Messages from Strasbourg: Lessons for American Courts from the Highest Volume Human Rights Court in the World - The European Court of Human Rights

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MESSAGES FROM STRASBOURG: LESSONS FOR AMERICAN COURTS FROM THE HIGHEST VOLUME HUMAN RIGHTS COURT IN THE WORLD—THE EUROPEAN COURT OF HUMAN RIGHTS

ALLEN E. SHOENBERGER*

I. INTRODUCTION

On June 26, 2003, the United States Supreme Court rendered the groundbreaking decision of Lawrence v. Texas, invalidating a Texas statute which criminalized "deviate sexual intercourse" as violative of adults' due process and privacy interests. Not only did Lawrence overrule Bowers v. Hardwick, but also the opinion of the Court by Justice Kennedy cited as persuasive precedent a decision by the European Court of Human Rights, Dudgeon v. United Kingdom. This article focuses upon the latter citation, not for the particulars of the citation, but in order to consider the following question: What other...

* Professor of Law, Loyola University Chicago School of Law. I wish to thank Lindsay Morgan for her research assistance.

2. Id. at 563, 578.
3. Id. at 578.
4. Id. at 573. "Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization." Id.
precedents of the European Court of Human Rights are potential persuasive precedents for American constitutional law? This article explores this issue, after describing the European Court of Human Rights, a Court which is now the most prolific supreme court in the world deciding human rights cases as measured by the number of decisions a year. The Court also issues opinions in a multitude of official languages including English. Since its opinions are readily available on the computer database operated by Lexis, as well as through various web sites, the opinions of the European Court of Human Rights are quite available to United States courts and lawyers.

Decisions by the European Court of Human Rights

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<td>1960-69:</td>
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Indeed, as the table above indicates, the pace of decision making by the Court has rapidly increased over the last decade and a half.

The European Court of Human Rights consists of judges nominated by each member state, who for decision purposes normally sit in one of four panels of seven judges. These judges sit in their individual capacities and must be persons of “high moral character.”

On special occasions for cases considered particularly important the court sits in a Grand Chamber consisting of seventeen judges to hear appeals from judgments of ordinary chambers. The Court’s decisions


7. Id. at ¶ 1, 21.

8. Id. at ¶ 36. In cases that raise a serious question affecting the interpretation or
are pretty routinely obeyed by the nation states that are members of the Council of Europe.\textsuperscript{9} Awards of money damages and court costs and attorneys fees are relatively simple matters. Compliance with decisions that require alteration of nation state's domestic law and/or procedural changes take more time. The Committee of Ministers of the Council of Europe, a political body, monitors compliance with the Court's decisions.\textsuperscript{10} The Court, itself, does not monitor compliance with its decisions, although it has conducted a study of compliance which appears on its website.\textsuperscript{11}

While the European Court of Human Rights is obviously not an American court, it owes its origin in a very direct way to the United States Bill of Rights. The essence of the Bill of Rights was incorporated into the \textit{Universal Declaration of Human Rights}, adopted by the United Nations General Assembly on December 10, 1948.\textsuperscript{12} Subsequently the Council of Europe drafted the \textit{European Convention on Human Rights}.
on Human Rights (Convention) in 1950 incorporating many of the rights from the Universal Declaration of Human Rights and giving explicit credit to the Universal Declaration of Human Rights in its preamble.\(^{13}\)

It should surprise few that the United States Supreme Court might be interested in viewing fundamental human rights through the prism of a court interpreting a document that owes so much to its American origins. However, the citation did not go unnoticed in Congress, in which was introduced both a bill\(^{14}\) and a separate resolution\(^{15}\) objecting to such citations. While neither the proposed bill nor the resolution appears to have progressed much beyond the submission state, the text of the bill is worth some reflection.

In its only operative section, the bill purports to limit the judicial use of:

\[ \text{T} \]he constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.\(^{16}\)

In its finding section, the bill mentions John Marshall’s decision in *Marbury v. Madison*.\(^{17}\) It explicitly castigates two Supreme Court decisions, *Atkins v. Virginia* and *Lawrence v. Texas* that purportedly “employ[] a new technique of interpretation called ‘transjudicialism’: the reliance by American judges upon foreign judicial and other legal sources outside of American constitutional law.”\(^{18}\)


\(16. \) H.R. 4118, 108th Cong. at § 3.

\(17. \) Id. at § 2(3).

\(18. \) Id. at § 2(5); see also Justice Scalia’s dissenting opinion in *Atkins v. Va.*, which stated:

But the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called “world community,” and respondents to opinion polls. . . . I agree with [the Chief Justice] . . . that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally
Such statements, however, ignore United States legal history, both regarding the full panoply of the areas covered by law, as well as the area traditionally covered by constitutional law. John Marshall, for example, made frequent use of the laws of nations and the laws of other countries. Indeed, the history of the incorporation of the protections of the Bill of Rights through the Fourteenth Amendment so as to make them applicable to the states also owes a significant debt to the laws of other countries as the United States Supreme Court sought definitions of rights that were so “fundamental” as to be protectable through the due process clause of the Fourteenth Amendment.¹⁹

In Talbot v. Seeman,²⁰ an opinion by Chief Justice Marshall for the Supreme Court prior to Marbury v. Madison,²¹ the Chief Justice frequently refers to the law of nations, the law of war, and considers as well the law of France.²²

The case concerned a salvage claim on behalf of the officers and crew of the United States ship of war, the Constitution.²³ The

irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”


¹⁹. It is ironic that a proposal would attempt to limit citations to foreign authorities that are “English” for recently “English” courts have routinely cited European Court of Human Rights (ECHR) decisions in very important cases. On December 16, 2004, for example, the House of Lords, the highest court in the United Kingdom, decided a case about detention of alleged terrorists, none of whom had been charged with a criminal offense. The Court held improper the government's actions, primarily as a result of the obligations of the United Kingdom under the European Convention on Human Rights given domestic effect by the Human Rights Act of 1998. The lead opinion by Lord Bingham of Cornhill cites European Court of Human Rights cases more frequently than it cites British cases (27 ECHR cites versus 20 British case cites). Other opinions in the same case cite only ECHR cases. See separate opinions by Lord Hoffmann, and Lord Hope of Craighead. The other separate opinions only infrequently cite British cases, more frequently citing ECHR cases. A and others v. Sec. of St. for the Home Dept., UKHL 56 (Dec. 16, 2004).

²⁰. Talbot v. Seeman, 5 U.S. 1 (1801).


²³. Id. at 1.
Constitution had recaptured a neutral ship that the French had captured and were taking to port for a determination of whether the ship was subject to confiscation because it may have been carrying British cargo. War then existed between Great Britain and France. Congress had enacted various statutes to protect American ships from seizure by French ships, and authorized, upon recapture of any American merchant ships, that salvage would be allowed to the recapturing ship. In addition, seizure of armed French vessels was also permitted by public armed vessels of the United States. Such ships were subject to forfeiture.

However, none of the specific statutes enacted by Congress applied to a situation in which a neutral ship was recaptured. Yet the Court determined that the law such as it was did not make salvage impossible. The determination of such a claim would depend on "the principles of general law." The Court determined that the recapture of the ship was lawful; but that left remaining the determination of whether meritorious service had been rendered so as to entitle the recapture to salvage. That was to be determined by the laws of war and the settled doctrine of the law of nations. There was no doubt that the general rule of the law of nations was "that a neutral vessel captured by a belligerent [was] to be discharged without paying salvage . . . ." But "[t]he general principle is, that salvage is only payable where a meritorious service has been rendered." But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to condemnation all neutrals captured by its cruisers, and who will say that no benefit is conferred by a re-capture? Chief Justice Marshall then went on to examine the law of France and after

24. Id. at 1-3. The ship was originally owned by individuals from Hamburgh, which was not then at war with France, or with the U.S. Id. at 2.
25. Id. at 29-31.
26. Id. at 30.
27. Id.
28. Id. at 31, 33. "[T]he right of re-capture is expressly given in no single instance, but that of a vessel or goods belonging to a citizen of the United States." Id. at 33.
29. Id. at 34.
30. Id. at 36.
31. Id.
32. Id.
33. Id. at 37.
34. Id.
considering a French statute that subjected to condemnation in the courts of France, "neutral vessel laden, in whole or in part, with articles the growth of England or any of its possessions," decided that the state of hostility between England and France authorized the recapture by the captain of the USS Constitution.\(^{35}\) Since the danger that the French courts would authorize confiscation of the vessel and its cargo was "real and imminent," her danger was also "real and imminent," and thus the recaptor rendered an essential service and was entitled to salvage.\(^{36}\)

The heart of the reasoning by Chief Justice Marshall concerned the scope and application of the law of nations, its content and exceptions. Congress had not acted, until after the seizure at issue. A subsequently enacted statute "can certainly not affect that case as to the quantity of salvage, or give a right to salvage which did not exist before."\(^{37}\) While the latter statement does not reflect current jurisprudence of the Supreme Court, it did in John Marshall’s court. Thus the decision turned on the Court’s interpretation of the law of nations, not on United States statutory, case, or constitutional law.

_Talbot v. Seeman_ was not unusual, for many decisions of the Marshall Court sounded similar themes. The issues ranged from the mundane to the important. In _McCoul v. Lekamp’s Administratrix_, the issue was the admissibility of books of account.\(^{38}\) In footnote, Chief Justice Marshall addressed the civil or Roman law first, then the codes of nations of the European continent, the law of France and only after such discussion turned to the common law of England, and finally the law of New York and Pennsylvania.\(^{39}\) In _Murray v. Schooner Charming Betsy_, Chief Justice Marshall observed that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."\(^{40}\) In _Mason v. Ship Blaireau_, the Chief Justice referenced the "common usage of commercial nations," with particular reference to France and England in determining the law of salvage after a maritime accident.\(^{41}\)

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35. Id. at 39, 41.
36. Id. at 42-43.
37. Id. at 34.
39. Id. at 117 n. a.
In a more momentous case, *The Antelope*, the Court determined the fate of slaves captured by a privateer from Spanish ships and ships flying the Portuguese flag. Much of the legal discussion by Chief Justice Marshall concerned whether the law of nations was violated by the slave trade. Case law from England was employed to determine that the law of the flag of the ship determined whether restitution of slaves to their owners was required. If the flag nation had made the slave trade illegal, as had England, there was no right of restitution. If it had not, as Sweden had not, then restitution was ordered even by a British court. In the end, the United States Supreme Court determined that the proportion of slaves that could be fairly traced to Spanish ownership, were to be returned to the Spanish owners. However, since there was virtually no proof that any Portuguese owner existed for the remaining slaves, no restitution was ordered to the Portuguese owner, represented by the Vice Counsel of Portugal. Instead, the remaining slaves were to be transmitted to the United States “to be disposed of according to law.”

Whether during Chief Justice John Marshall’s first term on the Court, *Talbot v. Seeman*, or the last term of his tenure, *Mitchel v. United States*, references to the law of nations, or the laws of other countries such as Spain, were frequent.

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43. Id. at 115-23.
44. Id. at 118.
45. Id. at 117-18.
46. Id. at 126-28. The Vice-Counsel for Spain claimed 150 as belonging to Spanish subjects. However, the Court limited this claim to 93 slaves, pursuant to a deposition of the captured ship, reduced as well in proportion to the fact that approximately a third of the slaves had died. At the time of the capture of the ship, the Africans amounted to upwards of 280. Sixteen had been turned over to the U.S. Marshall as being a fair proportion of U.S. slaves that had been taken from a U.S. vessel (said to number 25 originally). Id. at 127.
47. Id. at 129-30. The Vice Counsel of Portugal’s claim was for 130 slaves, or more. But in the five years since the seizure of the ship and the determination by the United States Supreme Court, no subject of the crown of Portugal had appeared to assert his title. After discussion of the possibility that a false flag might have been employed by Americans and others who cannot use their own nation’s flags, such possibility is so serious that it may be judicially noticed by Courts of Admiralty. Id.
48. Id. at 132.
The Marshall Court's practice was echoed by the United States Supreme Court during its struggles with the incorporation of parts of the Bill of Rights through the due process clause of the Fourteenth Amendment so as to make certain protections applicable to the states. In *Palko v. Connecticut*, the opinion for the Court by Justice Cardozo considered whether "[t]he right to trial by jury and the immunity from prosecution except as the result of an indictment [were] . . . of the very essence of a scheme of ordered liberty," or whether to abolish them would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "50 Justice Black became the champion of a total incorporation theory that maintained that the entire Bill of Rights should be incorporated and made applicable as against the states. Justice Black's dissent in *Adamson v. California*, contained the essence of his argument, wherein he rejected the majority's position based as he saw it upon a "natural-law-due-process formula."51 Justice Frankfurter, who concurred with the majority opinion in *Adamson*, strongly disagreed with the total incorporation theory of Justice Black.52 Instead Justice Frankfurter referenced the "canons of decency and fairness, which express the notions of justice of English-speaking peoples . . . ."53 Justices Cardozo and Frankfurter clearly refuse to confine the appropriate sources of interpretative authority to American sources. Whether defined as "natural law" or "the search for schemes of ordered liberty" or "canons of justice of English-speaking peoples" these sources go beyond the new world, and indeed, beyond the British Isles.

In *Duncan v. Louisiana*, the Supreme Court made applicable to the states the right to trial by jury in serious criminal cases and in doing so made somewhat more focused the inquiry for the Court when seeking fundamental rights for potential incorporation.54 The *Duncan* Court spoke of the right to trial by jury as "fundamental to the American scheme of justice."55

In the full course of interpreting the nature of rights that are considered fundamental for purposes of protection in the United States,

52. *Id.* at 59-68 (Frankfurter, J., concurring).
53. *Id.* at 67.
55. *Id.*
for most of our constitutional history it is fair to maintain that foreign practices and attitudes have not been ignored as irrelevant. Rather the experience of other nations, particularly English speaking ones, but the French and Spanish as well, have been looked to by the Supreme Court for guidance. To be sure, such references to the law of nations, France or England, have not been made with the sense that the Supreme Court is bound by such laws as "binding precedent." But neither are they to be ignored as sources for illumination on oft-times difficult problems.\(^{56}\)

In *The Antelope*, Chief Justice Marshall was confronted with a case which potentially jeopardized the neutrality of the United States in armed conflict between warring states. To ignore the law of nations in such context would have been the height of stupidity, a vice that the Marshall Court seldom displayed.

With this general background, the decision of the Supreme Court in *Lawrence v. Texas* will first be analyzed, as well as the decision of the European Court of Human Rights that was referenced therein. Then the article will turn to other areas of decision-making by the European Court of Human Rights to see if there might be other areas in which useful guidance might be sought. In this search, it is critically important to be as objective as possible. This must not be a search for "liberal values" or "conservative values" that will reflect the position of either this author or the reader.

**II. LAWRENCE V. TEXAS: CRIMINAL PROSECUTION FOR DEVIATE SEXUAL INTERCOURSE BETWEEN CONSENTING ADULTS**

The petitioners in *Lawrence v. Texas* had been convicted of deviate sexual intercourse with another individual of the same sex after entering pleas of *nolo contendere*.\(^{57}\) The opinion for the Court by Justice Kennedy framed the issue as "determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."\(^{58}\) After discussing precedents such

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56. In the classic commerce clause of *Wickard v. Filburn*, the Court cited the practices of regulating wheat in the countries of Argentina, Australia, and Canada as supportive of Congress’s power to regulate homegrown wheat. *Wickard v. Filburn*, 317 U.S. 111, 125-26, 126 n. 27 (1942).


58. *Id.* at 564.

The Georgia statute in Bowers prohibited the same conduct as in Lawrence regardless of whether the conduct was engaged in by persons of the same sex.64 With that exception, the cases were quite similar as far as the Court was concerned. The Lawrence decision reviewed the Bowers opinion and determined that the Bowers Court had fundamentally misconstrued the right at issue, considering the right to engage in sodomy as the right at issue, whereas the Lawrence Court considered the right a right of adult privacy.65 The opinion then turned to a discussion of the legal history, or not, of laws against homosexuality. The Court reviewed laws as far back as the Reformation Parliament of 1533, as well as American nineteenth century statutes dealing with sodomy, buggery, and crimes-against-nature statutes.66 The Court also considered the infrequency of prosecutions for such conduct.67 The Court concluded after this examination that the first time any state singled out same-sex relations for criminal prosecution was in the 1970s, and that only nine states had done so.68 In sum, the Court concluded that the historical grounds relied upon in Bowers were doubtful “and, at the very least, . . . overstated.”69

The Court then commenced its own review of legal authorities, including recognition that the Model Penal Code promulgated in 1955 by the American Law Institute “did not recommend or provide for

59. Id. Pierce stood for the inability of the State to prohibit religious schools. 268 U.S. 510 (1925).
60. Id. Meyer held that the State cannot prohibit teaching the German language. 262 U.S. 390 (1923).
61. Id. (State may not criminalize distribution of information regarding contraceptives.).
62. Id. at 565 (Law invalidated prohibiting distribution of contraceptives to unmarried individuals.).
63. Id. at 565 (Recognition of the fundamental right of a woman to make decisions regarding abortion.).
64. Id. at 566.
65. Id. at 566-67.
66. Id. at 568.
67. Id. at 569.
68. Id. at 570.
69. Id. at 559.
'criminal penalties for consensual sexual relations conducted in private.' \(^{70}\) After recognition that sodomy prohibitions had seldom been enforced, including in Georgia (the state involved in \textit{Bowers}), the Court turned to other sources of authority following upon Chief Justice Burger's analysis of Western civilization and Judeo-Christian moral and ethical standards.\(^{71}\) A committee advising the British parliament in 1957 recommended the repeal of laws criminalizing homosexual conduct.\(^{72}\) A decade later that recommendation was adopted by Parliament.\(^{73}\)

It is at that point that Justice Kennedy's opinion for the Court references for the first time, a decision by the European Court of Human Rights. Then in a paragraph of six sentences and fewer than 150 words, the Court cites \textit{Dudgeon v. United Kingdom}.\(^{74}\) The paragraph ends with the following sentence: "Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in \textit{Bowers} that the claim put forward was insubstantial in our Western civilization."\(^{75}\)

Immediately afterwards, the opinion returns to United States law and practice. The very next paragraph noted that the twenty-five states at the time of \textit{Bowers} that prohibited the relevant conduct had been reduced to thirteen and only four enforced their laws against homosexual conduct.\(^{76}\) Indeed, Texas's admission in 1994 that it had not prosecuted anyone under those circumstances was also noted.\(^{77}\)

The opinion then turned to two Supreme Court decisions subsequent to \textit{Bowers}: \textit{Romer v. Evans} and \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}.\(^{78}\) \textit{Casey}, a case dealing with abortion, confirmed that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."\(^{79}\)

\(^{70}\) \textit{Id.} at 572 (citing Model Penal Code § 213.2, comment 2 (ALI 1980)).
\(^{71}\) \textit{Id.}
\(^{72}\) \textit{Id.} at 572-73.
\(^{73}\) \textit{Id.} at 573.
\(^{75}\) \textit{Id.}
\(^{76}\) \textit{Id.}
\(^{77}\) \textit{Id.}
\(^{79}\) \textit{Id.} (citing \textit{Casey}, 505 U.S. at 851).
Romer invalidated a Colorado constitutional provision that deprived homosexuals, lesbians and bisexuals of protection under state antidiscrimination laws. The Court discussed the collateral consequences of criminal convictions, including that at least four states would require persons convicted of such offenses to register as sex offenders.

The Court concluded that the foundations of Bowers sustained serious erosion both from the Supreme Court's own decisions, legal commentators within the United States and the rejection of its principle by five different states. Then, in one additional paragraph, the opinion returned to the jurisprudence of the European Court of Human Rights, citing not only the Dudgeon case, but also P.G. and another v. United Kingdom, Modinos v. Cyprus, and Norris v. Ireland. These cases were cited for the proposition that to the extent that Bowers relied upon values shared with a wider civilization, the reasoning of Bowers had been rejected elsewhere, including by the European Court of Human Rights which followed its Dudgeon precedent, not Bowers.

The Dudgeon case involved a thirty-five year old British citizen resident in Northern Ireland. Mr. Dudgeon's home was searched pursuant to a warrant to search for narcotics. A quantity of cannabis was found during the search and another person was subsequently charged with drug offenses. Personal papers and diaries were discovered which described homosexual activity. The petitioner was

80. Id. at 574.
81. Id. at 575. In a separate opinion predicated upon equal protection rather than due process, Justice O'Connor noted that among other consequences such convictions would disqualify petitioners from engaging in a number of professions including medicine, athletic training, and interior design. Id. at 579, 581. (O'Connor, J., concurring).
82. Id. at 576 (majority).
83. See infra nn. 122-26 and accompanying text.
85. Id.
87. Id. at para. 33.
88. Id.
89. Id.
subjected to four-and-a-half hours of questioning at a local police
station about his sexual activities and his file was forwarded to the
Director of Public Prosecutions.\textsuperscript{90} The Director, in consultation with
the Attorney General, decided that it was not in the public interest to
bring charges.\textsuperscript{91} A year and a month after the search had been
conducted, the petitioner was informed that he would not be
prosecuted.\textsuperscript{92}

Under the law of Britain at the time, no prosecution could have
occurred against the petitioner in England, Wales, or Scotland as a
result of decriminalization of consensual homosexual conduct between
consenting adults.\textsuperscript{93} Changes proposed to the law of Northern Ireland
had not been adopted, partly because of public opposition in Northern
Ireland including, in particular, the opposition of various religious
groups.\textsuperscript{94} There was, however, support for proposed decriminalization
as well.\textsuperscript{95} The parliament for Northern Ireland had been prorogued in
1972 and the counties were subjected to direct rule from Westminster.\textsuperscript{96}

In practice, however, such conduct was not prosecuted in
Northern Ireland. During the period of January 1972 to October 1980
there were sixty two prosecutions for homosexual offenses in Northern
Ireland.\textsuperscript{97} None of which involved consenting adults, the majority
involved minors (i.e. under the age of eighteen) and a few aged
eighteen to twenty-one or mental patients or prisoners.\textsuperscript{98}

The claims before the European Court of Human Rights by
petitioner were failure to respect the petitioner’s private life, in breach

\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at para. 17 n. 3. The age of consent was first defined as twenty-one years of
age, and later recommended to be lowered to eighteen years. Id. By the time of the
Dudgeon case the age had not been lowered in statute. Attempts to amend the statutory
law for Scotland were successful in 1980 decriminalizing consensual homosexual
sexual activity between adults. Id. at para. 18. Prior to that statutory change,
successive Lord Advocates had represented in Parliament that the government’s policy
was not to prosecute offenses in Scotland that would not have been criminal under the
laws of England and Wales. Id.
\textsuperscript{94} Id. at para. 25.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at para. 20.
\textsuperscript{97} Id. at para. 30.
\textsuperscript{98} Id.
of Article 8 of the *Convention* and discrimination in breach of Article 14 of the *Convention*.

The Court held by a vote of fifteen to four that Article 8 was violated by an unjustified interference with the right to respect for private life, but by a vote of fourteen to five that it did not have to reach any issue under Article 14 (equal protection) of the *Convention*. In reaching its decision regarding Article 8, the Court considered the government’s argument that it sought to protect vulnerable members of society, such as the young, as well as the protection of the rights and freedoms of others as well as morals.

In that context, however, the issue became whether the Northern Ireland provisions were necessary in a democratic society. The Court considered that the legislation in Northern Ireland differed from that existing in the great majority of the member states. Despite the deference ordinarily given to nation states under the *Convention* the Court considered that the practices at issue in *Dudgeon* “concerns a

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99. *Id.* at para. 38. Article 8 provides:

[(1)] Everyone has the right to respect for his private and family life, his home and his correspondence.

[(2)] There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*Id.* at para. 38.

100. *Id.* at para. 65. Article 14 provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

*Id.* at para. 64.

101. *Id.* at paras. 63, 70, 72. One of the dissenting Judges, Judge Pinheiro Farina, considered that since there had been no enforcement against the petitioner the Court should have had no jurisdiction to consider the case. *Id.* at paras. 5-6 (Farina, J., dissenting).

102. *Id.* at para. 47 (majority).

103. *Id.* at para. 48.

104. *Id.* at para. 49.

105. *Id.* at para. 52. Deference is referred to as a “margin of appreciation.” *Id.*

106. *Id.* at 49. “What distinguishe[d] the law [of] Northern Ireland from that existing in the great majority of the member-States [was] that it prohibit[ed] generally gross indecency between males and buggery whatever the circumstances.” *Id.*
most intimate aspect of private life.\textsuperscript{107} That required the existence of particularly serious reasons before interferences on the part of public authorities could be legitimate under Article 8(2).\textsuperscript{108}

Justification required a proportional relationship between the government's aims and the utilization of penal provisions to achieve such aims.\textsuperscript{109} In considering this matter the Court considered that the moral climate in Northern Ireland might be different from that in the remainder of Great Britain.\textsuperscript{110} In part that difference explains why Westminster was reluctant to impose a legislative solution upon Northern Ireland.\textsuperscript{111} A need for caution and for sensitivity to public opinion in Northern Ireland was conceded.\textsuperscript{112}

Considering the "essentially private manifestation of the human personality" at issue, the Court noted that in the great majority of the member states of the Council of Europe, penal sanctions are no longer considered necessary or appropriate.\textsuperscript{113} Indeed, in Northern Ireland, not only have the authorities not prosecuted such conduct in recent years against consenting males over the age of twenty-one years capable of valid consent, but also there had been no evidence submitted that this had been injurious to the moral standards of Northern Ireland.\textsuperscript{114} Thus, the existence of a pressing social need for such legislation could not be seen.\textsuperscript{115} While decriminalization does not involve approval, the shock or offense or disturbance of members of the public from the commission of such acts by consenting adults does not warrant the use of penal sanctions.\textsuperscript{116}

On the other hand, the Court did conclude that there was a legitimate necessity in a democratic society to safeguard the vulnerable, including those vulnerable by reason of their youth.\textsuperscript{117} As

\textsuperscript{107} Id. at para. 52 n. 21.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at paras. 53, 54.
\textsuperscript{110} Id. at para. 56.
\textsuperscript{111} Id. at para. 58. In this connection, it should be noted that the legislative changes in England and Wales, as well as the separate changes in Scotland had all originated as Private Members' (i.e. not governmentally proposed) bills. Id. at paras. 17-18.
\textsuperscript{112} Id. at para. 58.
\textsuperscript{113} Id. at para. 60.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at paras. 60-61
\textsuperscript{117} Id. at para. 62.
a result, the request that the age of consent for male homosexual conduct should be the same as that for heterosexual and female homosexual relations, (seventeen years of age in Northern Ireland), was rejected.\textsuperscript{118} It was moreover determined that deference should be given to the judgment of the member states as to the determination of the appropriate age of majority.\textsuperscript{119}

While the opinions in \textit{Lawrence v. Texas} make no mention of the age of consent issue, it is clear that the \textit{Dudgeon} decision on that issue might very well form the basis for a decision limiting \textit{Lawrence} itself in the future.\textsuperscript{120} It is fair to ask whether such a determination should be ignored in further litigation before the United States Supreme Court.\textsuperscript{121}

\begin{itemize}
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} \textit{Id.} at para. 62.
  \item \textsuperscript{120} One of the other cases cited by the Supreme Court from the European Court of Human Rights is a Cyprus case, in which a prosecution had been distinguished by the Supreme Court of Cyprus from \textit{Dudgeon}, since the defendant, a 19 year old soldier did not commit the offense in private. \textit{Costa v. The Republic}, 2 Cyprus L.R. 120 (1982), discussed in \textit{Modinos v. Cyprus}, 259 Eur. Ct. H.R. (ser. A) paras. 11, 20-21 (1993). The discussion in \textit{Modinos} would reinforce the requirement that applicable conduct must be private to be protected. \textit{Id.}
  \item \textsuperscript{121} One of the dissenting Judges in \textit{Dudgeon} in an exercise of renvoi, noted that the Supreme Court of the U.S. as of the date of the \textit{Dudgeon} decision had refused to extend the constitutional guarantee of privacy to homosexual activities or heterosexual sodomy outside of marriage. The effect was described as to uphold as virtually absolute privacy within marriage and privacy of sexual activity within the marriage. \textit{Dudgeon}, 45 Eur. Ct. H.R. at para. 21 (Walsh, J., partially dissenting). Judge Walsh also did not think the Petitioner in \textit{Dudgeon} was a victim and thus should not have had standing. \textit{Id.} at para. 6.
\end{itemize}

In two of the other European Court of Human Rights cases cited by \textit{Lawrence} as following \textit{Dudgeon}, the specific issue was of the right of privacy precluding possible penal actions against consensual adult homosexuality. \textit{Norris v. Ireland}, 142 Eur. Ct. H.R. (ser. A) para. 10 (1988). The principle in \textit{Dudgeon} was extended from Northern Ireland to Ireland itself. The petitioner in \textit{Norris}, a lecturer at Trinity College, Dublin and member of the Irish parliament elected by the graduates of Dublin University, had not been prosecuted, or even investigated in contrast to \textit{Dudgeon}. \textit{Id.} at paras. 8, 11. However, his participation in a television program on a state-broadcasting channel in 1975 had formed the basis of a complaint against the television program, a complaint that had been upheld for violation of the Current/Public Affairs Broadcasting Code in that it could be interpreted as advocacy of homosexual practices. \textit{Id.} at para. 10. Notwithstanding the absence of threat of or actual prosecution the Grand Chamber held by a vote of eight to six that Norris was a victim within the meaning of the \textit{Convention} and by a similar vote that his rights to a private life had been violated. However, no damages were awarded, it being considered that the declaration of the decision was
Examination of one of the other European Court of Human Rights cases cited by the Supreme Court in Lawrence also is worthwhile, for several additional principles of constitutional law are suggested. For example, law needs to be public to be constitutional.\textsuperscript{1} Police secret taping of conversations within a home must be pursuant to legislative authority—not simply pursuant to non-public and non-binding home office guidelines.\textsuperscript{1} Similarly, secret recording of conversations while a defendant was being booked at the police station and while in a jail cell, all done without legislative authority, also violated appropriate respect for private life.\textsuperscript{1}

On the other hand, competing public interests must be considered in the context of fair trial rights, and sometimes the rights of the accused give way to interests in national security and/or protection of specific prosecutorial interests (protection of informants against reprisals). In camera testimony without the defense present regarding surveillance measures and background questions about surveillance was held not to be violative of the defendant’s rights to a fair trial considering the competing interests of national security and the need to protect witnesses at risk of reprisal.\textsuperscript{1} Moreover, the use of secretly taped conversations for voice sample purposes was analogized to the taking of blood samples, or hair samples, to which a privilege against self incrimination does not apply, and held not to violate the fair trial rights of the defendants.\textsuperscript{1}


\textsuperscript{1} Id. at paras. 35, 38.

\textsuperscript{1} Id. at paras. 62-63. The court noted that Great Britain, subsequent to the dates of the case at issue, enacted specific legislation covering covert listening devices by the police on their own premises. Id. at para. 63.

\textsuperscript{1} Id. at paras. 68, 71-73.

\textsuperscript{1} Id. at paras. 80, 81.
III. THE PRINCIPLE OF EQUALITY IN SEXUAL RELATIONSHIPS WITH ADOLESCENTS

In a related series of cases, however, the European Court of Human Rights considered questions of equality with respect to age and consent in regards to sexual relationships. In *BB v. United Kingdom*, the Court considered whether the United Kingdom could apply a different age of consent to heterosexual sexual relationships from that of homosexual sexual relationships. The Court unanimously held that the United Kingdom could not criminalize homosexual conduct below the age of eighteen (and sixteen or above) when it did not criminalize heterosexual relations at the age of sixteen or above. Reflection on such considerations of equality might require reevaluation of the ages of consent in various states of the United States for similar purposes where distinctions based upon age often infuse rape statutes. The Supreme Court's decision in *Michael M. v. Superior Court of Sonoma County*, might stand reexamination. That case considered California's statutory rape law, which criminalized the male participant but not the female participant when the woman was under eighteen years of age and not married to the male.

The *BB v. United Kingdom* decision followed two similar decisions. One involved actual criminal conviction for homosexual conduct with an adolescent (the Austrian statutory ban covered ages fourteen up to eighteen). Austrian law criminalized only male relationships with adult males, not young women's relationships with adult females, or males. The second Austrian case, *SL v. Austria*, involved a petitioner who realized he was a homosexual at the age of

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128. *Id.* at paras. 24, 41.
130. *Id.* at 466.
132. *Id.* The court awarded the petitioner 15,000 euro for non-pecuniary damage and costs and expenses of 10,633.53, and the second petitioner 15,000 euro and costs and expenses of 6,500 euro. *Id.* at para. 69.
fifteen but was prevented from practicing any relationships with adults until reaching the age of eighteen.\textsuperscript{133}

\section*{IV. The Equality Principle Allows the State to Prevent Adoption of a Child by a Homosexual}

There are limits, however, to the extent to which the principle of equality must be accorded to homosexuals—for example, when they seek prior authorization to adopt a child.

In \textit{Frette v. France}, the Court considered a request for prior approval for purposes of adoption by a single man who was homosexual.\textsuperscript{134} Frette had litigated his request for such permission to the highest administrative court in France, the Conseil d'Etat.\textsuperscript{135} The Court concluded that the homosexuality of the petitioner was the decisive factor in denying the authorization for adoption.\textsuperscript{136}

The Court considered various arguments advanced by the government seeking to justify the difference in treatment. One argument rejected by the Court was that such a child might be

\begin{itemize}
\item \textsuperscript{133} \textit{SL v. Austria}, App. No. 45330/99 paras. 9-10 (Eur. Ct. H.R. Jan. 9, 2003) (available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (accessed Dec. 25, 2005)). The court awarded 5,000 euro for non-pecuniary damage and 5,000 euro for costs and expenses. \textit{Id.} at para. 56 (laid out in the court's holding section). The Court noted that there was regular prosecution, an average of sixty criminal prosecutions a year with a conviction in about a third of the cases. \textit{Id.} at para. 14. Subsequent to the filing of this case, Austria repealed the relevant statutory section and enacted provisions that criminalized sexual conduct with persons under the age of sixteen if there is any imposition upon the juvenile, or if there is payment for the activity. \textit{Id.} at para. 15. These provisions apply regardless of whether the sexual acts are heterosexual, homosexual, or lesbian. \textit{Id.} The Court determined that even though the repeal accomplished part of what the petitioner sought, it remained appropriate to award damages because the applicant was precluded from entering into relationships until he reached the age of eighteen. \textit{Id.} at para. 52.


\item \textsuperscript{135} \textit{Id.} at para. 21. He also complained that he had not been notified before the hearing before the Conseil d'Etat so that he could attend. \textit{Id.} at para. 2. Had he been represented by an attorney, the attorney would have received four days notice. \textit{Id.} at paras. 21, 22. The Court determined that his right to a fair trial under Article 6 of the \textit{Convention} was violated by that lack of notice and awarded costs and expenses in the amount of 3,500 euro. \textit{Id.} at para. 58.

\item \textsuperscript{136} \textit{Id.} at para. 32.
\end{itemize}
MESSAGES FROM STRASBOURG

stigmatized in the short term.\footnote{137} However, given what the Court determined to be a total lack of consensus in the Council of Europe about the advisability of allowing a single homosexual to adopt a child, a wide margin of appreciation (i.e. great deference) must be given to a government that determines it is not in the best interests of a child to permit such an adoption.\footnote{138} The Court concluded then that no violation of Article 14 (equal protection) of the Convention had occurred.\footnote{139} Among other reasons the Court noted that there were not enough children to satisfy the demand for adoption, and that the scientific community was divided over the possible consequences of a child being adopted by one or more homosexual parents.\footnote{140} Would a court in the United States not consider similar factors were a similar case presented?

V. WHEN DOES LIFE BEGIN: ROE V. WADE IN EUROPE?

In July 2004, the European Court of Human Rights issued a decision in which it indicated that it could not itself determine when life began regarding an unborn child.\footnote{141} Instead, that issue was left to the discretionary determination of the member states of the Council of Europe.\footnote{142} The case before the Court, however, did not involve a voluntary abortion, as did Roe v. Wade.\footnote{143} The case involved the tragic consequences of a medical mistake and the conduct of the wrong operation upon the wrong woman.\footnote{144} The misfortune of the young woman was then compounded by her erroneous choice of a criminal

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137. \textit{Id.} at para. 35. To accept that argument would be to give a right of veto to parties who were motivated by such prejudice. The Court cited, \textit{inter alia}, a U.S. Supreme Court case, \textit{Palmore v. Sidoti}, where the Court refused to permit a trial court judge to award custody of children to the divorced father because the mother remarried to a husband of another race. \textit{Palmore v. Sidoti}, 466 U.S. 429, 434 (1984).


139. \textit{Id.} at para. 43.

140. \textit{Id.} at para. 42.


142. \textit{Id.} at para. 82.


144. \textit{Vo}, App. No. 53924/00 at paras. 11,12.
legal route in the French court system rather than an administrative civil tort remedy route.\textsuperscript{145}

The applicant, Mrs. Thi-Nho Vo, who was of Vietnamese origin, went to a hospital in Lyon for a scheduled medical examination during her sixth month of pregnancy.\textsuperscript{146} At the same time waiting in the same waiting room, another woman, Mrs. Thi Thanh Van Vo was at the hospital to have a coil removed.\textsuperscript{147} When the name Vo was called, Mrs. Thi-Nho Vo responded.\textsuperscript{148} After a brief interview by the physician, who noted that she had difficulty understanding French, the physician sought to remove the coil without a prior examination.\textsuperscript{149} In doing so he pierced the amniotic sac causing the loss of a substantial amount of amniotic fluid.\textsuperscript{150} Both Mrs. Vos were admitted to the hospital, and a further error was narrowly averted the next morning when Mrs. Thi-Nho Vo was taken to the operating theatre instead of Mrs. Thi Thanh Van Vo, for removal of the coil.\textsuperscript{151} This time Mrs. Vo objected and she was recognized by an anesthetist.\textsuperscript{152} Mrs. Thi-Nho Vo left the hospital to return several days later.\textsuperscript{153} It was discovered at that time that the amniotic fluid had not been replaced and the pregnancy was then terminated on health grounds.\textsuperscript{154}

Mrs. Thi-Nho Vo and her partner filed a criminal complaint and applied to be joined as civil parties to the criminal proceeding alleging, \textit{inter alia}, unintentional homicide of her child and total unfitness for work for a period not exceeding three months.\textsuperscript{155}

Expert evaluations were conducted which concluded that the fetus was in all respects normal, no permanent damage had been done to

\textsuperscript{145} \textit{Id.} at para. 74. Under French law as well as other civil law countries such as Italy, it is possible for a complaining party to attach a request for damages to a criminal action. The criminal action and the essentially civil action are tried together. In the U.S. of course, actions such as tort actions, would be brought as separate suits.

\textsuperscript{146} \textit{Id.} at para. 10.

\textsuperscript{147} \textit{Id.} at para. 11.

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.} at para. 12.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.} at para. 13.
Mrs. Vo, and that the doctor acted negligently, by omission, and is accountable for the error.  

A criminal complaint was filed charging the physician with causing unintentional injury, through negligence or inattention, leading to the child’s death. Although the physician was ordered to stand trial on counts of unintentional homicide and unintentionally causing injuries, a year later the criminal court determined that the physician was entitled as of right to an amnesty under an amnesty law regarding the offense of negligently causing injury entailing temporary unfitness for work. On the second charge, unintentionally causing the death of the child, the Court acquitted the physician since it could not determine that French law defined a fetus of the age of twenty to twenty-one weeks as a viable fetus (six months), as a person.  

On appeal, the Lyons Court of Appeals affirmed the acquittal on the charge of unintentionally causing injuries, but reversed the other decision finding the physician guilty of unintentional homicide, and imposed a sentence of a six month suspended prison sentence, a fine of 10,000 francs and civil compensation to Mrs. Vo in the amount of 5,000 francs. That court made references to international treaties, including the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, which it asserted recognized a right to life protected for everyone, and notably children. The appeals court also considered various decisions by the highest court of France, the Criminal Division of the Court of Cassation, one of which indicated that by implication the Convention on the Rights of the Child could concern a fetus aged less than ten weeks.

That decision was appealed to the Court of Cassation which reversed the decision of the court of appeals and determined that a remand was not necessary. The Court of Cassation determined that

156. Id. at paras. 14-16.

157. Id. at para. 17. The complaint also alleged that the physician caused bodily injury resulting in the unfitness for work for a period of not more than three months, itself a criminal offense. Id.

158. Id. at para. 19.

159. Id.

160. Id. at para. 21.

161. Id.

162. Id.

163. Id. at para. 22.
the court of appeals had misinterpreted French law. The Court of Cassation based its determination on the rule of strict construction in criminal cases.

The European Court of Human Rights examined the question of whether the failure of French law to punish the unintentional destruction of a fetus constituted a failure of the State to protect the right to life within the meaning of Article 2 of the Convention. The court noted the difference in text between the European Convention on Human Rights, and the American Convention on Human Rights. The American Convention explicitly provided that protection should be accorded “from the moment of conception”; the European Convention does not. The Court also examined prior case law from the European Court of Human Rights, concluding that that jurisprudence did not establish that an unborn child was entitled to protection as distinct from the mother under Article 2 of the Convention. However, the Vo case presented a new issue, where the interests of the mother and unborn child were consistent.

The Court determined that it should not enter the debate about when life begins. The absence of consensus without the member states of the Council of Europe, and indeed, the inability in France itself, to resolve the particular question, counted against the propriety of the Court becoming involved. The Court declared, it was “convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of art 2 of the Convention . . .”

164. Id. at para. 29.
165. Id.
166. Id. at para. 74.
167. Id. at para. 75.
168. Id.
169. Id. at paras. 75-80 (Most of these cases dealt with voluntary abortions where the mother’s interests were at odds with the interests of the fetus.).
170. Id. at para. 81.
171. Id. at para. 82.
172. Id. at paras. 82-84. Among other matters referenced the French National Assembly twice rejected attempts to adopt bills creating the offense of involuntary termination of pregnancy, the last time after a “fierce controversy” regarding which the Minister of Justice declared the proposal “caused more problems than it solved.” Id. at paras. 32-33.
173. Id. at para. 85 (emphasis added).
The Court, however, went on to determine that it was not necessary to find that French law lacked adequate protection for the unborn with the absence of a criminal statute on the subject.\textsuperscript{174} A civil remedy was adequate, and the court found that it was clear that a civil remedy against the authorities did exist in France in the context of an administrative court action for civil damages against the taking of the life of the fetus.\textsuperscript{175} It drew a distinction between the State intentionally taking life and the State safeguarding the lives of those within its protection.\textsuperscript{176}

In \textit{Roe v. Wade} the United States Supreme Court refused to determine when life began.\textsuperscript{177} "When those trained in . . . medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."\textsuperscript{178} The \textit{Vo} decision and \textit{Roe} are identical in this respect—demonstrating similarity between the European situation and the American one.

VI. MAY ONE NATION STATE PROHIBIT DISSEMINATION OF INFORMATION ABOUT ABORTION SERVICES IN ANOTHER NATION STATE?

The United States Supreme Court dealt with an analogous question in the case of \textit{Rust v. Sullivan}.\textsuperscript{179} In \textit{Rust} regulations promulgated by the Health and Human Services Department of the federal government prohibited (\textit{inter alia}) personnel involved in any project receiving federal family planning funds from providing counseling involving the use of abortion for family planning or providing referral for abortion services.\textsuperscript{180} The Supreme Court sustained that prohibition in the context of attacks based both upon the First Amendment and the Fifth Amendment's due process clause.\textsuperscript{181}

\begin{itemize}
\item \textsuperscript{174} \textit{Id.} at para. 90.
\item \textsuperscript{175} \textit{Id.} at paras. 91, 94.
\item \textsuperscript{176} \textit{Id.} at para. 88. The Court was not concerned by the fact that by the time of the Court of Cassation decision the statute of limitation had run on filing the administrative tort action. \textit{Id.} at paras. 92-93. There was in fact a remedy potentially available.
\item \textsuperscript{177} \textit{Roe v. Wade}, 410 U.S. 113, 159 (1973).
\item \textsuperscript{178} \textit{Id}.
\item \textsuperscript{180} \textit{Id.} at 179.
\item \textsuperscript{181} \textit{Id.} at 203. Justices Blackmun, Marshall, and Stevens dissented in one opinion.
\end{itemize}
Since the government had no duty to subsidize abortion itself, it was also under no duty to provide information about such services. Indeed, it mattered not that the services were medically necessary for a particular woman.

The European Court of Human Rights dealt with a series of cases involving injunctions in Ireland effectively closing down not-for-profit clinics providing non-directive counseling, including references to abortion facilities in other countries. Irish criminal law made it an offense to attempt to procure or to procure an abortion, or to administer an abortion or to assist in an abortion. Furthermore, Irish constitutional law also protected the right to life of the unborn from the moment of conception onwards. The applicant clinics submitted evidence in the European Court of Human Rights that the number of abortions of Irish women in Great Britain since the granting of the injunction was well over 3,500 per year. It was suggested that the failure to permit referrals would, among other results, increase the delays in obtaining abortions and result in poor aftercare with a failure to deal adequately with medical complications. The Irish Supreme Court had sustained the injunctions.

Irish law, however, was not invariably protective of the life of the unborn. In another case the Irish Supreme Court had discharged an injunction when the case dealt with an allegedly suicidal, pregnant

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Id. (Blackmun, Marshall & Stevens, JJ., dissenting). Justice O'Connor dissented in a separate opinion based upon the ground that the regulations exceeded statutory authority. Id. at 223, 224-25 (O'Connor, J., dissenting).

182. Id. at 201.
183. Id.
184. Open Door and another v. Ireland, App. Nos. 14234/88 and 14235/88 para. 15 (Eur. Ct. H.R. Oct. 29, 1992) (available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=haddock-en (accessed Dec. 25, 2005)). One of the injunctions provided "that the Defendants . . . be perpetually restrained from counseling or assisting pregnant women with the jurisdiction of this Court to obtain further advice on abortion or to obtain an abortion." Id.

185. Id.
186. Id.
187. Id. at para. 26.
188. Id. In the Irish Supreme Court the argument was made that if the applicants did not provide the counseling service "it was likely that pregnant women would succeed nevertheless in obtaining an abortion in circumstances less advantageous to their health." Id. at para. 18.
189. Id. at para. 20.
fifteen-year-old girl who wanted to leave the jurisdiction to obtain an abortion.\textsuperscript{190}

The issue as presented to the European Court of Human Rights was whether the restriction embodied in the injunctions was necessary in a democratic society for the protection of morals in relationship to the freedom to receive and impart information as provided by Article 10 of the \textit{Convention}.\textsuperscript{191} The Court focused on the issue of whether the injunctions were necessary in a democratic society.\textsuperscript{192} The government argued that there was no general restriction upon the discussion of abortion generally, or upon the right of women to travel abroad to obtain one.\textsuperscript{193} The protection of the right to life, asserted the government, might necessitate the infringement of other rights in a manner that might not be acceptable were lesser rights at issue.\textsuperscript{194}

The Court, however, asserted its power to review the situation and refused to defer to the State's discretion in the matter.\textsuperscript{195} The Court recalled that the protection of freedom of expression is also applicable to "'information' or 'ideas' that offend, shock or disturb the State or any sector of the population."\textsuperscript{196} "Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.' "\textsuperscript{197} The limitation of activities which are

\begin{footnotesize}
\begin{enumerate}
  \item Id. at para. 25 (citing \textit{Atty. Gen. v. X and others}, 15 BMLR 104 (1992)).
  \item Article 10 provides:
    \begin{enumerate}
      \item Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
      \item The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
    \end{enumerate}
  \item \textit{Open Door}, App. Nos. 14234/88 and 14235/88 at para. 66.
  \item Id. at para. 67.
  \item Id.
  \item Id. at para. 68.
  \item Id. at para. 71.
  \item Id.
\end{enumerate}
\end{footnotesize}
legal in other Convention countries, call for careful scrutiny as to their conformity with the tenets of a democratic society. The absolute nature of the injunction struck the Court as imposing a perpetual restraint upon the imparting of information regardless of age or state of health or the reasons women sought counseling on the termination of pregnancy. The sweeping nature of the restriction was highlighted by the case of Attorney General v. X and others and the concession made during oral argument that the injunction no longer applied to women in similar circumstances who were now free to have an abortion in Ireland or abroad. The Court considered the restriction overly broad and disproportionate. It also considered significant that the clinics involved did not advocate or encourage abortion, but simply explained available options, thus the link between providing information and destruction of unborn life was not as definite as contended. Moreover, the information was not provided to the public at large, although such information through phone books and magazines was already available in Ireland. The court also weighed the adverse health impacts upon women, particularly those without resources. Considering the current level of abortions obtained by Irish women abroad, the Court concluded that the restraint on imparting information was disproportionate to the aims pursued constituting a breach of Article 10.

Would an approach similar to that of the European Court of Human Rights have changed the result in the Rust decision? The restriction in Rust was far more limited—however, the impact, particularly forbidding abortion references even when the life of the woman was at issue, would seem plainly inconsistent with the treatment of The Attorney General v. X by the Irish Supreme Court, a major factor in the European Court of Human Rights’ determination.

198. Id. at para. 72.
199. Id. at para. 73.
200. Id.
201. Id. at para. 74.
202. Id. at para. 75.
203. Id. at paras. 75-76.
204. Id. at para. 77.
205. Id. at paras. 78, 80. The judges voted fifteen to eight that Article 10 had been violated. One of the two clinic applicants requested damages for the period it was closed. The Court awarded IR£ 25,000 plus substantial attorneys fees. Id. at pars. 88-94.
VII. MAY A GOVERNMENT BE CIVILLY RESPONSIBLE FOR PROTECTING CHILDREN FROM DOMESTIC ABUSE?

The European Court of Human Rights held in *Z and others v. United Kingdom* that the United Kingdom was financially responsible when its child protective workers permitted psychological and physical abuse from the abuse and neglect of parents after the situation had been brought to the attention of government authorities. Such a failure was found to constitute a breach of the requirements of Article 13 of the *Convention* that guarantees the availability of a remedy to enforce the substance of *Convention* rights. The failure of United Kingdom law to make available a tort remedy against the government for the negligence of the local authority meant that the children's experiences, described as horrific by a psychiatrist, implicated a violation of Article 3 of the *Convention*, the infliction of inhumane and degrading treatment upon the children. The Court awarded the children various amounts ranging from 36,000 to 132,000 pounds, plus legal costs and expenses.

The earlier decision in *A v. United Kingdom*, had reached a similar result in somewhat more bizarre circumstances. The government had criminally charged a nine-year-old child's stepfather with assault causing bodily harm. The jury, however, acquitted the stepfather, despite medical testimony about the bruises left by a cane over a course of several days of beatings. The child then complained to the European Court of Human Rights that the state had failed to adequately protect him against the ill treatment by his stepfather. The complaint specifically alleged that Article 3 of the

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207. *Id.* at para. 108.

208. *Id.* at para. 102.

209. *Id.* at paras. 127, 131, 135.


211. *Id.* at para. 12.

212. *Id.* at paras. 9, 11.

213. *Id.* at para. 16.
Convention had been violated. Article 3 prohibited torture or inhuman or degrading treatment or punishment. The Court considered that the treatment reached the level of severity required by Article 3 and furthermore held that the law failed to provide adequate protection against treatment or punishment contrary to Article 3. Frankly, it is quite unclear what the Court expected the government to have done. It recalled that the burden was on the prosecution to prove beyond a reasonable doubt that the assault went beyond the limits of lawful punishment. In a preceding paragraph the Court recited various earlier decisions and the United Nations Convention on the Rights of the Child for the proposition that it was the obligation of the high contracting parties to secure rights for the child through state protection in the form of effective deterrence. The United Nations Convention was quoted:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Whatever the Court considered the proper remedy, the holding of violation and awarding of non-pecuniary damages of 10,000 pounds and 20,000 pounds of cost reflected its conviction that the State’s actions were inadequate.

Contrast those decisions with the decision of the United States Supreme Court in DeShaney v. Winnebago County Department of Social Services. In DeShaney the petitioner was beaten and permanently injured by his father. Ultimately the father beat the

214. Id.
215. Id. at para. 19.
216. Id. (The government did not contest the fact of a violation of Article 3).
217. Id. at para. 24.
218. Id. at para. 23.
219. Id. at para. 22.
220. Id.
221. Id. at paras. 34, 37.
223. Id. at 191.
child so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time.

Joshua did not die, but suffered such severe injury that "he is expected to spend the rest of his life confined to an institution for the profoundly retarded." The Supreme Court rejected the argument that the years of ineffective intervention by the state department of social services entitled Joshua to a remedy. The "Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." Since Joshua was not taken into state custody, the state bore no responsibility for his safety and general welfare.

"While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." Under these conditions "the State had no constitutional duty to protect Joshua." Its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause.

The United States Supreme Court's decision stands in stark contrast to the European Court of Human Rights decisions which clearly demand more affirmative duties to act so as to protect children on the part of the government. Perhaps the grant of certiorari on November 1, 2004 in the case of Town of Castle Rock v. Gonzales, 

224. Id. at 193.
225. Id.
226. Id.
227. Id. at 197-98.
228. Id. at 196.
229. Id. at 199-01.
230. Id. at 201.
231. Id.
232. Id. at 202 (footnote omitted).
233. Town of Castle Rock v. Gonzales, 125 S. Ct. 417 (2004). The result of DeShaney was effectively reaffirmed, however, by the decision in Town of Castle Rock v. Gonzales where the Court held the wife had no property interest in seeing the police enforcement of the protective order. 125 S. Ct. 2796, 2810 (2005). An amici curiae brief was filed citing international precedent by the International Law Scholars and Women's Civil Rights and Human Rights Organizations but none of the Justices opinions referred to international authority. However, the amici brief did not cite A v.
suggests willingness to reexamine *DeShaney.*\(^{234}\) *Castle Rock* concerns the failure of the government to take any steps to enforce a domestic abuse restraining order against the husband. He ignored the order, abducted the three children of the marriage, killed each and then went to a police station where he opened fire on the police station with a semiautomatic weapon, and was himself shot dead.\(^{235}\)

**VIII. THE EUROPEAN COURT OF HUMAN RIGHTS HAS SIMILARLY INTERPRETED THE RIGHTS TO FAMILY AND PRIVATE LIFE TO ACCORD SUBSTANTIAL RIGHTS TO CITIZENS OF THE COUNCIL OF EUROPE.**

The rights of the natural father of a child are more protected by the European Court of Human Rights than by the Supreme Court of the United States. In *Kroon and others v. The Netherlands*, the Court considered the application of Article 8 of the *Convention*, "the right to respect for his private and family life, his home and his correspondence," when the natural father of a child sought registration by the state as the father of the child.\(^{236}\) However, the government refused to register him as the father because the mother had been married to another man when she gave birth to the child.\(^{237}\) Although she obtained a divorce from her husband the following year,\(^{238}\) according to the registrar of births, only if the former husband brought proceedings to deny paternity, it was impossible under Netherlands law to register the natural father as the "legal" father.\(^{239}\) Three levels of Netherlands courts also rejected the request.\(^{240}\) The government argued that since the child was born of an extramarital affair, there was no family between the two.\(^{241}\) Moreover, their

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235. *Id.* at 1097-98


237. *Id.* at para. 10.

238. *Id.* at para. 9.

239. *Id.* at para. 10.

240. *Id.* at paras. 11-14. Three more children were also born by the mother and natural father, although they never married and also did not cohabit. *Id.* at para. 15.

241. *Id.* at para. 29.
subsequent failure to marry and/or live together, as well as the applicant's failure to contribute to the financial support of the child meant that there was no family life. The applicant argued that he did spend half his time on the child's care and upbringing and that he made financial contributions from his modest income.

The court ruled that the "notion of 'family life' . . . is not confined . . . to marriage-based relationships and may encompass other de facto 'family ties' where parties are living together . . . ." However, while living together ordinarily might be a requirement for a family life, other factors may demonstrate that a relationship has sufficient consistency to create de facto " 'family ties,' " such as the four children born to the same persons in the instant case.

According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family.

According to the Court, " '[R]espect' for 'family life' requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone." While the Court declined to award damages, since it considered the finding of a violation of Article 8 of the Convention sufficient compensation, it did award costs and lawyer's fees.

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242. Id.
243. Id.
244. Id. at para. 30 (citation omitted).
245. Id. at para. 30.
246. Id. at para. 32.
247. Id. at para. 40.
248. Id. at paras. 45, 47. The decision was by a vote of 8 to 1 that Article 8 of the Convention was applicable, and seven to two that it had been violated. Id. at para. 47. In dissent, the opinion of Judge Mifsud Bonnici emphasized that " 'family life' necessarily implies 'living together as a family.' " Id. at para. 3 (Bonnici, J.,
A similar result and holding was reached in *Lebbink v. Netherlands*. Although the father never cohabited with the mother and child, the ties were that the father was present at the birth, served as auxiliary guardian until the law creating that position was abolished, had changed the child’s nappy a few times, and had been consulted about the child’s medical problems, which were sufficient to claim Article 8 protection.

Such decisions are at a sharp contrast with the United States Supreme Court’s decision in *Michael H. v. Gerald D.* At issue in that case was a California law that established a presumption that a child born of the wife is legitimately a child of the marriage, a presumption rebuttable under only a limited number of circumstances—not including the instant case. Thus the fact that blood tests confirmed that Michael H. had a probability of 98.07 percent of being the actual father of the child was irrelevant. No constitutional rights of Michael H. were violated! According to Justice Scalia (writing for himself and three other justices) the
traditional protection accorded to the family unit was valid as a historical fact and entitled to judicial attention and deference.255

Deference to the traditional extended family is not unknown under the European Convention on Human Rights. For example, in another case dealing with family life, the Commission by a vote of fourteen to four, recognized the right of an uncle to be considered entitled to petition for a child as an aspect of family life.256 While the case was accepted by the Court, during the interval between the Commission and Court consideration, the United Kingdom changed the relevant statutory law to recognize the right of an uncle.257 As a result the case was dismissed by consent.258

On the other hand, the European Court of Human Rights has not recognized every novel claim of “rights to a family life.” In X, Y and Z v. United Kingdom, the court refused to support the right of a transsexual (female to male) to be registered as the father of an artificially inseminated by donor child, despite “his” living in a permanent relationship with the natural mother of the child for over 13 years.259 The Court held unanimously, however, that Article 8 of the Convention applied to the case, however, found by a vote of fourteen to six that no violation had occurred.260

In reaching its determination the Court observed that “no common European standard” existed with regards to the “granting of parental rights to transsexuals.”261 The Court further observed that no trend could be discerned with respect to how social relationships should be recognized between a child conceived by artificial insemination and the person who performed the role of a father.262 In the absence of common ground between the member states of the Council of Europe, the Court determined that a wide margin of

255. Id. at 124.
257. Id. at paras. 12, 16.
258. Id. at para. 18.
260. Id. at para. 56.
261. Id. at para. 44.
262. Id.
appreciation (i.e. deference) should be given to the respondent State.\textsuperscript{263} While the Court considered arguments based upon the child’s sense of security (or lack thereof), as well as the practical problems such as foreign employment that could not be taken up because a lack of recognition of a dependency relationship had consequences in immigration and nationality matters as well as benefits, such as free education and lodging, these were inadequate reasons to justify overcoming the cautious approach of the nation state.\textsuperscript{264}

The court concluded its analysis:

\begin{quote}
G]iven that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States, the Court is of the opinion that Article 8 cannot, in this context, be taken to imply an obligation for the respondent State formally to [recognize] as the father of a child a person who is not the biological father. That being so, the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between [the parties] does not amount to a failure to respect family life within the meaning of [Article 8].\textsuperscript{265}
\end{quote}

In short, the Court would not itself break this new ground in family law; it would await developments in the member States. Such an approach is not dissimilar to the cautious approach with which the United States Supreme Court addresses newly identified “rights.” Indeed, the similarity may suggest that the two constitutional courts are not all that dissimilar, particularly in confronting one of the most problematic issues a constitutional court must consider, what are the appropriate sources for constitutional rights?

\textsuperscript{263} Id.
\textsuperscript{264} Id. at paras. 45-48. Inheritance issues could, for example, be settled through the execution of a will. Id. at para. 48. There was no nationality problem for the instant child since U.K. citizenship was conferred through the mother. Id. Rare necessities of producing birth certificates without a father’s name was deemed insufficient to produce particular stigma to the child or family. Id. at para. 49. Nothing restricted the “‘father’ ” from acting as such in social settings and the father could, with the mother, apply for a joint residence order which was stated could confer full parental responsibility for the child under English law. Id. at para. 50.
\textsuperscript{265} Id. at para. 52.
IX. THE RIGHT TO FAMILY LIFE AND PRIVATE LIFE INCLUDES NOT ONLY AN OBLIGATION TO PROVIDE BLOOD TESTING TO DETERMINE PATERNITY: THE STATE MUST ASSURE THAT THE PUTATIVE FATHER SUBMITS TO BLOOD TESTING OR PROVIDE AN ALTERNATIVE REMEDY

The United States Supreme Court determined in *Little v. Streater*, that the State was obliged to provide state-subsidized blood testing for an indigent defendant in a paternity action. The holding resulted from the State’s prominent role in such litigation, particularly considering that there is a federally mandated program enabling states to assist indigent mothers in collecting child support payments. The states, however, are only encouraged to establish such child support collection programs—they are not required to do so. Indeed, the ultimate issues are between private parties, and ordinarily the Supreme Court mandates little, if any, obligation on behalf of the state to assist in such disputes. Thus the holding of *Little v. Streater* places an unusual obligation upon the states.

The European Court of Human Rights requires member states to provide more “active” state assistance to mothers seeking orders declaring paternity. In *Mikulic v. Croatia*, the mother and child sought a declaration of paternity against a putative father. Ultimately the court ordered the putative father to provide blood tests, but the man never appeared for such testing as ordered. Four years and four months passed by. The mother and child then lodged a complaint against the government for violations of rights to a family and private life under Article 8 of the *Convention*, and the right to a trial in a reasonable time under Article 6.

The Court found a violation of the Article 6 right. In effect, the failure to compel the putative father to actually submit to the DNA tests

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267. *Id.* at 6, 9, 10 n. 6.
268. *Id.* at 10 n. 6.
270. *Id.* at paras. 16-20, 22.
271. *Id.* at para. 45. Six appointments for DNA tests had been scheduled and fifteen hearings at the first instance court. *Id.*
272. *Id.* at paras. 35, 47.
273. *Id.* at para. 46.
violated the mother's and child's rights, particularly the rights to a "private life" which the Court defined as "a person's physical and psychological integrity and . . . sometimes embrace[s] aspects of an individual's physical and social identity."\textsuperscript{274} The right to a private life includes the determination of a legal relationship between a child born out of wedlock and her father.\textsuperscript{275} The positive actions required by the State include the State's obligation to take affirmative action to secure respect for private life "even in the sphere of the relations of individuals between themselves . . . ."\textsuperscript{276} If a member state lacks a mechanism to compel the putative father to appear for blood testing, it must provide another method to determine the paternity claim speedily.\textsuperscript{277} In some states the state may fine or imprison the person in question.\textsuperscript{278} In others the failure to appear may create a presumption of paternity.\textsuperscript{279} The failure to have any of these methods to assist amounts to a failure to have a fair balance between the rights of the applicant to have her rights determined, and the rights of the supposed father not to undergo DNA tests.\textsuperscript{280}

\section*{X. The Right to Family Life Protects the Interest in the Family Staying Together, Even Against the Interest of the State in Deporting Non-Citizens}

The United States frequently deports aliens who have been convicted of criminal offenses as provided for by statute. Such deportations have been severely limited by decisions of the European Court of Human Rights on the grounds of the right to family life and on occasion, considerations of equality between the sexes.

In \textit{Moustaquim v. Belgium}, Belgium sought to deport a Moroccan national who had lived in Belgium since he was one-year-old.\textsuperscript{281}

\begin{quote}
\begin{tabular}{l}
\textsuperscript{274.} \textit{Id.} at para. 53. \\
\textsuperscript{275.} \textit{Id.} at paras. 53, 55. \\
\textsuperscript{276.} \textit{Id.} at para. 57. \\
\textsuperscript{277.} \textit{Id.} at para. 64. \\
\textsuperscript{278.} \textit{Id.} \\
\textsuperscript{279.} \textit{Id.} \\
\textsuperscript{280.} \textit{Id.} at para. 65. The Court awarded 7,000 euros in non-pecuniary damage, holding unanimously that violations of Articles 6 and 8 had been established. \textit{Id.} at paras. 78, 80. \\
\end{tabular}
\end{quote}
While still a minor, 147 charges of criminal activity had been brought against him, resulting in ten periods of detention not exceeding fifteen days. After Moustaquim became an adult, he was charged with twenty-six further offenses, and found guilty of twenty of the offenses. On appeal, the judgment below was set aside and Moustaquim was found guilty of twenty-two of the offenses, and prison sentences were ordered of two years plus additional sentences of eight days and fifteen days. The offenses included aggravated theft, attempted aggravated theft, theft, handling stolen goods, destroying a vehicle, assault, and threatening behavior. He was acquitted of indecent assault with violence on an under-age girl over sixteen, criminal conspiracy, one count of attempted theft, and criminal damage to fencing. He served eighteen months in jail.

The Ministry of Justice referred Moustaquim's case to the Advisory Board on Aliens seeking deportation. That Board found that although the very large number of offenses that Mr. Moustaquim had engaged in constituted serious prejudice to public order, and deportation would be justified in law, but recommended against deportation. The Board considered deportation inappropriate because of Mr. Moustaquim's youth, both at the time of the offenses and at the time of its decision, that he had lived in Belgium since he was one-year-old, his entire family (father, mother and seven other siblings (four of which were born in Belgium) lived in Belgium, Mr. Moustaquim was learning his father's trade (a butcher) and was able to be helped in that endeavor by his father, and the fact of several short periods of prison leave without any untoward incidents and the granting of such leave showed some confidence in his behavior.

Despite this recommendation, a royal order was served upon Mr. Moustaquim requiring him to leave Belgium after release from prison and not to return for ten years. A petition asking the Queen to

282. Id. at para. 10.
283. Id. at paras. 13, 14.
284. Id. at paras. 15, 17.
285. Id. at para. 15.
286. Id.
287. Id. at para. 16.
288. Id. at para. 17.
289. Id.
290. Id.
291. Id. at para. 18.
intervene was rejected, as were two applications to the Conseil d’Etat.292 After leaving Belgium Mr. Moustaquim went first to Spain and then Stockholm where he remained for nearly six years, living at times legally and other times illegally, by his wits and by taking the odd undeclared job in various restaurants.293 On December 14, 1989 a royal order was issued suspending the deportation order for a period of two years and Mr. Moustaquim returned to Belgium.294

However, several years previously in 1986, Mr. Moustaquim had applied under the European Convention of Human Rights alleging that his deportation infringed upon his rights to family and private life as well as other provisions of the Convention.295 The European Court of Human Rights held in 1991 by a vote of seven to two that there had been a breach of Mr. Moustaquim’s rights to family life by the deportation order.296 It agreed, thereby, with the Commission of Human Rights that had reached a similar result, finding that the deportation was disproportionate as the authorities had not reached a proper balance between the applicant’s interest in maintaining a family life and the public interest in the prevention of disorder.297 The court considered that all of the offenses related to the period when Mr. Moustaquim was an adolescent.298 The latest offense on which Mr. Moustaquim had been convicted dated from December 21, 1980, but the deportation order was not issued until February 28, 1984.299 In the intervening period, which Mr. Moustaquim was in custody for sixteen months, he also had been at liberty for nearly twenty-three months.300 Mr. Moustaquim had lived in Belgium since he was less than two-years-old, and had received all of his schooling in French.301 He had returned to Morocco only twice for holidays in the entire period of twenty years.302 Given that his entire family lived in Belgium, the

292. Id. at paras. 19, 20.
293. Id. at para. 21. He attempted to make a declaration of nationality under Belgium law, but Belgium authorities rejected that attempt. Id. at para. 22.
294. Id. at para. 25.
295. Id. at para. 30.
296. Id. at para. 59.
297. Id. at paras. 41, 46.
298. Id. at para. 44.
299. Id.
300. Id.
301. Id. at para. 45.
302. Id.
Court considered that the deportation order, which the Advisory Board on Aliens had recommended against, was a serious disruption of his family life. The Court awarded not only costs but also 100,000 Belgian francs for non-pecuniary injury.

Nor is this the only case in which family life was seen by the Court as trumping other serious State interests. For example, in Al-Nashif and others v. Bulgaria, revocation of a residence permit on the basis of national security was deemed inappropriate as an infringement against family life!

Mr. Al-Nashif was a stateless person of Palestinian origin who moved to Bulgaria with his wife. Mr. Al-Nashif's brother lived in Bulgaria and was married to a Bulgarian national. Mr. Al-Nashif was born in Kuwait of a stateless father of Palestinian origin and a Syrian mother. He lived there until age twenty-five. After the first Gulf War many Palestinians were expelled from Kuwait, and Al-Nashif left Kuwait ultimately going to Bulgaria in September 1992. By February 1995 he had obtained a permanent residence permit in Bulgaria. In that same month he contracted a Muslim religious marriage with a Bulgarian citizen, but under Bulgarian law that marriage had no legal effect. Al-Nashif alleged that he continued to live with his first wife and children, although his "second wife" alleged that he lived with her. The second wife apparently suffered from a mental disturbance. In March 1999, the local police in the Bulgarian town in which Al-Nashif was living proposed that his residence permit be withdrawn under the Aliens Act which provides for

303. Id.
304. Id. at para. 55. He had asked for 500,000 BEF. Id. at para. 54.
306. Id. at paras. 9, 11, 13. Subsequently two children were born in Bulgaria of this marriage. Id. at para. 11.
307. Id. at para. 12.
308. Id. at para. 10. He cannot become a citizen of either Kuwait or Syria since only offspring of male nationals of each state can become citizens. Id. at para. 10.
309. Id. at para. 11.
310. Id. at para. 13.
311. Id. at para. 15.
312. Id. at para. 16.
313. Id. at para. 18.
314. Id. at para. 19.
revocation for "a foreigner who poses a threat to 'the security or the interests of the Bulgarian State.' "315 "No further details were mentioned" and no additional information was given to Mr. Al-Nashif who was served with an order to leave the country within fifteen days.316

While the authorities gave no further information, two national newspapers published articles explaining that Mr. Al-Nashif "did not have permission to teach the Muslim religion, that he had taken part in an unauthorized religious seminar in 1997 and that he was linked to 'Muslim Brothers[]' a fundamentalist organization."317 Several local Muslim leaders in the town Al-Nashif lived in and the Chief Mufti of the Bulgarian Muslims filed letters with the government supporting Mr. Al-Nashif.318 They confirmed that he was teaching under their authorization in full conformity with Bulgarian law.319 The Chief Mufti stated that the local police had made defamatory statements about Mr. Al-Nashif, falsely portraying him as a dangerous terrorist connected to fundamentalist organizations, and that the measures against Mr. Al-Nashif constituted "a demonstration of, and incitement to, anti-Islamic and xenophobic tendencies."320

Attempts to challenge the deportation order in the Sofia City Court resulted in an initial order granting a stay of execution of the order.321 However, days later a certificate was filed stating that Mr. Al-Nashif "had committed acts against the national security and the interests of the Republic of Bulgaria, consisting in unlawful religious activity . . . ."322 No further detail was furnished although the initial determination of the Sophia City Court had indicated that in camera submissions of the government failed to support the allegation that Mr. Al-Nashif posed a threat to national security or to the national interests.323 That same court, sitting again in camera, reversed its previous ruling and permitted the deportation to go forward.324

315.  Id. at paras. 21-22.
316.  Id. at para. 22.
317.  Id. at para. 23.
318.  Id. at para. 24.
319.  Id.
320.  Id.
321.  Id. at para. 38.
322.  Id. at para. 39.
323.  Id. at para. 38.
324.  Id. at para. 40.
Subsequent to the deportation, on appeal to the Supreme Administrative Court of Bulgaria, that Court found that the determination was not subject to appeal and that the decision did not have to be reasoned.\textsuperscript{325}

Mr. Al-Nashif appealed on behalf of himself and his two children complaining of violations of the right to family life as well as the failure to provide an effective remedy under domestic law to challenge the basis for the deportation order.\textsuperscript{326} By a vote of four to three both allegations were sustained by the European Court of Human Rights.\textsuperscript{327}

The Court determined that notwithstanding the government's submissions that there was indeed a family life in Bulgaria, even though the government alleged that Mr. Al-Nashif spent much time away from the household with his children and despite the "second" marriage.\textsuperscript{328} The Court found that from the moment of birth there exists between a child and his parents a bond amounting to family life which cannot be broken save in exceptional circumstances.\textsuperscript{329} Both families that are based on marriage and de facto relationships are entitled to protection.\textsuperscript{330} A number of factors may be relevant to determining whether there was a family life including living together, the length of the relationship, and whether they have demonstrated their commitment to each other by having children together.\textsuperscript{331} In this case the couple came to Bulgaria as a married couple, lived together, and bore several children.\textsuperscript{332} The subsequent religious marriage to another woman had no legal effect in Bulgaria, and the government failed to decisively demonstrate that Mr. Al-Nashif ever lived together.\textsuperscript{333} Indeed, the Court was convinced that Mr. Al-Nashif continued to live with his first wife until he was arrested for purposes of the deportation.\textsuperscript{334}

\textsuperscript{325} Id. at para. 41. Further attempts to litigate in Bulgarian courts resulted in no further decisions. Id. at paras. 42-43.
\textsuperscript{326} Id. at paras. 46, 130.
\textsuperscript{327} Id. at para. 153.
\textsuperscript{328} Id. at para. 113.
\textsuperscript{329} Id. at para. 112.
\textsuperscript{330} Id.
\textsuperscript{331} Id.
\textsuperscript{332} Id. at para. 113.
\textsuperscript{333} Id.
\textsuperscript{334} Id.
Both Mr. Al-Nashif and his first wife had established lawful residence in Bulgaria on the basis of permanent residence permits. Their children were born there, acquired Bulgarian citizenship, and attended school in Bulgaria.

The Court readily found an interference with family life. It then considered whether the interference with that life was "‘in accordance with the law,’ " and "‘necessary in a democratic society.’ " The Court determined that "‘in accordance with the law’ required that the legal basis must be ‘accessible and foreseeable.’ " Foreseeability required that a rule be "formulated with sufficient precision to enable any individual—if need be with appropriate advice—to regulate his conduct." The Court admitted that the "quality of law" criterion, depends to some extent "on the nature and extent of the interference in question." There was no requirement, for example, that legal provisions list in detail all conduct that would justify deportation, since threats may vary in character and be unanticipated or difficult to define in advance. However, the concepts of lawfulness and rule of law in a democratic society requires some form of adversarial proceedings before an independent body competent to review the reasons for deportation and relevant evidence. If need be, appropriate procedural limitations may be taken to safeguard classified information. The individual must be permitted to challenge the determination; but the independent authority must be able to determine whether the threat to national security has a reasonable basis in facts "or reveals an interpretation of ‘national security’ that is unlawful or contrary to common sense and arbitrary."

The determination to deport Mr. Al-Nashif was made without providing any reasons to him at any time, or allowing the testing of

335. *Id.* at para. 115.
336. *Id.*
337. *Id.* at para. 116.
338. *Id.* at para. 119.
339. *Id.*
340. *Id.* at para. 121 (citation omitted).
341. *Id.*
342. *Id.* at para. 123.
343. *Id.*
344. *Id.* at para. 124.
such reasons in any independent tribunal competent to examine the matter. The Court observed that various judges and members of the Bulgarian parliament, including half of the judges on the Constitutional Court of Bulgaria, expressed opinions that the practice violated the Bulgarian Constitution as well as the Convention. In short, the Court found that the deportation failed to provide adequate protection against arbitrariness.

The Court further found that Bulgarian law, insofar as it permitted deportation based upon "national security" as its justification, need not state reasons and are not subject to appeal, violated Article 13 of the Convention, i.e. deprived individuals of an effective remedy against violations of the Convention. The Court stated:

While procedural restrictions may be necessary to ensure that no leakage detrimental to national security would occur and while any independent authority dealing with an appeal against a deportation decision may need to afford a wide margin of appreciation to the executive in matters of national security, that can by no means justify doing away with remedies altogether whenever the executive has chosen to invoke the term "national security."

Reasons grounding the deportation decision must be provided and the independent tribunal must be competent to reject the government's assertions that deportation is necessary where it finds it arbitrary or unreasonable. Some form of adversarial testing is required, if need be through a special representative after a security clearance. The Court also awarded non-pecuniary damages to Mr. Al-Nashif of 7,000 euro and 5,000 euro to each of his children, as well as costs and expenses.

Thus, the rights to family life and to legal regularity conjoin to require testing of even "national security" actions. It is worth comparing this 2002 decision with the 2004 decision of the United States Supreme Court in Hamdi v. Rumsfeld requiring that hearings be

345. Id. at para. 126.
346. Id. at para. 127.
347. Id. at para. 128.
348. Id. at paras. 135, 138.
349. Id. at para. 137 (citation omitted).
350. Id.
351. Id. at paras. 148, 152.
provided to detainees at Guantanamo Bay to contest the factual basis for the detention before a neutral decision maker.352 The Court stated: "We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker."353

The European Court of Human Rights and the United States Supreme Court are thus not that dissimilar in the area of one of the most important rights, "the most elemental of liberty interests—the interest in being free from physical detention by one’s own government."354

However, a country is not required to allow a family to reunite inside its borders if its generally applicable immigration laws would prohibit such joining. At the same time, the Convention requires the principle of equality on the basis of gender to be applied so that a country does not prefer one gender over another in such immigration laws.

In the case of Abdulaziz v. United Kingdom, three married women in the United Kingdom sought permission for their husbands to join them in the United Kingdom.355 All were denied, although in a comparable situation, were the husbands the ones in the United Kingdom, the wives would have been granted immigration permission.356

By a unanimous vote, the Commission determined that there had been a violation of Article 14 (gender equality) of the Convention in conjunction with Article 8 (right to family life).357 The Court held that Article 8 had not been violated in itself, but that it in combination with Article 14 had been violated.358

The Court determined that each of the applicants made out a case that family life had been implicated.359 It also considered, unlike the Commission, that it should determine whether Article 8 had been

353. Id. at 2648.
354. Id. at 2646.
356. Id. at para. 74.
357. Id. at para. 56.
358. Id. at para. 100.
359. Id. at para. 65.
This was seen as a difficult question, one in which a wide margin of appreciation is appropriate for the policies of the contracting parties. The issue is commixed with not only issues of family life, but also immigration and the well recognized right that a state has, in international law, to control the entries of non-nationals into its territory. None of the applicants in the instant case had formed a family before coming to the United Kingdom; indeed, in each instance the marriage occurred after the women had entered the United Kingdom. Nor did any of the applicants demonstrate why they would have special difficulty in establishing family life in their own or husband’s respective countries. The Court then concluded that no “lack of respect” for family life was revealed in the facts of the case.

On the other hand, taking Article 8 in conjunction with Article 14, the Court reached the opposite conclusion. The Court examined each of the three grounds advanced by the women: Sex, race, and on the ground of birth. Each was analyzed in relationship to the interest advanced by the government to justify a difference in treatment between bringing wives to the United Kingdom and bringing husbands to the United Kingdom.

With respect to sex, the government asserted it was trying to regulate “‘primary immigration,’ ” and was justified to protect the domestic labor market. The government relied on statistics demonstrating the likelihood that men were more likely than women to be working. The women minimized the utility of statistics, deprecated the government’s ignoring the modern role of women, and also asserted that men may be self-employed, thus creating rather than

360. Id.
361. Id. at para. 67.
362. Id.
363. Id. at para. 68.
364. Id. (Pointing out that two of the women knew explicitly at the time of the marriage that permission would probably be refused, and that the third woman, who had never cohabited with her husband in the U.K. should have known that permission would be required and that under the rules in force at that time it would probably be refused.).
365. Id. at para. 69.
366. Id. at para. 70.
367. Id. at para. 75.
368. Id.
seeking jobs.\textsuperscript{369} The government also advanced an argument based on domestic tranquility, to which the applicants rejoined was a justification based upon racial prejudice.\textsuperscript{370} Each of these reasons had been rejected by the Commission, which minimized the annual reduction in immigration (2,000), considering it not of sufficient size or importance to justify a difference based upon gender.\textsuperscript{371} Moreover, the Commission viewed that race relations might be exacerbated by the rules, rather than assisted.\textsuperscript{372} Before the Court, the Commission’s representative indicated that a revised figure newly submitted by the government of 5,700 per annum, would not have changed the result in the Commission.\textsuperscript{373} While the aim of protecting the domestic labor market was considered significant by the Court, that in itself did not justify the difference in treatment based upon gender.\textsuperscript{374} Only “very weighty reasons” could justify such a difference.\textsuperscript{375} In the Court’s view, the government’s arguments were not convincing.\textsuperscript{376} In particular, at the time of the adoption of the rules in question, “‘economically active’” status included many immigrant wives, who at that time already outnumbered by far immigrant husbands.\textsuperscript{377} Whatever differences there may be, the Court was unconvinced that they were sufficiently important to justify the different treatment.\textsuperscript{378} Nor was the Court persuaded that domestic tranquility was aided by the rules.\textsuperscript{379} Lastly, the Court rejected an argument presented by the government that it had acted more generously than required in its policy allowing wives to join their husbands.\textsuperscript{380} Such an argument ignores the general equality command, demanding equality of

\begin{itemize}
\item[369.] \textit{Id.}
\item[370.] \textit{Id.} at para. 76.
\item[371.] \textit{Id.} at para. 77.
\item[372.] \textit{Id.}
\item[373.] \textit{Id.}
\item[374.] \textit{Id.} at para. 78.
\item[375.] \textit{Id.}
\item[376.] \textit{Id.} at para. 79.
\item[377.] \textit{Id.} (Even thought many of these economically active women were engaged in part time work, being economically active does not necessarily mean one is seeking to be employed by someone else.).
\item[378.] \textit{Id.}
\item[379.] \textit{Id.} at para. 81.
\item[380.] \textit{Id.} at para. 82.
\end{itemize}
treatment even though particular treatment is not commanded by the Convention.\textsuperscript{381}

That decision stands is square opposition to a decision by the United States Supreme Court in \textit{Nguyen v. Immigration and Naturalization Service}.\textsuperscript{382} In \textit{Nguyen} the Supreme Court held that the equal protection guarantee of the Fifth Amendment was not violated by an immigration statute that made it more difficult for a child born out of wedlock abroad to claim citizenship if the citizen parent was a father, not a mother.\textsuperscript{383} The petitioner, Tuan Anh Nguyen was born in 1969 in Saigon, Vietnam to an American father and a Vietnamese mother.\textsuperscript{384} The father never married Tuan’s mother.\textsuperscript{385} For a time after his birth, Tuan lived with his father’s new girlfriend in Vietnam.\textsuperscript{386} When he was six, Tuan came to the United States, becoming a lawful permanent resident raised by his father in Texas.\textsuperscript{387} When he was twenty-two-years-old, Tuan pleaded guilty to two counts of sexual assault on a child, and the Immigration and Naturalization Service initiated deportation proceedings against him as an alien who had been convicted of two crimes involving moral turpitude, as well as an aggravated felony.\textsuperscript{388} He was found deportable, but appealed the determination.\textsuperscript{389} While the appeal was pending, his father obtained an order of paternity from a state court based on DNA testing.\textsuperscript{390} By that time, Nguyen was twenty-eight-years-old, but his claim to citizenship was denied based upon failure of his father to comply with a federal requirement that the father agree to provide financial support prior to the age of eighteen, and establish paternity through various methods prior to the child turning eighteen.\textsuperscript{391} Federal statutes do not impose such requirements upon the children of citizen mothers who are born abroad.\textsuperscript{392} The Court rejected an equal protection attack on the

\textsuperscript{381} \textit{Id.}
\textsuperscript{383} \textit{Id.} at 56-59.
\textsuperscript{384} \textit{Id.} at 57.
\textsuperscript{385} \textit{Id.}
\textsuperscript{386} \textit{Id.}
\textsuperscript{387} \textit{Id.}
\textsuperscript{388} \textit{Id.}
\textsuperscript{389} \textit{Id.}
\textsuperscript{390} \textit{Id.}
\textsuperscript{391} \textit{Id.} at 57-58 (based upon 8 U.S.C. §§ 1401(g) and 1409(a)(1-4) (2000)).
\textsuperscript{392} \textit{Id.} at 59-60 (quoting 8 U.S.C. § 1409(c), “if the mother had the nationality of
differential classification, rejecting any requirement that Congress must accord respect to DNA testing in lieu of other methods of establishing paternity.\footnote{393} The Court also relied upon the government’s interest in ensuring that a meaningful relationship existed between the parent and the child.\footnote{394} The Court cited statistics indicating that the average American traveling overseas spent 15.1 nights out of the country in 1999.\footnote{395} In the mind of the majority this “reality” demonstrated the critical importance of the government making certain that there be some opportunity to ensure a tie between the citizen father and the foreign-born child.\footnote{396} The Court then considered that the statutory list of methods of evidencing such a tie before age eighteen are reasonable means of making such a determination.\footnote{397}

The four dissenters considered that the Court’s decision inappropriately applied prior precedents involving heightened scrutiny to gender based classifications, and in particular failed to demand an “‘exceedingly persuasive justification for the classification.’”\footnote{398} The dissenters asserted that at the bottom, the requirement of a real practical relationship embodied in section 1409(a)(4) “finds support not in biological differences but instead in a stereotype—i.e., ‘the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.’”\footnote{399}

Nguyen was thus subject to deportation although he had lived in the United States since the age of six, was over thirty-on years of age by the time of the Supreme Court decision and was indisputably the child of an American father whom he had lived with since birth. Not only does this decision ignore the decision in Abdulaziz, it also ignores the holding of the European Court of Human Rights in Moustaquim \textit{v.} Belgium, considered above.

\footnote{393. \textit{Id.} at 63-64.}
\footnote{394. \textit{Id.} at 64-65.}
\footnote{395. \textit{Id.} at 66.}
\footnote{396. \textit{Id.}}
\footnote{397. \textit{Id.} at 68-69.}
\footnote{398. \textit{Id.} at 74-75 (O’Connor, Souter, Ginsburg & Breyer. JJ., dissenting).}
\footnote{399. \textit{Id.} at 88-89.}
XI. THE RIGHT TO PRIVACY AND A PRIVATE LIFE: PROTECTION OF THE HOME AND OFFICE FROM TELEPHONE MONITORING AND OFFICIAL SEARCHES

Article 8 of the *European Convention* protects the right to privacy and private life, as well as the right to family life.\(^{400}\) The right to private life explicitly encompasses the home: "Everyone has the right to respect for his private and family life, his home and his correspondence."\(^{401}\) However, the *Convention* has been held applicable to business premises as well. For example, the right to privacy includes within its protection an attorney's office as was the case in *Niemetz v. Germany*.\(^{402}\)

In extending the protection of the right to private life to an office, the Court advanced several justifications. First, the French text of the *Convention* employed the word "'domicile,'" which in French has a broader connotation than the word "'home.'"\(^{403}\) Second, it is impossible to ensure that work is only done in an office, it may be done at home.\(^{404}\) A narrow interpretation might generate inequality in application.\(^{405}\) Third, and more generally, interpretation of the words "'private life'" and "'home'" more broadly would be more consonant with the essential object or purpose of Article 8—to protect the individual against arbitrary interference with private life by public authorities.\(^{406}\) Lastly, the Court determined that in this particular case, the warrant issued was unlimited as to its definition of documents, resulting in the search examining four cabinets concerning clients as well as six individual files—thereby covering "correspondence," a term not limited by Article 8 by any adjective.\(^{407}\)

While in this particular case, the Court determined that the search had been in technical compliance with the legal requirements,\(^{408}\) and

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\(^{401}\) *Id.*


\(^{403}\) *Id.* at para. 30.

\(^{404}\) *Id.*

\(^{405}\) *Id.*

\(^{406}\) *Id.* at para. 31.

\(^{407}\) *Id.* at para. 32.

\(^{408}\) *Id.* at paras. 34-35.
had a legitimate aim, the interference was not ‘necessary in a
democratic society.’ However, while the Court deemed the reason
for the search a substantial one, the failure to limit the search,
particularly the search of a lawyer’s office, by any procedural
safeguards, and the impact upon professional secrecy, was deemed an
encroachment on the rights to a fair trial under Article 6 of the
Convention.

However, not only are private attorneys entitled to respect of their
“private life” while on their office premises; an Assistant Chief
Constable is also entitled to privacy, even in telephone calls from her
office as well as her home. *Halford v. United Kingdom* held that the
requirement that any interference with a person’s private life and
correspondence be in accordance with domestic law as well as the rule
of law. A total absence of regulation over the circumstances and
conditions under which covert surveillance and interception of
communications were conducted meant that Articles 8 and 13
(effective remedy) of the *Convention* had been violated. Pecuniary
damages of 10,600 British pounds were awarded along with costs and
expenses of 25,000 British pounds.

The requirement that surveillance be in accordance with law has
been repeatedly applied by the European Court of Human Rights. For
example, in *Malone v. United Kingdom*, during a trial for offenses
relating to the handling of stolen goods, it was revealed that the
defendant’s telephone calls had been monitored by the police pursuant
to a warrant of the Secretary of State. Although several trials
resulted in acquittals on all charges, an application to the European
Court of Human Rights resulted in a holding that the Article 8 rights to
private life of the accused had been violated.

409. *Id.* at para. 36.
410. *Id.* at para. 37.
411. *Id.* (The Court mentioned one such safeguard might have been the presence of
an independent observer during the search.).
68 (1997).
413. *Id.* at para. 49.
414. *Id.* at paras. 49, 83.
415. *Id.* at paras. 74-83 (pecuniary loss and legal costs and expenses).
(1997).
417. *Id.* at para. 80.
In the opinion of the Court, the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.\textsuperscript{418}

The essential difficulty for the Court was that the powers to intercept were neither incorporated into legal rules nor were limitations of the discretion of the executive enacted in rules.\textsuperscript{419}

Similarly French law failed to provide with reasonable clarity the scope and manner under which wiretapping and other forms of interception of telephone communications could be seized, and even though little or no harm resulted from such seizures in the instant case, the right to private life had been violated.\textsuperscript{420}

Moreover, failure to comply with national law in wiretapping, when the police supplied a private citizen with taping equipment and instruction on how to operate the machine, in order to gather evidence of sexual advances by an attorney (for which the attorney was convicted), violated the attorney’s right to private life under Article 8.\textsuperscript{421}

Such decisions might be looked to for suggestions as to possible remedies a court might award when constitutional rights have been violated, but harm is absent or difficult to demonstrate. Even awards of legal fees and costs might serve as a modest deterrent to poorly designed surveillance and warrant procedures.

\textsuperscript{418} Id. at para. 79.
\textsuperscript{419} Id. Perhaps the latter point particularly concerned the court since an official governmental report had described the Secretary of State’s discretion as absolute, albeit in practice limited, but failed to specify how it was limited. Id. at para. 75.
\textsuperscript{421} M.M v. The Netherlands, App. No. 39339/98 paras. 13, 46 (Eur. Ct. H.R. Apr. 8, 2003) (available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hu doc-en (accessed Dec. 25, 2005)). The applicant made no request for damages from the Court, but did request attorney’s fees and expenses, and was awarded 10,000 euro. Id. at paras. 48, 55.
XII. IS THE WRIT OF HABEAS CORPUS AN ADEQUATE REMEDY TO TEST THE RIGHT TO DETAIN AN INDIVIDUAL?

In an otherwise unremarkable Grand Chamber decision of the European Court of Human Rights in 1981, the Court found the English remedy of habeas corpus inadequate to test the legitimacy of detention of a mental health patient.\textsuperscript{422} By the time of the decision, it meant nothing to X, for he had passed away, but the precedent is worth reflecting upon in light of the enormous restrictions on the effectiveness of the writ of habeas corpus in the United States as a result of both judicial decisions limiting the writ as well as a result of the \textit{Antiterrorism and Effective Death Penalty Act of 1996}.\textsuperscript{423}

X’s detention originally dated to his assault of a fellow worker with a spanner (wrench).\textsuperscript{424} He pled guilty and after medical examination was detained at Broadmore Hospital, a special secure hospital for the criminally insane.\textsuperscript{425} After detention for several years he was conditionally discharged, on conditions that included residence in the matrimonial home.\textsuperscript{426} After several years of such release, his wife visited the probation officer and informed him that X remained deluded, and threatening, using obscene language, accused her of loose morals, and drinking quite heavily.\textsuperscript{427} She informed the probation officer she intended to leave her husband the following day.\textsuperscript{428} That same afternoon, X was once again taken into custody by the police and returned to Broadmore Hospital.\textsuperscript{429}

While there was some dispute about the matter, X maintained that he was never informed about the basis for readmission, although he inferred it had something to do with complaints from his wife.\textsuperscript{430} Over the next years, X sought to challenge the readmission through several legal routes, including the common law writ of habeas corpus.\textsuperscript{431}

\begin{thebibliography}{99}
\item 425. \textit{Id.} at para. 20-21.
\item 426. \textit{Id.} at para. 21.
\item 427. \textit{Id.} at para. 23.
\item 428. \textit{Id.}
\item 429. \textit{Id.} at para. 24.
\item 430. \textit{Id.} at para. 25.
\item 431. \textit{Id.} at paras. 26-30.
\end{thebibliography}
challenge was successful, although several years later he was released again on a conditional discharge.\textsuperscript{432}

Meanwhile, X had challenged his readmission under the \textit{European Convention on Human Rights}.\textsuperscript{433} He complained that he was re-detained without any legal proceedings, without any examination by physicians and complained that habeas corpus proceedings did not fully investigate the merits of the decision to recall him, but only examined if the recall had been ordered in accordance with statutory provisions.\textsuperscript{434}

The European Court of Human Rights had no difficulty determining that the emergency recall procedures were permissible in that they were in accordance with procedures prescribed by law, and were thus "lawful" in the sense of conformity with domestic law.\textsuperscript{435}

However, the claim regarding the inadequacy of the remedy of habeas corpus received quite different treatment. The remedy of habeas corpus was described as inquiring into whether the detention is in compliance with the requirements stated in the relevant legislation and the applicable principles of the common law.\textsuperscript{436} Subject to these principles a decision even if technically legal on its face may be upset, \textit{inter alia}, if the detaining authority misused its powers by acting in bad faith or capriciously or for a wrongful purpose, or if the decision is supported by no sufficient evidence or is one which no reasonable person could have reached in the circumstances.\textsuperscript{437} Subject to the foregoing, the Court will not review the grounds or merits of a decision taken by or on administrative authority to the extent that these are exclusively a matter for determination by that authority.\textsuperscript{438} In particular, when the terms of the relevant statute affords the administrator discretion, whether broad or narrow, habeas review will focus solely on the conformity of that discretion with the statute.\textsuperscript{439}

\textsuperscript{432} \textit{Id.} at para. 30.
\textsuperscript{433} \textit{Id.} at para. 31.
\textsuperscript{434} \textit{Id.}
\textsuperscript{435} \textit{Id.} at paras. 41-42.
\textsuperscript{436} \textit{Id.} at para. 56.
\textsuperscript{437} \textit{Id.}
\textsuperscript{438} \textit{Id.}
\textsuperscript{439} \textit{Id.}
In the Court’s view, such review was inadequate to justify continuing confinement of X.\textsuperscript{440} Such review must be wide enough to bear on the merits of the lawful detention of the person, especially in the instant case on whether the reasons capable of justifying the initial detention may have ceased to exist.\textsuperscript{441} “This means that in the instant case, [Article 5 (right to liberty) of the \textit{Convention}] required an appropriate procedure allowing a court to examine whether the patient’s disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety.”\textsuperscript{442} In short, the reviewing tribunal must to some extent be permitted to decide the merits of the detention, not just the technical “lawfulness” in the sense of compliance with procedural substance.

Consequently, the Court unanimously held that there had been a breach of the \textit{Convention}.\textsuperscript{443} A holding that habeas corpus to be adequate must not only check procedural compliance but also the substantive merit of the underlying ground for detention would mark a sharp break from precedents in the United States.

Federal court deference to state court determinations of substantive constitutional procedural issues would appear suspect under such treatment. Moreover, the ultimate basis for detention, in the sense of guilt or innocence would also appear open to review under a “broader writ of habeas corpus.” Indeed, many provisions of the \textit{Antiterrorism and Effective Death Penalty Act of 1996} might be suspect under the analysis of the European Court of Human Rights.\textsuperscript{444}

\textbf{XIII. CONCLUSION}

The European Court of Human Rights has rendered an enormous number of human rights decisions over its short existence, more than

\textsuperscript{440} \textit{Id.} at para. 58.
\textsuperscript{441} \textit{Id.}
\textsuperscript{442} \textit{Id.}
\textsuperscript{443} \textit{Id.} at para. 67.
\textsuperscript{444} \textit{See} Ronn Gehring, Tyler v. Cain: \textit{A Fork in the Path for Habeas Corpus or the End of the Road for Collateral Review}? 36 Akron L. Rev. 181 (2002) (which discusses, \textit{inter alia}, the gatekeeper provisions of \textit{AEDPA}, the time limitations for initiating habeas review (one year after direct appeal ended), as well as retroactivity as interpreted in \textit{Tyler v. Cain}, 533 U.S. 656 (2001) and the earlier decision in \textit{Teague v. Lane}, 489 U.S. 288 (1989)).
3600 decisions to date, increasing by 700 or more decisions a year. If the United States Supreme Court only issued opinions in similar cases, it would take nearly fifty years to match the output of the European Court. It appears not only sensible, but appropriate for United States courts and lawyers to examine this enormous body of case precedents for ideas and suggestions on appropriate responses to new as well as old issues. When such case law is so readily available on free web sites as well as computer data bases such as Lexis, an attorney who ignores this body of law may be doing a disservice to his or her clients, and more importantly, to the future development of United States law.

Moreover, the March 1, 2005 decision of the Supreme Court invalidating the juvenile death penalty in the United States, *Roper v. Simmons*, indicates that the Supreme Court will continue to pay attention to international authorities, citing *inter alia*, the United Nations Convention on the Rights of the Child, the International Convention on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child.445

This article merely scratches the surface of some of these decisions. The future use of such decisions is limited only by the creativity of American and European lawyers and judges.

Other matters of substance that have been considered by the European Court of Human Rights include:

Is “don’t ask, don’t tell,” a constitutional principle?446

What constitutional rules apply to surveillance of mail, post, and telecommunications for national security purposes?447

Is extradition permissible when the woman involved may be subjected to stoning to death for adultery?448

What rights does the father of an illegitimate child have to visitation of his child?449

Does a husband have a valid claim against prosecution for assisted suicide for his terminally ill wife?\footnote{Pretty v. United Kingdom, App. No. 2346/02 para. 14 (Eur. Ct. H.R. Apr. 29, 2002).}

Does an injunction against newspaper publication of a story about thalidomide and the proposed settlement discussions with the drug manufacturers violate the right to a free press?\footnote{Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) para. 44 (1979).}