opinion in which Justice White pulled various snippets of language from earlier cases such as *Korematsu*, *Hirabayashi*, and *Bolling* out of context and cobbled them together into the high Court's first comprehensive statement of the strict scrutiny standard for racial and other constitutionally suspect classifications.[155] The Vietnam draft case made the sole use of Justice Frankfurter's pro-government concurrence in *Korematsu* to appear in any circuit opinion and summarized Frankfurter's argument: "[C]onsiderations of national defense may render lawful what would be unlawful in a different context".[156]

Thus, most circuits did not rediscover *Korematsu* until 1970 or later. When they did, though, they brought a comparative surge of thirty-seven uses from 1970-1980 (32.2% of the total 115 opinions; almost the same as the number of civil rights-related cases from 1966-1980)—three times a year in almost every year except 1972 (a peak of six uses) and 1971 and 1973 (each with four uses). These were spread across various jurisdictions. The Fourth Circuit came relatively early to the party with four uses (one in 1970, two in 1971, one in 1975); the Third Circuit came relatively late, though actively, with six uses (two in 1976, three in 1978, one in 1980). The Second Circuit arrived relatively early, with four uses (two in 1972, one in 1973 and 1975). The Fifth Circuit added six more uses (two in 1972, 1974, two in 1977, 1980). The Eighth Circuit saw four uses (1971, two in 1974, 1980). The Ninth Circuit added only three, relatively early (1970, 1971, 1975). The D.C. Circuit showed six uses, most relatively early (two in both 1972 and 1973, 1977, 1979). Some other circuits were apparently less impressed. The First (1970, 1976) and Seventh (1973, 1979) Circuits both saw only two uses. The Sixth, Tenth, and Federal Circuits never cited *Korematsu* even once during the pre-1980 Civil Rights era. The Eleventh Circuit did not yet exist.

[153] *See* Jackson v. Godwin, 400 F.2d 529, 537 (Tuttle, J.); *see also* Baker v. City of St. Petersburg, 400 F.2d 294, 295, 297-298 (Wisdom, J.).

[154] *See* Simmons v. United States, 406 F.2d 456, 459 (Ainsworth, J.).

[155] McLaughlin, 379 U.S. at 191-93; *see* Dewey, *supra* note 10, at 118-121 (discussing in detail the linguistic evolution of the strict scrutiny standard in *McLaughlin*). The full McLaughlin mantra reads as follows:

> Normally, the widest discretion is allowed the legislative judgment ***; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. [Citations] But we deal here with a classification based upon the race of the participants which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect", [Bolling v. Sharpe at 499] and subject to the "most rigid scrutiny". [Korematsu at 216], and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, [Hirabayashi at 100].

[156] Simmons v. United States, 406 F.2d 456, 459 (5th Cir. 1969) (citing Korematsu at 224-225 (Frankfurter, J., conc.))].

3.1.1. CIVIL RIGHTS CASES, 1966-1980:

Nearly all circuit cases and opinions citing *Korematsu* in the 1970s concerned civil rights to one degree or another. Only five of the thirty-seven cases did not: four concerned federal powers and constitutionality in the context of the Federal Drivers Act (creating exceptions to the wider Federal Tort Claims Act), the Federal Firearms Act, and the Social Security act; the fifth concerned attorney disciplinary standards. However, of the remaining thirty-two pre-1980 cases and opinions (27.8% of 115 opinions) citing *Korematsu* in which civil rights arguments were raised, usually involving equal protection, in over half the cases (seventeen of thirty-seven opinions, 1966-80; 14.8% of 115 total), the courts rejected such bids to extend civil rights further. Granted, attorneys during the Civil Rights era presumably had an overall incentive to make relatively freewheeling equal protection or other arguments, throw them at the wall of the court, and see which would stick. Some such arguments probably were better than others, while some may have been easier for courts to reject. Yet already from the beginning of the decade, courts appear to have been offering significant push-back to claims for expanded civil rights. Eleven of the cases rejecting civil rights arguments were decided from 1970-74, seven of those just in 1971-72, followed by two in both 1976 and 1977, one in 1979 and 1980. Of the fifteen cases (13% of 115 opinions) that did advance civil rights between 1971 and 1980, nine appeared from 1971-1975, three of those in 1975 alone, followed by two cases in both 1978 and 1980, one in 1977 and 1979.[157]

Although civil rights advocates continued to win some battles among the cases citing *Korematsu*, the overall momentum of civil rights activity appeared to have been somewhat blunted, with fewer numbers of both wins and losses during the second half of the decade—at least judging by this sample of cases in which *Korematsu* usually played a minor role. Notably, five of the seventeen opinions in cases rejecting civil rights claims were dissents in which particular judges invoked *Korematsu* while urging their "brethren" to be more sensitive to the civil rights issues raised, in cases involving rights of draft resisters, privacy rights, gender and equal opportunity in education, free speech, and immigration/nationality (the D.C. Circuit's Iranian students case). Three of those dissents appeared in the later period (1976, 1977, 1979). Among the cases that accepted civil rights claims, there were two dissents: one from the first case on that list, from the

[157] One case was, more than most, arguably both a victory and a loss for civil rights. In Drummond v. Fulton County Dept. of Family and Children's Services, 547 F.2d 835, 852 (5th Cir. 1977), the circuit court reversed the district court's finding that white, would-be adoptive parents of a Black foster child had no fundamental, constitutional rights violated by a local government policy favoring Black adoptive parents for Black foster children. The circuit court thus arguably upheld the rights of the white parents and Black child at the expense of (Black nationalist-derived) "community rights" arguments then in vogue regarding placement of Black foster children.

Fourth Circuit in 1971, concurring and dissenting because the other judges had not adopted an even stronger position in favor of school desegregation; the second, the very last case on the list, from the Third Circuit in 1980, in which a conservative judge criticized his colleagues for accepting a program to aid low-income litigants on only rational basis rather than strict scrutiny grounds. Those two dissents perhaps provide appropriate bookends to the whole decade during which civil rights initially advanced, then gradually stalled.[158]

The 1970-80 civil rights-related cases citing *Korematsu* involved a range of different rights claims and issues, though with a few recurring themes. In nine cases, defendants/parties raised equal protection arguments regarding criminal prosecutions or post-conviction felon status. Six concerned equal employment, mostly regarding race or ethnicity, but with a successful gay (non-military) litigant on the issue also surfacing.[159] Three cases concerned traditional sex/gender discrimination, two of those also concerning equal employment,[160] the other a challenge to an all-male public school.[161] Three cases concerned racial desegregation of schools, the first two earlier and

[158] For an interesting brief discussion of the wider phenomenon of the progress of civil rights stalling, see, e.g., Shaylyn Romney Garrett & Robert D. Putnam, *Why Did Racial Progress Stall in America?*, N.Y. Times, Dec. 4, 2020, https://www.nytimes.com/2020/12/04/opinion/race-american-history.html(briefly summarizing research results from the authors' recent book, Robert D. Putnam and Shaylyn Romney Garrett, The Upswing: How America Came Together a Century Ago and How We Can Do It Again (2020). Garrett and Putnam juxtapose what they present as the established mythology of the Civil Rights movement—no progress on the issues for decades until a sudden upswing in the 1960s—with their findings of gradual but significant progress in earlier decades that began to stall around 1970: "These data reveal a too-slow but unmistakable climb toward racial parity throughout most of the century that begins to flatline around 1970—a picture quite unlike the hockey stick of historical shorthand". Specifically regarding the 1970s, it is possible to see rather clearly, with hindsight, that the process that began in 1968—a majority of Americans gradually turning their backs on President Lyndon Johnson and his relatively aggressive civil rights agenda, and rejecting Democratic presidential candidate Hubert Humphrey, a life-long champion of civil rights, in favor of Republican candidate Richard Nixon, whose "Southern Strategy" of appealing to conservative white southern Democrats and their often pre-civil rights racial attitudes to convert the South to Republicanism tacitly announced that the new administration would be much less aggressive on civil rights matters, regardless of any politically necessary countervailing empty rhetoric to the contrary—ultimately and perhaps almost inexorably led to the election of Ronald Reagan in 1980 on an arch-conservative platform that much more overtly opposed the further extension of civil rights. Ironically, though (and based upon personal experience), because various civil rights battles were still being fought, and some of them even won, during the 1970s, it likely was difficult for civil rights advocates at the time to fully recognize the degree to which the tide already had turned against them by the early 1970s. This meant that the election of Reagan in 1980 came as a greater shock to liberals than it otherwise might have. The overall trajectory of America lurching in an ever more conservative direction since then—under the leadership of the likes of Newt Gingrich, George W. Bush, and Donald Trump, all of whom make Reagan look moderate and Nixon look downright liberal by comparison—is well-known and widely recorded. For more on the already predominantly conservative trajectory of the United States in the 1970s, see, e.g., Edsall & Edsall, *supra* note 18, 74-115.

[159] *See* Van Ooteghem v. Gray, 628 F.2d 488, 500 (5th Cir. 1980).

[160] *See* Struck v. Secretary of Defense, 460 F.2d 1372, 1378 (9th Cir. 1971) (pregnancy in the military); Wood v. Mills, 528 F.2d 321, 323 (4th Cir. 1975) (unequal pay and gender disparity among prison employees).

[161] *See* Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 894 (3d Cir. 1976) (Gibbons, J., diss.).

more traditional (and both unsuccessful),[162] the last of those a challenge by Black students to programs designed to guarantee some fraction of other racial/ethnic backgrounds in particular schools.[163] Other issues, from zoning and redistricting to hair-length ordinances, also made sporadic appearances.

Regarding "wins" or "losses" for civil rights during the 1970s, most "participating" jurisdictions saw some of each. The Third Circuit was somewhat striking, with three "wins" from 1978 onward and only one "loss", the gender equality/education case in 1976 (which drew a dissent).[164] The Fifth Circuit was also striking, with four "wins" and two "losses", all of them spread over time from 1972-1980. The Second Circuit saw two "wins" and one "loss", with one majority opinion in a successful case plus a dissent in the unsuccessful one both contributed by Judge Feinberg (both in 1972). The First Circuit had two cases rejecting civil rights arguments, both authored by Judge Coffin. Those were the only near-patterns visible among opinion-writers citing *Korematsu* during the 1970s (other than Judge Winter of the Fourth Circuit using *Korematsu* both in the 1971 school desegregation concurrence/dissent and briefly in passing in a non-civil rights 1970 case involving the Federal Drivers Act). Returning to civil rights wins or losses at the circuit level, the Seventh and Ninth Circuits had one in each column. The Eighth and D.C. Circuits, along with the First, perhaps showed more clearly the direction the nation was headed as it moved toward the 1980s and the election of Ronald Reagan: the Eighth had only one win and three losses; the D.C. Circuit, one win against five losses in cases involving civil rights claims, with dissents in the last two losses (1977, 1979).

3.2. KOREMATSU: USE IN GENERAL, 1981-2016

There were sixty-three cases (57.8% of 111) and sixty-seven opinions (58.2% of 115) not specifically associated with Japanese American reparations and exoneration that cited *Korematsu* from 1981 to 2016. The First Circuit produced three of these opinions (4.5% of 67) in 1986, 2007, and 2014. The Second Circuit accounted for six cases and eight opinions (11.9%), with two cases (three opinions) in 1986, one case (two opinions) in 1995, and other cases/opinions in 2000, 2002, and 2014. The Third Circuit saw five opinions (7.5%) in 1981, 1990, 1993, 2002, and 2015. The Fourth Circuit saw four cases and five opinions (7.5%) in 1982, 1995, 1996, and 2003 (two opinions).

[162] *See* Wright v. Council of City of Emporia, 442 F.2d 588, 595 (4th Cir. 1971) (Winter, J., diss.); Bulluck v. Washington, 468 F.2d 1096, 1116 (D.C. Cir. 1972).
[163] *See* Johnson v. Board of Ed. of City of Chicago, 604 F.2d 504, 515 (7th Cir. 1979).
[164] *See* Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 894 (3d Cir. 1976) (Gibbons, J., diss.).

The Fifth Circuit, one of the more active users of *Korematsu* in the pre-1981 period, was less so in the post-1980 period, with six opinions (9.0%) appearing in 1982, 1992, 1996, 2000, 2001, and 2011. By contrast, all seven uses of *Korematsu* in the Sixth Circuit (10.4%) were post-1981: in 1990, two in 1992, 1994, 1996, 1998, and 2014. The Seventh Circuit, among the less active users of *Korematsu* pre-1980, saw three additional uses (4.5%) in 1986, 1994, and 2008. The Eighth Circuit saw four of its total of eight uses of *Korematsu* in 1981, 1987, 1991, and 2010 (6.0%). The Ninth Circuit, a relatively major user of *Korematsu* before 1981, remained so after 1980, with nine cases and ten opinions (14.9%), starting after a long gap since 1975 with two cases (three opinions) in 1990, one in 1995, 1997, 1999, 2001, 2003, 2014, and 2015. The Tenth Circuit produced only three opinions (4.5%), all post 1981, in 1985, 1989, and 2004. The Eleventh Circuit's single opinion (1.5%) came in 1996. The D.C. Circuit wrote ten post-1980 opinions (14.9%)—more than half their total of sixteen *Korematsu*-citing opinions, even leaving out the two iterations of the *Hohri* reparations litigation they heard in 1986—in 1984, 1987, 1990, 1992, 1994, 1998, 2010, 2012, and 2016. The Federal Circuit wrote its single *Korematsu*-citing opinion in 1989.

Grouping all the post-1980 cases and opinions together might be slightly misleading, in that of course there were very significant political developments over the course of the 1980s regarding *Korematsu*, *Hirabayashi*, and other Japanese American internment cases from the 1940s: by the early 1980s, especially by about 1983-85, it was already clear that there was "trouble" with the cases, including a growing movement to overturn them and the 1982 congressionally commissioned study that attributed the Japanese American internment to racism;[165] but it wasn't until 1988 that Congress gave federal courts clear instructions as to just what to think about the problematic cases.[166] So to provide more detail: again, leaving aside the important *Hohri* and *Hirabayashi* reparations/exoneration litigation that reached the Ninth and D.C. Circuits during 1986-87, only thirteen of the other sixty-seven post-1980 federal circuit opinions citing *Korematsu* (19.4%) appeared before 1989, and of those, eight (11.9%) came while the *Hohri* and *Hirabayashi* re-litigation was already very visibly underway. The other fifty-four post-1980 opinions—80.6%, and nearly 47% of the 115 opinions citing *Korematsu*—all appeared after Congress's formal apology and reparations in 1988.

[165] Comm'n on Wartime Relocation and Internment of Civilians, Personal Justice Denied 18 (1982), https://www.archives.gov/research/ japanese-americans/justice-denied [readers accessing the website from a country different than the U.S.A. might experience automatic redirection to the homepage of the National Archives website].

[166] *See generally* Civil Liberties Act, 50 U.S.C. app. §§ 1989b–1989b9 (1988) (current version as amended at 50 U.S.C. §§ 4211–4220 (2012 & Supp. III 2015).

The overwhelming majority of the post-1980 cases and opinions—forty-one (65.4% of the sixty-three post-1980 cases, 36.9% of the total of 111 cases citing *Korematsu*)—involved a wide variety of civil rights claims. Another ten post-1980 cases involved federal drug prosecutions that often included potential civil rights implications. Eleven other cases involved other legal issues, including, among others, the Federal Tort Claims Act and qualified immunity, Social Security benefits, destruction of foreign property in the "War on Terror", military veterans whose commanders deliberately exposed them to radiation during early atomic weapons tests, and a challenge to Minnesota's code of judicial conduct, along with three other federal criminal prosecutions.[167]

Most of the ten "ordinary" drug cases apparently were seen by panel majorities as relatively straightforward criminal prosecutions not especially concerning civil rights beyond the usual Fourth Amendment search and seizure issues, but nine of the ten cases drew concurrences or dissents in which a panel member nevertheless raised the specter of improper racial classifications and invoked *Korematsu* for purposes of warning and/or hand-wringing. Five drug cases came from the Sixth Circuit (two in 1992, one in 1990, 1994, and 1996), and four of those included concurrences or dissents (two of each) from Judge Nathaniel R. Jones, an African American jurist who repeatedly and urgently warned against the "War on Drugs" being allowed to repeat the unconstitutional excesses and

[167] Two of the most interesting "other cases" not concerning ordinary civil rights claims were a rare internment/reparations case not involving Japanese Americans (Jacobs v. Barr, 959 F.2d 313 (3d Cir. 1992) and parents' successful civil suit against Hamas for the death of their son at the hands of terrorists (Boim v. Holy Land Foundation for Relief and Development, 549 F.3d 685 (7th Cir. 2008). In the former case, the appellant, a German American citizen born in the United States who had been interned along with his non-citizen father at a (mostly) Japanese American internment camp, asked why he hadn't received reparations. Judge Mikva of the Third Circuit more or less tut-tutted him, noting that Congress had found that only Japanese Americans had suffered violations of their rights, so only they could receive reparations. In the latter case, dissenting Judge Rovner warned:

> The murder of David Boim was an unspeakably brutal and senseless act, and I can only imagine the pain it has caused his parents. Terrorism is a scourge, but it is our responsibility to ask whether it presents so unique a threat as to justify the abandonment of such time-honored tort requirements as causation. Our own response to a threat can sometimes pose as much of a threat to our civil liberties and the rule of law as the threat itself. See, e.g., [*Korematsu*].

549 F.3d at 718-19. In the military veterans radiation exposure case, dissenting Judge Gibbons invoked *Korematsu* in warning against the over-extension of absolute immunity to federal officials. Jaffee v. United States, 663 F.2d 1226, 1252 (3d Cir. 1981). Gibbons' dissent was a relatively early example of a federal judge calling *Korematsu* into question, and remained somewhat indirect and circumspect in doing so:

> In 1949, when Judge L. Hand wrote the *Gregoire* opinion, the notion of absolute official immunity for federal officers probably seemed a politically attractive idea. We had recently fought a war in which many things had been done which were thought necessary for victory, but which with the benefit of hindsight, probably would seem quite inconsistent with our concept of democracy and its traditions of personal integrity and individual freedoms. [See, e.g., [*Korematsu*] (legitimizing wholesale internments of Japanese)]. It was perhaps a fortunate fortuity that the *Gregoire* issue did not reach the Supreme Court for some time.

abuses of an earlier war.[168] In the only Sixth Circuit case in which Judge Jones was not on the panel, the defendants raised, but the panel rejected, what would become the often-repeated argument that federal laws and aggressive prosecution directed at crack cocaine involved improper de facto racial classifications and disparities constituting equal protection violations.[169] The other drug cases appeared in the First Circuit (1986), Fourth Circuit (1982), Fifth Circuit (2000 and 2001), and Eighth Circuit (1991).

3.2.1. CIVIL RIGHTS CASES, 1981-2016:

Returning to the main category of post-1980 cases citing *Korematsu* (cases generally involving civil rights), although judicial pushback against the further spread of civil rights and rejection of rights claims may already have been visible in *Korematsu*-citing cases from the early 1970s onward, that overall trend only intensified after 1980. In twenty-eight of the forty-one civil rights-related post-1980 cases (69.3%), courts rejected equal protection claims, affirmative action initiatives, or other civil rights arguments. Of these rejections, only five appeared from 1982-87, followed by a pronounced cluster of eleven from 1989-96, a still strong but dwindling collection of seven from 1997-2004, and five late strays from 2007-2016 (three of those just in 2014).

Such rejections of civil rights claims were spread throughout the various circuits, though some more than others. [And some circuits that may have been equally active in rejecting civil rights claims may of course have done so without ever invoking *Korematsu* in the process]. The First Circuit saw two post-1980 unsuccessful civil rights cases citing *Korematsu* (2007, 2014); the Second, three (1995, 2000, 2014); the Third, three (1990, 1993, 2002); the Fourth, three (1995, 1996, 2003); the Fifth, two (1982, 1996); the Sixth, none; the Seventh, one (1994); the Eighth, one (1987); the Ninth, four (1990, 1997, 2003, 2014); the Tenth, two (1985, 2004); the Eleventh, one (1996); the D.C. Circuit, five (1984, 1987, 1994, 1998, 2016); and the Federal Circuit, one (1989). Fifteen of the twenty-one cases included dissenting opinions from more rights-conscious judges questioning their bench colleagues: one of the two from the First Circuit, all three from the Second, two of three from the Third, one of three from the Fourth, the only case from the Eighth, three of four from the Ninth, both cases from the Tenth, and two of five from the D.C. Circuit. No patterns in authorship were visible beyond that Judge Betty Fletcher of the Ninth Circuit

[168] *See* United States v. Inman, 902 F.2d 35 (6th Cir. 1990) (Nathaniel R. Jones, J., conc.); United States v. Taylor, 956 F.2d 572, 592 (6th Cir. 1992) (Nathaniel R. Jones, J., diss.); United States v. Harvey, 24 F.3d 795, 799 (6th Cir. 1994) (Nathaniel R. Jones, J., diss.); United States v. Smith, 73 F.3d 1414, 1422 (6th Cir. 1996) (Nathaniel R. Jones, J., conc.).

[169] *See* United States v. Reed, 977 F.2d 584 (6th Cir. 1992).

wrote two of the three rights-conscious dissents, while conservative Judge Lawrence Silberman of the D.C. Circuit wrote two of that circuit's five majority opinions rejecting rights claims.

The rights raised and rejected included a diverse range of issues, though with a few recurring themes. Three cases involved unsuccessful challenges to pre-2000 rules on gays in the military and the Clinton administration's legendarily problematic "Don't Ask, Don't Tell" policy (1989, 1996, 1997),[170] while another case rejected a lesbian applicant's allegation of employment discrimination by the Federal Bureau of Investigation (1987).[171] Four cases involved undocumented immigrants; two of those also specifically concerned denial of health benefits (1990, 2004, two in 2014).[172] Several cases involved prison and prisoner issues, including the availability of prison reading materials in Japanese (1994),[173] prisoners' access to nude photos of loved ones (1995),[174] prisoners classified as special security threats (2002),[175] racial segregation in prison (2003),[176] and prisoners' access to sex-change surgery (2014).[177] Two additional unsuccessful rights claims concerned drug testing of prison staff (1987)[178] and of national security employees (1990).[179] Two cases that produced sharp dissents concerned the rights of enemy combatants in the unending "War on Terror" (2003, 2016).[180]

Of the thirteen cases citing *Korematsu* that saw civil rights claims upheld, seven (over half) appeared in 1990 or earlier, three of those in 1986 alone; while six other cases appeared between 1999 and 2015, three of those just from 2014-2015. Successful cases were limited to fewer circuits: the First, Fourth, Eighth, Eleventh, and Federal Circuits saw none; the Second Circuit had three, two of those finding the court taking a stand on pretrial detention in 1986;[181] the Third Circuit, one, concerning surveillance of Muslim communities as religious discrimination (2015);[182] the Fifth Circuit, one, concerning

[170] *See* Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *see* Thomasson v. Perry, 80 F.3d 915, 927 (4th Cir. 1996); *see also* Philips v. Perry, 106 F.3d 1420, 1439 (9th Cir. 1997) (Fletcher, J., diss.).
[171] *See* Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987).
[172] *See* Flores by Galvez-Maldonado v. Meese, 934 F.2d 991, 1014 (9th Cir. 1990) (Fletcher, J., diss.); Soskin v. Reinertson, 353 F.3d 1242, 1265 (10th Cir. 2004) (health benefits); Korab v. Fink, 797 F.3d 572, 588 (9th Cir. 2014) (health benefits); Maldonado v. Holder, 763 F.3d 155, 174 (2d Cir. 2014) (Lynch, J., dissenting).
[173] *See e.g.*, Kikumura v. Turner, 28 F.3d 592, 599 (7th Cir. 1994).
[174] *See* Giano v. Senkowski, 54 F.3d 1050, 1062 (2d Cir. 1995) (Calabresi, J., dissenting).
[175] *See* Fraise v. Terhune, 283 F.3d 506, 530 (3d Cir. 2002) (Rendell, J., dissenting).
[176] *See* Johnson v. California, 336 F.3d 1117, 1119 (9th Cir. 2003) (Ferguson, J., dissenting).
[177] *See* Kosilek v. Spencer, 774 F.3d 63, 113 (1st Cir. 2014) (Thompson, J., dissenting).
[178] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./dissenting).
[179] *See* Hartness v. Bush, 919 F.2d 170, 175 (3d Cir. 1990) (Edwards, J., dissenting).
[180] *See* Hamdi v. Rumsfeld, 337 F.3d 335, 373, 375-76 (4th Cir. 2003) (Motz, J., dissenting); Bahlul v. United States, 840 F.3d 757, 837 (D.C. Cir. 2016) (Rogers, J., dissenting).
[181] *See* United States v. Melendez-Carrion, 790 F.2d 984, 1004 (2d Cir. 1986); United States v. Salerno, 794 F.2d 64, 74 (2d Cir. 1986); Patrolmen's Benevolent Ass'n. of City of New York v. City of New York, 310 F.3d 43, 53 (2d Cir. 2002).
[182] *See* Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015).

racial preferences in university admissions (and later even upheld by the U.S. Supreme Court!) (2011);[183] the Sixth Circuit, one, finding gun rights for the mentally ill subject to strict scrutiny (2014);[184] the Seventh Circuit, one, finding dismissal of a Korean doctor to require strict scrutiny on racial/ethnic grounds (1986);[185] the Ninth Circuit, three, concerning free speech and public protest, racial balancing at a university laboratory school, and immigration detention/flight risk (1990, 1999, 2015);[186] the Tenth Circuit, one, concerning the Fourth Amendment and search of a home;[187] and two slightly unusual cases from the D.C. Circuit, both written by Judge Robinson, an African American jurist and formerly a distinguished civil rights attorney.

Robinson's two opinions, both of them ultimately based on national origins grounds, are perhaps both somewhat notable as exceptions to overall patterns. The first case, in 1988, involved a clash between freedom of speech and privacy: a newspaper sought to use the Freedom of Information Act to learn the U.S. citizenship status of a medical doctor who later was a prominent figure in the Iranian government. The district court favored the newspaper; the D.C. Circuit reversed, applying strict scrutiny to defeat the First Amendment claim where national origins were concerned.[188] The other case involved federal prosecution of unusually successful and aggressive Jamaican drug dealers. In the district court, expert police testimony as to the drug dealers' alleged Jamaican origins, associations, and characteristic methods and mannerisms was admitted, but the D.C. Circuit, hewing to a strict "color-blind" standard on national origins, applied strict scrutiny and ruled the expert evidence inadmissible.[189] Thus, as with the much later Muslim surveillance case, in which the Third Circuit also applied a strict "color-blind" standard in a situation largely involving ethnic and/or national origins,[190] "color-blind" strict scrutiny could still sometimes be used to affirm civil rights in particular contexts, even as it was being used much more frequently and successfully to torpedo affirmative action programs and other efforts to address structural racism.[191]

[183] *See* Fisher v. University of Texas at Austin, 631 F.3d 213, 248 (5th Cir. 2011) (Garza, J., concurring).
[184] Although the Sixth Circuit had no cases citing *Korematsu* that rejected civil rights claims, their one case citing *Korematsu* that upheld civil rights claims was a peculiar one, applying strict scrutiny to gun rights for mental health patients. Tyler v. Hillsdale County Sheriff's Dept., 775 F.3d 308, 329 (6th Cir. 2014).
[185] *See e.g.*, Doe on Behalf of Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 418 (7th Cir. 1986).
[186] *See* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1232-1233 (9th Cir. 1990); Hunter ex rel. Brandt v. Regents of University of California, 190 F.3d 1061, 1075 (9th Cir. 1999); Rodriguez v. Robbins, 804 F.3d 1060, 1074 (9th Cir. 2015).
[187] *See e.g.*, O'Rourke v. City of Norman, 875 F.2d 1465, 1467 n.1 (10th Cir. 1989).
[188] *See generally* Washington Post Co. v. U.S. Dept. of State, 840 F.2d 26, 35 n.66 (D.C. Cir. 1988).
[189] *See* United States v. Doe, 903 F.2d 16, 21-22 (D.C. Cir. 1990).
[190] *See* Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015).
[191] *See* Gotanda, *supra* note 8; Bedi, *supra* note 8; Washington, *supra* note 8.

Unlike the rights-rejecting post-1980 cases, with their numerous dissents, the post-1980 rights-affirming opinions generated only three dissents invoking *Korematsu*: one, a conservative judge grumbling that a university laboratory school's admissions policies should have been subjected to "color-blind" strict scrutiny;[192] the other two found more conservative judges complaining that their colleagues had no business either invoking *Korematsu* or further extending rights in their majority opinions.[193]

3.3. KOREMATSU: USE AS A PROXY FOR RACIAL CLASSIFICATIONS, AND OTHER USES

Perhaps the single most interesting pair of repeated uses of *Korematsu* in federal circuit court opinions is, more or less, *Korematsu* = race, matched with *Korematsu* = national origin (or ancestry, parentage, lineage, descent, etc.). Because, basically, one is wrong, and the other is right. Legally speaking, *Korematsu* fundamentally was never about just race, or indeed race at all. As we understand matters today, the Japanese are not a separate "race". Nor was the Japanese American internment also targeted at fellow members of the same "race", such as Chinese Americans or Filipino Americans. Legally speaking, Japanese Americans were singled out because of their national origin and/or ancestry, for the same reason that German and Italian nationals of a different "race" from along the Pacific Coast were also interned (although their native-born children mostly were not, which was a key difference with respect to Japanese Americans).[194] The internment, rather obviously, targeted nationalities with which the United States was at war—meaning, in turn, that by definition, the internment was not undertaken *solely* on the basis of national origin or ancestry; it was undertaken based upon that combined with the enemy status of the nations/nationalities in question. The official dual citizenship of a significant number of Japanese Americans, as well as the eagerness with which the Japanese government sought to promote such dual citizenship among Japanese-derived immigrant communities in other nations, including American-born Japanese American United States citizens, caused additional confusion and suspicion and provided some added reasons for including native-born Japanese American citizens

[192] *See e.g.*, Hunter ex rel. Brandt v. Regents of University of California, 190 F.3d 1061, 1075 (9th Cir. 1999) (Beezer, J., dissenting).

[193] *See* United States v. Melendez-Carrion, 790 F.2d 984, 1013 n.5 (2d Cir. 1986) (Timbers, J., dissenting); *see also* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1237 (9th Cir. 1990) (O'Scannlain, J., dissenting).

[194] However, significant numbers of German American and Italian American citizens were also interned along with non-citizen enemy nationals. *See* Alan Rosenfeld, German and Italian Detainees, Densho Encyclopedia, http://encyclopedia.densho.org/German_and_Italian_detainees (last visited Dec. 21, 2020). Rosenfeld notes that of the roughly 11,500 German Americans and 3,000 Italian Americans interned during the war, many were U.S. citizens.

along with Japanese citizens in the internment—even if those reasons proved to be mostly wrong.

The confusion concerning *Korematsu* as being a case about "race" arises from what was effectively an already antiquated use of the term "race" in the *Korematsu* opinions, dating back to the late 1800s (or earlier), when every different nation was described as a separate "race". This is all discussed at greater length elsewhere.[195] Suffice it to say that to describe *Korematsu* simplistically as giving a rule about "race" is simply and fundamentally wrong; to say it concerned national origin and ancestry—as was usually recognized correctly about its companion case, *Hirabayashi*—is quite correct. Federal judges should perhaps have received a clear if tacit signal of that lesson from U.S. Supreme Court Justice Harry Blackmun's opinion in *Graham v. Richardson*,[196] where, following some years of confused lumping of *Korematsu* together with race in Supreme Court jurisprudence based upon the earlier linguistic misunderstanding, Blackmun first subtly indicated that both *Korematsu* and *Hirabayashi* were actually about national origins and ancestry, not race.[197] As the following discussion reveals, many judges apparently never got that message.

From 1966, when the Fifth Circuit reintroduced *Korematsu* into federal circuit court jurisprudence after a long hiatus, through 2014, circuit courts repeated the basic statement that *Korematsu* = race as a suspect classification or target of strict scrutiny (or closely related statements such as, *Korematsu* and *Hirabayashi* = race, *Korematsu* and *Loving v. Virginia* = race, *Korematsu* and *McLaughlin v. Florida* = race, etc.) thirty times, making that legal equation the single most common use of *Korematsu* in its precedential life cycle. It appeared twice in 1968, once in 1970, four times in 1971 (at least two of those long after the opinion in *Graham v. Richardson* came out in June 1971), five times in 1972, twice in 1975 and once in every other year from 1973-1980, followed by later appearances in 1986, 1990, 1998, 2001, 2007, 2011, and twice in 2014.

Between 1972 (probably non-coincidentally just a year after *Graham v. Richardson*) and 1996, fifteen circuit opinions recognized that *Korematsu* = national origins (or ancestry, parentage, "corruption by blood", etc.). Seven of these appeared from 1972-1980 (one in each year except 1975 and 1978), with two additional uses emerging in both 1987 and 1989, single uses in 1985, 1990, 1995, and 1996).

[195] *See generally* Dewey, *supra* note 10.
[196] 403 U.S. 365, 371 nn. 21 & 22 (1971). For more on this particular matter, see Dewey, *supra* note 10, at 123-27.
[197] *See* Dewey, *supra* note 10, at 126-27.

Comparing these two uses, it is perhaps notable that the wrong use appeared twice as frequently as the right one; the wrong one remained stronger and more popular than the right one even after *Graham v. Richardson*; and the right one vanishes from the record after 1996, while the wrong one continued making appearances from 1998-2014.

Circuits seemingly varied in terms of their ability to get the message of *Graham v. Richardson* or, indeed, to actually read and understand *Korematsu* rather than merely absorbing brief, passing (mis)statements taken out of context and inserted into many other legal opinions. The First Circuit, never a major user of *Korematsu*, cited it once for *Korematsu* = race in 2007 (and got it wrong). The Second Circuit got it wrong four times, all after *Graham* (1972, 1973, 1976, 2014), and never got it right once. The Third Circuit, out of two uses, got it right once (1976) and wrong once (1978—after the correct use). The Fourth Circuit got it wrong four times in the 1970s (twice in 1971, once in 1972 and 1975) and right once in 1996. The Fifth Circuit, as usual an active user, got it wrong seven times, mostly in the 1960s-70s (1966, twice in 1968, 1972, 1974, 1977, 2011), right once in 1980. The Sixth Circuit got the matter right once in 1990. The Seventh Circuit got it wrong three times (1972, 1979, 1986). The Eighth Circuit got it wrong twice (1971, 1980) and right twice (1974, 1987—both correct uses came from Judge Lay; both incorrect ones came from different judges). The Ninth Circuit got it wrong five times (1970, 1971, 1975, 2001, 2014), right once in 1995 (by a district judge sitting *pro tem*). The Tenth Circuit got it right twice (1985, 1989). The D.C. Circuit got it wrong three times (1972, 1990, 1998) but right five times (1972, 1973, 1977, 1979, 1987)—though many of the right uses came earlier while wrong ones came later. The Federal Circuit got the definition right once (1989). The Eleventh Circuit didn't participate in this particular game. Interestingly, and perhaps ironically, aside from the First Circuit, those circuits that made relatively little use of *Korematsu* appear to have gotten this particular issue "right" more often than most heavier users.[198]

Relatively few judges had the distinction of having to make this particular distinction more than once. Of those, only Judge Lay of the Eighth Circuit got it right twice (1974, 1987). Judge Cudahy of the Seventh Circuit got it wrong twice (1972, 1986). Judges Wisdom (1966, 1968) and Tuttle (1968, 1977) both got it wrong twice, in the Fifth Circuit where the use of *Korematsu* for considering civil rights claims took root earliest

[198] Given courts' propensity to (sometimes unreflectively) recycle their own language as well as to rotely borrow language from higher courts, more "garbage in the system" typically means more such garbage resurfacing later, sometimes notwithstanding earlier efforts to clean it out; while jurisdictions that mostly never took in a particular sort of "garbage" in the first place do noticeably better at keeping free from it. *See* Dewey, *The Case of the Missing Holding*, *supra* note 16, at 216-218 (discussing the 6th Circuit's singular success at avoiding importation of an unfounded, ill-conceived legal doctrine).

and most deeply, following earlier misleading statements about *Korematsu* and race from Supreme Court opinions predating *Graham*.

In discussing courts and judges getting it "right" or "wrong", in a manner that might seem improperly dismissive, it is worth emphasizing that of course the judges and clerks who produced all these opinions generally were both, very bright and conscientious, as well as very busy, and likely were preoccupied with various other, more salient aspects of the often complex cases they were considering. So the purpose of this particular exercise is not so much to smugly play "Gotcha!" as to point out how, for all the best efforts of court professionals, the "garbage in the system"—the linguistic misunderstanding and misreading of the holding of *Korematsu*, compounded by repetition, simplification, and abstraction out of context—was significantly more stubborn and persistent than a more correct reading (rather like misinformation on the Internet?).[199]

The forty-five "right" or "wrong" uses of *Korematsu* described above already represent 38.3% of the 115 opinions using *Korematsu* in one way or another (with two-thirds of the forty-five, and more than a quarter of the 115, "wrong"). Other uses included twelve invocations of *Korematsu* regarding suspect classifications in general (1970-2000); seven others regarding strict scrutiny (1982 and 1990-2014, suggesting that the judicial recognition and use of "strict scrutiny" as a generic legal term of art may have come a little later than "suspect classifications"); seven invocations of *Korematsu* regarding national/wartime emergencies or pressing public necessity (1967, 1971, 1973, two in 1996, 2010, 2015; interestingly, none in this category from the 1940s); six citations supporting federal war powers, general powers, and the validity of the internment program, all but one from the 1940s; two opinions much later, both from the D.C. Circuit, drawing upon Justice Jackson's "loaded gun" dissent to use *Korematsu* as a basis of support for appropriate suspicion of federal power (2012, 2016); among various others.

[199] The list in the wrong column includes some additional examples, such as Judge Robinson's 1990 opinion (in the Jamaican drug dealers case) that lumps race together with national origin/ancestry indiscriminately (United States v. Doe, 903 F.2d 16, 21-22 (D.C. Cir. 1990)), and a similarly unhelpful 1975 opinion by Judge Oakes similarly lumping *Korematsu* and *Hirabayashi* together to collapse any meaningful distinction between race and ethnic origin (United Jewish Organizations of Williamsburgh, Inc. v. Wilson, 510 F.2d 512, 528 (2d Cir. 1975)). Although a statement may be correct that in a particular case or situation, a distinction between race and national or ethnic origin may be meaningless, a general, sweeping statement to the effect that any distinction between race and national or ethnic origin always is and must be meaningless, may be patently incorrect, both legally and logically. Regarding persistent misinformation, both on the Internet and generally, see, e.g., John Cook, Ullrich Ecker & Stephan Lewandowsky, *Misinformation and How to Correct It*, *in* Emerging Trends in the Social and Behavioral Sciences (Robert Scott & Stephan Kosslyn eds., 2015), *available at* https://www.researchgate.net/profile/Ullrich_Ecker/publication/277816966_Misinformation_and_its_Correction/links/5575066108ae7536374ff554/Misinformation-and-its-Correction.pdf.

A perhaps sort of interesting before-and-after comparison may be found by comparing a Ninth Circuit opinion from 1950, holding that courts inherently cannot judge military necessity,[200] with later opinions holding that, for instance, courts necessarily make major political decisions,[201] or that the Supreme Court frequently decides foreign policy and national security questions.[202]

After the (mis)statement using *Korematsu* as a stand-in for race regarding strict scrutiny, though, by far the most substantial category of use of *Korematsu* came in the post-1980 flurry of hand-wringing over the (finally and belatedly) discredited Japanese American internment. There were twenty-four such uses from 1986-2015, with one in the First Circuit (2014), three in the Second (1986, 1995, 2002), three in the Third (1990, 2002, 2015, the first two both by Judge Wiener), one in the Fourth (2003), three in the Fifth (1992, 2000, 2001), four in the Sixth (1990, 1992, 1994, 1996, all from Judge Jones), one in the Seventh (2008), two in the Eighth (both by Judge Lay) (1987, 2008), three in the Ninth (1990, 1997, 1999), one in the Tenth (2004), and two in the D.C. Circuit (1992, 1994). In four cases, such hand-wringing generated calls from other (usually more conservative) panel members to knock off the hand-wringing, at least in the case at hand: two in the Second Circuit (1986 and 1995), one in the Fourth (2003), and one in the Ninth (1990). Nineteen of the hand-wringings appeared in alternate opinions, mostly dissents (fifteen dissents, one concurrence/dissent); the calling-out of the hand-wringing also involved two dissents and one concurrence.

3.4. KOREMATSU: JUDGES/OPINION WRITERS

Out of a total of ninety-one judges who wrote individual opinions citing *Korematsu*—as usual, leaving out the reparations/exoneration cases of the 1980s, plus another two *per curiam* opinions and a Joint Statement questioning denial of a rehearing—only sixteen judges cited *Korematsu* in more than one opinion, often spaced far enough in time to raise doubts about any pattern, and only three of those sixteen judges used *Korematsu* more than twice: Judge Denman, Ninth Circuit, three times (1947, 1949, 1950); Judge Jones, Sixth Circuit, four times (1990, 1992, 1994, 1996); and Judge Lay, Eighth Circuit, four times (1974, 1981, 1987, 1991). The latter three judges do all tend to show some pattern, and in the cases of Judges Jones and Lay, that appears to go with a heightened overall sensitivity regarding civil rights. Based upon the nature and/or timing of their respective opinions,

[200] *See* Bridges v. United States, 184 F.2d 881, 887, quoting *Korematsu* at 245 (Jackson, diss.).
[201] *See* Northern Kentucky Right to Life Committee, Inc.v. Kentucky Registry of Election Finance, 134 F.3d 371 (6th Cir. 1998) (Ryan, J., conc./diss.).
[202] *See* El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 856 (D.C. Cir. 2010).

the same might be true for some of the "two-timers": Judge Feinberg, Second Circuit (1970, 1972); Judge Fletcher, Ninth Circuit (1990, 1997); Judge Gibbons, Third Circuit (1976, 1981); Judge Robinson, D.C. Circuit (1988, 1990); Judge Wiener, Fifth Circuit (1992, 2000); Judge Winter, Fourth Circuit (1970, 1971), and Judge Wisdom, Fifth Circuit (1966, 1968). It is possible that Judge Tuttle, Fifth Circuit (1968, 1977) and Judge Cudahy, Seventh Circuit (1986, 1994) also should appear on this latter list.[203] Other judges who used *Korematsu* mostly for not especially pro-civil rights purposes include: Judge Coffin, First Circuit (1970, 1976); Judge Roney, Fifth/Eleventh Circuit (1977, 1996); Judge Silberman, D.C. Circuit (1987, 1998); Judge Wilkinson, Fourth Circuit (1996, 2003). Perhaps notably, given the relative popularity of *Hirabayashi* with certain conservative judges in the post-1980 period, *Korematsu* appears never to have gained quite the same currency for enforcing color-blindness and defeating affirmative action. For instance, Judge Jerry Smith of the Fifth Circuit and Judge O'Scannlain of the Ninth Circuit, who respectively used *Hirabayashi* twice and four times for such purposes, each used *Korematsu* only once.

[203] Notably, Judge Tuttle, who might not have especially stood out in this particular list based upon only two widely spaced citations of *Korematsu*, was of course a known and relatively early friend of civil rights. *See* Bass, *The "Fifth Circuit Four"*, *supra* note 63. Judge Wisdom also used *Korematsu* twice (but only twice), situated more closely in time; the other two members of "The Four", Judges Brown and Rives, apparently did not feel the need to cite it more than once.

3.5. KOREMATSU: QUOTES

Thirty-two of the 115 opinions in 111 cases citing *Korematsu* (not counting the three reparations/exoneration cases of the 1980s and an early 1944 case citing only the earlier Ninth Circuit opinion) included or claimed to include quotes from *Korematsu*. Ten of these barely count as quotes, having only one to three words (seven of "most rigid scrutiny";[204] one "constitutionally suspect";[205] one "suspect";[206] one "pressing public necessity"[207]), although at least a few of these include additional paraphrasing ultimately derived from *Korematsu*. Another supposed quote is a quotation of *Hirabayashi* ("odious to a free people") misattributed to *Korematsu*.[208] Still another quotation, from Justice Murphy's dissent, is memorable if brief: "the ugly abyss of racism".[209]

Of the remaining twenty-three separate quotes in twenty-one other opinions, three are repetitions of the Supreme Court's strict scrutiny "mantra" in *McLaughlin*.[210] One of the more popular quotations was the "loaded gun" quotation warning against executive or legislative over-reaching from Justice Jackson's dissent, abbreviated to varying degrees (used four times): "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need".[211] Other quotations from Jackson included: "The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding";[212] "[We] can apply only law, and must abide by the Constitution, or [we] cease to be civil courts and become instruments of [police] policy";[213] "So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination".[214] The list also includes a frankly problematic quote from Jackson's dissent in which Jackson admits that "military

[204] *See, e.g.*, Kills Crow v. United States, 451 F.2d 323, 325 (8th Cir. 1971); Chance v. Board of Examiners, 458 F.2d 1167, 1177 (2d Cir. 1972); United States v. Antelope, 523 F.2d 400, 403 (9th Cir. 1975); Hall v. Pennsylvania State Police, 570 F.2d 86 (3d Cir. 1978); Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810, 820 (4th Cir. 1995).

[205] United States v. Thoresen, 428 F.2d 654, 658 (9th Cir. 1970).

[206] United States v. Doe, 903 F.2d 16, 22 (D.C. Cir. 1990) (again, the Jamaican drug smugglers case).

[207] Toles v. Katzenbach, 385 F.2d 107, 110 (9th Cir. 1967) (Browning, J., dissenting).

[208] *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 871 (citing only *Korematsu* at 216, meaning to also cite *Hirabayashi* at 100).

[209] Maldonado v. Holder, 763 F.3d 155, 174 (2d Cir. 2014) (Lynch, J., dissenting).

[210] *See supra* note 155.

[211] *See, e.g.*, United States v. Brainer, 691 F.2d 691, 700 (4th Cir. 1982) (quoting *Korematsu* at 246 (Jackson, J., diss.)); Washington Post Co. v. U.S. Dept. of State, 840 F.2d 26, 35 n.66 (D.C. Cir. 1988); United States v. Burwell, 690 F.3d 500, 533 n.6 (D.C. Cir. 2012) (providing the entire Jackson "loaded weapon" quote).

[212] Hamdi v. Rumsfeld, 337 F.3d 335, 373 (4th Cir. 2003) (Motz, J., dissenting) (quoting *Korematsu* at 247 (Jackson, J., dissenting)).

[213] Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015) (quoting *Korematsu* at 247 (Jackson, J., diss.)).

[214] Hamdi v. Rumsfeld, 337 F.3d 335, 376 (4th Cir. 2003) (Motz, J., diss.) (quoting *Korematsu* at 245 (Jackson, J., diss.)).

decisions are not susceptible of intelligent judicial appraisal" but that "a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority".[215]

Justice Murphy's stinging, resounding dissent also appeared more than once, and more than briefly. "[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights" (used twice);[216] "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support [and to do otherwise

[215] The entire quote, used in Bridges v. United States, 184 F.2d 881, 887 (9th Cir. 1950), concerning the McCarthy-era prosecution of well-known Australian-born American radical labor leader Harry Bridges for subversive activities and for lying under oath about his Communist sympathies and affiliations, reads as follows:

> In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. * * * I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

In these statements, Jackson appears to acknowledge, at least tacitly, that military decisions sometimes must be made, as well as more overtly recognizing that judges cannot intelligently evaluate them. Jackson then contends that courts cannot be forced to provide constitutional stamps of approval to unconstitutional military actions—even if those military exercises of authority are, in fact, reasonable under the circumstances (and, implicitly, will be undertaken as such in the face of a national crisis). Jackson, here, thus appears to come uncomfortably close, at least for legal and constitutional theorists, to acknowledging the essential powerlessness of the law and the Constitution in the face of military crises or other national emergencies. Although this interesting and ironic feature of Jackson's *Korematsu* dissent has not perhaps drawn as much attention as it probably deserves—possibly because, as with so much other legal language, readers cherry-pick the language they like and pull it out of context without a second thought—it did not escape the notice of legal scholar Eugene V. Rostow, who was more of a radical in the 1940s than in his later years and who clearly read the entire *Korematsu* opinion, including all the dissents, in great detail. Rostow, in a memorably scathing article blasting the Supreme Court for upholding military, legislative, and executive actions associated with the Japanese American internment in *Korematsu*, lavishly praised Justice Murphy's dissent but somewhat lengthily skewered Jackson's dissent as fundamentally absurd and a "fascinating and fantastic essay in nihilism". Eugene V. Rostow, *The Japanese American Cases - A Disaster*, 54 YALE L.J. 489, 510-12 (1945). For a brief discussion of the very interesting life of Harry Bridges, see, e.g., *Harry Bridges: Life and Legacy*, Waterfront Workers History Project, University of Washington Civil Rights and Labor History Consortium, http://depts.washington.edu/dock/Harry_Bridges_intro.shtml (accessed Dec. 22, 2020). Regarding Eugene Victor Rostow, named by his parents after American socialist leader Eugene Victor Debs, and who served in the Roosevelt, Kennedy, and Johnson administrations before, in effect, converting to neoconservatism in his later years and working for the Reagan administration as a director of the Arms Control and Disarmament Agency who was vocally opposed to either nuclear arms control or disarmament, see, e.g., *Eugene V. Rostow*, Wikipedia, https://en.wikipedia.org/wiki/Eugene_V._Rostow (accessed Dec. 22, 2020). The former liberal/radical is remembered as a "Contributor" by the Federalist Society. *Prof. Eugene V. Rostow, Former Dean, Yale Law School*, The Federalist Society, https://fedsoc.org/contributors/eugene-rostow (accessed Dec. 22, 2020).

[216] *See e.g.*, Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981) (quoting *Korematsu* at 240 (Murphy, J., diss.)); Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015) (quoting *Korematsu* at 240 (Murphy, J., diss.)).

would] encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow".[217]

Quotations from the *Korematsu* majority opinion include: "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify [this sort of discriminatory deprivation]"(used twice);[218] "[the Court upheld the order only because it] could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal";[219] "[the Japanese plaintiff was] not excluded from the military area because of hostility to him or his race";[220] "[P]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can";[221] "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect, [and] courts must subject them to the most rigid scrutiny";[222] "there were disloyal members of [the Japanese-American] population, whose number and strength could not be readily ascertained ... such persons ... constituted a menace to the national defense and security, which demanded that prompt and adequate measures be taken against it";[223] and a very lengthy quotation likely used for local self-justification

[217] United States v. Taylor, 956 F.2d 572, 592 (6th Cir. 1992) (Jones, J., dissenting) (quoting *Korematsu* at 234, 240 (Murphy, J., diss.)). Judge Jones, however, notably also included a rather major concession in Justice Murphy's dissent, somewhat similar to the conundrum raised in the problematic quote from Justice Jackson: [That the] "scope of [. . .]discretion [of those waging the war] must, as a matter of necessity and common sense, be wide" (quoting *Korematsu* at 234 (Murphy, J., diss.)). The complete quotation from the Murphy dissent—the second paragraph of that dissent—actually tracks the problematic Jackson quote even more closely:

> In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

Korematsu at 234 (Murphy, J., diss.).

[218] Culver v. Secretary of Air Force, 559 F.2d 622, 636 (D.C. Cir. 1977) (Bazelon, J., diss.) (quoting *Korematsu* at 218); Narenji v. Civiletti, 617 F.2d 745, 754 (D.C. Cir. 1979) (joint statement dissenting against decision not to rehear case en banc) (the Iranian students case).

[219] Culver v. Secretary of Air Force, 559 F.2d 622, 636 (D.C. Cir. 1977) (Bazelon, J., diss.) (quoting *Korematsu* at 219).

[220] Doe on Behalf of Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 418 (7th Cir. 1986).

[221] Fisher v. University of Texas at Austin, 631 F.3d 213, 248 (5th Cir. 2011) (Garza, J., conc.).

[222] Bulluck v. Washington, 468 F.2d 1096, 1116 (D.C. Cir. 1972) (quoting *Korematsu* at 216).

[223] United States v. Smith, 73 F.3d 1414, 1422 (6th Cir. 1996) (Jones, J., conc.) (quoting *Korematsu* at 218). This quote, used by the liberal, pro-civil rights Judge Nathaniel R. Jones, at first glance may disturb civil libertarians, but here it is taken out of context; Jones used the quote only as part of a wider explanation and warning about how the Supreme Court got things terribly wrong in *Korematsu*. Ironically, of course, given the nature of selective cherry-picking of language out of context in the legal profession, this quote could be used in support of the specific point it makes—and it could be made to appear that Judge Jones used it approvingly.

in a 1947 Ninth Circuit opinion concerning an exclusion order applied to a non-Japanese American.[224]

Finally, another quotation from Justice Roberts' dissent that nevertheless, taken out of context, tended to support government authority, was used: "The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended".[225]

After two early quotations in 1947 and 1950, both from the Ninth Circuit, *Korematsu* was not allegedly quoted again until the misattributed quotation from *Hirabayashi* in 1966, then the brief "pressing public necessity" quote in 1967. The *McLaughlin* mantra appeared twice from the Fifth Circuit in 1968, followed by a third appearance from the Fourth Circuit in 1971. Of the fourteen quotations appearing between 1968 and the end of the 1970s, along with the three recitations of the mantra, there were seven of the very brief quotes (six of "most rigid scrutiny", one "constitutionally suspect"), along with both uses of "[n]othing short of apprehension [. . .]"; "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect, [and] courts must subject them to the most rigid scrutiny"; and the out-of-context quote from the Roberts dissent.

Quotation patterns changed abruptly starting in the early 1980s as *Korematsu*, *Hirabayashi*, and the whole Japanese American internment increasingly were called into doubt. Notably, the fourteen opinions after 1980 that quoted *Korematsu* one or more times included all but one of the quotations of Jackson's dissent and all those of Murphy's dissent.

Who did the quoting? The First, Tenth, Eleventh, and Federal Circuits appear never to have quoted *Korematsu* even once. The Second offered only three very brief quotes, two in 1972, the other in 2014. The Third quoted from *Korematsu* twice, once briefly in 1978, later at length from both Jackson's and Murphy's dissents in 2015. The Sixth quoted *Korematsu* twice, in 1992 and 1996, both in dissents or concurrences by Judge Nathaniel R. Jones.

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[224] *See e.g.*, DeWitt v. Wilcox, 161 F.2d 785, 787-788, 790-791 (9th Cir. 1947):

> Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, *Korematsu* was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

[225] United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971) (quoting Korematsu at 231 (Roberts, J., diss.)).

The Seventh quoted *Korematsu* only once, in 1986; the Eighth quoted *Korematsu* twice, once in 1971 with the very brief "most rigid scrutiny", the other time in 1981, the first circuit to quote *Korematsu* in the 1980s and using a critical quotation from Murphy's dissent.[226]

Thus, the other twenty-two of thirty-two quotations all came from just the Fourth, Fifth, Ninth, and D.C. Circuits, four from the Fifth, five apiece from the Fourth and Ninth, and seven from the D.C. Circuit. The Fourth Circuit's two quotations from 1971 included the *McLaughlin* mantra and the uncritical-looking Roberts quote; two of the three between 1982 and 2003 were critical Jackson quotes. Leaving aside the 1966 misquote of *Hirabayashi*, the Fifth recited the *McLaughlin* mantra twice in 1968, then much later, in 2011, used the more resounding, "[P]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can".

The Ninth Circuit quoted *Korematsu* in 1947, 1950, 1967, 1972, and 1975. 1947 saw use of the lengthiest quote in support of government authority; 1950, the slightly perplexing Jackson quotation to the effect that a court should not rubber-stamp military decisions as constitutional, but also cannot stop them. The remaining three quotations were extremely brief, and the Ninth Circuit never quoted *Korematsu* again.

The D.C. Circuit's three quotations of *Korematsu* from before 1980 include "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect, [and] courts must subject them to the most rigid scrutiny" in 1972, and the two uses of "[n]othing short of apprehension ..." in 1977 and 1979. By contrast, of the four quotations of *Korematsu* to appear after 1980 in the D.C. Circuit three were different versions of the Jackson "loaded gun" quote (1988, 2012, and 2016), plus the diminutive, one-word "suspect" (1990).

Other than Second Circuit Judge Feinberg, with two uses of "most rigid scrutiny" in 1972, and Sixth Circuit Judge Jones, with two lengthy quotations in 1992 and 1996, and excluding the 1966 misquote of *Hirabayashi* from the Fifth Circuit and the single-word quote from the D.C. Circuit in 1990, no other judges quoted *Korematsu* even twice.

[226] *See* Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981) (quoting *Korematsu* at 240 (Murphy, J., diss.))

3.6. KOREMATSU: USE IN CONCURRENCES OR DISSENTS

Out of the 115 total opinions in 111 *Korematsu*-citing cases, forty-one opinions (35.7%) were either concurrences or dissents, the overwhelming majority—thirty-six—of those being dissents, plus five concurrences and two partial concurrences/dissents. Only ten of these alternate opinions appeared between 1950 and the end of 1980 (nine dissents, one concurrence); the other thirty-one, more than 75% of the total, came from 1981 onward, all but one from 1985 onward. After somewhat uneven appearances during the 1980s—one in 1985, three in 1986, one in 1987, none in 1988 or 1989, then a cluster of four in 1990—these alternate opinions appeared at an average rate of about one per year from 1991 through 2002, with slight variations (none in 1993, two in 1994, and two in 2000). After another small surge of three opinions in 2003—two of them being a concurrence and a dissent challenging each other in the same case[227]—the engine sputtered somewhat, with only six more such alternate opinions appearing between 2004 and 2016 (and clustered somewhat toward the end of that period).[228]

Generally, in most circuits, such concurrences or dissents were relatively few in number and/or widely scattered in time, showing few repeat performers and seemingly no particular patterns.[229] The partial exceptions are the Third Circuit, with five alternate opinions from 1976-2002 and two of those both dissents by Judge Gibbons (1976, 1981); the Sixth Circuit, in which all four concurrences and dissents, 1990-1996, came from Judge Jones; the Eighth Circuit, in which both alternate opinions, a dissent and a concurrence/dissent, were by Judge Lay (1987, 1991); and the Ninth Circuit, with seven alternate opinions, 1950, 1967, and 1990-2003, with the five dissents from 1990 onward showing a pronounced pattern of more liberal judges challenging more conservative majorities or more conservative judges challenging more liberal majorities, and with two of the more liberal dissents coming from Judge Fletcher.

[227] *See* Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., conc.; Motz, J., diss.).
[228] These last six alternate opinions appeared in 2004, 2008, 2011, 2016, and two in 2014.
[229] [First: 2x 1986, 2014; Second : 5x, 1972, 1986, 1995, 2000 2014; Fourth: two cases with three opinions, two of them answering each other in 2003: 1971, 2003, 2003; Fifth: 3x 2000, 2001, 2011; Seventh 2x 1973 2008; Tenth: 2x 1985, 2004; D.C.: 5x, 1977, 1979, 1986, 1994, 2016; Eleventh & Fed: 0].

3.7. KOREMATSU: USE OF CONCURRENCES OR DISSENTS FROM KOREMATSU ITSELF

Fifteen of the 115 opinions not including the reparations cases drew upon the concurrences or dissents in *Korematsu*. Only three of these appeared before 1981 and included the only citation of Justice Frankfurter's concurrence, supporting federal war powers authority, in any federal circuit opinion (1969),[230] along with the two quotations from the Jackson and Roberts dissents that, taken out of context, appeared to support government authority.[231] From 1981 onward, the other twelve opinions drew only from the more critical language of the sharper dissenting opinions, with four uses of Murphy and nine of Jackson (and one opinion using both of them at some length[232]). Opinions using the *Korematsu* dissents also represented twelve of the thirty-two quotations of *Korematsu*.

3.8. KOREMATSU: DEPTH OF USE

The depth of use of *Korematsu* in circuit court opinions was ranked by eleven (or twelve) different categories: Passing Reference [hereinafter P.R.], in which an opinion mentioned *Korematsu* only briefly in passing for some relatively normal citation purpose; P.R.*, in which an opinion mentioned *Korematsu* briefly in passing to criticize it or raise a warning based upon it; Passing References including very brief Quotes (i.e., "most rigid scrutiny") [hereinafter P.R.(Q.)]; P.R.**, in which an opinion, in passing, chided a P.R.* opinion in the same case or otherwise questioned the propriety of raising *Korematsu* at all in the context of the case; Passing References including slightly more substantial Quotes than with P.R.(Q.)s [hereinafter P.R.Q.]; Quote [hereinafter Q.], indicating a more normal-length quote from *Korematsu*; Substantial, referring to uses of *Korematsu* at some length and depth, though without quotes; Substantial*, like P.R.* indicating the invocation of *Korematsu* to criticize it or warn against it, only more substantial; Substantial Q., including a lengthier quote from *Korematsu*; Substantial+ Q., including both substantial discussion and substantial quote/s; Full Mantra, reciting (nearly verbatim) the language from the Supreme Court's *McLaughlin v. Florida* statement of the strict scrutiny standard, which represents in effect a somewhat more stylized but

[230] *See* Simmons v. United States, 406 F.2d 456 (5th Cir. 1969) (a Vietnam War draft resistance case).
[231] *See* Bridges v. United States, 184 F.2d 881, 887 (9th Cir. 1950) (quoting *Korematsu* at 245 (Jackson, J., diss.)); United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971) (quoting *Korematsu* at 231 (Roberts, J., diss.)).
[232] *See* Hassan v. City of New York, 804 F.3d 277, 307 (3d Cir. 2015).

distinctive version of the P.R.(Q.); and, finally, P.R.(Q.)-Mistake, for the misattribution of the quote from *Hirabayashi.*[233]

The tally of these uses is as follows (and includes how frequently such uses involved co-citations of certain other key cases involving civil rights and/or the Japanese American experience):

- P.R. = fifty-three [includes twenty-six uses of other cases]
- P.R.* = twenty-four [includes six uses of other cases, including 4x *Plessy* and 2x *Dred Scott*]
- P.R.(Q.) = ten [includes eight uses of other cases]
- P.R.** = five [one use of another case, *Plessy*]
- P.R.Q. = two [no other cases co-cited]
- Q. = nine [includes four uses of other cases]
- Substl = two [includes two uses of other cases]
- Substl* = two [includes one use of other cases]
- Substl Q = three [includes two uses of other cases]
- Substl+ Q = four [includes two uses of other cases]
- Full Mantra = three [includes three uses of other cases]
- P.R.(Q.)-Mistake = one [includes one use of other cases]

[233] This "depth of use" analysis is borrowed from a pair of studies of all the citations of works by Michel Foucault over a twenty-five year period in the journal literature produced by library/information science scholars. It represents an effort to overcome what has been a basic flaw of citation analysis ever since the beginning of computer-assisted citation-counting efforts in the 1960s for academic articles—the inability to go beyond raw numbers to check the character, quality, and depth of use of the citation through what bibliometricians refer to as "tiered analysis". See, e.g., Blaise Cronin, *Tiered Citation and Measures of Document Similarity*, 45 J. Am. Soc'y Info. Sci. 537 (1994). [Of course, Westlaw's Depth scale for court opinions already helps with comparative depth analysis, along with other similar systems from other legal information providers. Westlaw's, and Lexis-Nexis/Shepard's systems for tracking positive or negative treatment of court opinions in later citing opinions also generally do a good job of revealing citation "valence"—positive or negative—that traditionally has been lacking from academic citation analysis systems such as the first and best-known, Web of Science]. Such an approach admittedly may produce more useful and interesting results with larger data sets, such as the hundreds of articles citing Foucault, than the more limited data set here. *See* (if so inclined) Scott Hamilton Dewey, *Foucault's Toolbox: Use of Foucault's Writings in LIS Journal Literature, 1990-2016*, 76 J. Documentation 689 (2020); Scott Hamilton Dewey, *(Non-)Use of Foucault's Archaeology of Knowledge and Order of Things in LIS Journal Literature,* 1990-2015, 72 J. Documentation 454 (2016).

P.R.s, by far the dominant category (46.1% of 115 opinions), were spaced fairly evenly in time, with five, 1945-1950, twenty-seven, 1969-1980, and twenty-one, 1982-2014. Use activity of all P.R.(etc.) variants varied somewhat among the circuits, with some visible clustering in certain circuits and across time.

P.R.*s, perhaps a somewhat more historically, politically, and rhetorically interesting category for criticizing *Korematsu*, basically all appeared from 1985 onward, with only two earlier pioneers that gently criticized the opinion appearing in 1973 (a dissent urging fellow panelists to reflect on the "unfortunate ruling in *Korematsu*")[234] and 1981 (in a case involving U.S. service members deliberately exposed to radiation in early atomic weapons tests, the dissent questioned the over-extension of absolute official immunity for federal officers).[235] Only two more P.R.*s appeared in the 1980s (1985 and 1986), followed by a comparative flood of eighteen from 1990-2004 (including at least one such use in every year except 1993 and 1998), then only three later stragglers in 2008, 2014, and 2015. Most circuits produced either zero (Fourth, Eleventh and Federal Circuits), one (Eighth Circuit) or two (First, Second, Sixth, Seventh, Tenth, D.C. Circuits) PR*s, often spaced fairly widely in time, but the Third Circuit had three while the Fifth and Ninth Circuits each had four P.R.*s.

Twenty-one of the twenty-four cases producing P.R.*s involved civil rights claims. Notably, nineteen of the P.R.*s appeared in alternate opinions, including one concurrence and eighteen dissents. Sixteen of these dissents found dissenting judges using *Korematsu* to warn against executive or legislative overreaching and/or improper denial of equal protection or fundamental rights in cases where the majority rejected rights claims. The one concurrence accepted the majority's decision in a drug prosecution, but still worried about *Korematsu*-like excesses in the war on drugs.[236]

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[234] United States v. Fern, 484 F.2d 666, 670 (7th Cir. 1973) (Gordon, District J., diss.)[discussing a federal drug prosecution]

> It is clear from the facts of this case that the search of the appellant's handbag conducted here cannot be brought within the ambit of *Terry*. The mere fact that the appellant fitted a 'behavioral profile' does not constitute probable cause for the search in this case. Moreover, when faced with a heated issue such as this, I think we might reflect on the unfortunate ruling in *Korematsu*, before approving the search in this case.

[235] *See* Jaffee v. United States, 663 F.2d 1226, 1252 (3d Cir. 1981) (Gibbons, J., diss.)

> In 1949, when Judge L. Hand wrote the *Gregoire* opinion, the notion of absolute official immunity for federal officers probably seemed a politically attractive idea. We had recently fought a war in which many things had been done which were thought necessary for victory, but which with the benefit of hindsight, probably would seem quite inconsistent with our concept of democracy and its traditions of personal integrity and individual freedoms. [See, e.g.,[*Korematsu*] (legitimizing wholesale internments of Japanese)]. It was perhaps fortunate that the *Gregoire* issue did not reach the Supreme Court for some time.

[236] *See* United States v. Inman, 902 F.2d 35 (6th Cir. 1990) (Nathaniel R. Jones, J., conc).

Two P.R.*s were in majority opinions finding in favor of rights claimants;[237] one came in a majority opinion rejecting an affirmative action program;[238] and one P.R.* found a conservative judge dissenting from a more liberal majority's upholding of an affirmative action program (and rolling out *Plessy* to help make his point).[239] Only one of the P.R.*s invoked one of the *Korematsu* dissents.[240]

The five P.R.**s, mostly criticizing *Korematsu*'s critics in P.R.*s and also a relatively interesting category (that tended to produce lengthy and sometimes vitriolic discussion), all appeared, relatively evenly spaced, between 1986 and 2003, with two from the Second Circuit (1986, 1995), one each from the Ninth (1990), Eighth (1998), and Fourth (2003) Circuits. Two of the P.R.**s appeared in conservative dissents against more liberal majorities in civil rights cases, one from the Second Circuit concerning pretrial detention based on a determination of dangerousness,[241] and one from the Ninth Circuit concerning free speech, public protest, and appropriate time/manner/place restrictions (and representing conservative Judge O'Scannlain's one invocation of *Korematsu*).[242]

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[237] *See* Patrolmen's Benevolent Ass'n. of City of New York v. City of New York, 310 F.3d 43, 53 (2d Cir. 2002); *see also* Rodriguez v. Robbins, 804 F.3d 1060, 1074 (9th Cir. 2015).

[238] *See* Hopwood v. State of Texas, 78 F.3d 932, 945 n.26 (5th Cir. 1996).

[239] *See* Hunter ex rel. Brandt v. Regents of University of California, 190 F.3d 1061, 1075 (9th Cir. 1999) (Beezer, J., diss.) (also invoking *Plessy*).

[240] *See e.g.*, Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1986) (Calabresi, J. diss.).

[241] *See* United States v. Melendez-Carrion, 790 F.2d 984, 1013 n.5 (2d Cir. 1986) (Timbers, J., diss.)

> These procedural safeguards, including an individual determination of probable cause to believe the defendant has committed a serious crime, an individual detention hearing, the right to counsel, the right to present evidence, the right to cross-examine witnesses, and the burden of "clear and convincing evidence" imposed on the government, were not present in the case of the internment of the Japanese-Americans during World War II. [. . .] Judge Newman's allusion to [*Korematsu*], fails to recognize these significant distinctions. While *Korematsu* indeed may be a regrettable blemish in the history of American jurisprudence, obviously the form of detention authorized under the Bail Reform Act, with its attendant procedural protections, is not such a departure from American ideals of individual liberty.

[242] *See* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1237 (9th Cir. 1990) (O'Scannlain, J., diss.)

> In short, the Coast Guard properly acted in an anticipatory fashion to ensure security and to promote maritime safety. In so doing, it was advancing significant governmental interests through a narrowly-tailored regulation. The majority's implication that a catastrophe must first occur before a sufficient safety-and-security zone may be established is not compelled by the first amendment.11 [FN 11] Ironically, the concurrence considers this view of the government's security interests to be "overblown," yet itself goes on to represent this dissent as concluding that "even speculative security interests are so significant as to justify almost any type of regulation". Ante at 1232. Such an assessment grotesquely mischaracterizes and distorts this dissent. Only a focal length of 150 feet (the spread between seventy-five yards and twenty-five yards) constitutes the entire jurisprudential difference between the majority and the dissent. The three-hour-long safety-and-security zone of seventy-five yards, therefore, is scarcely on an analytical par with the forcible internment of Japanese–Americans during World War II. [. . .] The attempted conflation of this case with *Korematsu* cannot stand; excited references to emotionally charged symbols are of no assistance to good-faith analysis of the relevant constitutional issues.

Other P.R.**s found majority or concurring opinions criticizing a dissenter's allegedly improper use of *Korematsu*, as in a key Fourth Circuit enemy combatants case from the "War on Terror"[243] and a Second Circuit case in which the majority rejected prisoners' claim of a fundamental right to access to nude photos of loved ones.[244] [The fifth case categorized as a P.R.**, though somewhat different from the others, did not fit neatly in any other bin and is interesting enough to deserve some special attention.[245]] Since 2003, there have been no further slap-downs alleging inappropriate waving of the bloody shirt of *Korematsu*.

Of the nine Q.s (1971-2012), two came from the Fourth Circuit (1971, 1982),[246] four from the D.C. Circuit (1972, 1979, 1988, 2012),[247] and one each from the Fifth,[248]

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[243] Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., conc.)

> Moreover, the recharacterizations of the holding in the dissent are manifestly far afield. The panel did not suggest that its holding would apply to any part of the world where American troops might happen to be present.[. . .] There is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in *Korematsu*. These attempts to recharacterize the holding of the panel find no support in the opinion's text itself.

[244] *See* Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1986)

> The dissent's suggestion that our affirmance of a prison regulation barring certain naked pictures from the prison puts us on the damnable path to [*Korematsu*] (upholding an executive order that excluded citizens of Japanese ancestry from restricted areas of the West coast and placed them in relocation centers), is a lyric leap. Courts do not exist to rubber stamp bureaucratic excesses. There is a point where judicial deference to executive or administrative expertise must be denied. Nude pictures of loved ones in a prison setting do not begin to approach that point.

[245] *See e.g.*, Northern Kentucky Right to Life Committee, Inc.v. Kentucky Registry of Election Finance, 134 F.3d 371 (6th Cir. 1998) (Ryan, J., conc./diss.)

> Courts are used to adjudicate "political" issues, as I understand the term, all the time, and in an honorable and wholly appropriate fashion. There is nothing more deeply and honorably rooted in our tradition of constitutional self-government than the people's First Amendment right of access to the court to protect the hard-won political principle of free speech. Surely it is readily apparent that "political" considerations inspired the litigants and their various supporters and detractors in a variety of noteworthy Supreme Court cases-cases, indeed, that have shaped the constitutional landscape. See, e.g., [. . .]; [Brown v. Board]; [Korematsu]; [. . .]. I will not belabor the point, but it seems self-evident to me that while it is obviously improper for judicial decision-making to be colored by political considerations, it is salutary indeed that the litigants can utilize the courts in this country in order to fight "political" battles. Indeed, the lower court itself seemed to recognize this much when it observed, in denying fees to the Registry under section 1988, that the type of challenge brought by the plaintiffs here "draw[s] out the nuances of the guarantees of the First Amendment[. . .]"

[246] *See* United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971) (quoting Korematsu at 231 (Roberts, J., diss.)); United States v. Brainer, 691 F.2d 691, 700 (4th Cir. 1982) (quoting *Korematsu* at 246 (Jackson, J., diss.).

[247] *See* Bulluck v. Washington, 468 F.2d 1096, 1116 (D.C. Cir. 1972) (quoting *Korematsu* at 216); Narenji v. Civiletti, 617 F.2d 745, 754 (D.C. Cir. 1979) (joint statement dissenting against decision not to rehear case en banc) (the Iranian students case); Washington Post Co. v. U.S. Dept. of State, 840 F.2d 26, 35 n.66 (D.C. Cir. 1988); United States v. Burwell, 690 F.3d 500, 533 n.6 (D.C. Cir. 2012).

[248] *See* Fisher v. University of Texas at Austin, 631 F.3d 213, 248 (5th Cir. 2011) (Garza, J., concurring).

Seventh,[249] and Eighth Circuits.[250] These included two dissents and one concurrence, and they invoked Justice Jackson's dissent five times, Justice Murphy's once, and Justice Roberts' once. The eleven Substantial uses of various sorts (1947-2015) included three from the Ninth Circuit (1947, 1950, 1990);[251] two from the Sixth Circuit (both penned by the ubiquitous Judge Jones in 1992 and 1996);[252] two from the D.C. Circuit (1977, 1992);[253] and one each from the Second (1986),[254] Third (2015),[255] Fourth (2003),[256] and Eighth (1987)[257] Circuits. Eight of the eleven Substantials (all but one after 1950) concerned civil rights issues; the other was an unusual (and unsuccessful) German American reparations case from 1992.[258] The Substantials showed two dissents, one concurrence, and one concurrence/dissent, and they invoked Jackson's dissent twice, Murphy's once, and both Jackson's and Murphy's in one case.[259]

3.9. KOREMATSU: CO-CITING OF OTHER CASES

Fifty-one (44.3%) of the 115 opinions citing *Korematsu* (excluding the reparations/exoneration cases, etc.) also cited other cases from the batch of key civil rights cases—*Bolling*, *McLaughlin*, *Loving*, *Plessy*, *Dred Scott*—and/or Japanese American cases—*Hirabayashi, Endo*, *Yasui*, *Oyama*, *Hirabayashi*—that were also checked regarding

[249] *See* Doe on Behalf of Doe v. St. Joseph's Hosp. of Fort Wayne, 788 F.2d 411, 418 (7th Cir. 1986).
[250] *See e.g.*, Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981) (quoting *Korematsu* at 240 (Murphy, J., dissenting)).
[251] *See e.g.*, DeWitt v. Wilcox, 161 F.2d 785, 787-788, 790-791 (9th Cir. 1947); *see* Bridges v. United States, 184 F.2d 881, 887 (9th Cir. 1950); *see also* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1232-1233 (9th Cir. 1990).
[252] *See* United States v. Taylor, 956 F.2d 572, 592 (6th Cir. 1992) (Jones, J., diss.); *see* United States v. Smith, 73 F.3d 1414, 1422 (6th Cir. 1996) (Jones, J., concurring).
[253] *See* Culver v. Secretary of Air Force, 559 F.2d 622, 636 (D.C. Cir. 1977) (Bazelon, J., dissenting) (quoting *Korematsu* at 219); Jacobs v. Barr, 959 F.2d 313 (3d Cir. 1992).
[254] *See* United States v. Melendez-Carrion, 790 F.2d 984, 1004 (2d Cir. 1986).
[255] *See* Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).
[256] *See* Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003) (Motz, J., dissenting).
[257] *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (Lay, J., conc./diss.).
[258] *See* Jacobs v. Barr, 959 F.2d 313 (3d Cir. 1992). *See supra* note 167.
[259] A separate section on the depth of use of *Hirabayashi* was not included in the main text because it was likely less interesting, with an overwhelming number of passing references and fewer other interesting categories, while some potentially more interesting issues likely were addressed by discussing quotations. At any rate, 262 of the 306 opinions citing *Hirabayashi* (85.6%) were in the P.R. (passing reference) range, with eleven of those making two passing references, ten of them giving a brief quote (so, P.R.Q.s). *Hirabayashi* had 31 Q.s, overwhelmingly dominated by the "odious distinctions" quote. Again, leaving aside the richer original 9th Circuit appearance of what would become *Korematsu* (1944) as well as the 1980s exoneration/reparations cases, only ten opinions, by a liberal definition, could be considered to have offered more "Substantial" treatment of *Hirabayashi* (six of these from the 1940s and addressing the issues of those times): *see* O'Neal v. U.S., 140 F.2d 908 (6th Cir. 1944); Ex parte Duncan, 146 F.2d 576 (9th Cir. 1944); Kramer v. U.S., 147 F.2d 756 (6th Cir. 1945); *see* Smith v. U.S., 148 F.2d 288 (4th Cir. 1945); *see* Spaulding v. Douglas Aircraft Co., 154 F.2d 419 (9th Cir. 1946); *see* Atherton v. U.S., 176 F.2d 835 (9th Cir. 1949); *see* Smith v. U.S., 335 F.2d 270 (D.C. Cir. 1964) (Bazelon, J., maj'y; Miller, J., diss.); *see* Fuller v. U.S., 407 F.2d 1199 (D.C. Cir. 1967) (Leventhal, J., maj'y; Fahy, J., diss.); *see* U.S. v. Hooper, 432 F.2d 604 (D.C. Cir. 1970); *see also* Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003) (Motz, J., dissenting).

Hirabayashi. *Hirabayashi* itself was, predictably, unusually popular, appearing nineteen times, either alone with *Korematsu* or along with various other cases on the list. *Bolling*, however, was even more popular, appearing twenty-one times in cases also citing *Korematsu*, while *Loving* is the co-citation champion with twenty-two appearances. *McLaughlin* was co-cited twelve times; *Plessy*, eight times; and *Dred Scott*, only three times, all of those in the Fifth Circuit and all of them along with *Plessy* (1966, 2000, 2001).[260]

The other Japanese American cases, aside from *Korematsu* and *Hirabayashi*, mostly have had more specialized and less salient roles in jurisprudence and citation, and they appear less frequently in association with *Korematsu* as such. However, *Endo*—still an important authority regarding citizenship, naturalization, and loyalty—was co-cited with *Korematsu* five times through 2015.[261] *Takahashi* also appeared five times,[262] *Yasui*[263] and *Oyama*[264] only twice.

Thirty-two of the uses of other cases in conjunction with *Korematsu* appeared from 1945-1979, all but six of those, 1966-1979; the other twenty-two, 1982-2015. Certain co-cited cases gained or lost relative popularity between the two periods. For instance, *Hirabayashi* appeared thirteen times in the earlier period, only six times in the latter period. *Bolling* faded even more dramatically, with seventeen earlier, four later appearances. *Loving* had fifteen earlier, seven later appearances; *McLaughlin* almost vanished in the later period with eleven earlier appearances, one later appearance. *Plessy* and *Dred Scott* gained momentum in the later periods, with three/five and one/two earlier/later appearances, respectively. Overall, the Japanese American cases were mostly rediscovered in the post-1980 period, with earlier/later scores as follows: *Endo*: three/two; *Takahashi*: one/four; *Yasui*: one/one; *Oyama*: zero/two.

As usual, different circuits made differential use of co-cited cases. Some of the usual heavier users of *Korematsu* continued in that capacity: the Third Circuit had five co-citations with other cases (1976-78, 2015); the Fourth Circuit, seven co-citations with other cases (1970-2003); the Fifth, eleven (1945, 1966-2001); Ninth Circuit, ten (1946-1975, 1999, 2014); the D.C. Circuit, six (1972-1992). Other circuits provided co-citations little if at all: First Circuit, once (with *Plessy*, 2014); Second Circuit, three times (1972-75, including

[260] Database searches also bring up situations where particular cases are not being cited, but either earlier or later related cases may be—as with citations of the litigation to exonerate Gordon Hirabayashi that reached the Ninth Circuit by 1987—as well as, in recent years, relatively numerous appearances of names such as Hirabayashi, Korematsu, and Yasui, reflecting the formation and active participation by descendants of earlier Japanese American internment defendants in various public interest organizations committed to civil rights.

[261] Ninth Circuit, 1946, 1949; D.C.Circuit, 1979, 1992; Third Circuit, 2015.

[262] Fourth Circuit, 1975; Seventh Circuit, 1986; D.C. Circuit, 1990; Tenth Circuit, 2004; Ninth Circuit, 2014.

[263] Ninth Circuit, 1946; D.C. Circuit, 1992.

[264] D.C. Circuit, 1990; Fourth Circuit: 1995.

Hirabayashi, *Bolling*, *McLaughlin*, *Loving*); Sixth Circuit, never; Seventh Circuit, three times (1979, 1986, 1994, including only *Bolling*, *Loving*, and *Takahashi*); Eighth Circuit, twice (1971, 1974, including *Bolling*, *McLaughlin*, and *Loving*); Tenth Circuit, twice (1989, 2004, including *Loving* and *Takahashi*); Eleventh Circuit, never; Federal Circuit, once (1989, including *Bolling* and *Loving*).

Few individual judges were repeat players in the co-citation game. The few who cited *Korematsu* together with another targeted case more than once include: Judge Cudahy, Seventh Circuit (1986, 1994, co-citing *Bolling*, *Loving*, and *Takahashi*); Judge Denman, Ninth Circuit (1947, 1949, *Hirabayashi* and *Endo* only); Judge Tuttle, Fifth Circuit (1968, 1977, co-citing *Hirabayashi* (in both), *Bolling* (in both), *McLaughlin*, *Loving*); Judge Winter, Fourth Circuit (1970, 1971, co-citing *Hirabayashi*, *Bolling* (in both), *McLaughlin*, *Loving*, *Plessy*); and Judge Wisdom (1966, 1968, co-citing *Hirabayashi*, *Bolling* (in both), *McLaughlin*).[265]

4. A COMPARISON OF CIRCUIT COURT USES OF *KOREMATSU* AND *HIRABAYASHI* WITH HISTORICAL TRENDS AND SUPREME COURT USES, 1943-2016

This Section offers a wider comparative historical framework for this study by providing a brief summary of the political, social, and cultural history of the postwar United States that set the backdrop for all developments regarding *Korematsu* or *Hirabayashi* at both the Supreme Court and federal circuit court levels.[266] Although some or all of this may only be review for members of the legal community,[267] particularly those who were formerly undergraduate history majors or graduate students in history, this approach, by illuminating the wider context, seeks to prevent the law and legal evolution from hiding in either an ahistorical fantasy land or an "exceptional" purely legal realm where,

[265] Again, Judges Tuttle and Wisdom appear on this list of co-citers, but Judges Brown and Rives do not. *See* Bass, *The "Fifth Circuit Four"*, *supra* note 63.

[266] [Any of the brief, encyclopedic summary here can, of course, be documented and footnoted to death. I haven't done so, but I can].

[267] Anyone who has been a history professor or teacher likely knows not to put too much faith in readers' general historical awareness, though. Plenty of Americans long have, and still do, largely subscribe to Henry Ford's famous statement that "History is bunk". *See generally* H. L. Mencken, A New Dictionary of Quotations on Historical Principles from Ancient and Modern Sources (3th ed. 1946). Mencken gives the short version of the quote that has become best remembered in history. The full quote, from an interview Ford gave to the *Chicago Tribune* in 1916, allegedly reads, "History is more or less bunk. It's tradition. We don't want tradition. We want to live in the present, and the only history that is worth a tinker's damn is the history that we make today". *See* Martin, G. (2014). History is bunk. In *The Phrase Finder online*. Retrieved April 17, 2014 from https://www.phrases.org.uk/meanings/182100.html.

frankly, law too often is happy to reside. A close comparison of relevant time frames both inside and outside the law may, among other things, help to reveal the degree to which outside forces and developments were driving changes in the law—as opposed to assumptions to the contrary within the legal profession.

America's prewar history of discrimination against Japanese Americans, as well as the mounting friction between Japan and the United States over geopolitical issues in China and the Pacific region from the 1930s onward, which culminated in the Japanese attack on Pearl Harbor which in turn triggered the policies and governmental or legal decisions that allowed the Japanese American internment to move forward from early 1942 onward, are relatively lengthy and complex and are discussed in greater detail elsewhere.[268]

After a year of danger and uncertainty for the Allies in 1942 in which the Axis powers reached their respective high-water marks, from 1943-1945, the Allies finally began to roll back the Axis powers in World War II, with ultimate victory looking increasingly inevitable throughout the later years of the war. With final victory and unconditional surrender of Nazi Germany and Imperial Japan secured, ahead of the anticipated schedule, by September 1945 (with the help of the atomic bomb), the United States turned toward the matters of de-commissioning and bringing home millions of service members scattered around the globe, and reintegrating them into everyday life as the nation converted from war production back to a peacetime economy. Peace was shorter-lived than the architects of the new United Nations international organization had dreamed, though, as conflicts over the future of the postwar world arose between the world's last two remaining superpowers, the United States and the Soviet Union. Such friction was quite visible already in Europe by 1947, and grew and spread from there as the two former allies gradually settled into the Cold War, which also broke out into hotter "proxy wars" in the Korean War from 1950-1952 and the Vietnam War from (roughly) 1965-1972. In the United States, as with the earlier aftermath of World War I, Americans launched into a nationwide anti-radical "Red Scare" that included the hunting of alleged pro-Soviet spies and the quelling of domestic radicals and "subversives", culminating in the hysterical red-baiting remembered as McCarthyism. A nuclear standoff between the two superpowers that developed during the 1950s reached a crescendo with the Cuban Missile Crisis of 1962, when the United States and Soviet Union came closer to actual nuclear war than at any time before or later. Thereafter, Cold War tensions eased somewhat.

[268] *See* Dewey, *supra* note 10, at 55-90.

Through the Cold War years, the African American Civil Rights movement was struggling to build upon racial progress achieved gradually during the 1930s-1940s, while encountering stiff headwinds due to the postwar conservative reaction, during which many Americans viewed both labor organizing and racial equality as emblematic of the Spread of International Communism. The Southern Civil Rights movement against legal segregation especially in the American South, led by figures such as Dr. Martin Luther King, Jr., sought both to display Americanism and seize the moral high ground using nonviolent tactics. During the 1950s, key legal victories at the U.S. Supreme Court striking down segregation in particular contexts—such as *Brown v. Board of Education* (1954) and *Browder v. Gayle* (1956) (the Montgomery Bus Boycott case)—unfortunately were followed by limited actual progress on the ground and in some cases were met with resistance, threats and intimidation, and outright violence. The Civil Rights movement continued its non-violent political mobilization while attracting domestic and international media attention. By 1963, the movement was starting to force initially reluctant U.S. federal officials to act more aggressively to promote racial equality. In 1964, the major new Federal Civil Rights Act was passed by Congress, over pro-segregationist Southern legislators' resistance, partly in the name of the recently slain President John F. Kennedy. Other important federal enactments, such as the 1965 Voting Rights Act and the 1968 Fair Housing Act, followed.

By the later 1960s, youth radicalism was visibly on the rise, as well as a nationwide crime wave associated with the unusually large Baby Boom generation reaching late adolescence/young adulthood. Civil rights activism in the Northern inner cities gradually abandoned non-violence in favor of greater militance, as leadership was taken over by younger and more radical leaders. Around the same period, especially from 1967 onward, a youth anti-war movement protesting U.S. involvement in Indochina grew, especially on college campuses. Other protest movements also emerged more visibly: feminism, Brown Power (concerned with Latino civil rights), etc. Young radicals grew more radical and more militant in the anti-war movement up until the Kent State incident of 1970, when U.S. National Guardsmen at an Ohio University campus shot and killed four militant protesters. After a gradual earlier winding down of U.S. involvement in the Vietnam War, the United States withdrew its last forces from Indochina in 1972. Saigon quickly fell to Communist North Vietnamese forces.

1968 already had been a watershed year, in which new federal reforms together with youth radicalism and militance triggered a visibly growing conservative backlash. The assassination of Dr. King in April 1968 brought the worst rioting to the most cities that the nation had ever seen.

Student radicals clashed with Chicago police at the infamous 1968 Democratic Convention. Ultimately, American voters elected President Richard Nixon, a moderate conservative who tacitly promised to slow down the pace of civil rights progress and other reforms, and who, through his "Southern Strategy", began the process of turning conservative Southern Democrats into conservative Southern Republicans.

During the 1970s, civil rights, feminism, environmentalism, and other movements continued to win some victories, yet also gradually lost momentum and faced growing conservative pushback during times of mounting economic troubles. A sense of national frustration helped bring the election in 1980 of popular, arch-conservative President Ronald Reagan, who promised not just to slow but to roll back liberal reforms of the 1960s-1970s. Reagan started that process in earnest during his two terms, while later waves of further increased political conservatism—reflected in the "Contract With America" Congress led by Newt Gingrich after the 1994 midterm elections and the elections of conservative Republican Presidents George W. Bush (2001-2008) and Donald Trump (2017-2021)—confirmed the overall nationwide conservative backlash, while moderate, pro-corporate Democratic Presidents Bill Clinton (1993-2001) and Barack Obama (2009-2017) mostly could only help to slow or moderate the overall conservative trend.[269] The various Republican administrations from Reagan onward also were more successful at placing more, increasingly conservative Republican judges on all levels of the federal bench, helping to lock in Republican political advantages even when Democrats controlled the White House or Congress.

Although *Korematsu* and *Hirabayashi* admittedly might not be the ideal cases to measure the overall performance of the federal judiciary against the political and historical backdrop of the times, nevertheless, use of the two cases by federal circuit courts generally matches the shifts of political winds rather well. Both cases were featured in the post-war clean-up phases, plus the onset of the Cold War. *Korematsu*, as noted earlier, went entirely dormant between August 1950 and December 1966, while *Hirabayashi* saw sporadic uses in the later years of the Cold War as well as occasional early applications to civil rights situations (1950, 1956, 1958, 1959, 1960, most of those dissents and/or defeats for civil rights activists)—but *Hirabayashi* already had shifted into its primary role as a general federal criminal procedure precedent, including prosecutions arising from the 1960s-1970s Boomer crime wave (like *Korematsu* (1943)). *Korematsu* was belatedly rediscovered for civil rights purposes in late 1966; *Hirabayashi* not until 1968;

[269] The historical situation of the Japanese American reparations movement, occurring during the already conservative 1980s when overall civil rights progress was on the defensive at best, is an interesting topic left for an anticipated future study. For a very brief background on "the road to reparations", see Dewey, *supra* note 10, at 91-97.

both of those well after the really hot phase of the Civil Rights movement re-started in 1963-1964, and also a while after the U.S. Supreme Court saliently rediscovered both cases for civil rights purposes in *McLaughlin* in 1964 (and in *Loving* in 1967). Thereafter, both cases saw at least small flurries of use in civil rights contexts during the 1970s, with the federal circuit courts using *Korematsu* little more than, and *Hirabayashi* less than, the Supreme Court itself (although the circuit courts might have been making greater use of other opinions that recycled the *Korematsu* or *Hirabayashi* language without citing them).[270] During the 1980s, and especially after 1988 and congressional apology and reparations, *Korematsu* and *Hirabayashi* both shifted into their primary hand-wringing roles, with *Hirabayashi* eagerly brandished by conservative judges to help batter down affirmative action programs or other efforts to address structural racism, while more liberal judges used *Korematsu*-as-constitutional-train-wreck to warn their more conservative counterparts against excesses in the denial of civil rights. Both *Korematsu* and *Hirabayashi* also saw some rediscovery during the post-2001 "War on Terror". Such circuit uses generally tracked and followed earlier, similar uses by the Supreme Court.

CONCLUSION

In this study, various identifiable data categories have been reviewed systematically, in an effort to provide a more complete picture of the life-cycles of two major, interesting, and problematic Supreme Court cases than might be available through a more conventional narrative study that only cherry-picked anecdotal items of interest. Of course, readers (understandably!) might wish they'd received a cherry-picked (and perhaps more readable) anecdotal treatment instead. Some of the data, hopefully, might be sort of interesting—perhaps regarding the significant (and possibly unexpected?) participation of both *Korematsu* (1943) and *Hirabayashi* in the construction of the postwar edifice of criminal procedure, quite remote from their wider constitutional and civil

[270] Regarding the Supreme Court's use of *Korematsu* from 1964 onward, see *id.* at 118-131. The Supreme Court made notably less use of *Hirabayashi* than the circuits for the concurrent sentences doctrine (ten such uses, 1946-1969, ending with *Benton v. Maryland*, the case that first really called the doctrine into question), but greater use of the opinion for civil rights purposes than the circuits—including ten cases from 1948-1980 (and another seven from 1986-2016) using the "odious to a free people" quote, plus another six from 1971-1974 (and two from 1982-1987) correctly associating *Hirabayashi* with national origin, plus other three cases (other than *McLaughlin*) quoting a misleading quotation from *Hirabayashi*: "racial discriminations are in most circumstances irrelevant and therefore prohibited" (Hurd, 1948; San Antonio, 1973; Parents Involved, 2006). Interestingly, this particular misleading and anachronistic quote from *Hirabayashi* only appears in its entirety one time in the federal circuit court jurisprudence: Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996) (Jerry Smith, J.). [Citations for all Supreme Court cases can be provided if desired].

rights implications; perhaps conservative judges' eager grasping of the color-blind language of *Hirabayashi*, mostly post-1980, as civil rights progress was mostly being beaten to a standstill, is of interest, as is perhaps more liberal judges' hand-wringing over *Korematsu* in the post-1980s period (along with more conservative judges' challenges to that particular rhetorical bludgeon). Perhaps federal circuit courts' total ignoring of *Korematsu* between 1950 and the very end of 1966 (notwithstanding the Supreme Court's pointed flagging of *Korematsu* in key civil rights cases in 1954 and 1964) is of some interest. Perhaps the marked chronological pulsing/clustering patterns of citations of the internment cases in various circuits—which don't always match chronologically between circuits, and which would require additional analysis to try to determine whether such pulsing was endogenous or the result of imported influences from foreign circuits[271]—is of at least some interest. Perhaps the evidence regarding relative "wins" or "losses" on civil rights issues in the 1970s is of some interest. Perhaps the relative surge in the quoting of *Korematsu* dissents, and the co-citing of *Korematsu* or *Hirabayashi* with the likes of *Plessy*—mostly after it was "safe" to do so—may be of some interest. At least in theory, the circuit courts' overall misinterpretation of *Korematsu* (and following of the Supreme Court in doing so) as being a case about "race" when it was really about national origins (in the particular and peculiar context of enemy nationals during wartime), might be of some interest.

Perhaps even some of the rather quaint historical details—like somebody getting busted and imprisoned for Prohibition violations longer after Prohibition had ceased to be the law or the Constitution—might be of interest.[272]

But, perhaps not.

Some other, more inconclusive results—such as efforts to track recurring patterns of citation or quotation by particular federal circuit judges, or other mostly failed efforts to track and detect recurring patterns—likely are of no interest. [Oh, well—it's not for lack of trying].

Yet as indicated earlier, perhaps of most interest for the project overall is the extent to which it was, indeed, the dog that didn't bark.[273]

[271] Regarding the exportation/importation and incorporation of "bad" legal doctrines and holdings between foreign federal circuits, see e.g., Dewey, *The Case of the Missing Holding*, *supra* note 16.

[272] [As always, people with some sense of history may be more inclined to see some modest level of interest where other, normal people don't].

[273] *See* Doyle, *supra* note 43.

This project—really at the Supreme Court level as well as the federal circuit court level—essentially presents a conundrum:

- First, if the Japanese American internment cases were indeed among the most awful, *legal and constitutional* train-wrecks of American history—then why were they not solved, by *legal and constitutional* (i.e., judicial) means, much earlier? [And, at the very latest, in the 1980s, in the *Hohri* litigation—before political, non-judicial branches of government "instructed" the judiciary as to what to think?]
- Secondly, if the whole, tragic and ultimately unnecessary Japanese American internment process of the war years was, nevertheless, legally justifiable (given the unfortunate major gap between what people (and judges) knew at the time, and what we all now (somewhat smugly) recognize with hindsight)—then why did federal judges begin fulminating about it (only) after they received a (notably, inherently political and non-judicial) signal that it was OK to do so?

And—unfortunately—the U.S. federal judiciary has no very satisfactory answer to this conundrum. And no amount of ostentatious hand-waving or hand-wringing, long after the fact, and long after it became "safe" to do so, provides an adequate answer.

This particular study was a study of how the major Japanese American internment cases not only were used, but were not used. And, the many details of the study show that, contrary to whatever might have been anticipated or wished for going into the study, federal circuit courts generally did little or nothing to use the cases to resolve the constitutional problems that federal courts had helped to make—until after non-judicial, political branches of government sought to resolve the problem, very belatedly, and in so doing, told courts what to think about the cases. Basically, circuit courts' uses of the cases tracked both overall trends in politics and history, and earlier signaling uses by the Supreme Court—rather like a delayed-action political weathervane. Rather disappointing?

Yes. [At least for people who believe in the myth of The Law and The Courts as appropriate de facto super-legislatures to (justly and accurately) resolve all human problems. Here, judges and courts only showed any significant awareness of the problem after non-judicial authorities instructed them to do so—and more than forty years too late].

Or to summarize, perhaps more bluntly and brutally: if the (post-John Marshall, *Marbury v. Madison*) judicial super-legislature (as enhanced at various moments in the later nineteenth and twentieth centuries, and raised to an extreme level in the politically dysfunctional recent decades since the 1970s) can solve everything, as they implicitly claim to—why didn't they, in a timely fashion, in the Japanese American internment context? And, alternately—if they can't solve everything: why don't they stop making claims they cannot fulfill, and perhaps go back to being "the least dangerous branch of government" as envisioned by the Constitution's framers?

Notably, and realistically, in response to various later, comfortably post-1970 and post-1988 judges and scholars who wondered aloud how and why the likes of Hugo Black and William O. Douglas—life-long, clearly demonstrated friends of civil rights—could have gone along with *Korematsu* and *Hirabayashi*: perhaps some much wiser and more experienced judges, some of whom had some actual experience in real political life outside the law (in the case of Hugo Black, experience of not one but two World Wars), recognized what was actually politically possible under the bizarre, ugly political and actual realities of total war? In a way that comfortably post-1970 lawyers, judges, and scholars generally cannot?

Such people might be engaging in the classic cognitive-historicist fallacy of imagining that they, suddenly transported back to 1942 with all their smug post-1970 and post-1988 hindsight-fueled awareness magically intact, would have done "right" at the time in a way their more benighted actual denizens of the early 1940s could not.

That is a cute fantasy—but also rather laughable. [Similarly to high-school or college students who might envision themselves as having been antebellum Abolitionists at a time and in places where Abolitionists were not very welcome and perhaps got lynched. Or people who think they readily would have risked life, limb, and all their family members to resist the Nazis when it was so much easier just to go along with the Nazis. Or that Hollywood movie that had a 1990s-vintage American super-carrier transported back in time to deal with the much more rudimentary Japanese 1940s-vintage fleet before Pearl Harbor].

In particular—would people who (somewhat unquestioningly) agreed with whatever Congress said in 1988, after mostly failing to do justice or stick their necks out on the issue in any other way before then, likely somehow have been quite heroically different when the same Congress said something back in the much more charged and dangerous days of 1942?
To put it mildly: probably not.

This is not, of course, to gratuitously bash federal judges, who are and long have been of course mostly very bright, hard-working, conscientious people, as well as their clerks. [Few of the rest of us would do any better in dealing with difficult issues now, and even fewer of us would have done any better back in the crisis/panic period of 1942].

It is, however, to call out the traditional smug ahistoricism and pseudo-timelessness/universality of The Law. [That is, pretending, at any given moment in time, that The Law, in whatever form it arrives at after various political and historical processes, is and always was and will be The Law, and was always supposed to be that way, and is right and true, regardless of whatever particular political and historical processes that formed it]. By this quasi-religious understanding of The Law, both the *Dred Scott* decision, and for that matter the Fugitive Slave Act, were in their day of course The Law, and thus "right" and to be respected and revered, before a long, bloody American Civil War and its aftermath declared them to be, in fact, no longer The Law or "right". The somewhat tortured history of the Japanese American internment cases offers a less bloody, but equally blatant, example of the political re-visioning of what was, in fact The Law and what was, therefore, "right".

There is another, perhaps somewhat disturbing, temporal anomaly associated with the whole legal/constitutional train-wreck of the Japanese American internment and the undoing of it. Although this could of course be purely coincidental, it is nevertheless noteworthy that the congressionally sponsored study that started the process of assembling the evidentiary base, later used to challenge and officially reject the internment began in 1981—after the last two surviving members of the *Korematsu* and *Hirabayashi* Courts, retired former Justices William O. Douglas and Stanley Reed, both passed away at advanced ages in early 1980. [Justice Hugo Black, author of the *Korematsu* opinion, had died earlier in 1971, while Justices Frank Murphy and Robert H. Jackson, the main dissenters in the opinion, both died relatively soon after the Second World War in 1949 and 1954, respectively]. If this specific timing was indeed a factor of any significance—if, in other words, justice had to await the passing of two formerly important men, so that their egos no longer could be bruised—then that potentially represents yet another significant problem for timely "justice under the law" that surfaced in the internment context.[274]

[274] Because most members of the *Korematsu* Court were Roosevelt appointees, it's possible that Republicans in Congress and in the Reagan administration may have had some political incentive to see the internment cases be discredited, also. Although Douglas lived to be eighty-one, Reed lived to be ninety-five—so waiting for him to pass was like waiting for things to come out from under copyright protection. [See Wikipedia for confirmation of all these dates, but others are available as necessary].

To return to the overarching theme of "the banality of evil": this study, and its related predecessor, already have alluded to the problem of chronic historical decontextualization in the law—the law's and legal profession's relative overall obliviousness to the particular historical contexts of particular cases and decisions, as reflected in the lifting of selected facts and resulting legal language from one case and its potential application to what are, on balance, really quite different factual and historical contexts.[275] Perhaps that phenomenon is associated with the banality of evil, and the process of very historically specific—and toxic—cases and opinions getting used and recycled through other, less dangerous court opinions and areas of the law without regard for the specific features that in fact made such precedential cases the sort of great cases that could make bad law, to paraphrase Justice Holmes.

[275] Perhaps a classic example is Eugene V. Rostow's extended harping (in his biting 1945 critique of the *Korematsu* decision, *see supra* note 215) on how any decision in the Japanese American internment cases, in 1942, should have been entirely controlled by the historically and factually quite different situation encountered in *Ex parte Milligan* during the U.S. Civil War. *See Ex parte Milligan*, 71 U.S. 2 (1866); Rostow, *supra* note 215. Rostow's argument may even have been legally correct, at least in theory: the United States had not seen any major threats of invasion or of overthrow of the U.S. federal government between the Civil War and World War II, so legal precedents had not advanced much during the intervening three quarters of a century. But technology, military hardware, and military tactics had advanced a great deal, far ahead of the law. Aircraft, and aircraft carriers, and landing craft designed to deliver soldiers armed with machine guns as well as tanks, did not exist in the 1860s; but they were extensively used by the early 1940s. Rostow's argument, in his article, basically contends that the law should pretend that the 1940s were the same as the 1860s. For an amusing intellectual experiment, readers can consider the absurdity of pretending that the 1950s-1960s, with "Mutually Assured Destruction" by nuclear weapons delivered by aircraft or missiles within minutes, also operated on the same timetable as that which existed in the 1860s. More digitally inclined readers can consider whether not only ICBMs, but also a massive digital/Internet attack by one nation upon another's critical systems, should be judged according to the technological and timeframe standards of *Ex parte Milligan* in the 1860s? It may be absurd to contend such a position in the 2020s; it may even have been absurd for Rostow to contend such a position in the mid-1940s, notably after any invasion threats were already safely laid to rest by a whole lot of U.S. and other Allied service members who, unlike Rostow, didn't have the comfort of being ensconced in a law school or government agency, and many of whom paid with their lives, lacking the luxury of living in worlds of pure intellectual theory or government policy. Notably, Rostow's article appeared during the very brief window of time when the Second World War visibly was drawing to a close, but before the forthcoming Cold War was yet anticipated (i.e., it was easier to make such arguments during the period of (temporarily) relaxing from a former crisis rather than during the onset of a new crisis); this was precisely the same international frame of mind among the Allied nations that produced the initial hopeful dreams for the new United Nations, before those dreams were too soon undone by the newly developing harsh reality of the Cold War. Rostow, who went from being the child of radical socialists (in the early 20th century) to a dutiful New Dealer (1930s-1940s) to somebody who coped with both the Cold War and the 1960s before becoming a neoconservative when the new, altered political reality of post-1980 Reaganite America beckoned, demonstrated that he was nothing if not a political survivor (perhaps even a political opportunist?). [To put it more succinctly and evocatively: Rostow, who rose to be dean of Yale Law School as well as an official of the Reagan administration, rode the various waves of twentieth-century U.S. history like a skilled surfer]. Notably, after his 1945 article, Rostow appears to have abandoned the whole issue of the Japanese American internment and seems never to have revisited it – rather like most of the pre-1980s federal circuit court opinions reviewed in this article. Notably also, *Ex parte Milligan*, decided in 1866, came at a historical moment, and with a corresponding political and rhetorical mindset, when any actual crisis was long past, and when the (re-)United States sought healing and closure from the horrifically bloody events of the early 1860s – including a gradual process of welcoming former rebels and traitors back into the national community. It is perhaps inevitable that facts observed, and decisions made, at moments of outright crisis will look different from facts observed and decisions made after the crisis is past.

Yet, beyond this sort of historical/factual decontextualization, an associated and perhaps even more powerful factor in the conversion of great cases/bad law into more garden-variety, apparently domesticated, recurring legal rubber-stamps on more mundane issues—as seen notably with *Hirabayashi* regarding the concurrent sentences doctrine—is textual/linguistic decontextualization. That is, by the nature and customary working of the law, it is perhaps rather too easy for lawyers, judges, and clerks, in their various briefs, opinions, and bench memoranda, to take some abstracted, decontextualized cluster of words—perhaps found in a legal brief, or some other court opinion, or even a Westlaw headnote—and plug it into a particular slot in a later legal argument in such a fashion that, for example, *United States v. Hirabayashi*—a big, dark case later determined by history to have been part of a monumental mass violation of human rights and of constitutionality—can appear to be no different from a hypothetical, relatively innocuous *United States v. Smith* concerning much lesser issues. Most such lawyers, judges, and clerks, in routinely recycling and perhaps further abstracting *Hirabayashi*'s language and holding regarding concurrent sentences, likely never had to interact more fully or thoughtfully with the full meaning and entirety of *Hirabayashi* and the wider (and darker) reality it represented. [And, as always, busy, hard-working federal judges and clerks wrestling with crowded case dockets usually would have had other, bigger, perhaps more urgent cases, or issues in the same case, requiring more of their time and attention—making a relatively quick rubber-stamp that much more desirable where it seemed appropriate].[276]

Although one might also perhaps question to what extent this abstracting is really a problem, at least regarding certain routine and (supposedly) well-settled legal issues? That is, even if cases and opinions such as *Korematsu* and *Hirabayashi* are later recognized to be extremely regrettable legal/constitutional train-wrecks—does that mean, for example, that *Hirabayashi*'s widely used language/holding regarding concurrent sentences, or any other legal or general statement made in the case, was therefore also fundamentally "wrong"? And, to return briefly to the matter of temporal decontextualization as well: was *Hirabayashi's language*/holding on concurrent sentences, like similar holdings in other cases, legally "right" at least until the Supreme Court in *Benton v. Maryland*, twenty-six years later, suggested that it might in fact be "wrong"?

[276] For a brief reflection from a former judicial attorney on such matters regarding time efficiency, see Dewey, *How Judges Don't Think*, *supra* note 16, at 79-82.

Whatever the ultimate answers to the questions raised in the preceding paragraph, perhaps the main, overarching irony to the whole situation—and to this study—is that, whether "right" or "wrong", either on the truly major issues (like federal executive and/or legislative power in wartime and its ability to trump constitutional rights) or more ancillary issues (like concurrent sentences or probation as an appealable final judgment), toxic train-wrecks such as *Korematsu* and *Hirabayashi* are in fact by now so woven into the fabric of American common law as to be effectively impossible to pull out. That is, the Supreme Court can officially disown and overrule an earlier holding—as it has already done with *Korematsu*,[277] and presumably might do with *Hirabayashi* at some later point[278]—but doing that can in no way undo such opinions' wider, hydraulic (perhaps in some ways corrosive?) overall impacts on the law. An earlier study explained in detail how the Supreme Court's doctrine of strict scrutiny of racial and other suspect classifications, for purposes of Fourteenth (and Fifth) Amendment equal protection analysis, came into being through what were, effectively, judicial rhetorical sleights of hand, primarily in *Bolling* and *McLaughlin*—the selective textual/linguistic and historical/factual abstraction and decontextualization of *Korematsu* and *Hirabayashi*, which (somewhat mystically) transmuted the very fact- and situation-specific holdings of cases concerning wartime emergency infringements upon the civil rights of persons with the misfortune to share national origins with an enemy combatant nation, into a generalized prohibition of consideration of race in virtually any situation, which, in turn, started out as a convenient legal-rhetorical tool for dismantling de jure segregation, but later was wielded enthusiastically by conservatives, in effect, to protect de facto segregation by striking down most affirmative action programs or other initiatives to challenge structural racism for being insufficiently "color-blind".[279] [Which is not even to say that the doctrine of strict scrutiny is necessarily either morally or legally "wrong" in principle, but only to point out that it is in fact legally and constitutionally unfounded

[277] *See e.g.*, Trump v. Hawaii (2017), at 38, https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf. The Supreme Court in 2017 notably followed the misunderstandings of earlier opinions by characterizing *Korematsu* as having been entirely and exclusively about race when, as explained above, it clearly wasn't: "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority" [In other words, the Supreme Court itself, like circuit courts discussed above, ultimately got it "wrong"]. Notably, scholars have argued that although *Korematsu* formally was overturned, it still, unfortunately, survives. *See, e.g.* Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L. J. FORUM 641 (2019). Jamal Greene, *Is Korematsu Good Law?,* 128 YALE L.J. FORUM 629 (2019).

[278] *See, e.g.,*Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N. C. L. REV. 1333 (2010). (May 2010) (calling for full reversal of *Hirabayashi* as with *Korematsu* (and implicitly confirming that *Hirabayashi* has never received the public salience of the better-known *Korematsu*)).

[279] Dewey, *supra* note 10, at 109-123, and 97-131 generally.

according to the interrelated doctrines of precedent and stare decisis that, in theory, control the American common law].[280] The present study tracks and confirms the spread of strict scrutiny doctrine—as well as the original fundamental misunderstanding regarding race and related, decontextualized snippets of language—throughout the various federal circuits, plus other aspects of the Japanese American internment cases taking firm root in the law. As such language gets further abstracted and recycled—including in later court opinions only quoting or citing a later source that recycled the same language without including its earlier origins—connections to original, perhaps tainted sources become ever more difficult to trace.[281] [For instance, any case that cites either *Bolling*, *McLaughlin*, or *Loving* on strict scrutiny, either directly or indirectly, is also already "tainted" by *Korematsu* and *Hirabayashi*, whether it cites them or not]. To track down all of *Korematsu*'s or *Hirabayashi actual* if sometimes indirect impacts on the law since the mid-1940s would require a vast, unwieldy forensic precedential dragnet—monumentally difficult if not absurd in theory, and impossible in actual practice. It is impossible to clean them entirely out of the system, even if we wanted to. That garbage got in, and there's effectively no way of getting it out.

Thus, even if *Korematsu* and *Hirabayashi* are officially cast out as pariahs, their numerous precedential progeny will remain alive and well, and various legal language or principles originating in or advanced by the two cases likely will remain in active circulation—whether "right" or "wrong".

Perhaps all these theoretical complications do not really matter in practice. But if in fact they don't matter, that raises further doubts about whether the doctrines of precedent and *stare decisis* really matter, either.

Which leads to the standard ultimate question for any normal law journal article: "OK—so what do we do now?"

[280] In Australia, another common law nation, the national constitution is different and primarily concerned only with the overall structure of Australia's federal government rather than particular enumerated rights, while Australian judges reportedly offer their decisions in cases with factual and legal reasons, but more briefly and without all the obsessive precedential baggage found in American court opinions. Australian courts thus handle precedent and stare decisis rather differently from American ones. Political power in Australia also remains more focused in the legislative branch, and less so in a judicial super-legislature—as was also the intent and expectation of the Framers of the United States Constitution for the new American nation centuries ago. With its reduced obsession over judicial precedent, as well as parliamentary supremacy, Australian judicial practice notably is more like judicial practice throughout the global majority of nations that are civil law jurisdictions.

[281] This inexorable process of precedential sedimentation in the common law might be thought of as "precedent-laundering", perhaps generally more innocent than but still analogous to money-laundering (passing of tainted assets through the hands of various different holding institutions to help hide their suspect origins in organized crime or similarly unlawful sources). Again, regarding precedential sedimentation in general, see, e.g., Dewey, *The Case of the Missing Holding*, *supra* note 16.

The present study already has revealed itself as not a normal law journal article, being both insufficiently practical or useful, as well as much too long.

Yet at least in theory, pointing out recurring problems and arguable misfirings in the transmission of legal rules, principles, and precedents within America's common law system, should help aid the possibility of discovering better ways to rein in these processes, and so perhaps make the law more truly stable and reliable, and less of a political football or badminton birdie.

Yet a review of the history cautions that, although we might keep our fingers crossed regarding such beneficial reforms, we would probably best not hold our breath.

VOLUME 6 ISSUE 2 NOTES

UNIVERSITY OF BOLOGNA LAW REVIEW

https://doi.org/10.6092/issn.2531-6133/14495

Received: 31 July 2020 | Accepted: 7 Sept. 2020 | Published: 28 Feb 2022

Import Bans on Products from Forced Labor in the Trump Era

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ABSTRACT

On 30 September 2019, the United States prohibited the imports of five products suspected of being made with forced labor from companies all over the world. This article contextualizes these Withhold Release Orders from the perspective of international law and politics. While the Trump Administration's blunt and protectionist trade policy has been widely criticized, this article argues that it might also have created an opening to rethink the multilateral trade regime that prioritizes free trade over the abolishment of forced labor.

KEYWORDS

Withhold Release Orders; Trade; General Agreement on Tariffs and Trade; Import Restrictions; W.T.O.

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INTRODUCTION

On 30 September 2019, the United States (hereinafter U.S.) Customs and Border Protection (hereinafter C.B.P.) issued five Withhold Release Orders (hereinafter W.R.O.s) for garments from the Chinese company Hetian Taida Apparel Co Ltd, gold from artisanal small mines in the Democratic Republic of the Congo (hereinafter D.R. Congo), artisanal rough-cut diamonds from Marange Diamond Fields in Zimbabwe, bone black from Bonechar Carvao Ativado Do Brasil Ltda and disposable rubber gloves from the Malaysian company WRP Asia Pacific Sdn Bhd.[1] This article contextualizes these five W.R.O.s from the perspective of international law and politics. This article first discusses these W.R.O.s (section 1) and their legal basis, section 307 of the Tariff Act (section 2). Section 3 contextualizes the five W.R.O.s in light of international law. Much ink has been shed on the Trump Administration's protectionist trade policy which has paralyzed the World Trade Organization Dispute Settlement Mechanism's (hereinafter W.T.O. D.S.M.) Appellate Body. This body became de-facto non-operational in December 2019 due to the persistent veto of the U.S. on the appointment of new members, but the W.T.O. D.S.M. 's panels are still functioning. It is explained that the five W.R.O.s might be justified under the exception clauses of General Agreement on Tariffs and Trade (hereinafter G.A.T.T.) Articles XX and XXI.[2] While it is unfortunate that the Trump Administration has alienated other World Trade Organization (hereinafter W.T.O.) Members and halted cooperation towards an improved international trade regime, its controversial approach towards trade forces us to think about slavery beyond these exceptions in the G.A.T.T. Finally, section 4 analyzes the five W.R.O.s in light of international politics. It discusses significant world events that have led the C.B.P. to relax some and strengthen other W.R.O.s on products of forced labor in 2020. It is hopeful that the C.B.P. seems to continue to value the concept of international cooperation, which plays a key role in imposing or sustaining import restrictions.

[1] Press Release, C.B.P., C.B.P. Issues Detention Orders Against Companies Suspected of Using Forced Labor (Oct. 1, 2019), https://www.C.B.P..gov/newsroom/national-media-release/C.B.P.-issues-detention-orders-against-companies-suspected-using-forced.

[2] General Agreement on Tariffs and Trade, April 15, 1994, 1867 U.N.T.S. 154.

1. WITHHOLD RELEASE ORDERS

This section discusses each of the five W.R.O.s in turn. First, C.B.P. issued a W.R.O. against Hetian Taida because its textile is allegedly made by forced labour in China.[3] A variety of re-education centers started to mushroom in Xinjiang Uyghur Autonomous Region in 2017.[4] A few months before the W.R.O. was issued, then U.S. Vice President Mike Pence alleged that "Beijing is holding hundreds of thousands, and possibly millions, of Uyghur Muslims in so-called "re-education camps" " at a Ministerial to Advance Religious Freedom.[5] On the same day, then U.S. Secretary of State Michael Pompeo alleged that Uyghurs do not get a chance to tell their stories because "the Chinese Communist Party [. . .] demands that it alone be called God".[6] These concerns were echoed by twenty-two Members of the United Nations Human Rights Council.[7] The Chinese government from its side alleged that the "re-education" of Uyghurs is a component of its "war on terror".[8] Counter-terrorism has often been used as an excuse to blatantly violate human rights.[9] For example, after the Twin Towers fell due to a terrorist attack on 11 September 2001, the U.S. locked up twenty-two innocent Uyghurs captured in Afghanistan, initially without any form of judicial process, in Guantanamo Bay. There is increasingly more evidence – including leaked Chinese Communist Party files – that seem to suggest that the "re-education" facilities are – in fact – prison camps where Uyghurs are forced to work.[10] Forced labor has often been authorized by authoritarian regimes to effect political coercion or education or to punish those who hold or express views contrary to the views endorsed by the ruling government.[11]

[3] US Trade Representative, 2019 Report to Congress on China's W.T.O. Compliance (2020), https://ustr.gov/sites/default/files/2019_Report_on_China%E2%80%99s_W.T.O._Compliance.pdf.

[4] David Brophy, *China's Uyghur Repression,* Jacobin Magazine, May 31, 2018, https://www.jacobinmag.com/2018/05/xinjiang-uyghur-china-repression-surveillance-islamophobia.

[5] Mike Pence, U.S. Vice President, Remarks at Ministerial to Advance Religious Freedom (Jul. 28, 2018), https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/.

[6] Michael Pompeo, U.S. Secretary of State, https://www.state.gov/secretary-of-state-michael-r-pompeo-at-the-release-of-the-2018-annual-report-on-international-religious-freedom/.

[7] Letter from Sally Mansfield, Permanent Representative of Australia to the United Nations Office in Geneva et al., to the President of the Human Rights Council (Jul. 8, 2019), https://www.hrw.org/sites/default/files/supporting_resources/190708_joint_statement_xinjiang.pdf.-k

[8] *China Defends Internment Camps for Uighur Muslims,* Al Jazeera, Oct. 16 , 2018, https://tinyurl.com/2jkx2akb. Michael Dillon, Xinjiang in the Twenty-First Century: Islam, Ethnicity and Resistance 196-7 (2020).

[9] Ashley Terlouw, Angst en Regelgeving. Onderscheid door de Overheid op Grond van Nationaliteit, Afkomst en Religie [Fear and Regulations: Discrimination by the Government on grounds of Nationality, Ethnicity and Religion] 14 (Nijmegen: Wolf Legal Publishers, 2009).

[10] Austin Ramzy & Chris Buckley, "Absolutely No Mercy" Leaked Files Expose How China Organized Mass Detentions of Muslims, New York Times, Nov. 16, 2019, https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html.

[11] Convention concerning Forced or Compulsory Labour, art.1, June 28, 1930, Nr. C105 [hereinafter I.L.O.]; *see* Christopher Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. Int'l L. & Pol. 19, 30 (1975).

Second, the C.B.P. prohibited imports of two scarce resources: artisanally mined gold from D.R. Congo and rough-cut diamonds from Zimbabwe's Marange region. These minerals owe their nicknames "conflict minerals" and "blood diamonds" to the fact that their trade funds civil wars and fuels human rights violations. The abundance of resources is often a source of struggle, and not a source of tremendous opportunities for people on the ground. The government, opposition groups, foreign states, and rebel groups have fought many conflicts to control access to gold and other minerals in the eastern part of D.R. Congo, while the military violently took over the Marange diamond fields in Zimbabwe in 2008.[12] The government of Zimbabwe has protested against the W.R.O. on rough-cut diamonds, noting that it is "a grave and serious attack on Zimbabwe's interests".[13] Similarly, the state-owned Zimbabwe Consolidated Diamond Co. held that it "employs labor in terms of the Labour Relations Act and there is no compromise on that".[14] The Zimbabwean government's interests heavily compromise the obligations in this Act.[15]

These two W.R.O.s are not the first measures that the U.S. has taken to break the spell of Africa's "resource curse ".[16] For example, section 1502 of the Dodd-Frank Act (2010) tried to regulate gold, cassiterite, wolframite, and coltan, their metal derivatives extraction and trade in D.R. Congo and nine adjoining countries.[17] The impact of this section has been minimized under the Donald Trump Administration. The Securities and Exchange Commission announced that it only partly enforces the rules which were established to implement section 1502.[18] This change in policy came after a decision by the relevant U.S. Appeals Court.[19] This court agreed with the U.S. Chamber of Commerce that the requirement to post a statement that their products have "not been found to be "DRC conflict free" " on company websites violated the free speech-rights of companies.

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[12] Farai Maguwu, *Marange Diamonds and Zimbabwe's Political Transition,* 8 J. Peacebuilding Dev. 74, 74 (2005); Stefaan Smis, *The Role of the International Community in Stabilizing the Democratic Republic of Congo (DRC),* 58(2-4) Mededelingen der Zittingen van de Koninklijke Academie voor Overzeese Wetenschappen [Announcements of the Sessions of the Royal Academy for Overseas Sciences] (2012), at 237, 239-244 (Neth.).

[13] Antony Sguazzin, Godfrey Marawanyika & Bill Faries, *Zimbabwe Accuses U.S. of Lying About Diamond-mining Forced Labour*, Bloomberg, Oct. 4, 2019, https://www.bloomberg.com/news/articles/2019-10-04/zimbabwe-accuses-u-s-of-lying-about-diamond-mining-forced-labor.

[14] Ibid.

[15] Lovemore Madhuku, Labour Law in Zimbabwe 12-24 (2015).

[16] Daniëlla A. Dam-de Jong, *The Role of Informal Normative Processes in Improving Governance over Natural Resources in Conflict-Torn States,* 7 Hague J. on Rule L. 219 (2015).

[17] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, para. 1502, 124 Stat. 1376, 2213-2218 (2010).

[18] Michael Piwowar, Chairman U.S. SEC, 'Statement on the Court of Appeals Decision on the Conflict Minerals Rule' (Apr. 7, 2017), www.sec.gov/news/public–statement/piwowar–statement–court–decision–conflict–minerals–rule.

[19] *National Association of Manufacturers, et al.* v. *Securities and Exchange Commission*, 800 F.3d 518; final judgment No. 13-CF-000635 (D.D.C. 3 April 2017).

Third, the workers in Brazil's Bonechar and Malaysia's WRP allegedly work as forced laborers in factories with frequent gas leaks. Contrary to the three W.R.O.s discussed above, both countries had started their own investigations against the targeted companies. The Paraná Public Prosecutor's Office in Maringá investigated allegations regarding forced labor in Bonechar following complaints from the Non-Governmental Organization Gipfor Instituto.[20] The workers were allegedly not able to leave Bonechar's premises. Gipfor had therefore staged a trip to the hospital for the workers to create a safe environment where they could voice their grievances out loud. The founder of Bonechar alleged that a Mexican corporation, its main competitor in the American and European Market, triggered the investigations. The W.R.O. targeting rubber gloves came after investigations by the Malaysia's Labor Department found that WRP had illegally withheld the salaries of its migrant workers from Bangladesh and Nepal, while forcing them to work during breaks and public holidays.[21]

2. LEGAL BASIS

The five W.R.O.s have been issued on the basis of Section 307 of the Tariff Act (1930), which prohibits the importing into the U.S. of any goods, wares, articles and merchandise mined, suspected to be produced or manufactured, wholly or in part by forced labor (and/or indentured labor and/or convict labor) in any foreign country.[22] Forced labor is defined in the Act as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily". While this definition was modeled after the International Labour Organisation's [hereinafter I.L.O.] Forced Labor Convention (1930), the drafters of Section 307 were primarily economically motivated.[23]

[20] *See* Walter Tele, *Supostos Trabalho Escravo e Crime Ambiental em Fábrica de Carvão Ativado em Maringá Geram Inquéritos no Ministério Público. Concorrência Internacional Teria Motivado Denúncias [Alleged Slave Labor and Environmental Crimes in an Activated Coal Plant in Maringá Bring Forth a Public Investigation. International Competition Would Have Made the Accusations]*, Maringá Post, Jun. 11, 2018, https://maringapost.com.br/negocios/2018/06/11/suposto-trabalho-escravo-e-crime-ambiental-em-fabrica-de-carvao-ativado-em-maringa-geram-inqueritos-no-ministerio-publico-concorrencia-internacional-teria-motivado-denuncias/.

[21] *See* Jason Santos, Labour Department Monitoring Wage Payments to Workers of Liquidated Glove Maker, Free Malaysia Today, Jan. 7, 2020, https://www.freemalaysiatoday.com/category/nation/2020/01/07/labour-dept-monitoring-wage-payments-to-workers-of-liquidated-glove-maker/.

[22] Tariff Act, ch. 497, para. 307, 46 Stat. 590, 689-90 (1930) (codified as amended at 19 U.S.C. §1307 (2000).

[23] Convention concerning Forced or Compulsory Labour, June 28, 1930, Nr. C029 [hereinafter I.L.O.]; Christoper Casey, Cathleen Cimino-Isaacs & Katarina O'Regan, Section 307 and Import Produced by Forced Labour, 1 (2020), https://crsreports.congress.gov/product/pdf/IF/IF11360.

Section 307 aimed to protect U.S. producers from competing with foreign producers that have made their merchandise exceedingly low cost due to exploitation.

In February 2016, former President Barack Obama signed an Act that relaxed the rules to impose W.R.O.s. The Trade Facilitation and Trade Enforcement Act (2015) repealed the "consumptive demand" clause in Section 307.[24] This clause had often prevented W.R.O.s from being imposed because it allowed imports of certain forced labor-produced goods if the goods were not produced "in such quantities in the U.S. as to meet the consumptive demands of the U.S.".

C.B.P. regulations determine that any port director or other principal Customs officer shall communicate their belief that merchandise (likely to be) imported in the U.S. falls within the ambit of Section 307 of the Tariff Act to the Commissioner of C.B.P.[25] Any other person may also communicate such belief to any port director or Commissioner of C.B.P. The Commissioner of C.B.P. (or their designated representative) will start an investigation "as appears to be warranted by the circumstances of the case". Any representations offered by foreign interests, importers, domestic producers, or other interested persons are to be considered. If the Commissioner of C.B.P. finds at any time that information available "reasonably but not conclusively" indicates that merchandise within the purview of Section 307 is being, or is likely to be, imported, it will be withheld. These findings are then published in the weekly issue of the Customs Bulletin and in the Federal Register by the Commissioner of C.B.P. (with the approval of the Secretary of the Treasury).

Importers have three months to contest a W.R.O.[26] They must submit a certificate of origin and demonstrate that they have made "every reasonable effort" to determine both the source of and the type of labor used in any stage of production of the merchandise and its components. If the importer does not successfully contest the W.R.O. and does not remove the merchandise at issue from the U.S., then the merchandise is subject to exclusion and/or seizure. While C.B.P. publishes information about the date, merchandise type, manufacturer, and status of a W.R.O., it does not generally publish information about specific re-exportations, exclusions, seizures, or further communications with the importer. Immigration and Customs Enforcement can pursue criminal investigations of Section 307 violations.

[24] Trade Facilitation and Trade Enforcement Act, Pub. L. No. 114-25, 130 Stat. 122 (2015).
[25] 19 C.F.R. para.12.42.
[26] 19 C.F.R. para.12.43 (a-b).

3. W.T.O.

The U.S., Brazil, Zaïre, Zimbabwe and Malaysia signed the G.A.T.T. in 1994. China followed suit in 2001. This Agreement voided the Protocol of Provisional Application which contained a waiver that allowed domestic legislation—such as the Tariff Act (1930)—to be grandfathered into the 1947 General Agreement on Tariffs and Trade.[27] Therefore, W.R.O.s taken under the Tariff Act need to comply with the G.A.T.T. 1994.

This is a considerable challenge. The W.T.O. D.S.M.'s interpretation of the G.A.T.T. substantially limits the W.T.O. Members' discretion to eliminate forced labor. In particular, the W.T.O. D.S.M.'s interpretation of G.A.T.T. Article III:4, one of the foundational principles of the W.T. O., makes it difficult for the U.S. to impose W.R.O.s. This article obliges a W.T.O. Member to treat the goods of other Members the same as its own "like" goods. It prohibits discrimination by a W.T.O. Member between similar domestic and imported products in a way that treats imported products less favorably.

People concerned with forced labor will find that disposable rubber gloves produced by forced labor in Malaysia are not at all "like" disposable rubber gloves made without such labor in the U.S.. Yet, concerns about core labor rights violations are not often reflected in consumption behavior. This is due to various factors that influence people when they buy products including limited time, information, cognitive capacities, money, and options. The inconsistency between what people value or believe and what they actually do has been labeled the "value-action gap" in various disciplines, including sociology, psychology and business studies.[28] However, the W.T.O. D.S.M. only employs criteria concerned with competitive relationships in the marketplace to assess "likeness" in G.A.T.T. Article III:4.[29] I have argued elsewhere that this interpretation is unfortunate because it reduces people to subjects merely interested in consumption.[30] This creates, in turn, a breeding ground for questions about the W.T.O. D.S.M.'s legitimacy.

Despite the above, the five W.R.O.s can be justified under the exceptions regime of the G.A.T.T. First, the two relevant security exceptions contained in Article XXI need to be discussed. G.A.T.T. Article XXI(c) permits measures "to prevent any contracting party from taking any action in pursuance of its obligations under the U.N. Charter for the

[27] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law,* 91 Am J. of Int'L L 663, 689 (1997).

[28] Daina Mazutis & Anna Eckardt, *Sleepwalking into Catastrophe: Cognitive Biases and Corporate Climate Change Inertia*, 59 Cal. Mgmt. Rev., n. 3, 2017, at 74, 82-90.

[29] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, 101-03 and 113-17, W.T.O. Doc. WT/DS135/AB/R (*adopted* Mar. 12, 2001).

[30] Aleydis Nissen, *Can WTO Member States Rely on Citizen Concerns to Prevent Corporations from Importing Goods Made from Child Labour?*, 14 UTRECHT L. R., n. 3, 2018, at 70, 75.

maintenance of international peace and security". The W.R.O. on gold mined in artisanal mines in D.R. Congo fits within the scope of the U.N. Security Council Resolution 1857 and later resolutions.[31] This resolution calls upon all Member States of the U.N. to urge individuals or entities supporting the illegal armed groups in the eastern part of D.R. Congo through illicit trade of natural resources to exercise due diligence. Furthermore, G.A.T.T. Article XXI(b)(ii) contains an exception which allows a W.T.O. Member to take any action which it considers necessary for the protection of its essential security interests "relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment".[32] The U.S. has a relatively high degree of latitude to determine whether this provision is applicable.[33] It follows, that the U.S. can conceivably justify both, the W.R.O. on gold mined in artisanal mines in D.R. Congo and the W.R.O. on Marange diamonds from Zimbabwe on the basis of paragraph (b)(ii).

Second, paragraphs (a), (b), (c), (e) and (g) of G.A.T.T. Article XX are relevant. To begin, it is unclear whether all five W.R.O.s can be justified on the basis of paragraph (e) of Article XX, which contains an exception for measures "relating to [. . .] the products of prison labour" abroad. There is an ongoing discussion about whether this paragraph might be used to justify measures against products made under conditions of forced labor.[34] Those scholars who advocate for such a broad interpretation of paragraph (e) find that there is no difference between labor in a prison environment and in other environments in which labor is coerced. Those who find such interpretation too extensive usually argue that this is not in line with the text of paragraph (e). A textual interpretation of paragraph (e) would only justify the W.R.O. on products from Hetian Taida Apparel as they can likely be categorized as "products of prison labor". While the Chinese government maintains that Uyghurs have been placed in "re-education" facilities, it has been noted above that there is increasingly more evidence that these facilities seem to be prison camps.

[31] S.C. Res. 1857 ¶ 4.g (Dec. 22, 2008); Daniëlla A. Dam-de Jong, *Standard Setting Practices for the Management of Natural Resources in Conflict-Torn States*, *in* Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices169, 183-4 (Carsten Stahn, Jens Iverson & Jennifer Easterday eds., 2017).

[32] For an analysis of Article XXI(b) *see* Chao Wang, *Invocation of National Security Exceptions under G.A.T.T. Article XXI: Jurisdiction to Review and Standard of Review*, 18 Chinese J. Int'l L. 695 (2019).

[33] *See* Jaemin Lee, *Commercializing National Security? National Security Exceptions' Outer Parameter Under GATT Article XXI*, 13 Asian J. W.T.O. & Int'l Health L. & Pol'y 277, 293-94 (2018).

[34] E.g. Federico Lenzerini, *International Trade and Child Labour Standards, in* Environment, Human Rights and International Trade 287, 301-02 (Francesco Francioni ed., 2001). Nicola Wenzel, *Article XX Lit. e G.A.T.T., in* WTO - Technical Barriers and SPS Measures 537, 537-40 (Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr eds., 2007).

The Appellate Body held that the words "relating to" implicate that there should be "a close and genuine relationship of ends and means".[35] The inquiry of whether such a relationship exists should be based on consideration of the measure's predictable effects – inherent in, and discernible from, the design and structure of the measure - and not its empirical or actual effects.[36]

Article XX(c) contains an exception for restrictive measures "relating to" the imports (or exports) of gold and silver. Like paragraph (e), paragraph (c) has an explicit extraterritorial dimension. It will likely be easier to justify the W.R.O. on gold mined in artisanal mines in D.R. Congo on the basis of this paragraph, than on paragraph (g) of Article XX – which contains an exception for measures "relating to the conservation of exhaustible natural resources" – but does not explicitly refer to extraterritorial applications.[37] There has been a long-standing discussion whether paragraph (g) allows such applications. In the *Shrimp* case – which considered U.S. restrictive measures to conserve the endangered species of turtles – the Appellate Body explicitly did "not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation".[38] Rather, the Appellate Body held that turtles were an essentially migratory species, and therefore sufficiently within U.S. territory to provide a "jurisdictional nexus" between the turtles and the U.S. Various scholars have interpreted this decision as permitting extraterritorial production measures for environmental policy objectives, a truly global concern under paragraph (g).[39] However, extraterritorial measures that protect from forced labor in exporting states would be more controversial. While all Member states of the I.L.O. are obliged to respect, promote and realize in good faith the elimination of all forms of forced or compulsory labor, China and Zimbabwe have, for example, opposed the W.R.O.s.[40]

[35] Appellate Body Reports, *China - Measures Related to the Exportation of Various Raw Materials*, ¶ 355, WTO Doc. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Feb. 22, 2012) referring to Appellate Body Report, *U.S. - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 136, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

[36] Appellate Body Reports, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum,* ¶ 5.113, WTO Doc. WT/DS431/AB/R, WT/ DS432/AB/R, WT/DS433/AB/R (adopted Aug. 29, 2014).

[37] Peter Van den Bossche et al., Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of Other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures Concerning Non-Product-Related Processes and Production Methods 94-96 (2007).

[38] Shrimp, *supra* note 35, at 133; *see* Cedric Ryngaert, Selfless Intervention: The Exercise of Jurisdiction in the Common Interest 169 (2020).

[39] *See e.g.* Carola Glinski, *CSR and the Law of the WTO – The Impact of Tuna Dolphin II and EC-Seal Products* 2017 Nordic J. Com. L. 121, 130.

[40] I.L.O., Declaration on Fundamental Principles and Rights at Work, adopted at its Eighty-sixth Session (Jun. 18, 1998); I.L.O., Declaration on Social Justice for a Fair Globalization, adopted at its Ninety-seventh Session, (Jun. 10, 2008).

It would be another option to try and justify all five W.R.O.s on the basis of paragraphs (a) and (b) of G.A.T.T. Article XX. Like paragraph (g), these paragraphs do not have an explicit extraterritorial dimension. This means that it is not clear whether they might be used to justify measures necessary to protect "public morals" (paragraph (a)) or the "human, animal or plant life or health" (paragraph (b)) abroad. It is, however, possible to argue that the W.R.O.s protect the "public morals" of people in the U.S.. In 2014, the European Union (E.U.) successfully relied upon paragraph (a) to argue that import bans of seal products are necessary measures to protect the public morals of E.U. citizens in the *Seal* case against Norway and Canada.[41] The E.U. argued that E.U. citizens were concerned about the welfare of seals anywhere in the world, and about exposure to economic activity that sustains the market for seal products obtained from animals killed and skinned in a way that causes pain and other forms of suffering. This seems to indicate that if public morals concerns exist in the U.S. about being exposed to the economic activity that sustains the market for products from forced labor, then import prohibitions might be necessary to protect the public morals of the U.S. population. Note that the test in paragraphs (a) and (b) is stricter than the test in paragraphs (c), (e) and (g). It is not sufficient that measures taken under paragraphs (a) and (b) "relate to" the protection of "public morals" of U.S. citizens. They need to be "necessary" for the protection of these objectives. This means that the employed measures were the least trade-restrictive measures that could have been reasonably employed to achieve the desired objective.[42] The W.T.O. D.S.M. uses a holistic "weighing and balancing" test to assess this condition. Some of the factors that the W.T.O. D.S.M. applies to use this test are the importance of the interests or values protected by the measure at issue and the accompanying impact of this measure.

If an import ban on products that were produced by violating labor standards would survive an exception formulated in G.A.T.T. Article XX, then it must also pass the chapeau test of this article. According to this test, measures that constitute an arbitrary or unjustifiable discrimination between W.T.O. Members where the same conditions prevail and disguised restrictions on international trade are forbidden. The W.T.O. D.S.M.'s approach to the chapeau test has been unpredictable, but various scholars have tried to make sense of it.[43] It is not necessary to repeat all their arguments here in detail, but it is useful to note that the 2016 elimination of the consumptive demand exception

[41] Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (2014).

[42] Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef 50* (2001).

[43] E.g. Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 Am. J. Int'l L. 95 (2015). Fengping Gao, *Trade and Environment Standard Rendering China-Rare Earths GATT Article XX Exemptions Impossible, Other International Laws Incompatible*, 45 Denv. J. Int'l L. & Pol.y 97 (2016).

seems to negate possible claims that the purpose of Section 307 of the Tariff Act is really to protect American consumers and industries.[44]

While it seems to be possible to justify the said violation of G.A.T.T. Article III:4 under the exceptions regime of G.A.T.T. Articles XX and XXI, various scholars have long questioned why forced labor, one of the I.L.O. core labor standards, needs to be framed as an "exception" to a free trade regime. Notably, James Thuo Gathii argued that we need to think about core labor rights "beyond" this regime "which creates unacceptable levels of inequality".[45] The Trump Administration's approach towards trade has been controversial. Notoriously, the U.S. and China have imposed unilateral measures on each other, while alienating other W.T.O. Members to work together on an improved multilateral trade regime. Amongst others, the U.S. has been accused of abusing the exceptions regime in G.A.T.T. Article XXI, while China rigs the system by exploiting its slow and non-retroactive sanction regime.[46] Yet, at the same time the Trump Administration's blunt and protectionist approach towards trade has created an opening to think out of "the comfort zone of the given economical order".[47]

4. RELAXING AND STRENGTHENING OF THE W.R.O.S

4.1. RELAXING

Three W.R.O.s have been relaxed at the time of writing. First, the C.B.P. revoked the W.R.O. on WRP, saying that this corporation is no longer producing rubber gloves under forced labor conditions in March 2020.[48] Various things have changed for WRP workers in Malaysia. For example, a private equity fund injected MYR 325 million (USD 750,144 at USD 1: MYR 433) to enable the interim liquidators to pay salaries to workers and executives during the temporary suspension of W.R.P.'s business operations.[49] The C.B.P. communicated that it "worked together" with and "provided feedback" to W.R.P. "in

[44] *See* Matthew T. Mitro, *Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, 51 Am. Univ. L. R. 1223, 1272-73 (2002).
[45] James Thuo Gathii, *International Justice and the Trading Regime,* 19 Emory Int'l L. Rev. 1407, 1421-23 (2005).
[46] *See* Lee, *supra* note 33, Mark Wu, *China's Export Restrictions and the Limits of WTO Law*, 16 World Trade Rev. 673 (2017).
[47] *See* Stijn Smismans, *Risk Regulation at Risk. Brexit, Trump It, Risk It*, 8 Eur. J. Risk Regul. 33, 41 (2017).
[48] *See* Press Release, C.B.P., C.B.P. Revokes Withhold Release Order on Disposable Rubber Gloves (Mar. 24, 2020), https://www.C.B.P..gov/newsroom/national-media-release/C.B.P.-revokes-withhold-release-order-disposable-rubber-gloves.
[49] *See* Chester Tay, Glove Maker WRP Asia Pacific Sues ex-CEO over Alleged CBT, The Edge Markets, Jun. 23, 2020, https://www.theedgemarkets.com/article/glove-maker-wrp-asia-pacific-sues-exceo-over-alleged-cbt.

order to adjust its manufacturing and labor practices and ensure that its supplies are compliant with U.S. and international labor standards", including the I.L.O.'s labor standards.[50] This is the right approach. Import restrictions alone are insufficient and ineffective to eliminate forced labor in third countries. They need to be backed up by collaborative cross-border efforts to change the situation for slaves on the ground.

While the C.B.P. did not mention the coronavirus disease 2019 pandemic, it is highly likely that the sudden escalating demand and depleting supplies of gloves for health and other essential workers in the U.S. has been a factor in its decision. While the U.S. and various other countries have taken extensive emergency measures during this pandemic,[51] this revocation seems to be reasonable for two reasons. First, import restrictions may only be sustained as long as more cooperative measures are not feasible because they can have various undesirable consequences. For example, migrants who are no longer allowed to work at W.R.P. might move to other dangerous sectors that are not involved in exports, such as the construction industry. Labor activist Andy Hall suggested that money raised from the sale of W.R.P. gloves needs to be used to remediate the past recruitment fees and related costs that its migrant workers allegedly had to pay.[52] Second, rubber gloves are essential protective equipment for health and essential workers in the U.S. that have been risking their lives to save lives. After the outbreak of the pandemic, the W.H.O.'s Director Tedros Adhanom Ghebreyesus called for a lift of export bans or limits on the free flow of necessary medical supplies and personal protective equipment.[53] It can, nevertheless, be considered unfortunate that the C.B.P. has not referred explicitly to the need to protect WRP workers during the current pandemic. Amongst other things, they should get protective equipment, a hardship allowance, and labor inspections.

[50] C.B.P., *supra* note 48, 50; C.B.P. (@C.B.P.TradeGov), Twitter (Mar. 24, 2020, 12:50 PM), https://twitter.com/C.B.P.TradeGov/status/1242554291635847178.

[51] See Liora Lazarus et al., A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-10 Pandemic Across 11 Jurisdictions, 3 (2020), https://www.law.ox.ac.uk/sites/files/oxlaw/v3_bonavero_reports_series_human_rights_and_covid_19_20203.pdf.

[52] *See* Khalid Azizuddin, *Human Rights Concerns Arise as EU Asks Malaysian Glovemakers to Ramp Up Production,* Responsible Investor, Apr. 8, 2020, https://www.responsible-investor.com/articles/human-rights-concerns-arise-as-eu-asks-malaysian-glovemakers-to-ramp-up-production?fbclid=IwAR2DJHaCr0PiGPsX-DPWknSCsJDqbwehKUfxCcfLiMAeuxPUcQZr4O1oib0.

[53] *See* B20 Saudi Arabia Chair Yousef Al-Benyan, WHO Director General Tedros Adhanom Ghebreyesus and ICC Secretary General John W.H. Denton AO, Open letter dated Mar. 23, 2020 addressed to G20 Heads of State and Government, https://iccwbo.org/content/uploads/sites/3/2020/03/open-letter-to-g20-leaders-on-response-to-covid-19.pdf.

Second, the importer Chambers Federations successfully contested the W.R.O. for D.R. Congo in May 2020.[54] This importer is now allowed to import gold from D.R. Congo into the U.S. This partial revocation is an interesting approach that seems to remedy an issue that has often been raised regarding Section 1502 of the U.S. Dodd-Frank Act. This section would create an incentive for corporations to pull out of D.R. Congo altogether, depriving those who work in artisanal mines of their livelihoods.[55] The C.B.P. did not give much explanation as to how it conducted its "rigorous evaluation" of the Chambers Federations' due diligence program in D.R. Congo and whether it worked together with this importer.[56] But the C.B.P.'s Brenda Smith warned that the C.B.P. "will continue to vigilantly monitor U.S.-bound supply chains for products made with forced labor" when the partial revocation was announced. [57] In the past, we have learned that the credibility of the voluntary Kimberley Process Certification Scheme diminished because it certified Marange diamonds.[58] While this scheme - the first that received a W.T.O. waiver for human rights reasons - aimed at stopping the trade of blood diamonds, it has been accused of becoming a "diamond laundering" marketing tool for diamond traders.

Finally, the C.B.P. lifted Bonechar's W.R.O. in December 2020. The C.B.P. explained that Bonechar submitted a report which sufficiently supports that workers are free to leave the premises of Bonechar and an affiliated company if they wish, and are not subjected to any form of punishment since at least August 2020.[59] This report addressed the I.L.O. indicators of forced labor and incorporated data from worker interviews, a site visit and document reviews. Smith said that this demonstrates that "companies are taking the consequences of C.B.P.'s forced labor enforcement seriously".[60]

[54] *See* Press Release, C.B.P., C.B.P. Modifies Withhold Release Order Gold Imports Democratic Republic of the Congo (May 28, 2020), https://www.C.B.P..gov/newsroom/national-media-release/C.B.P.-modifies-withhold-release-order-gold-imports-democratic-republic.

[55] See Donald Trump, U.S. President, Presidential Memorandum: Suspension of the Conflict Minerals Rule (Feb., 2017) (unenacted), https://www.documentcloud.org/documents/3457048-Document-Final.html#document/p1.

[56] C.B.P., *supra* note 48, 56.

[57] Id.

[58] *See also* Paidamoyo Bryne Saurombe, Legal Perspective on the Regulation of Trade in (Conflict) Diamonds in Zimbabwe by Means of the Kimberley Process Regulation Scheme, 35 (2014), https://repository.nwu.ac.za/handle/10394/15536.

[59] *See* Press Release, CBP, CBP Modifies Withhold Release Order on Imports of Bone Black from Bonechar Carvao Ativado Do Brasil Ltda (Dec. 7, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-modifies-withhold-release-order-imports-bone-black-bonechar-carv.

[60] Ibid.

4.2. STRENGTHENING

The U.S. has further strengthened the import restrictions imposed on China. In May 2020, the C.B.P. issued a new W.R.O. on hair products from Hetian Haolin Hair Accessories Co. Ltd., based in the Xinjiang Uyghur Autonomous Region, for allegations of forced labor.[61] In addition, the U.S. adopted the Uyghur Forced Labor Prevention Act in September 2020.[62] This act presumptively prohibits U.S. imports of all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region or by entities working with the Chinese government of the Xinjiang Uyghur Autonomous Region under poverty alleviation or mutual pairing assistance programs. This broad scope is likely inspired by a report from the Australian Strategic Policy Institute that alleges that Uyghurs are trafficked to re-education camps outside Xinjiang Uyghur Autonomous Region.[63] The presumption can be rebutted if clear and convincing evidence shows that targeted goods do not involve forced labor. The U.S. has previously created a similar legal rebuttable presumption for goods made by North Koreans (all over the world) in the Countering America's Adversaries through Sanctions Act (2017).[64]

While former President Trump has never publicly spoken about the Uyghur sanctions, his former National Security Advisor John Bolton wrote in his memoir that Trump did not favour such sanctions.[65] They impeded the bilateral trade negotiations between the U.S. and China. Bolton alleges that Trump even approved President Xi Jinping's policy on Uyghurs during the 2019 G20 meeting in Osaka. He writes, "Trump said that Xi should go ahead with building the camps, which Trump thought was exactly the right thing to do".[66] Behind Trump, however, there were officials, as noted in Section 1, who were genuinely concerned about the alleged mass detainment of Uyghurs.[67] These officials, politically supported by evangelicals at home, have shown a lot of interest in the freedom of religion. Their approach has not always been

[61] *See* Press Release, C.B.P., C.B.P. Issues Detention Order on Hair Products Manufactured with Forced Labor in China (May 1, 2020), https://www.C.B.P..gov/newsroom/national-media-release/C.B.P.-issues-detention-order-hair-products-manufactured-forced-labor.
[62] Uyghur Forced Labor Prevention Act, S. 3471, 116th Cong. (2020).
[63] *See* Vicky Xiuzhong Xu et al., *Uyghurs for Sale*, ASPI, 3 (2020), https://www.aspi.org.au/report/uyghurs-sale.
[64] *See, e.g.* Countering America's Adversaries through Sanctions Act, Pub. L. No.115-4, 131 Stat. 886 (2017).
[65] *See generally* John Bolton, *Thunder Out of China*, *in* The Room Where It Happened: A White House Memoir (2020).
[66] Ibid.
[67] Ibid; *See also,* Fumiaki Kubo, *Reading the Trump Administration's China Policy*, Asia-Pacific Rev., Dec. 2019, at 58, 66.

straight-forward.[68] Yet, it appears that the sheer scale of the alleged repression of Uyghurs made this a "no-brainer" for them.

It is estimated that there are more than one million Uyghurs detained in Xinjiang Uyghur Autonomous Region, a region that supplies twenty percent of the world's cotton to companies such as the Coca-Cola Company and Tommy Hilfiger.[69] It is better to turn the question around. Why have other Member States of the I.L.O. – including various Member States of the Organisation of Islamic Cooperation [hereinafter O.I.C.] – not yet voiced any concerns about the situation of Uyghurs?[70] U.S.-based Muslim groups accused the O.I.C. of paying lip-service to China to prioritise perceived economic interests.[71]

The sanctions are relatively consistent with the Trump Administration's dislike for regulatory regimes beyond the U.S. Trump deserves credit for increasing awareness about China's mercantilist policies, albeit in a self-righteous and perfunctory way.[72] While Trump tried to make controversial business deals with Xi,[73] he also used the word "China" as a trigger to rally supporters for his populist "America first" agenda. He accused China of "taking advantage", "stealing", and "raping" the U.S. economy.[74] Trump seemed to understand that China's perceived free-rider attitudes in the world economy are a sensitive issue for those negatively affected by globalization in the U.S..[75] Not unlike his predecessors, Trump did, however, not seem to have a long-term China strategy.

[68] *See* Peter Henne, *Pompeo Investigation Could Undo Religious Freedom Movement's 'Success'*, Religion News Serv. (May 20, 2020) https://religionnews.com/2020/05/20/pompeo-investigation-could-undo-religious-freedom-movements-success/.

[69] *See* Uyghur Forced Labor Prevention Act, S. 3471, 116th Cong. 2(1) & (7) (2020); *See also* Amy Lehr, *Addressing Forced Labor in the Xinjiang Uyghur Autonomous Region: Towards a Shared Agenda*, Center for Strategic & International Studies (July 30, 2020), https://www.csis.org/analysis/addressing-forced-labor-xinjiang-uyghur-autonomous-region-toward-shared-agenda.

[70] *E.g.* Barbara Kelemen & Richard Turcsányi, *It's the Politics, Stupid: China's Relations with Muslim Countries on the Background of Xinjiang Crackdown*, 21 Asian Ethnicity 223 (2020).

[71] X., US Muslim Groups Accuse OIC of Abetting China's Uighur "Genocide", Al Jazeerah (Dec 18, 2020) https://www.aljazeera.com/news/2020/12/18/us-muslims-press-organization-of-islamic-cooperation-on-china.

[72] *See, e.g.* Thea Lee, U.S.–China Trade and Competition 3, Docs House, (2020), https://tinyurl.com/29aartfs.

[73] Bolton, *supra* note 65.

[74] *See, e.g.* Nick Glass, *Trump: 'We can't continue to allow China to rape our country'*, Politico (Feb. 5 ,2016), https://tinyurl.com/y2cr89sb; *E.g.* Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 10:59 AM), https://twitter.com/realDonaldTrump/status/1164914959131848705; *E.g.* Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 5:00 PM), https://twitter.com/realDonaldTrump/status/1165005927864512512.

[75] *See generally,* Ludger Kühnhardt, The Global Society and Its Enemies: Liberal Order Beyond the Third World War 200 (2017).

CONCLUSION

This article discussed five recent Withhold Release Orders on products from forced labor that have been issued by U.S. Customs and Border Protection under the relaxed Tariff Act (1930) from the perspective of international law and politics. While the W.R.O.s seem to be justified under the exceptions regime set out in the G.A.T.T., we need to think about slavery "beyond" this exceptions regime. It is unfortunate that President Trump alienated other W.T.O. Members from working together on an improved international trade regime, but there is hope in that the C.B.P. seems to value the concept of international cooperation, which plays a key role in imposing or sustaining import restrictions. The Trump Administration's approach towards trade has been highly controversial, but this article has demonstrated that it might potentially create an opening to rethink the international trade regime. The new US President Joe Biden - who took office in January 2021 - seems to acknowledge this. He immediately asked a task force to review key U.S. supply chains, including semiconductors, medical supplies and rare earth materials.[76] While this assessment aims to support national security and emergency preparedness, it might have far-reaching consequences for the elimination of forced labor in supply chains.

[76] The White House, FACT SHEET: Securing America's Critical Supply Chains (Feb. 24, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/24/fact-sheet-securing-americas-critical-supply-chains/.

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