

## APPENDIX 2. EXERCISES ON SOURCES OF LAW

### Exercise 1. Sources and Limits of Lawmaking Powers

Examine each government action described in the sections below. Which represents a legitimate exercise of legislative, judicial, or executive authority?

#### a. The Flag-Bashing Bill

The First Amendment to the United States Constitution provides in part that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” Shortly before July 4, however, Congress sought to override the First Amendment by restricting speech critical of the American flag. Offended by a wave of public criticism of the American flag and the values for which it stands, Congress enacted the “Flag-Bashing Bill,” which the president signed into law. Section 1 of that statute makes it an “unlawful publication practice for any person to publish any oral or written statement critical of the flag of the United States of America.” Section 2 provides for fines of up to \$5,000 for each violation of the statute.

Section 3 of the statute created the Flag Protection Commission (FPC), a federal agency, and granted it powers to investigate violations of the statute, to hold hearings on alleged violations, to impose fines for violations, and to issue rules and regulations to aid in its investigative and enforcement activities. Section 4 of the statute grants jurisdiction to the United States District Courts to review the FPC’s actions, subject to further appeal to the United States Supreme Court.

#### b. The FPC Flexes Its Muscle

As the chief officer of the executive branch of the United States government, the president appointed several staunch flag enthusiasts to the FPC. Without delay, the FPC issued rules and regulations that, among other things, (1) describe procedures for FPC hearings, (2) authorize FPC hearing officers to impose fines of \$1,000 to \$10,000 for various kinds of violations of the Flag-Bashing Bill, and (3) define the statutory phrase “unlawful publication practice” to include any public criticism of the flag or the president’s wardrobe.

#### c. Judicial Review

In the FPC’s first major hearing, an FPC hearing officer found that a Washington, D.C., newspaper publisher had violated the Flag-Bashing Bill by publishing a critical commentary entitled “The Stars and Stripes—Do the Colors Clash?” The hearing officer fined the publisher \$2,000. The newspaper filed for review in the federal district court for the District of Columbia.

The district court judge overturned the hearing officer’s fine. Advancing his own policy preferences, and contrary to the plain language, legislative history, and clear purpose of the Flag-Bashing Bill, the judge found that the bill prohibited only actions interfering with the president’s foreign trade policies.

On appeal to the U.S. Court of Appeals for the District of Columbia, that federal appellate court affirmed the district judge’s overturning of the hearing officer’s actions, but on a different ground: that the statute, regulations, and fine violated the First Amendment to the United States Constitution.

### Exercise 2. Survival of the Fittest and the Common Law

In responding to the exercise below, do not feel compelled to identify a “correct answer” or to couch your response in any special legal format or style. Instead, simply develop an honest response based on your personal values and opinions and express your response freely in a style that comes to you naturally and comfortably.

Imagine that you are deciding cases in the nineteenth century as the chief justice of a state’s highest appellate court. Your state has no criminal statutes; instead, the criminal law of the state is exclusively common law, a law fashioned by judges and based on custom, common sense, and community values.

You are addressing an appeal from a murder conviction in the case of *State v. Blight*. After a full trial, the jury found that Fletcher Blight, the defendant and appellant, had killed Davie Jones by pushing him off a life raft and into the ocean.

The trial record shows that both men boarded the life raft after their vessel had sunk on the high seas. After days of drifting, and with no ship or land on the horizon, it became apparent that the water rations would not sustain both men until a rescue ship arrived.

Blight made two decisions: (1) The stronger of the two, Blight decided to save the remaining water supply for himself by refraining from administering water to Jones, who was too weak to move or even communicate, thus allowing Jones to die. (2) Jones suffered as he slowly died of dehydration. To end Jones's misery and to spare himself the emotional distress of watching Jones suffer, Blight tearfully pushed the helpless Jones into the sea, where Jones quickly died.

When Blight was rescued by a passing ship a few days later, he was near death himself. Physicians testified at trial that both men undoubtedly would have died before the rescue ship arrived if Blight had continued sharing the water rations with Jones until the water was exhausted. Moreover, because Jones was too weak to drink water on his own, leaving all the water exclusively for Jones would also have resulted in both men dying prior to rescue.

**a. Were Blight's actions morally justified?**

Speaking as an individual with no connection to the case, do you think Blight's actions were morally justified? Why or why not? Separately address Blight's acts of (1) Allocating all the remaining water to himself, and (2) Hastening Jones's death by pushing him overboard.

**b. Should the Court expand the legal justifications?**

Now, imagine that you are an attorney or a judge in the criminal prosecution of Blight in State X, which you can assume has jurisdiction. Criminal law in State X is still a matter of "common law," developed by judges, and has not yet been codified into statutes by the State X legislature. In State X, the courts have defined the common law crime of murder as the "unlawful killing of a human being without justification." At the time of Blight's prosecution, the Supreme Court of State X had addressed and recognized only one justification for killing another person: self-defense in the face of a potentially deadly attack from the other person. Because Jones had not attacked Blight, Blight's actions were not justified under current law, and he was convicted at trial. On appeal, Blight asks the State X Supreme Court to expand the common law justifications to cover the circumstances of his case. In your view, should the law evolve to find justification in Blight's acts of (1) allocating the remaining water to himself, and (2) hastening Jones's death?

**c. Precisely what new common law rule or rules would justify Blight's deeds?**

As Blight's attorney, draft Blight's proposed rule or rules in the form of proposed trial court instructions to the jury: "You must acquit the defendant of the charge of murder if he was justified in killing Jones. In this case, the defendant was justified in killing Jones if you find that . . . ." This will help to define the expanded justification that the Supreme Court is being asked to approve.

(1) As the Chief Justice of the State X Supreme Court, would you adopt the proposed rule? What reasons would you give for supporting or opposing an extension of the common law doctrine of justification that would result in Blight's acquittal?

(2) Would you support a new common law rule that would improve the law but would not necessarily result in acquittal for Blight? If so, describe the rule and explain your reasons for proposing it.

### Exercise 3. Assessing and Interpreting Statutes That Modify the Common Law

One hundred years after *State v. Blight*, your state has largely replaced the common law crimes with a comprehensive criminal code: a collection of statutes that defines criminal conduct and penalties, incorporating some common law principles and modifying or rejecting others. Section 101 of the criminal code defines the crime of murder as “the killing of another human being without justification.” Section 101.A provides that “premeditated murder” constitutes first-degree murder, which carries a maximum penalty of life in prison. Section 101.G, enacted just last year, provides that “a desire to ease the suffering of a terminally ill person, even at that person’s request, is not justification for ending the person’s life prematurely.” A state legislative committee report explained the purpose of the bill that later was codified as section 101.G:

This bill makes it clear that euthanasia, popularly known as “mercy-killing,” is not “justified” under § 101 of our criminal code and therefore is not excluded from our definition of murder. With this bill, the state declares its policies to preserve the life of even a terminally ill patient for as long as possible. The physical and emotional suffering of terminally ill patients should be relieved through counseling and pain relief rather than the termination of medical treatment or other actions to hasten death. Thus, even well-meaning friends or relatives who cause, or assist in causing, the death of a terminally ill patient may be charged under our murder statute, even if the patient requests it or has previously stated such a desire.

#### a. Merits of the Section 101.G

Do you support section 101.G? Explain your position.

#### b. Withholding Medical Treatment

Emma Padilla was losing her battle against cancer. Although she continued to receive chemotherapy, it made her quite ill and offered her almost no hope of remission. Preferring to live her final days in familiar surroundings, she arranged for full-time nursing care in her home. She often spoke to her nurses about her desire to die and about her wish that no one prolong her life with heroic lifesaving measures.

One evening, Padilla suffered a seizure; her heart stopped beating, and she ceased breathing. Her night nurse, Jim Murrow, rushed to Padilla’s side to administer cardiopulmonary resuscitation and to hook up a portable respirator and other lifesaving equipment. He stopped short, however, remembering Padilla’s wish to die naturally. Murrow allowed Padilla to die, notified the hospital that had been treating Padilla with chemotherapy, and admitted to several colleagues that he had honored Padilla’s wishes that he refrain from actively prolonging her life.

Is Murrow guilty of murder under sections 101 and 101.G of the criminal code? Fully analyze the law and the facts, taking care to advance arguments for both the defense and the prosecution.