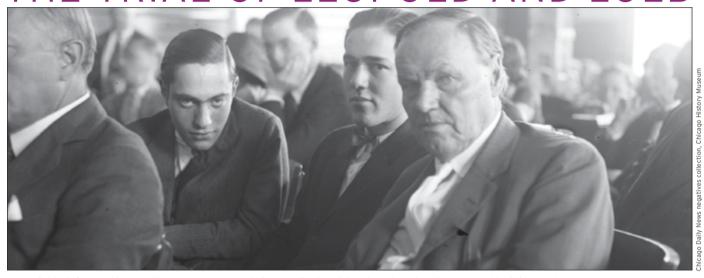
Bill of Rights in Action



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SAVED FROM THE GALLOWS THE TRIAL OF LEOPOLD AND LOEB



From right, defense attorney Clarence Darrow and his two clients, Richard Loeb and Nathan Leopold, sit in court.

IN 1924 IN CHICAGO, NATHAN LEOPOLD, 19, AND HIS FRIEND, RICHARD LOEB, 18, WERE TRIED FOR THE BRUTAL MURDER OF A 14-YEAR-OLD BOY. THE PROSECUTOR CALLED IT "ONE OF THE MOST COLD-BLOODED, CRUEL AND COWARDLY CRIMES EVER COMMITTED IN HISTORY." NEWSPAPERS ALL OVER THE COUNTRY CARRIED STORIES OF THE ARREST AND THE GRISLY FACTS OF THE CRIME ON THE FRONT PAGE. THE PUBLIC CALLED FOR LEOPOLD AND LOEB'S EXECUTION. BUT THE BOYS

WERE SAVED FROM THE GALLOWS BY THE WORK OF THEIR ATTORNEY, CLARENCE DARROW, IN WHAT HAS OFTEN BEEN CALLED ONE THE MOST FAMOUS TRIALS OF THE 20TH CENTURY.

Nathan Leopold grew up in Chicago, Illinois. He came from a wealthy family; his father had made millions manufacturing boxes. By 1924, Nathan had graduated from college and was a law student at the University of Chicago. He engaged in

many hobbies and interests, including birding, which he pursued with a passion. At home he read books on philosophy, including books by the German philosopher, Friedrich Nietzsche. Nietzsche wrote often about the *Ubermensch*, a superman who sets his own values and can affect the lives of others.

Leopold admired his close friend. Richard Loeb, whom he often described as a "superman." Loeb, like Leopold, was extremely intelligent. He skipped several grades in school and was the youngest student ever to graduate from the University of Michigan. Like Leopold, he also came from a wealthy family; his father was a retired vice president of Sears Roebuck. Loeb did not read books on philosophy; he loved detective stories, reading every one he could find. Loeb also tried committing minor crimes — stealing bottles of liquor from a relative and a Liberty Bond from his brother's desk. But minor crimes were not enough.

THE LAW

This edition of *Bill of Rights in Action* looks at issues related to law. The first article explores the famous trial of Leopold and Loeb, which rocked the nation in the 1920s. The second article examines the *Great Qing Code*, the laws of the last dynasty of China, which was in power from 1644 to 1912. The last article looks at the meaning of the First Amendment's free exercise clause.

U.S. History: Saved From the Gallows – The Trial of Leopold and Loeb World History: The *Great Qing Code*: Law and Order During China's Last Dynasty Government: The Free Exercise of Religion in America

Guest writer Lucy Eisenberg, Esq., wrote the article on Leopold and Loeb. Our longtime contributor Carlton Martz wrote about the Qing Code. CRF's senior writer Damon Huss wrote on the free exercise of religion.

What he really wanted was to commit the "perfect" crime, a crime in which he would collect ransom after kidnapping a young person and escape detection by murdering the kidnapped victim and hiding the body where it would not be discovered. Loeb managed to persuade his friend Leopold to help him create and carry out such a plan.

After at least two months of planning, Loeb and Leopold decided to carry it out. On May 21, they got into a car, which they had rented under a false name, and cruised a street near the Harvard school, where wealthy parents sent their children. It was late afternoon and a 14-year-old student, named Bobby Franks, was walking home. Leopold and Loeb pulled over to the curb and persuaded Bobby to climb into the car. Two minutes later Bobby had been hit four times on the head with a chisel, thrown onto the floor, and suffocated to death. The killers then drove into marshlands around Wolf Lake, a place where Leopold often went birdwatching. stripped off Bobby's clothes, poured hydrochloric acid on his body, and stuffed it into a drainpipe. They then called the Franks' house, telling Bobby's mother that her son had been kidnapped, he was safe, and further instructions would follow.

The next day, Mr. Franks received a ransom note, sent by special delivery, stating that if he put \$10,000 in old \$20 and \$50 bills into a cigar box and delivered it as instructed, Bobby would be safely returned in six hours. But that didn't happen, because the perfect crime had gone wrong.

Glasses Foil the Crime

A day after the murder, a workman walking near Wolf Lake saw two feet sticking out of a drain pipe close to the railroad tracks. He yelled for help, and another group of workmen joined him. Together they pulled out the body of Bobby Franks and called the police. One of the workers noticed a pair of glasses nearby and handed those to the police. Bobby Franks' father had been waiting to hear from the kidnappers, certain that the kidnappers would not harm his son. At first, he paid no attention to the news that the body of a

young boy had been found in a swamp. He refused to go to the morgue to look at the body, but finally agreed to send a family member, who came back with the horrible news that it was Bobby's body.

With Bobby's death known, the plot to collect ransom collapsed. But for eight days, the identity of the killers was unknown. Then suddenly the pieces of the puzzle came together. The police located the company that had sold the eyeglasses found near the crime site. The company had kept careful records, and after searching 54,000 records in the company's files, the police discovered that the glasses had been sold in November 1923 to a person named Nathan Leopold. At 2:30 p.m. on May 29, the police went to Leopold's house and took him in for questioning. He acknowledged that the glasses belonged to him. He told the police that he often walked near Wolf Lake to do birdwatching, and the

Two minutes later Bobby had been hit four times on the head with a chisel, thrown onto the floor, and suffocated to death.

glasses had probably fallen out of his breast pocket when he stumbled. The police questioned Leopold about where he had been on the day of the murder. At first, he said he could not remember, but then began to tell a story of hanging out with his friend Richard Loeb. The police picked up Loeb and began questioning him in a different room. At first, Loeb said he couldn't remember where he had been on the day of the murder, and then he began talking. The two boys were telling different stories, but after more than 12 hours of questioning, both confessed to having together organized and carried out the murder. Their stories had one major difference: Each said that the other one had actually killed Bobby Franks.

At 6 a.m., the state's attorney, Robert Crowe, came out of his office to address the gathered crowd of reporters. He was exhausted but beaming with satisfaction. "The Franks murder mystery has been solved," he said, "and the murderers are in custody. Nathan Leopold and Richard Loeb have completely and voluntarily confessed." And with great confidence he said: "I have a hanging case."

Darrow for the Defense

News of the confessions created a storm of publicity and excitement. The Hearst papers printed a confession "extra" and claimed that they distributed 100,000 copies within 10 minutes. The papers cried for blood: "Never has public opinion in Chicago been at such a white heat of indignation." And they demanded action right away. The Herald and Examiner called for an immediate resolution of the case. The case, it editorialized, "should not be allowed to hang on Every consideration of public interest demands that it be carried through to its end at once." Without dissent, the newspapers reported that public opinion demanded the death penalty.

The families moved quickly to find legal help. The day after the confessions were announced, Loeb's brother Mike went to the state attorney's office with an attorney named Benjamin Bachrach to find out where the accused boys were being held. A well-schooled criminal lawyer, Bachrach had successfully defended a number of gangsters. That same night Loeb's uncle Jacob went to the apartment of an attorney named Clarence Darrow, pleading with him to represent his nephew, Leopold. With desperation, Loeb's uncle said: "Get them a life sentence instead of death. That's all we ask."

In 1924, Clarence Darrow was best known for defending labor unions and strikers. His public image, in the words of one author, "was a defender of the underdog, a devil's advocate, a man who stood perpetually opposed to the great and powerful of the earth." He certainly was not accustomed to representing wealthy and powerful families. But he was passionately opposed to capital punishment, and he saw the Leopold-Loeb case as a chance to strike a blow against the death penalty.

Darrow went to work immediately and hired three of the most eminent

psychiatrists in the country to examine the boys and explain their medical condition. On June 11 (the day that Richard Loeb turned 19), the defendants appeared in court and pleaded not guilty to the charges against them, murder and kidnapping. Trial was set for August 4, with all motions to be filed on July 21. When that day arrived, the boys entered the courtroom carefully groomed and dressed in dark suits. Judge John R. Caverly called the courtroom to order, and Darrow began a lengthy statement about the facts of the crime as set forth in the defendants' confession. He acknowledged that given the facts of the crime, the boys should not ever be released and should be "permanently excluded from society." He then exploded an unexpected bombshell. After long reflection, he said, we have decided to move the court to withdraw the defendants' plea of not guilty and enter a plea of guilty.

No one had anticipated a guilty plea; everyone was in shock and reporters raced for the door. But Darrow's goal was simple: to avoid a jury trial. If the defendants pleaded not guilty by reason of insanity, the law required a jury trial. And Darrow believed that public opinion was so inflamed that no jury would accept insanity as a defense. But he had hope that with the judge making the decision, he might be able to obtain mercy for his clients. He planned to introduce evidence of the mental condition of his clients "to show the degree of responsibility they had" as grounds for mitigating the sentence. "With that," he concluded, "we throw ourselves upon the mercy of this court - and this court alone."

A Crime Without a Motive

The trial began on July 23, 1924. Three hundred people — 200 of whom were reporters from all over the country — packed Judge Caverly's courtroom. There were 70 seats set aside for the public, which were hotly contested for each day. The trial — which technically was a hearing for mitigation of the sentence because of the guilty pleas — lasted just over a month. Even though guilt was no longer an issue, the state called 102 witnesses to confirm the facts of the crime and impress

the court with its horror and coldbloodedness. Darrow stipulated to the facts and chose not to cross-examine any witnesses. The evidence presented by the defense was the testimony of the eminent psychiatrists who had examined Loeb and Leopold while they were in jail. The defense also presented various other medical specialists, including neurologists and endocrinologists, who testified to various metabolic abnormalities that affected the boys' mental condition.

At the closing arguments, one of the state's three attorneys boomed out with passion: "You have before you one of the most cold-blooded, cruel, cowardly, dastardly murders that was ever tried in the history of any court." It was then time for Darrow's closing argument, the demanding task of persuading the judge to spare the boys from hanging.

Darrow's argument began at 2:30 on Friday, August 22. Crowds rushed to the courthouse to hear him speak. Judge Caverly had to battle his way through the mob to get into the courtroom. Finally, Darrow rose to speak. His argument rested on two points: (1) disproving the state's claim that the boys' motive in kidnapping and killing Bobby Franks was to collect \$10,000, and (2) convincing the judge that since there was no motive, the boys were driven by diseased minds that they could not control.

On the issue of motive, Darrow did not — and could not — dispute the evidence that the state had presented of the intricate plan the boys had concocted to collect money from the Franks family. But Darrow reminded the judge that evidence had also been presented that the boys had plenty of money: Loeb had a \$3,000 checking account, and Leopold had a monthly allowance of \$125, got money from his parents whenever he wanted it, and had arranged to go to Europe and bought his ticket before he was arrested.

"And yet," Darrow said, "they murdered a little boy against whom they had nothing in the world, without malice, without reason, to get \$5,000 each. All right, all right, your honor, if the court believes it, if anyone believes it, I can't help it."



The mugshots of Leopold (top) and Loeb when they entered the Illinois State Penitentiary to begin serving their sentences.

If not money, then what was their motive? And if they had no motive, then why did they commit the crime?

The defense had offered the testimony of many psychiatrists and other physicians who had examined the boys. But in his closing argument, Darrow did not rely on the science of mental health. Yes, he said, nothing happens without a cause. And the boys did suffer some defects, perhaps defective nerves. But he, in effect, dismissed the experts' testimony: "I want to say, your honor, that you may cut out every expert in this case . . . vou may decide this case on the facts as they appear here alone; and there is no sort of question that these boys were mentally diseased."

"I know it is something," he said, "and it must have been something because without a motive the boys cannot be held to blame. . . . Without (a motive) it was the senseless act of immature and diseased children, wandering around in the dark and moved by some emotion that we still perhaps have not the knowledge or the insight into life to thoroughly understand."

A Plea for Mercy

Darrow's closing argument lasted 12 hours over three days. In pleading for life and against the death penalty, he emphasized the boys' youth. He

U.S. HISTORY 3

Excerpts From the Closing Arguments

Defense Attorney Clarence Darrow

[N]either the parents, nor the friends, nor the attorneys would want these boys released [T]hose the closest to them know perfectly well that they should not be released, and that they should be permanently isolated from society. We have said it and we mean it. We are asking this court to save their lives, which is the last and the most that a judge can do.

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How insane they are I care not, whether medically or legally. 8 9 They did not reason; they could not reason; they committed the most foolish, most unprovoked, most purposeless, 11 most causeless act that any two boys ever committed

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What is [the state attorney's] idea of justice? He says to this 13 court . . . "Give them the same mercy that they gave to 14 Bobby Franks." Is that the law? Is that justice? Is this what 15 a court should do? Is this what a state's attorney should do? 16 For God's sake, if the state in which I live is not kinder, more 17 human, more considerate, more intelligent than the mad act 18 of these two mad boys, I am sorry I have lived so long. 19

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Dick and Nathan . . . see the Franks boy, and they call to him to get into the car. It is five o'clock in the afternoon, on a thickly settled street, the houses of their friends and their companions; known to everybody, automobiles on the street, and they take him in the car - for nothing. If there had been a question of revenge, yes; if there had been a question of hate, where no one cares for his own fate, intent only on accomplishing his end, yes. But without any motive or any reason picking up this little boy right in sight of their own homes, surrounded by their neighbors. They drive a little way on a populous street, where everybody could see, where eyes might be.

33

There is not a sane thing in all of this from the beginning to 34 the end. There was not a normal act in any of it, from its in-35 ception in a diseased brain, until today, when they sit here 36 awaiting their doom. But they say they planned. Well, what 37 does that mean? A maniac plans, an idiot plans; an animal 38 39 plans; any brain that functions may plan, but their plans were the diseased plans of a diseased mind, of boys. 40

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What do they want? Tell me, is a lifetime for the young spent behind prison bars – is that not enough for this mad act? And is there any reason why this great public should be regaled by a hanging? 45

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And for what? Because the people are talking about it. Nothing else. Just because the people are talking about it. It would not mean, your honor, that your reason was con-49 50 vinced. It would mean in this land of ours, where talk is cheap, where newspapers are plenty, where the most immature expresses his opinion and the more immature the harder it is that a court couldn't help feeling the great pressure of public opinion 54

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Prosecutor Robert Crowe

I would suggest that if they want mercy and charity they practice a little bit of it. Treat them with kindness and 3 consideration? Call them babes, call them children? Why, from the evidence in this case they are as much entitled to the sympathy and mercy of this court as a couple of rattlesnakes, flushed with venom, coiled and ready to 7 strike. They are entitled to as much mercy at the hands of your honor as two mad dogs are entitled to, from the evidence in this case.

10 They are no good to themselves. The only purpose that 11 they use themselves for is to debase themselves. They 12 are a disgrace to their honored families and they are a menace to this community. The only useful thing that re-14 mains for them now in life is to go out of life and go out 15 of it as quickly as possible under the law.

16

17 Having taken into consideration everything that the doc-18 tors for the defense had testified to, having taken into 19 consideration everything contained in the Hulbert report, Dr. Church, Dr. Patrick, Dr. Singer and Dr. Krohn said that 2.0 21 there was absolutely nothing to indicate mental disease in either one of these defendants. 22

23 . . .

24 No person in all this broad land who knew these two defendants ever suspected that they were mentally dis-25 eased until after Bachrach and Darrow were retained to 26 defend them in a case where they had no escape on the 27 facts. If I had taken them into custody on the 20th day of May and attempted to have them committed to an insane 29 asylum Mr. Darrow would have been here, their families 30 would have been here, and all the doctors they could 31 hire; and there would be only one crazy man in the court-32 room, and that would be the state's attorney. 33

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35 Would it be possible in this case, if this crime had not 36 been committed, to persuade any reasonable authority 37 to commit either to an asylum as insane?

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39 It was not for the thrill or the excitement. The original 40 crime was the kidnaping for money. The killing was an af-41 terthought, to prevent their identification, and their subsequent apprehension and punishment. He said he did 43 not anticipate the killing with any pleasure. It was merely necessary in order to get the money. Motive? "The killing 44 apparently has no other significance" - now, this is not 45 my argument, your honor, but in their own report, their 46 own evidence . . . "The killing apparently has no other 47 significance than being an inevitable part of a perfect 48 crime in covering one possible trace of identification." 49 50

That is the motive for the murder, self-preservation, the 52 same as a thief in the night in your house, when suddenly surprised, shoots to kill. Why? He did not go into your house to kill; he went in to rob. The killing had no signif-54 55 icance, except he did not want to be apprehended; the desire, the urge of self-preservation. And that is the only significance that the murder in this case has. 57

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stated that no one in Chicago had ever been sentenced to death who was under the age of 23 and who had pleaded guilty. And, "I think I am safe in saying — that never has there been such a case in the state of Illinois." Why then, asked Judge Caverly, is the state demanding the death penalty? Yes, Darrow said, children were hanged in days long past. But to send these boys to the gallows would be turning your face toward the past. By saving these boys lives, you will make it

easier for every human being with an aspiration and a vision and a hope and a fate. I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men. When we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.

When Darrow finished his closing argument, there were tears in his eyes and tears on the judge's face. And the courtroom was silent for two minutes.

Darrow's argument did not change the state's position. In his rebuttal argument, the state's lead attorney Robert Crowe insisted that if the case had been tried by a jury, it would have fixed the punishment as death — and if not, everyone would believe that the verdict "was founded in corruption." Crowe insisted that the boys' motive was indeed money. "All the way through this unusual crime runs money, money," he claimed. And these defendants are not entitled to mercy. "They are as much entitled to sympathy and the mercy of this court as a couple of rattlesnakes flushed with venom, coiled, ready to strike." Crowe finished his argument warning the judge not to follow Clarence Darrow's philosophy of life, because by doing so, "a greater blow had been struck to our institutions than a hundred, yes, a thousand murders." With that, after 32 days, the hearing in mitigation of the boys' guilty plea was adjourned.

Life. Not Death

After two weeks, Judge Caverly returned to the courtroom to announce his decision. He acknowledged the considerable amount of testimony concerning the defendants' mental and emotional conditions, but said that absent legislative guidelines, his decision would not be affected by it. And he acknowledged that the case was one of "singular atrocity" and had been carefully planned and executed "with every feature of callousness and cruelty." Though "the path of least resistance" would be to impose the death penalty, the judge announced that the punishment would be life imprisonment, rather than death. In making that decision, he said, he was "moved chiefly by the consideration of the age of the defendants, boys of 18 and 19 years." The defendants will not be put to death by hanging, "but to the offenders, particularly of the type they are, the prolonged suffering of years of confinement may well be the severest form of retribution and expiation."

The boys were sent to the state penitentiary. In 1936, Loeb was killed in a fight with another inmate. Leopold managed to keep intellectually active, teaching in a prison school and working as an X-ray technician in the prison hospital. He also volunteered to be tested with an experimental malaria vaccine. In 1958, after 34 years of confinement, he was released from prison. He moved to Puerto Rico, where he earned a master's degree, taught mathematics, and worked in hospitals and church missions. He died in 1971, at age 66.

DISCUSSION & WRITING

- 1. Describe the crime in this case. What was the prosecution's theory of why the crime occurred? What was the defense's theory?
- 2. Why did the case draw so much press attention? How do you think the publicity affected the case? Why is it important that judges and juries not be influenced by publicity and public opinion?
- 3. Why did the defense plead guilty? What decision did the judge have to make in the case?
- 4. The day after Leopold died in 1971, the *Chicago Sun Times* editorialized that Leopold's life in prison, and after, was "a clear case of rehabilitation. And it clearly argues against the death penalty even for heinous crimes, for no one can reasonably say that Society would have benefitted more by Leopold's execution." Do you agree? Explain.

ACTIVITY

Life or Death?

Imagine that you are living in 1924 and are in charge of writing editorials for a major U.S. newspaper. You are going to write a 200–400 word editorial on what the sentence for Leopold and Loeb should be. Your editorial should:

- 1. State a clear position on whether they should get the death penalty or a life sentence.
- 2. Give reasons for your position. Cite evidence supporting your position from the article and from the **Excerpts From the Closing Arguments**.
- 3. Specifically address and offer counterarguments to the arguments made by the side you disagree with in the case. (These arguments appear in the article and in the **Excerpts From the Closing Arguments**.)
- 4. Be well-organized and use proper grammar and spelling.

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U.S. HISTORY 5

The Great Qing Code:

LAW AND ORDER DURING CHINA'S LAST DYNASTY

THE GREAT QING CODE CONTAINED THE COLLECTION OF LAWS WRITTEN OVER A PERIOD OF MORE THAN 2,000 YEARS BY CHINA'S RULING DYNASTIES. THE QING, CHINA'S LAST DYNASTY, BROUGHT THE CODE TO ITS ULTIMATE FORM.

China's first laws emerged from customs, traditions, and declarations by regional rulers. The first written code of laws appeared in 536 B.C. The purpose of the code was to control the people and maintain order.

In 221 B.C., the Chin Dynasty arose and established the first centralized Chinese empire ruled by an emperor. This accomplishment was greatly aided by a law code written by Chin officials called "Legalists." Their idea was to eliminate special privileges for those of high status and treat everyone equally under the law, thus protecting the weak from the strong. The Legalists also believed in harsh punishments for law violations to prevent crime and disorder in society.

The followers of Confucius (551–478 B.C.) opposed the Legalists. Confucians taught that the emperor, family ancestors, senior relatives, and those of higher rank, such as government officials, should be treated with great respect. Therefore, the penalties for offenders should differ, depending on their family and social ranking.

Confucians also rejected mandating harsh punishment for each crime. They favored making the punishment fit the seriousness of the offense based on the circumstances of a case.

Over the centuries, Legalist and Confucian legal principles merged in the laws approved by each emperor. The first comprehensive law code was produced during the Tang Dynasty in A.D. 653. After that time, each ruling dynasty revised and added to the code of the previous dynasty. China also developed a judicial system of local courts and an elaborate criminal review procedure.



The Qing came from Manchuria, in the northeast, which contained the provinces of Heilongjiang, Jilin, and Liaoning.

The Qing Dynasty

The Qing (pronounced "Ching"), China's last dynasty, ruled from 1644–1912. The Qing originated in Manchuria, a land northeast of China. In the early 1600s, Manchuria was a possession of China ruled by its Ming Dynasty. In 1636, Manchu leaders drove the Ming out of Manchuria and proclaimed their own Qing Dynasty to rule the country.

In 1644, the Manchus invaded China during a massive peasant revolt against the Ming, which caused the emperor to commit suicide. The Manchus crushed the revolt, occupied the capital (now called Beijing), and established the Qing as China's new ruling dynasty. Over the next 150 years, Qing armies conquered the rest of Ming China and expanded China's control over Taiwan, Mongolia, Tibet, and Central Asia.

Meanwhile, Qing emperors restored order throughout China and put Chinese and Manchu officials together to run the empire's bureaucracy. The highest officials, however, were always Manchu.

The Qing began work on their code of laws in 1646 when the emperor adopted the Ming Code. Changes and new laws were added for the next 100

years. In 1740, Emperor Qianlong approved the *Statutes and Sub-Statutes of the Great Qing* known today as the *Great Qing Code*.

The Great Qing Code

The *Great Qing Code* of 1740 established the ultimate format of China's criminal and civil laws, which included laws reaching back more than 2,000 years. The *Code* was basically a set of instructions to local officials, known as magistrates, as well as to higher authorities. These instructions attempted to state the punishment for every possible offense that the emperor believed was necessary to maintain law and order.

At first glance, the *Code* was a "book of punishments" as the Legalists would have liked it to be. But in practice, the judicial system focused on the facts of cases and the wording of laws in order to make the punishment fit the offense, as the Confucians preferred.

The first part of the *Code* began with "The Five Punishments." This was a schedule of the traditional penalties used throughout the *Code* for both criminal and civil law violations. They were ranked by severity:

5 WORLD HISTORY

- The lightest penalty was a beating with the **light bamboo stick**. There were five degrees from 10 to 50 strokes. Its purpose was to physically punish and also to make one feel ashamed.
- 2. The next level of punishment was beating with the **heavy bamboo stick**. The degrees ranged from 60 to 100 strokes. (The number of strokes was later reduced by the Qing after the dimensions of both the light and heavy bamboo beating sticks were enlarged.)
- 3. **Penal servitude** required forced labor in a region different from one's home province. Its purpose was to enslave and disgrace the law violator. This punishment involved an amount of time, ranging from one to three years, plus 60 to 100 strokes of the heavy bamboo stick. There were no prisons, only lockups where accused persons and sometimes even witnesses were held pending the outcome of a case.
- 4. Exile for life was considered a severe penalty since it removed a person from family and rituals at the graves of ancestors. The degrees of this punishment were based on how far from home the convicted person had to go (about 700 to 1,000 miles) plus 100 strokes of the heavy bamboo stick. This penalty was sometimes used by the emperor because "he cannot bear to inflict the death penalty."
- 5. The **death penalty** originally had two degrees: strangulation with a cord and beheading. But the Qing added a third degree of death by "slicing." This was a slow death by numerous cuts to the body followed finally by beheading. It was reserved for especially wicked crimes such as treason and murdering a parent or grandparent. Death penalty sentences were either "immediate" or "delayed" until the annual Autumn Court met to confirm or recommend a reduction of sentence to the emperor. The emperor had to approve all death penalty sentences.

There were other punishments in addition to the traditional five. These included whipping, wearing a wood



A depiction of the punishment of a beating with the heavy bamboo stick.

collar, tattooing, and paying a sum of money to substitute for a sentence called for by the *Code*. The substitution option usually just applied to women, those over 70, children under 16, and government officials.

The *Code* contained nearly 4,000 punishable offenses. Over 800 called for the death penalty, although many condemned lawbreakers received reduced sentences after their cases were reviewed by higher authorities and the emperor.

The *Code*'s statutes (laws) were not organized by subject. Instead, they were placed under the name of each government department to which they applied. The departments included administration, revenue and some civil law matters, rituals, the military, public works, and the Board of Punishments (which handled criminal matters). The *Code* contained 436 statutes and hundreds of sub-statutes.

One of the key principles of the *Code* was the Confucian idea that senior members and males within a family held superior status. For example, the punishment for a son striking a parent was beheading. But there was no penalty for a parent striking a son unless the son died. Even then, the penalty was less than death.

A magistrate had to tie his verdict and punishment to a statute in the *Code*. When no statute directly applied to a case, the *Code* advised the magistrate to sentence by *analogy*. This meant that the magistrate had to find a statute or sub-statute in the *Code* that came close to describing the act in the case and apply its punishment.

The magistrate might also choose to sentence an offender to 40 strokes of the light bamboo or 80 strokes of the heavy bamboo for doing "that which ought not to be done." In deciding which penalty should apply, the *Code* instructed the magistrate to "consider whether the offense is serious or minor and, according to the circumstances, adjudge the penalty."

"Every law comes into effect the day it is [proclaimed]," the *Code* declared. "If the offense was committed [before] that, the punishment should nevertheless be determined under the new law." Thus, the *Code* did not ban ex post facto laws.

Criminal Law Procedure

China's justice system developed along with the laws in the *Great Qing Code*. Criminal law procedure began with the magistrate. He was a local government official in charge of tax collection, the public granary, education, religious rituals, military defense of his city, and many other duties, including that of a judge. He was not trained in the law, but he usually hired a secretary who was knowledgeable about the *Code*.

WORLD HISTORY 7

Excerpts from Great Qing Code Criminal Statutes

Statute 266. Theft with Force (Robbery)

In the case of theft with force when it has been committed but no property has been taken, each [offender] will receive 100 strokes of the heavy bamboo and exile.... But if property is obtained from an owner, do not distinguish between principal and accessory. All will be beheaded.

Statute 302. Affrays and Blows

Quarreling together is an affray.... Everyone who engages in an affray or inflicts blows... and, using hands or feet, strikes another but does not cause injury, will receive 20 strokes of the light bamboo.... If he inflicts a blow with some other object and does cause injury, then he will receive 40 strokes of the light bamboo.

Statute 290. Killing Another in an Affray

1. Anyone who during an affray, strikes and kills another, regardless of whether he has struck with the hand, or the feet, or with another object, or with a metal knife, will be punished with strangulation with delay [until the Autumn Court considers mercy].

2. One who kills intentionally will be punished with beheading with delay.

Statute 282. Premeditated Murder

In the case of one who plots . . . to kill another, the principal formulator of the plot will be beheaded with delay. . . . Only if the killing takes place is there punishment.

Statute 284. Plotting to Kill Paternal Grandparents or Parents

In the case of anyone who plots to kill his paternal grandparents, parents, or his relatives... who are of superior rank or older,... or a husband... [will be] beheaded. If the killing has taken place, then [the murderer] will be condemned to death by slicing.

Statute 319. Striking Paternal Grandparents of Parents

Every child or [grandchild] who strikes his paternal grandparents or parents . . . will be beheaded.

Statute 315. A Wife Striking a Husband

Whenever a wife strikes a husband ... she will receive 100 strokes of the heavy bamboo. ... As far as the husband striking the wife, if he does not fracture, there is no punishment. If it amounts to fracturing or worse, then reduce the penalty for an ordinary person two degrees [80 strokes of the heavy bamboo]. The wife herself must complain. Only then can he be punished.

Statute 329. Cursing Paternal Grandparents and Parents

In every case where someone curses his paternal grandparents or parents, . . . the punishment will be strangulation. It is necessary that [the victim] himself file a complaint. Only then can punishment be inflicted.

Statute 338. Children Not Following Orders

In every case where a child or [grandchild] violates the orders of his paternal grandparents or parents... he will be sentenced to 100 strokes of the heavy bamboo. The paternal grandparents or parents must make the accusation themselves. Then there can be punishment.

Identify a law the Legalists and a law the Confucians would tend to favor. Explain why.

A criminal case began when someone went to the magistrate and filed a criminal complaint against another or when the magistrate himself began an investigation. The magistrate examined physical evidence and questioned the defendant as well as witnesses (sometimes using torture).

In minor cases, punished solely by bambooing, the magistrate conducted a trial and decided the verdict and sentence. No prosecution or defense lawyers were at these trials because the profession of attorneys did not exist in China. Also, a person accused of a crime was presumed to be guilty until proved innocent by the magistrate's investigation and judgment. Someone found guilty could appeal to a judicial commission at the province level.

After the magistrate investigated the facts in the more serious cases, the cases were automatically sent to the province's judicial commission. It conducted another investigation and the trial for each case. The provincial governor ratified the commission's verdict and sentence and then forwarded the most serious cases to the Board of Punishments in Beijing for further review.

The Board of Punishments conducted yet another investigation of the facts in a case. The board was almost entirely concerned with the correct degree of punishment rather than guilt or innocence. It could confirm, reduce, or increase the punishment in a case. The board made the final judgment for crimes punished by penal servitude or exile. Capital punishment cases, however, went on to still another level of review by high courts.

Many death penalty sentences were delayed until a special Autumn Court met. Apparently, this court recommended reducing a considerable number of death sentences. But the reduction sometimes only meant changing a death sentence from beheading to strangulation.

In any event, the emperor always had the final say whether a criminal convicted of a capital offense would be executed or spared. In fact, the emperor could overrule his own *Code* in any case, although this was rare.

In 1870, the Board of Punishments petitioned Emperor Tongzhi to allow judges to reduce any *Code* statute punishment in order to make it more justly fit the circumstances of the crime. The emperor agreed, and judges no longer were forced to impose a harsh punishment dictated by the *Code* if an injustice would occur.

Civil Law Procedure

The *Great Qing Code* dealt mainly with criminal matters. Civil laws did not appear in a separate section of the *Code*. Instead, they were scattered among criminal law statutes.

The most common lawsuit concerned land disputes, often within or between families. Other typical lawsuits involved marriage, inheritance, and debts.

In many cases, those who lost lawsuits faced criminal punishments. Take the example of when a lender won his lawsuit against a borrower who failed to pay his debt. The magistrate would first order the debtor to pay the principal and interest he owed and then sentence him to 10–50 strokes of the light bamboo, depending on how much he owed.

The government considered civil lawsuits "trivial disputes." But lawsuits

were common and involved peasants, town people, and wealthy landlords all suing one another.

The role of the magistrate in lawsuits was to find the facts of a case and rule in favor of one side. The magistrate had more freedom to use common-sense reasoning in deciding civil cases. Nearly all lawsuits were decided at the local level. They could be appealed, but not above the province level.

Although no lawyers officially existed in China, people involved in disputes sometimes turned to lawsuit specialists, who had some knowledge of the civil law. For a fee, these specialists helped illiterate persons file the correct lawsuit forms and sometimes managed their cases before the magistrate.

The government accused the lawsuit specialists of cheating ignorant peasants and clogging up the courts with cases based on false claims. The government branded them as "tricksters," but they provided poor people access to the courts and helped resolve disputes by the law rather than by violence.

End of the Great Qing Code

The strength of Qing Dynasty rule weakened during the 1800s when European nations and Japan used military force to open up trade relations and seize territory. After 1900, Western law and constitutional rights began to influence government and legal reforms. But the reforms came too slowly as Chinese revolutionary movements arose.

In 1911, revolutionaries rebelled against Manchu Qing rule. The following year, the last Qing emperor, Xuantong (also known as Puyi), abdicated the throne. This act ended the rule of China's last imperial dynasty.

The new Chinese republic based its laws on the German law code, as Taiwan still does today. Elements of the *Great Qing Code*, especially its great detail, remain in Taiwan's code. After the Chinese Civil War, the victorious Communists established a socialist legal system. But it continued the Qing emphasis on using the law to control the people.

The *Great Qing Code* and the codes that came before it seem harsh and lacking in rights familiar to us today. But the rulings of magistrate-judges

and the elaborate review process for serious criminal cases, including the death penalty, apparently did achieve a sense of justice among the Chinese people for more than 2,000 years.

DISCUSSION & WRITING

1. How did the law codes following the Tang code of A.D. 653 repre-

- sent a compromise between the principles of the Legalists and Confucians?
- 2. In what ways did Chinese criminal and civil law procedures differ from those of the U.S. today?
- 3. What do you think were the best and worst features of the Qing Dynasty's legal system?

ACTIVITY

The Case of Pu Yung-sheng (1812)

Facts of the Case

An affray occurred when a group of outsiders attacked the family of Pu Yung-sheng, age 12. Chang Chiu-lin, one of the attackers, pushed Pu's older brother to the ground, sat on him, and beat him with his fists. Seeing this, Pu grabbed a rake and hit Chang on the side of the head, killing him.

Judicial History

After investigating the facts, the local magistrate sent the case to the judicial commission of Kiangsu Province. The commission conducted a trial and found Pu Yung-sheng guilty of violating Statute 290 of the *Great Qing Code* (see sidebar on page 8).

The governor of Kiangsu ratified the sentence and sent the case to the Board of Punishments in Beijing. The Board considered a Statute 290 substatute, which stated that if a son, grandson, or wife acts to save grandparents, parents, or husband when attacked, the rescuer will receive a reduced sentence even if an attacker is killed. But the sub-statute said nothing about a younger brother saving an older brother.

Another sub-statute said that when an offense was committed by a child aged 11 to 15, the regular punishment may be substituted by a money fine. But this privilege was denied for a death penalty offense unless the child was less than 11 years old.

After reviewing the case and the law, the board agreed with the Kiangsu governor's sentence. The board reasoned that the absence of brothers from the list of victims and rescuers was a deliberate omission in the law. The case then went on to the Autumn Court to consider recommending mercy to Emperor Jiaqing. The recommendation of the Autumn Court and final decision of the emperor in this actual capital case are unknown.

The Autumn Court

In this activity, the class will meet in groups, each playing the role of Autumn Court judges. Their task will be to make a recommendation to the emperor, regarding the sentence of Pu Yung-sheng from among these choices:

- Confirm the finding of the Board of Punishments that Pu Yung-sheng should be executed by strangulation for killing Chang Chiu-lin.
- Use analogy to another statute or sub-statute to justify reducing the sentence from death to something less; recommend another sentence.
- Use the Confucian legal principle of "make the punishment fit the crime" for cases involving extenuating circumstances to justify reducing the sentence from death to something less; recommend another sentence.
- Petition the emperor to ignore the *Great Qing Code* and grant a lesser penalty to Pu Yung-sheng; recommend another sentence.

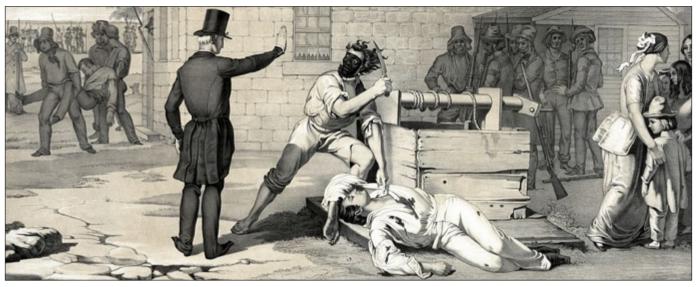
The role groups should use information from the article to justify their recommendations to the emperor. Students should remember they are acting as they think judges would during the Qing Dynasty.

Each group of judges will finally announce and defend its recommendation to the emperor.

WORLD HISTORY 9

THE FREE EXERCISE OF RELIGION IN AMERICA

WHEN, IF EVER, MAY THE GOVERNMENT LIMIT FREEDOM OF RELIGION? THE SUPREME COURT AND CONGRESS HAVE GRAPPLED WITH THIS QUESTION.



A lithograph, done seven years after the killing, depicts the 1844 murder of Mormon leader Joseph Smith.

The First Amendment to the U.S. Constitution begins with what are known as the religion clauses: "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof" Note that initially the First Amendment only limited the actions of Congress, our national legislature, but not the governments of any of the states. That came later.

The phrases establishment of religion and free exercise of religion mean different things. Most British colonies in America before 1776 had "established churches," churches that received direct financial support from taxpayer money. Several states in the early American republic also had established churches. The establishment clause protects against the federal government's funding or sponsoring particular religious views.

The free exercise clause serves another purpose: It prevents the government from interfering with people's religious beliefs and forms of worship. It was many years before the Supreme Court heard its first case involving the free exercise clause.

The First Free Exercise Case

In the 1820s, a man named Joseph Smith had spiritual visions, and from his visions came the new religion of the Church of Latter-day Saints, whose adherents are called Mormons. Throughout the 19th century, the Mormon faith spread as the charismatic Smith gathered followers. Among the Mormons' more controversial practices was polygamy, or men having multiple wives. Joseph Smith based his belief in polygamy on biblical examples of the practice, though his followers did not, at first, accept this part of his revelation.

The Mormons faced resistance and even persecution when they settled in many traditionally Christian communities. The Mormons followed Smith until his death at the hands of an angry mob in 1844 and then followed his successor, Brigham Young, until they ultimately settled in the territory of Utah. There, they openly practiced polygamy.

Determined to clamp down on their polygamy in U.S. territories, Congress passed the Anti-Bigamy Act of 1862, which President Lincoln signed into law. The law made polygamy a federal crime punishable by prison and a fine: "That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, . . . shall . . . be adjudged guilty of bigamy" Lincoln, however, promised not to enforce the law if Young agreed not to join the

Confederacy in the Civil War.

When the federal government began to more actively enforce the law in the 1870s, Young and other Mormon elders decided to challenge the law. Young had his secretary, George Reynolds, arrested for bigamy. According to plan, Reynolds claimed his arrest violated his fundamental right to free exercise of religion. The U.S. Supreme Court agreed to hear his appeal.

When in 1879, the court issued its opinion in *Reynolds v. U.S.*, Reynolds and the Mormons lost. In a unanimous opinion, Chief Justice Morrison Waite wrote, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." Unless the government can regulate our actions, every citizen would become "a law unto himself." In other words, the government may limit your actions, but not your beliefs.

In 1890, the Mormons formally banned the practice of polygamy within their church, though some fundamentalist Mormons continued the practice illegally even into the 21st century. (The practice of polygamy in Utah had made many in Congress oppose its becoming a state. After the ban, Congress admitted Utah to the Union in 1896.)

10 GOVERNMENT

Incorporation of Rights

The First Amendment initially only applied to the federal government. The Mormons could challenge the Anti-Bigamy Act because it was an act of Congress, the only governmental body named in the First Amendment.

But following the Civil War, the 14th Amendment was added to the Constitution. Among its provisions was the due process clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law" Beginning in the 1920s, the Supreme Court began to interpret the due process clause as incorporating the fundamental rights of the Constitution and thus protecting individuals against the actions of state and local governments. On a case-by-case basis, the court has decided which rights are incorporated into the 14th Amendment's due process clause. Once a fundamental right has been incorporated, it protects persons from unconstitutional laws and actions of their state and local governments and not just the federal government.

The free exercise clause was incorporated in the 1940 case of *Cantwell v. Connecticut*. Newton Cantwell belonged to the Jehovah's Witnesses, a Christian sect that places great importance on its members' proselytizing, or working to convert others to its beliefs. One day, Cantwell and his two sons went door-to-door in a mostly Catholic neighborhood in Connecticut, taking with them religious books and pamphlets and even a portable phonograph (record player) to play recordings for people at their front doors.

The recordings offended many people in the neighborhood. Some listeners later testified that they had to restrain themselves from punching Cantwell. A local ordinance forbade anyone from soliciting (asking for donations) for "any alleged religious, charitable or philanthropic cause" without prior approval from the local "public welfare council," a governmental body. The punishment for violating the ordinance included a fine and up to 30 days in jail. Cantwell was arrested for violating the ordinance and for disturbing the peace.

Cantwell defended his actions on the basis of his free exercise of religion under the First and 14th amendments. When his case was appealed to the Supreme Court, the court held unanimously in Cantwell's favor. In his opinion, Justice Owen Roberts wrote:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets [basic beliefs] of one man may seem the rankest error to his neighbor But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Compelling Interest

More than 20 years later, in *Sherbert v. Verner* (1963), the Supreme Court made another important ruling on the free exercise clause. The court was presented with this issue: If an employee cannot perform the required functions of a job for religious reasons, and is then fired, may a state deny that employee unemployment benefits?

The case involved Seventh Day Adventism, a Christian denomination. All Christians observe a holy day each week called the Sabbath, and most Christians in the United States observe the Sabbath on Sunday. The Seventh Day Adventists, however, observe it on Saturday, according to their biblical interpretation.

The free exercise clause prevents government from interfering with people's religious beliefs and forms of worship.

Adell Sherbert, a young woman, had converted to Seventh Day Adventism in South Carolina. She worked a five-day week at a textile mill, but when the mill's schedule changed to a six-day week, including Saturdays, she refused to work on her Sabbath day. She was fired, and she could not find other work because of her Sabbath restriction. When she applied for state unemployment benefits, the state denied her claim, stating that she was refusing to accept available work.

Sherbert appealed the state's decision. When her case ultimately reached the U.S. Supreme Court, the court decided in her favor. Writing for the majority, Justice William Brennan stated a rule for deciding when the government could limit a person's free exercise of religion. The decision to deny Sherbert her benefits

must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest. . . ."

In other words, the court, recognizing the free exercise of religion as a fundamental right, decided that if the government wants to place a burden on a person's sincere religious beliefs, then the government must have a very strong reason for placing such a burden. The only reason the state put forward in Sherbert's case was the possibility of "fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work." Brennan noted that no evidence of fraudulent claims was presented in court and doubted even if evidence existed, that this would amount to a compelling state interest. "For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."

Drugs, Religion, and the Law

For nearly 30 years, the courts used *Sherbert*'s "compelling interest" test to decide free exercise cases. In *Employment Division v. Smith* (1990), however, the Supreme Court moved decidedly in another direction, by reinvigorating the original standard set in *Reynolds v. U.S.*

The case of *Smith* involved adherents of a small religion called the Native American Church (NAC). The NAC synthesize Christianity with traditional North American indigenous, or Native American, religion. Beliefs and practices in the NAC vary from region to region.

GOVERNMENT 11

Full Text of the Religious Freedom Restoration Act

In the text of RFRA below, note how it uses the language of the Supreme Court's *Sherbert* decision to describe the only circumstances when the government may burden any person's free exercise of religion.

42 U.S. Code Sec. 2000bb - 1 - Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Part of the NAC's ritual practices, however, involves the controversial use of part of a small cactus called peyote (pronounced pay-OH-tee). When ingested into the body, peyote can cause a strong hallucinogenic (mind-altering) effect. Archaeologists have found peyote "buttons" (bite-size pieces) in caves in southern Texas that date back to 5,000 B.C., indicating a long tradition of use before the arrival of Europeans in North and South America.

The federal government classifies peyote as a Schedule I controlled substance, or illegal narcotic. Federal law, however, makes an exemption for peyote's use by the NAC: "The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church." All states also outlaw the use of peyote, but many of them also have exemptions for its use by the NAC.

In the late 1980s, Alfred Smith and Galen Black worked in a private Oregon drug-rehabilitation clinic as counselors. They also belonged to the Native American Church. When their employer learned they ingested peyote as part of their religious practice, they were fired for "misconduct" even though they did it when they were not working. Use of peyote is a crime in Oregon, and the state does not have an exemption for the NAC. Smith and Black, however, were never charged

with a crime. They made a claim for state unemployment benefits, but the Oregon Department of Human Resources denied the benefits because of the misconduct claim.

The Oregon Supreme Court held that the denial of benefits did violate the free exercise clause, citing *Sherbert v. Verner* and the compelling interest test. When the state of Oregon appealed the case to the U.S. Supreme Court, it argued that the use of peyote is a criminal act, and therefore the denial of benefits was permitted even though Smith and Black only used peyote for religious purposes. The state argued that their conduct set a bad example for the drug addicts who Smith and Black counseled.

Smith and Black argued that criminal activity not directly "job-related" is not a reason to deny unemployment benefits under Oregon law. They cited an example of a university professor who was not denied benefits even though he had been convicted for conspiracy to set off bombs at federal buildings.

The U.S. Supreme Court, however, held for the state of Oregon in a 6–3 split. In his majority opinion, Justice Antonin Scalia wrote that a "neutral, generally applicable law" does not violate the free exercise clause simply because it burdens a person's religious beliefs. Scalia continued, "We have never held that an individual's religious beliefs excuse him from

compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Citing the *Reynolds* case, Scalia warned that a decision favoring Smith and Black would allow "every citizen to become a law unto himself."

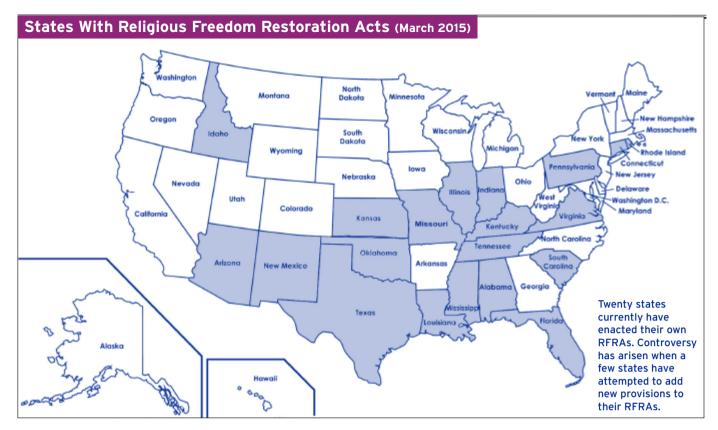
Writing in dissent, Justice Harry Blackmun argued that the compelling interest test "was settled and inviolate principle," and that the Oregon government had simply not established a compelling interest "in enforcing its drug laws against religious users of peyote." Blackmun said that the majority was wrong to say the court had "never held that an individual's religious beliefs" excuse him or her from the law. Blackmun pointed to the *Cantwell* decision as an example.

The RFRA

The decision in Smith prompted outrage from across political and religious dividing lines. Many liberals and conservatives thought the decision harmed religious liberty. Smith brought the liberal American Civil Liberties Union and the conservative Traditional Values Coalition together to denounce the Supreme Court's decision. A variety of religious groups also opposed the decision. The Religious Action Center of Reform Judaism, the Baptist Joint Committee on Public Affairs, the National Association of Evangelicals, and others all agreed that the decision would have far-reaching effects, damaging more than just the Native American Church.

Members of Congress responded. Representative Chuck Schumer (D-NY) introduced a bill called the Religious Freedom Restoration Act (RFRA) in 1993, which reinstated the compelling interest test of the *Sherbert* case. It passed unanimously in the House of Representatives and sailed through the Senate in a 97–3 vote. President Bill Clinton then signed RFRA into law. The text of the law referred only to "government," meaning that it applied at both the federal and state levels.

In 1997, however, the Supreme Court declared unconstitutional the application of RFRA to the states in the case of *City of Boerne v. Flores*. In a 6–3 decision, the court held that Congress exceeded its authority under the 14th Amendment when it passed



RFRA. The court decided that congressional legislation could limit the federal government's actions, but that Congress could not tell state governments to give citizens more First Amendment protection than the *Smith* decision required.

Over the ensuing years, several states passed their own *state-level* "RFRAs." As of March 2015, a total of 20 states have RFRA laws.

Hobby Lobby and Beyond

In *Burwell v. Hobby Lobby* (2014), the Supreme Court was once again asked to tackle the Religious Freedom Restoration Act. The owners of Hobby Lobby, a private for-profit corporation, are members of a single family and are evangelical Christians. *Hobby Lobby* is a "closely held" corporation, which is one that is owned by relatively few people and whose stock is not traded on the stock market. The corporation runs more than 500 stores nationwide and employs thousands of people.

Acting collectively as the Hobby Lobby corporation, the owners objected to having to comply with a portion of the Affordable Care Act (ACA) that required employers' health insurance plans to cover birth control for employees. They argued that their religious beliefs forbade them from funding "abortifacient" contraceptives, or those they believed caused the abortion of fetuses.

Hobby Lobby sued the federal government under RFRA. In its decision, the U.S. Supreme Court ruled 5–4 in favor of Hobby Lobby. In his opinion for the majority, Justice Samuel Alito wrote, "Protecting the free-exercise rights of corporations like Hobby Lobby protects the religious liberty of the humans who own and control those companies."

Justice Alito explained that the court had already decided in another case that RFRA applied to non-profit corporations. In *Hobby Lobby*, the court for the first time interpreted RFRA to apply to for-profit, closely held corporations. The holding also only pertained to the ACA's mandate for employer-covered birth control.

The case sparked deep controversy. In her dissenting opinion, Justice Ruth Bader Ginsburg said the *Hobby Lobby* decision would cause "havoc." She argued that Congress had already amended the ACA in 2012 to ensure that employers could not deny health care coverage to employees based on the employers' religious beliefs. On religious freedom, she continued, "There is . . . no support for the notion that free exercise rights pertain to for-profit corporations."

DISCUSSION & WRITING

- 1. What are the two religious clauses in the First Amendment? What does each guard against?
- 2. What are bigamy and polygamy? Why did Congress just write an anti-bigamy statute?
- 3. The article says the free exercise clause prevents government interference with each person's religious beliefs and practices. What government interference was alleged in the *Reynolds*, *Cantwell*, *Sherbert*, and *Smith* cases? Cite evidence from the article's text to support your answers.
- 4. Re-read the section "Drugs, Religion, and the Law." Compare the decision in *Reynolds* (1879) with the decision in *Smith* (1990). How were the facts in those cases similar or different? Do you think *Smith* was simply a restatement of *Reynolds*? Why or why not? Cite evidence from the article's text to support your answer.
- 5. Re-read the section "Hobby Lobby and Beyond." Do you agree with the majority opinion or with the dissenting opinion? Give reasons to support your answer.

GOVERNMENT 13

ACTIVITY

What Should the Test Be? A Close-Reading Activity on the Free Exercise Clause

The Supreme Court in the *Sherbert* and *Smith* cases used two different tests to decide free exercise clause cases. In this activity, students will apply the tests to the 1972 case of *Wisconsin v. Yoder*.

That case involved the Amish, separatist Christians who avoid most modern technology in favor of traditional communal farming. In the *Yoder* case, Amish parents refused to enroll their children in public high school, arguing that attending was "contrary to the Amish way of life." These parents were charged and fined for violating the state's compulsory education laws. The U.S. Supreme Court had to decide the following issue: **Do a state's compulsory education laws violate the First Amendment rights of parents who refuse to send their children to school for sincerely held religious reasons?**

For this activity, students should first form pairs and do a close reading of the facts of *Wisconsin v. Yoder*. Then each student will write a short essay, answering text-dependent questions.

Instructions:

- 1. Read the facts of the case below, taken directly from the majority opinion written by Chief Justice Warren Burger. Circle words or phrases that you do not understand or need to look up. After reading, discuss the main points with a partner and try to reach agreement on what the case is about. Read aloud the words or phrases that you do not understand and see if your partner can help explain them to you.
- 2. Re-read the excerpts, this time drawing a question mark in the margin next to any paragraph or sentence that makes you have a question about the text. Write down your questions on a separate sheet of paper if the margin does not give you enough room.
- 3. After re-reading, share your questions about the text with your partner. Determine if your partner can help you answer them, or if you need to look up more information.
- 4. **Writing Activity:** Using the text and the main article, answer the following questions, each with at least one well-developed paragraph, citing relevant text to support your answers:
 - (a) How should the *Yoder* case be decided under the compelling interest test of *Sherbert v. Verner*?
 - (b) How should it be decided under the "general applicability" test of Employment Division v. Smith?
 - (c) How do you think the case should be decided? Why?

Facts (as stated in the majority opinion of Wisconsin v. Yoder)

Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.

A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. . . .

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal "learning through doing;" a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs, with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. . . . In short, high school attendance with teachers who are not of the Amish faith — and may even be hostile to it — interposes a serious barrier to the integration of the Amish child into the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

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Supported by the Bill & Melinda Gates Foundation

Letter from a Vreedman to his Old Master. [The following is a genuine document. It was dictated by the old servant, and contains his ideas and forms of expression.—Eus. Com.] Darrow, Outo, August 7, 1885. To my Old Master, Coleal P. H. ANDRAD, Big Spring, Tonucasoe: San-i got your letter and was glad to find that you had not forgotten Jordun, and that you wanted me to come back and live with

that you had not forgotten Jordum, and that you wanted me to come back and live with you again—promising to do better for me than any body clae can. I have often feit unensy about you. I thought the Yankees would have hung you long before this for harboring the rebs. they found at your house, I suppose they never found out about your going to Colonel Martin's to kill the Union soldier that was left by his company in their stable. Although you shot at me twice before I left you, I did not want to hear of your



www.crf-usa.org/common-core/

Sources

Leopold and Loeb

Baatz, Simon. For the Thrill of It: Leopold, Loeb and the Murder that Shocked Chicago. NY: HarperCollins, 2008. • Farrell, John A. Clarence Darrow: Attorney for the Damned. NY: Doubleday, 2011. • Fass, Paula S. "Making and Remaking an Event: The Leopold and Loeb Case in American Culture." 80 J. Amer. Hist. 919, 1993. • Grant, Robert and Joseph Katz. The Great Trials of the Twenties: The Watershed Decade in America's Courtrooms. NY: Sarpedon, 1998. • Higdon, Hal. Leopold and Loeb: The Crime of the Century, U of Ill. P, 1999. • Jensen, Richard J. Clarence Darrow: The Creation of an American Myth. NY: Greenwood P, 1992. • "The Leopold & Loeb Trial," Clarence Darrow Digital Collection, U. of Minn. Law Library. URL: http://darrow.law.umn.edu/trials.php • Sellers, Alvin V. The Loeb-Leopold Case with Excerpts from the Evidence of the Alienists and Including the Arguments to the Court by Counsel for the People and the Defense. Brunswick, Ga.: Classic Pub. Co., 1926.

Great Qing Code

Bernhardt, Kathryn and Huang, Philip C. Civil Law in Qing and Republican China. Stanford, Calif.: Stanford UP, 1995. • Bodde, Derk and Morris, Clarence. Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases. Cambridge, Mass.: Harvard UP, 1967. • Embrey, Patricia Buckley. The Cambridge Illustrated History of China. Cambridge: Cambridge UP, 2010. • "Great Qing Legal Code." Wikipedia. 25 Sept. 2014. URL: http://en.wikipedia.org • Jones, William C., trans. The Great Qing Code. Oxford: Clarendon P, 1994. • Legalizing Space in China. URL: http://LSC.Chineselegalculture.org • Yi, Dai, ed. A Concise History of the Qing Dynasty. vol. 1. Singapore: Silkroad P, 2011.

Free Exercise of Religion

"A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875, Statutes at Large, 37th Congress, 2nd Session." American Memory. Library of Congress. URL: http://rs6.loc.gov • Ball, Howard. The Supreme Court in the Intimate Lives of Americans: Birth, Sex, Marriage, Childrearing, and Death. New York: New York University Press, 2002. • ___. The Supreme Court in the Intimate Lives of Americans: Birth, Sex, Marriage, Childrearing, and Death. NY: NY UP, 2002. • Bomboy, Scott. "What Is RFRA and Why Do We Care?" Constitution Daily. Nat. Constitution Center, 30 June 2014. URL: http://blog.constitutioncenter.org • Banning, Lance. The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic. Ithaca, NY: Cornell UP, 1995. • Burwell v. Hobby Lobby Stores, Inc., 573 U.S. (2014). • Cantwell v. Connecticut, 310 U.S. 296 (1940). • City of Boerne v. Flores, 521 U.S. 507 (1997). • Cookson, Catharine. Regulating Religion: The Courts and the Free Exercise Clause. NY: Oxford UP, 2000. • Employment Division v. Smith, 494 U.S. 872 (1990). • Haynes, Charles C. et al. The First Amendment in Schools: A Guide From the First Amendment Center. Alexandria, VA: Assoc. for Supervision and Curriculum Devt., 2003. • Jefferson, Thomas. Letter to James Madison. 20 Dec. 1787. The Founder's Constitution. U of Chicago P and the Liberty Fund. URL: http://presspubs.uchicago.edu • Kleiman, Mark A.R. et al. Drugs and Drug Policy: What Everyone Needs to Know. NY: Oxford UP, 2011. • Martz, Carlton. "The Persecution of the Mormons" Bill of Rights in Action Archive. 2000. URL: http://crf-usa.org • McNally, Michael D. "Church History." Church History 82.3: 762. 2013. • Nussbaum, Martha. Liberty of conscience: in defense of America's tradition of religious equality. NY: Basic Books, 2008. • "RFRA: The Religious Freedom Restoration Act, Contraception, Hobby Lobby." Baptist Joint Committee for Religious Liberty. URL: http://bjconline.org • Reynolds v. U.S., 98 U.S. 145 (1879). • Sherbert v. Verner, 374 U.S. 398 (1963). • Smith, Huston. The Way Things Are: Conversations with Huston Smith on the Spiritual Life. Ed. Phil Cousineau. Berkeley, CA: U of Calif., 2003. • Witte, John, Jr. "Overview: Religious Liberty in America." First Amendment Center. Newseum Institute. URL: http://www.newseuminstitute.org

Standards

Leopold and Loeb

National High School Civics Standard 18: Understands the role and importance of law in the American constitutional system and issues regarding the judicial protection of individual rights. (2) Knows historical and contemporary practices that illustrate the central place of the rule of law (5) Understands how the individual's rights to life, liberty, and property are protected by the trial and appellate levels of the judicial process and by the principal varieties of law (7) Understands the importance of an independent judiciary in a constitutional democracy.

National High School Civics Standard 25: Understands issues regarding personal, political, and economic rights. (1) Understands the importance to individuals and to society of personal rights such as . . . the right to due process of law

National High School U.S. History Standard 22: Understands how the United States changed between the post-World War I years and the eve of the Great Depression.
(1) Understands the major social issues of 1920s America

Common Core Standard RH.11-12.3: Evaluate various explanations for actions or events and determine which explanation best accords with textual evidence, acknowledging where the text leaves matters uncertain.

Common Core Standard W.11-12.1. Write arguments to support claims with clear reasons and relevant evidence.

Common Core Standard W.11-12.4: Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience.

Common Core Standard RH.11-12.8: Evaluate an author's premises, claims, and evidence by corroborating or challenging them with other information.

Great Qing Code

National High School World History Standard 30: Understands transformations in Asian societies in the era of European expansion. (4) Understands the cultural, economic, and social structure of China during the period of European commercial expansion (e.g., cultural and economic achievements of the Chinese during the reigns of the Kangzi and Qianlong emperors; . . . aspects of life of the elite in China; the family and its role in Chinese society).

National High School World History Standard 34: Understands how Eurasian societies were transformed in an era of global trade and the emergence of European power from 1750 to 1870.

(5) Understands China's relations with Western countries. . . .

National High School World History Standard 36: Understands patterns of global change in the era of Western military and economic domination from 1800 to 1914. (13) Understands significant political events in 20th-century China. . . .

California History-Social Science Standard 7.3: Students analyze the geographic, political, economic, religious, and social structures of the civilizations of China in the Middle Ages. (3) Analyze influences of Confucianism and changes in Confucian thought during the Song and Mongol periods. (6) Describe the development of the imperial state and the scholar-official class.

Common Core Standard RH.6-10.1: Cite specific textual evidence to support analysis of primary and secondary sources

Common Core Standard SL.9-10.1: Initiate and participate effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grades 9-10 topics, texts, and issues, building on others' ideas and expressing their own clearly and persuasively.

Free Exercise of Religion

National High School Civics Standard 2: Understands the essential characteristics of limited and unlimited governments. (5) Knows essential political freedoms (e.g., freedom of religion, speech) and economic freedoms . . . and understands competing ideas about the relationships between the two

National High School Civics Standard 11: Understands the role of diversity in American life and the importance of shared values, political beliefs, and civic beliefs in an increasingly diverse American society. (1) Knows how the racial, religious, socioeconomic, regional, ethnic, and linguistic diversity of American society has influenced American politics through time.

National High School U.S. History Standard 8: Understands the institutions and practices of government created during the Revolution and how these elements were revised between 1787 and 1815 to create the foundation of the American political system based on the U.S. Constitution and the Bill of Rights. (3) Understands the Bill of Rights and various challenges to it (e.g., . . . recent court cases involving the Bill of Rights).

National High School U.S. History Standard 31: Understands economic, social, and cultural developments in the contemporary United States. (3) Understands how the rise of religious groups and movements influenced political issues in contemporary American society (e.g., . . . how Supreme Court decisions since 1968 have affected the meaning and practice of religious freedom). California History-Social Science Standard 11.3: Students analyze the role religion played in the founding of America, its lasting moral, social, and political impacts, and issues regarding religious liberty. (5) Describe the principles of religious liberty found in the Establishment and Free Exercise clauses of the First Amendment, including the debate on the issue of separation of church and state.

California History-Social Science Standard 12.5: Students summarize landmark U.S. Supreme Court interpretations of the Constitution and its amendments. (1) Understand the changing interpretations of the Bill of Rights over time, including interpretations of the basic freedoms (religion, . . .) articulated in the First Amendment and the due process . . . clauses of the Fourteenth Amendment.

Common Core Standard RI.11-12.8: Delineate and evaluate the reasoning in seminal U.S. texts, including the application of constitutional principles and use of legal reasoning (e.g., in U.S. Supreme Court majority opinions and dissents)

Common Core Standard SL.11-12.1: Initiate and participate effectively in a range of collaborative discussions . . . with diverse partners on grades 11-12 topics, texts, and issues, building on others' ideas and expressing their own clearly and persuasively. Common Core Standard RH.11-12.1: Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.

Common Core Standard RH.11-12.8: Evaluate an author's premises, claims, and evidence by corroborating or challenging them with other information.

Common Core Standard WHST.11-12.4: Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience

Common Core Standard WHST.11-12.9: Draw evidence from informational texts to support analysis, reflection, and research.

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