



Human Rights and Counter-terrorism Striking a Balance?

Lecture 3

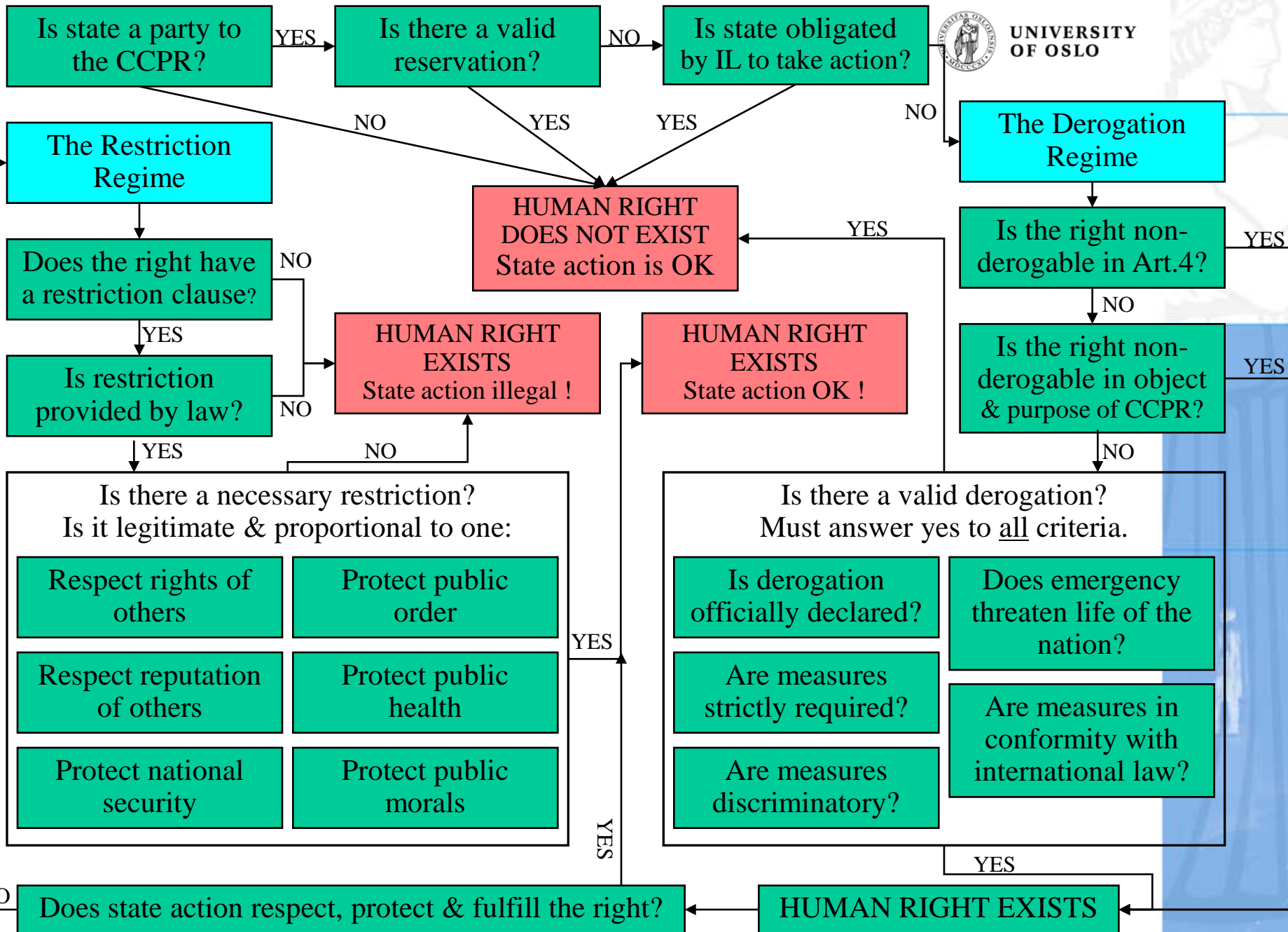
The Restriction Regime & The Freedom of Expression

16 September 2009

Outline of Class

- Focus
 - Restrictions on human rights in terrorism-related cases
 - Some general cases to illustrate the restriction regime
- Format
 - Participatory discussion
 - Ask questions at any time.
 - Add your ideas or comments at any time.
 - Question everything (the reading, your classmates, the instructor...)
 - The entire PPT will not be covered due to time constraints.
- Expected Outcome
 - Understanding how the HR regime deals with terrorism
 - Consideration whether HRs has sufficient flexibility to effectively combat terrorism
- Reminder:







The Restriction Regime

- *Compulsory Membership Case*
- *Sohn v. Korea*



The Restriction Regime "Provided by Law"

- Must be a law
 - State law, common law, rules and regulations, etc.
 - See *Gauthier v. Canada* and *Faurisson v. France*
- Precision
 - Cannot be vague and broad-ranging
 - Must provide guidelines to decision-makers—not complete discretion
 - Reasonable foreseeability of prohibition
 - See *de Groot v. the Netherlands* and *Sunday Times v. UK*
- Overcoming vague criteria
 - 'Cured' by subsequent due process (*Ross v. Canada*)
- Burden of Proof on State
 - State must provide details of the law
 - State must explain the application of the law in the particular case
 - See *Weisz v. Uruguay* and *Laptsevich v. Belarus*



UK Operation Kratos Shoot-to-kill Policy

- Officers receive training on identifying potential suicide bombers.
- Operationally, "A senior officer is on standby 24 hours a day to authorise the deployment of special armed squads, who will track and if needs be, shoot dead suspected suicide bombers."
- "The officer can open fire only if authorised to do so by a chief police officer - either at the start of a pre-planned operation ... or by police radio during a 'spontaneous' incident."
- "In extreme circumstances an armed officer can shoot a suspect in the head if the intelligence suggests that he is a suicide bomber who poses an imminent danger to the public or police. This is to avoid setting off any explosives that might be attached to his body and to ensure movement from the suspected bomber to detonate a device is prevented."

Shooting of Jean Charles de Menenez

Stockwell Tube Station, London, 22 July 2005



Jean Charles de Menenez



The shooting occurred in the same month as two terrorist attacks in London



Police shot
Menenez in the
head 7 times



The Restriction Regime Necessary (*Faurisson v. France*)

- Restriction cannot put right in jeopardy
 - If right is stripped of its substance, necessary test ends immediately without further inquiry. See *Mukong v. Cameroon*, para. 9.7.
- Legitimately connected to a valid purpose
- Proportionate to the purpose of the restriction
- Restriction must be the least intrusive means to achieve its purpose
- Concurring Opinion:
 - Restriction regime “bristles with difficulties, tending to destroy the very existence of the right sought to be restricted.”



Demonstration against the UK Public Order and Criminal Justice Act, 2 June 1994





UK Terrorism Act of 2000

Section 1

- (1) In this Act "terrorism" means the use or threat of action where:
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government [or an international governmental organisation or to intimidate the public or a section of the public, [...]]
- (2) (d) Action falls within this subsection if it [...] creates a serious risk to the health or safety of the public or a section of the public, [...]

Section 44

- Stop & search of any vehicle or any person within specified places or during specified times (no suspicion or justification required)



**US Congressional Representative
Joe Wilson yelled "You Lie!" during
US Presidential address to US Congress
in September 2009**

**Walter Wolfgang yelled "That's a lie and you
know it!" during UK Foreign Secretary Jack
Straw's speech to the UK Labour Party
Conference in September 2005**

The Restriction Regime

”Rights & Reputations of Others”

- Balancing ‘competing’ rights
 - E.g. the right to life and security



Former US Vice President Dick Cheney has asserted that “enhanced interrogation techniques [...] saved lives and prevented terrorist attacks.”



The Restriction Regime

National Security and Public Order

- *Travaux Preparatoires*
 - “preserve public order” vs. “prevent disorder”
 - Obvious definition of “national security”
 - Obvious definition of “public order”
- “National” Security
 - Siracusa Principles
 - “protect the existence of the nation or its territorial integrity or political independence against force or threat of force”
 - “Systematic violation of human rights undermines true national security, [including . . .] repressive practices against [a] population.”
- “Public Order”
 - Siracusa Principles: “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.”
 - Chile in *Travaux*: “not only the maintenance of order, but also the legal order which obtained in each State.”
 - Siracusa Principles: PO includes “respect for human rights”

Tiannamen Square, Spring 1989





Abu Bakr Mansha

UK Terrorism Act of 2000, section 58



Convicted in 2005 of “possessing information of a kind likely to be useful to a person committing or preparing an act of terrorism.”



UK Terrorism Act of 2006

- Prohibits the 'encouragement,' 'glorification,' and 'justification' of terrorism
 - Unlawful “to make a statement glorifying terrorism if the person making it believes, or has reasonable grounds for believing, that it is likely to be understood by its audience as an inducement to terrorism.”
 - “direct or indirect encouragement or other inducement” of terrorism
 - Detention of suspects up to three months without charge
- 2005 Home Office Policy (Press Release 124/2005, 24 August 2005)
 - Expulsion or deportation of non-UK citizens for justifying or glorifying terrorism

Sri Lankan Prevention of Terrorism Act

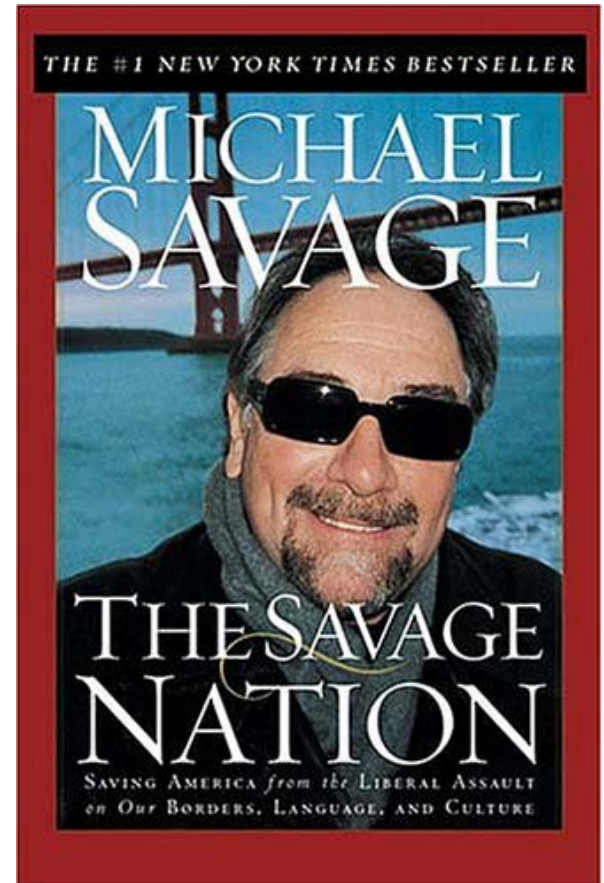
- Prohibits facilitating or providing support to terrorist organizations (the Tamil Tigers)
- J.S. Tissainayagam is a journalist who wrote for the Colombo-based Sunday Times newspaper and edited OutreachSL, a web site geared toward the country's Tamil population.
- Tissainayagam was charged with:
 - receiving money from Tamil Tiger rebels to spread Tiger propaganda, and
 - making false allegations of military mistreatment of Tamil civilians intended to spark communal unrest.
- He was found guilty and sentenced on 31 August 2009 to 20 years imprisonment with hard labour.



J.S. Tissainayagam

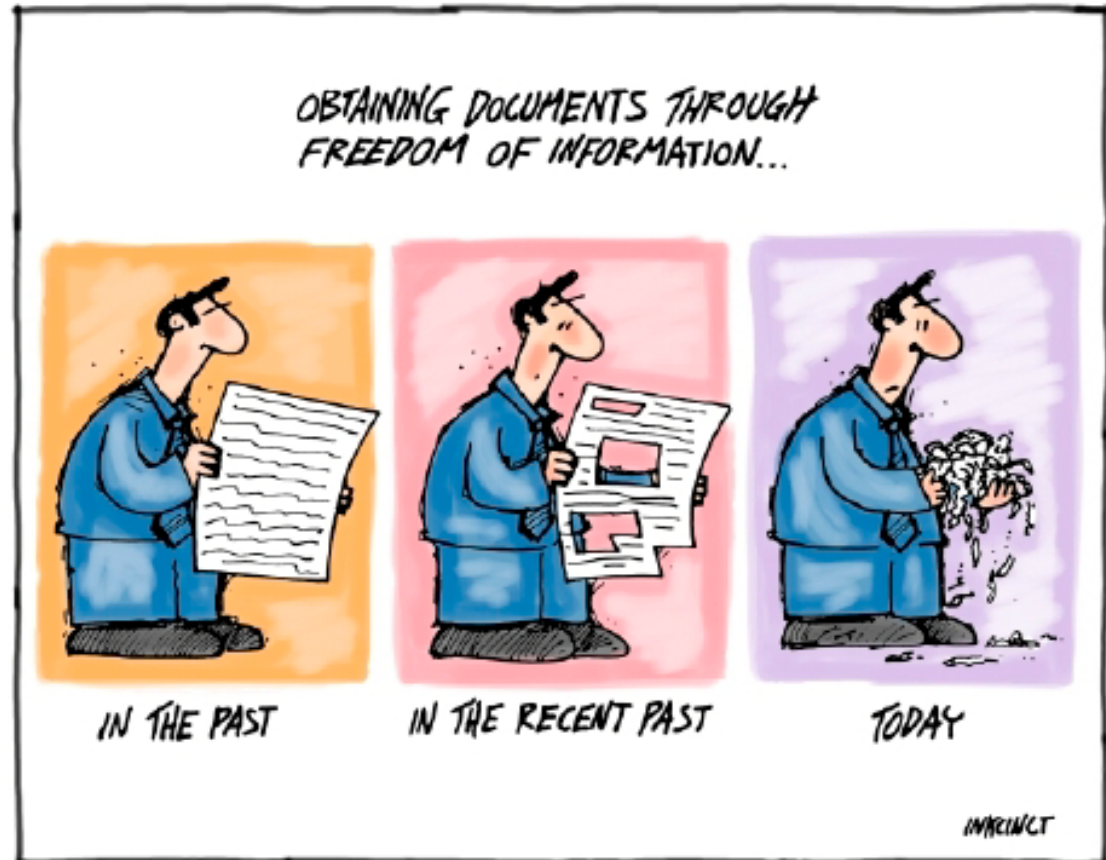
Michael Savage Banned from UK

- On Muslims: "They say, "Oh, there's a billion of them [...] so, kill 100 million of them, then there'll be 900 million of them. I mean, would you rather die — would you rather us die than them?"
- Muslims “need deportation,” and that adherents of Islam would do well to “take your religion and shove it up your behind” because “I’m sick of you.”
- The Qur'an is “a throwback document” and a “book of hate.”
- Encouraged listeners to burn Mexican flags to counter a pro-illegal immigration group that had burned American flags.
- On “illegal immigrants:” “I would say, let them fast until they starve to death; then that solves the problem.”
- On homeless and attempts to help them: they “can go in and get raped by them because they seem to like the excitement of it.”



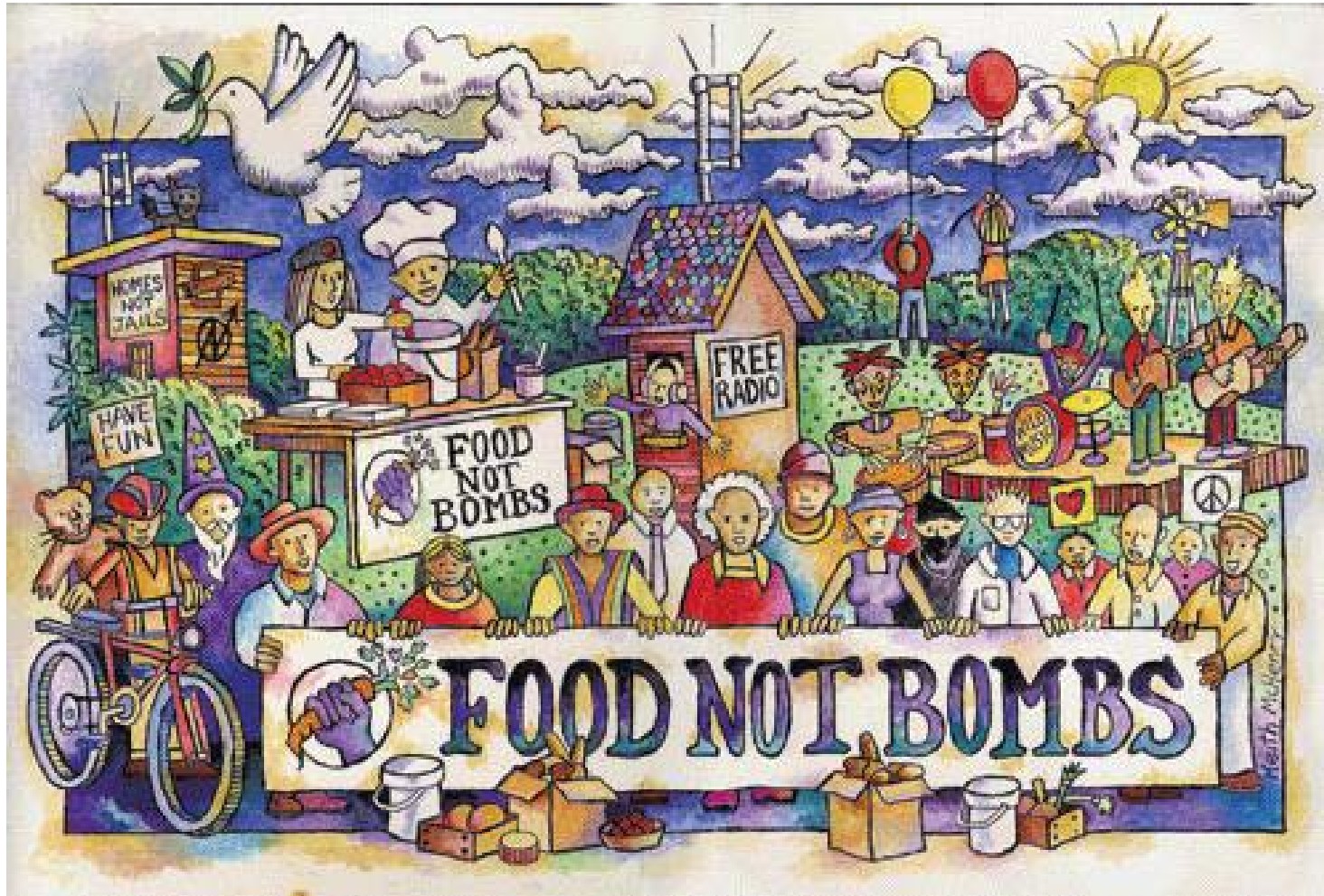
Discussion Case 1: USA FOIA

- USA Freedom of Information Act for All Government Info
 - Pre-12 Oct 2001: All requested info must be turned over unless doing so would cause **foreseeable harm**
 - Post-12 Oct 2001 (to January 2009): All requested info must be turned over unless a contrary decision is made on any "**sound legal basis**"



National Security & Public Order

Food Not Bombs



Food Not Bombs Public 'Feeding'

San Francisco, 24 October 1995, Celebrating UN Day



Food Not Bombs Terrorist Connections?

- Guest lecture in the course U.S. Law and National Security at the University of Texas School of Law on 8 March 2006
- Guest lecturer: FBI Senior Special Agent G. Charles Rasner displayed a PPT slide with the FBI's Central Texas "Terrorist Watch List"
- #7 was "Food Not Bombs?"





Food Not Bombs Terrorist Connections?

Food Not Bombs, Orlando Chapter Arrest for 'Large Group Feedings'



Police Report: The suspect gave "30 unidentified persons food from a large pot utilizing a ladle."



The defendant feeds homeless outside court immediately after preliminary hearing



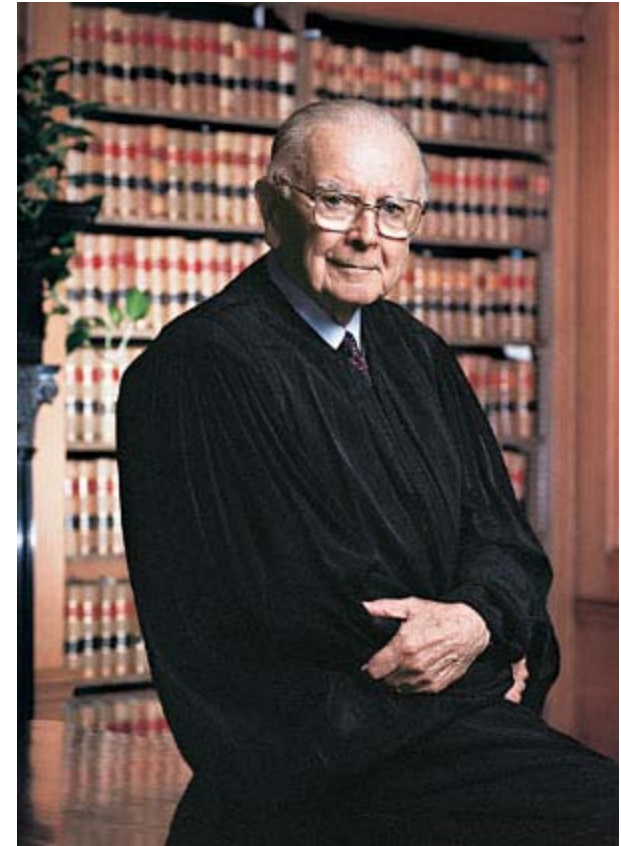


Orlando Food Not Bombs v. The City Of Orlando

- "Notwithstanding their diffuse political views, all OFNB members share in OFNB's core belief: that food is a right which society has a responsibility to provide to all of its members."
- "Rather than address the problem of homelessness in these downtown neighborhoods directly, the City has instead decided to limit the expressive activity which attracts the homeless to these neighborhoods. While the Ordinance may very well accomplish the goal of diminishing the number of homeless in the Thornton Park and Lake Eola neighborhoods, the restriction clearly prevents OFNB from communicating its Constitutionally protected speech at a meaningful location [a public park] which, from time immemorial, has been the traditional forum for free speech. Although some incidental restrictions on First Amendment freedoms must be tolerated, the Court concludes that the restriction here goes too far."
- "real, though unstated, reason for the ... adoption of this ordinance: re-distributing the putatively negative socio-economic effects of the homeless dispersing into surrounding neighborhoods after food sharing events; in short, discouraging the homeless from congregating in downtown orlando, and more particularly, ... Thornton Park and Lake Eola...."
- "as to the City's desire to prevent crowding, there is no evidence [presented by the City] that the parks in the GDPD are being overused."
- "Similarly, there was no evidence presented that there is any problem with littering or garbage in the parks, let alone one connected to group feedings," "In fact, the evidence presented shows that OFNB does not use disposable items at their events, that they clean up when they are done and that they leave the park cleaner than it was when they arrived."

U.S. Justice William Brennan, Jr.

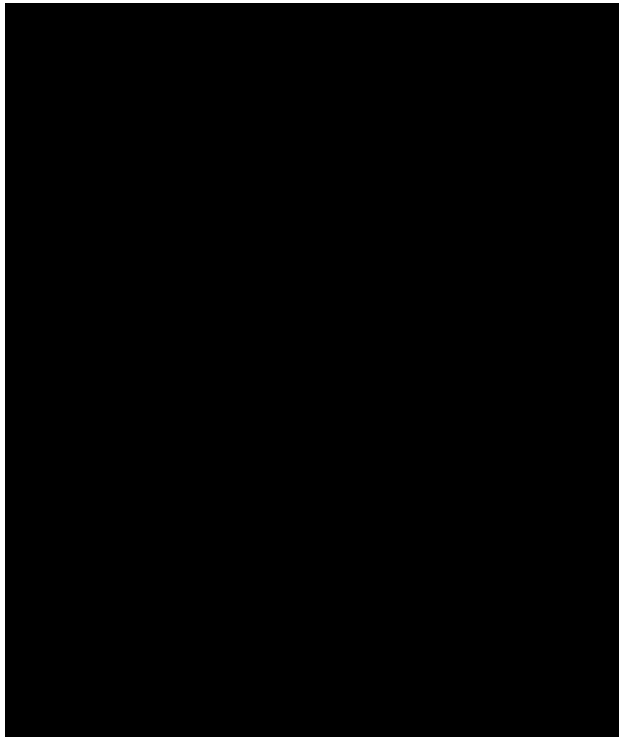
”For as adamant as my country has been about civil liberties during peacetime, it has a long history of failing to preserve civil liberties when it perceived its national security threatened. This series of failures is particularly frustrating in that it appears to result not from informed and rational decisions that protecting civil liberties would expose the United States to unacceptable security risks, but rather from the episodic nature of our security crises. After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.”



Justice Brennan (cont'd)

- "Rather, each crisis has manifested the same set of problems. The sudden national fervour causes people to exaggerate the security risks posed by allowing individuals to exercise their civil liberties and to become willing 'temporarily' to sacrifice liberties as part of the war effort. The peacetime jurisprudence of civil liberties leaves the nation without a tradition of, or detailed theoretical basis for, sustaining civil liberties against particularized security concerns. The nation's procedures for vindicating civil liberties prove too slow to resolve any issue before the time of calamity has passed. The inexperience of decision-makers in dealing with wartime security claims makes them reluctant to question the factual bases underlying asserted security threats [...]."

Is Cheney the new Cicero?



Are “patriotic illegalities” consistent with the HR rule of law?



Reminder of Extra Seminar

- Martin Scheinin, present UN Special Rapporteur on Human Rights and Counter-terrorism
- Monday, 21 September 2009
- 10:00 to 12:00
- Norwegian Centre for Human Rights
- Ground-floor Auditorium
- ESCRs and Counter-terrorism & the Most Pressing Contemporary Issues

- (Plus additional bonus seminar from 9:00 to 10:00 on a Potential World Court of Human Rights, NCHR, 2nd-floor Conference Room)



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