

2021

## The Right to Feast and Festivals

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### Recommended Citation

Juan C. RioFrio, *The Right to Feast and Festivals*, 23 *Vanderbilt Journal of Entertainment and Technology Law* 567 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol23/iss3/3>

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# The Right to Feast and Festivals

Juan Carlos Riofrio\*

## ABSTRACT

*Festive behavior is a basic characteristic of human life, as evidenced from ancient times. Humans need to use ceremony and ritual in specific places and times to mark their triumphs, joys, and sorrows. However, some categories of individuals are harmed because they cannot celebrate the most important highlights of their lives through such festive feasts: prisoners, mariners at sea, soldiers on the frontlines, workers subject to the pressures of ungenerous employers, towns occupied by oppressive invaders, and impoverished individuals who cannot afford customary celebrations, among others. When feasts and festivals are restricted, societies lose well-being, communities lose identity, and individuals lose freedom of expression.*

*This normative Article helps fill a gap in the legal literature, which overlooks feasts as a right based on reason, some constitutions, laws, and international human rights. This Article calls for formal recognition and robust and coherent protection of a general right to feast, in constitutional law and in the international framework of human rights. This Article provides three kinds of foundational arguments—factual, rational, and legal—explaining why feasts must be protected, and what must be protected.*

**Keywords:** Right to Party, Right to Fiesta, Right to Celebration, Festival Law, Civil Rights

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## I. INTRODUCTION

For some time now, scholars of philosophy, theology, ethnography, archaeology, and sociology have paid particular attention to feasts and festivals as remarkable characteristics of human behavior. Their academic research rests on the premise that our species can be defined as *homo festus*<sup>1</sup> and on the presumption that there should be a right to celebrate feasts, parties, or festivals—none of these authors cast doubt about this right. The same presumption of the existence of a right to feast is found in songs, blogs, and social media.<sup>2</sup> Legal science

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1. Cf. ÉMILE DURKHEIM, *LES FORMES ÉLÉMENTAIRES DE LA VIE RELIGIEUSE* (1912). Durkheim identifies *homo sapiens* and *homo festus* because he believes that one essential characteristic of the human species is the festival behavior. *Id.*

2. Three songs proclaim this right: BEASTIE BOYS, *Fight for Your Right*, on LICENSED TO ILL (Def Jam & Columbia Records 1986); ALBERTO GAMBINO, *Tu Derecho a la Fiesta*, on LAS COSAS

and political discourse also include a considerable number of studies about specific holidays, such as Christmas, Good Friday, Martin Luther King Jr. Day, as well as more general holidays like bulls' festivals and folk festivals.<sup>3</sup> However, current scholarship fails to examine the practicality of a general legal right to celebrate important moments and achievements via feasts and festivals. This normative Article intends to fill this gap by exploring the legal aspect of feasts and festivals, the constitutional framework of this right, its connections with fundamental rights treaties, and some of its potential implications in the legal system.

This Article uses “feast,” “fiesta,” and “festival” as synonyms,<sup>4</sup> defining them as a celebration of momentous events and values<sup>5</sup> in a festive way with friends, relatives, and neighbors, especially those who rejoice in the same things. This clarification is crucial because, although scholars generally analyze the same matters, they are not always consistent in titling their studies; most studies are about “festivals,”<sup>6</sup> numerous ethnographers focus on “feasts,”<sup>7</sup> and only a few

NO CAMBIAN (2016); LOS ESTAFADORES, *Pelea por tu Derecho a la Fiesta, on TODO ES ABURRIDO* (2009).

3. See, e.g., Derrick Bell, Jr., *A Holiday for Dr. King: The Significance of Symbols in the Black Freedom Struggle*, 17 U.C. DAVIS L. REV. 433 (1984). Regarding the bulls' festivals, see DAVID BLANQUER CRIADO & MIGUEL A. GUILLÉN GALINDO, *LAS FIESTAS POPULARES Y EL DERECHO* (2001). Regarding folk festivals, see MERCEDES LAFUENTE BENACHES, *FIESTAS LOCALES Y DERECHO AL DESCANSO* (2010). Regarding Christmas, Good Friday, and other religious feasts, this Author will quote numerous studies throughout this Article. See *infra* Section III.B and accompanying sources.

4. The language allows this use. Indeed, *Festivals*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/festival> (last visited Feb. 13, 2021) identifies sense 1b of “festivals” with sense 2 of “feast”; *Festivity*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/festivity> (last visited Feb. 13, 2021) identifies sense 1 of “festivity” with sense 1 of “festivals”; and “fiesta” and “festival.”

5. Feasts celebrate some important events, such as birthdays or wedding anniversaries, and some values too, such as liberty, the beauty of music, or friendship.

6. See, e.g., DRAGAN KLAIC, *FESTIVALS IN FOCUS* (2014); Judith Mair, *Introduction*, in *THE ROUTLEDGE HANDBOOK OF FESTIVALS* 3 (Judith Mair ed., 2019); Theodore C. Humphrey, Sue Samuelson & Lin T. Humphrey, *Introduction: Food and Festivity in American Life*, in “WE GATHER TOGETHER” *FOOD AND FESTIVAL IN AMERICAN LIFE* 1 (Theodore C. Humphrey & Lin T. Humphrey eds., 1991). Economics, business, tourism, and management studies use the term “festivals,” at least in the 423 papers collected by Donald Getz, *The Nature and Scope of Festival Studies*, 5 INT'L J. EVENT MGMT. & RSCH. 1 (2010).

7. See, e.g., Michael Dietler & Brian Hayden, *Digesting the Feast—Good to Eat, Good to Drink, Good to Think: An Introduction*, in *FEASTS. ARCHAEOLOGICAL AND ETHNOGRAPHIC PERSPECTIVES ON FOOD, POLITICS, AND POWER* 1 (Michael Dietler & Brian Hayden eds., 2001); BRIAN HAYDEN, *THE POWER OF THE FEASTS* (2014); MARTIN JONES, *FEAST: WHY HUMANS SHARE FOOD* 148 (2007) (understanding feasts more in the sense of meals, and less like celebrations, stating that “the boundary between a ‘meal’ and a ‘feast’ is an illusive one” and that “the distinction alludes to a number of things, such as frequency and scale”).

anthropologists use the word “celebration.”<sup>8</sup> Sometimes this Article distinguishes the right *to feast* (verb) and the right *to have feasts or festivals* (noun). However, when the text mentions just one of these rights, it includes the other because without festivals no one can feast, and festivals are not possible without people feasting.

This Article does not explain *how* feasts should be protected or regulated by national or international authorities, nor does this Article show all the content and possibilities of this right, or formulate a general theory of it. Rather, this Article only aspires to make explicit what is currently implicit: that the legal system includes a fundamental right to feast that should be singled out and then protected as fundamental within the constellation of human rights. This right includes both the right to feast (verb) and the right to have feasts or festivals (noun).

This Article advances three arguments in favor of the right to feast. Part II provides the factual foundation of this right, showing its deep roots in human nature and history, and presents some critical cases in which festivals were restricted. Here, this Article considers the conclusions from ethnography, anthropology, economy, psychiatry, and other disciplines.

Part III is dedicated to the rational foundation of the right. It is divided into two sections that analyze why feasts should be protected and what should be protected. Four arguments are given to justify why feasts should be protected: (1) an argument about the ultimate aim of the legal system—the pursuit of happiness; (2) a utilitarian argument about the general welfare; (3) an argument based on the well-being of the person; and (4) an argument from the common law principle of full protection of the person. Part III also delineates the scope of this right by showing what essentially should be protected under it.

Part IV deals with the legal foundation of the right, using a tripartite positivist methodology. It first observes that no law, treaty, or regulation squarely recognizes the right to feast. It then tries to determine an indirect recognition, testing whether the right to feast can be derived from other well-established rights, such as freedom of expression, cultural rights, or the right to rest and leisure. After weighing the problems of this indirect recognition, Part IV concludes by considering a diffuse foundation for the right to feast and its inclusion in the unenumerated rights clause of constitutions or human rights declarations.

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8. Cf. SMITHSONIAN INST.'S OFF. OF FOLKLIFE PROGRAMS & RENWICK GALLERY OF THE NAT'L MUSEUM OF AM. ART, *CELEBRATION: A WORLD OF ART AND RITUAL* (1982).

## II. FACTUAL FOUNDATIONS

## A. A Characteristic of Our Species

Feasts are observable in all human cultures. There is evidence that feasts occurred in the early ages of humankind. According to archaeologists, there is proof of all of the elements of the feast in the Upper Paleolithic period.<sup>9</sup> In a cave excavation in the 1960s in Southern Moravia, the famous French anthropologist and ethnologist Claude Lévi-Strauss found some traps, a few flints, bones of captured animals, and charcoal from a hearth that had left a dark horizontal band in the cave.<sup>10</sup> This discovery revealed that people came together to cook and eat more than thirty thousand years ago.<sup>11</sup> From the excavation, one can imagine a small community sitting around the fire, face to face, talking, smiling, laughing, and sharing food—behavior that is very unusual in the animal kingdom, as Lévi-Strauss remarked.<sup>12</sup> Moravia's excavation is the earliest archaeological evidence of cooking with fire.<sup>13</sup> By that time, the human species had already developed the first figurative paintings in caves, as well as some symbolic statues, carvings, and engravings on bone or ivory.<sup>14</sup> A few years after the discovery in Moravia, anthropologists found in several excavations substantial evidence of meals made from abundant and special food<sup>15</sup> and accompanied by pieces of art, all prepared to celebrate funerals, harvests, or other singular events.<sup>16</sup> Now it is clear that in ancient

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9. See JONES, *supra* note 7, at 1–2. See generally Karel Absolon, *Moravia in Palaeolithic Times*, 53 AM. J. ARCHAEOLOGY, Jan.–Mar. 1949, at 19 (establishing that Moravia existed during the Upper Paleolithic time period).

10. See JONES, *supra* note 7, at 1–2.

11. *Id.*

12. See *id.*

13. See *id.*

14. See Absolon, *supra* note 9, at 21, 24–25, 27.

15. See *infra* note 20. There is a discussion between anthropologists about the essential elements of the ancient feast, whether it needs just an abundance of food (grains or meats), or if there could also be special food, like some particular animal for the occasion. See HAYDEN, *supra* note 7, at 8. Hayden followed the first criterion until 2014 when he amended his definition of the feast as “any sharing between two or more people of a meal featuring some special foods or unusual quantities of foods (i.e., foods or quantities not generally served at daily meals) hosted for a special purpose or occasion.” *Id.*

16. The earliest evidence of feasting in world prehistory is documented by Michael Rosenberg & Michael Davis, *Hallan Çemi Tepesi, an Early Aceramic Neolithic Site in Eastern Anatolia: Some Preliminary Observations Concerning Material Culture*, 18 ANATOLICA 1 (1992). Hallan Çemi Tepesi is a Protoneolithic site localized in south-eastern Anatolia which was discovered in 1989 and is believed to be more than eleven thousand years old. Brian L. Peasall, *Intricacies of Hallan Çemi*, 44 EXPEDITION MAG., no. 1, 2002, at 5, 5. The presence of extremely high concentrations of animal bone was found there, including still articulated portions of animal

cultures, celebrations and banquets were quite connected.<sup>17</sup> Such a connection still remains to this day. In some places, such as New Guinea, if food is no longer available at a celebration, those attending disperse.<sup>18</sup>

Archaeologists accept that human feasting behavior existed in the Upper Paleolithic period in a few locations<sup>19</sup> and became more widespread in the Mesolithic and Neolithic periods.<sup>20</sup> The desire to mark particular occasions, such as equinoxes, solstices, and harvests, with communal expressions of feelings has been around since the Neolithic times.<sup>21</sup> From then until the present, there is ample evidence that people in every clan, town, and community have, in many ways, used traditional feasts to celebrate the momentous events in their lives.

Behaviors so deep rooted in human nature and history, like marriage, religious practice, fruit and grain harvest, respect for the dead, and festival celebrations, are valuable and deserve strong protection from the law. Unjustified restrictions on carrying out these activities negatively impact humanity. The law should protect all that is deeply human—all those features that from the beginning define our

carcasses and fire-cracked stone in the central activity area, which Hayden considers to be strong evidence of feasting. See Brian Hayden, *Fabulous Feasts: A Prolegomenon to the Importance of Feasting*, in FEASTS. ARCHAEOLOGICAL AND ETHNOGRAPHIC PERSPECTIVES ON FOOD, POLITICS, AND POWER, *supra* note 7, at 23, 47.

17. See Alessandro Falassi, *Festival*, in 1 FOLKLORE: AN ENCYCLOPEDIA OF BELIEFS, CUSTOMS, TALES, MUSIC, AND ART 295, 299 (Thomas A. Green ed., 1997). An Italian anthropologist expert on festivals, Alessandro Falassi, adds that:

ritual food is also a means to communicate with gods and ancestors, as expressed in the Christian belief that Christ is present in the sacred meal of Communion, the Greek tradition that Zeus was invisibly present at the ritual banquets of the Olympic Games, or the practice of the Tsembanga Maring people of New Guinea who raise, slaughter, and eat pigs for and with the ancestors. In far less frequent cases, as in the Native American potlatch, objects with special material and symbolic value are ritually consumed, wasted, or destroyed.

*Id.*

18. Cf. Polly Wiessner, *Of Feasting and Value: Enga Feasts in a Historical Perspective (Papua New Guinea)*, in FEASTS. ARCHAEOLOGICAL AND ETHNOGRAPHIC PERSPECTIVES ON FOOD, POLITICS, AND POWER, *supra* note 7, at 115, 116.

19. See Hayden, *supra* note 16 (stating that “it is probable that feasting was taking place at some Upper Paleolithic transegalitarian, faunally rich and diversified aggregation sites such as Altamira, Cueto de la Mina, or Enlène”).

20. HAYDEN, *supra* note 7, at 4; see *id.* (“There are many instances of feasting documented in prehistory, especially in the European Neolithic where abundant food remains of specialized nature have been found in front of, or in, megalithic tombs and associated with causewayed enclosures or other ring-ditch monuments . . . The earliest clear evidence in world prehistory is documented at Hallan Cemi.”).

21. Vern Biaett, *Festivity, Play, Well-Being . . . Historical and Rhetorical Relationships: Implications for Communities*, in HANDBOOK OF COMMUNITY WELL-BEING RESEARCH 189, 191 (Rhonda Phillips & Cecilia Wong eds., 2017).

species, such as marriage, harvest, or festival behavior, to truly protect humankind and human rights. Throughout history, there are dramatic examples of how invasions of towns or nations were followed by the destruction or suppression of established cultures.<sup>22</sup> The “great tragedy in colonial history has been the frequent attempt to suppress traditional feasting on the grounds that it was economically regressive or represented ‘devil’ worship,” says Brian Hayden, a professor of archaeology at Simon Fraser University who has studied feasts for years.<sup>23</sup> By canceling the feasts of the vanquished, conquerors also destroyed their community values, their way of living and sharing harvest, and, eventually, their identity. According to Vietnamese archaeologist Tran Quoc Vuong, this kind of festival colonialization is an “ethnic genocide.”<sup>24</sup>

Feasts are good for society. Ethnographers and anthropologists agree that feasts help shape communitarian culture and normally produce sundry favorable consequences for the celebrants and the entire society. In an extensive study about the archaeological and ethnographic perspectives of feasts around the world conducted by fifteen researchers in Africa, the Americas, Asia, and Oceania, Hayden concludes that feasting can (1) mobilize labor; (2) create cooperative relationships within groups or, conversely, exclude different groups; (3) create cooperative alliances between social groups; (4) invert surpluses and generate profits; (5) attract desirable mates, labor, allies, or wealth exchanges by advertising the success of the group; (6) create political power (control over resources and labor) through the creation of a network of reciprocal debts; (7) extract surplus produce from the general populace for elite use; (8) solicit favors; and (9) compensate for transgressions.<sup>25</sup> In New Guinea, for example, the acts of raising, slaughtering, and eating pigs during festivals are valuable traditions that promote commerce.<sup>26</sup> Often, rural hallmark events around the world strategically take the form of food and wine festivals in order to attract visitors and fill gaps in the market.<sup>27</sup>

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22. See Rhonda Reymond, *Art and Cultural Heritage Looting and Destruction*, ART HIST. TEACHING RES., <https://arthistoryteachingresources.org/lessons/art-and-cultural-heritage-looting-and-destruction/> [<https://perma.cc/327V-KPD3>] (last visited Feb. 10, 2021).

23. HAYDEN, *supra* note 7, at 14.

24. Brian Hayden & Tran Quoc Vuong, A Preliminary Report and Analysis of Cultural Ecological Investigations Among the Ta Oi of Quang Tri Province, in 1966 42 (1996) (unpublished manuscript), [https://www.sfu.ca/archaeology-old/dept/fac\\_bio/hayden/reports/vietnam.pdf](https://www.sfu.ca/archaeology-old/dept/fac_bio/hayden/reports/vietnam.pdf) [<https://perma.cc/4GHE-GRFP>].

25. Hayden, *supra* note 16, at 29–30.

26. See Wiessner, *supra* note 18, at 121–25, 129–33.

27. See Insun Lee & Charles Arcodia, *The Role of Regional Food Festivals in Destination Branding*, 13 INT'L J. TOURISM RSCH. 355, 357 (2011); George H. Lewis, *Celebrating Asparagus*:



Countless studies demonstrate that festivals promote welfare, tourism, economy, and business.<sup>28</sup> Christmas is typically a peak selling season for retailers in many nations around the world. Festivals may also benefit mental health; according to the US Center for Health Statistics, the suicide rate is highest between April and August and lowest around Christmas (from November to January).<sup>29</sup> Under a pure economic utilitarian theory, the commonly held, beneficial effects of feasts provide a solid foundation for the right to feast.

Notwithstanding that, festivals can have problems, fail to achieve their objectives, and produce negative consequences. Some celebrations suffer from a lack of tourists, sparse attendance, and some economic issues. Success is not guaranteed in any human business. There are also individuals who take questionable advantage of feasts to gain political power, and some powerful groups use them to impose their ideas. An example of this is the “big man” of New Guinea, who acquires followers by doing favors they cannot repay, such as settling their debts or sponsoring a pig feast that would serve to put more tribe members in his debt and shame his rivals.<sup>30</sup> Another famous example

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*Community and the Rationally Constructed Food Festival*, 20 J. AM. CULTURE 73, 73 (1997); Jennifer Laing, Warwick Frost & Melissa Kennedy, *Food and Wine Festivals as Rural Hallmark Events*, in THE ROUTLEDGE HANDBOOK OF FESTIVALS, *supra* note 6, at 285, 285–87. Occasionally, some “traditions” and legends are arbitrarily invented in order to create the festival, attract visitors, and gain governmental support. See Lewis, *supra*, at 73–74.

28. See, e.g., Charles Arcodia & Michelle Whitford, *Festival Attendance and the Development of Social Capital*, 8 J. CONVENTION & EVENT TOURISM 1, 2 (2007); Getz, *supra* note 6 (analyzing 423 papers published in the English-language scholarly press about economics, business, tourism, and management). There is also a journal dedicated to this field, the *International Journal of Event and Festival Management*. See *Journal Description: Aims & Scope*, EMERALD PUBLISHING, <https://www.emeraldgroupublishing.com/journal/ijefm#aims-and-scope> [<https://perma.cc/HL5N-MH3R>] (last visited Feb. 10, 2021). One example of a successful feast is the Salzburg Festival. In 2017, ticket sales revenue was about 27 million euros, directly and indirectly creating value to the sum of 183 million euros in Salzburg per year. *The Salzburg Festival Is a Boon to the Local Economy*, ECONOMIST (Sept. 26, 2017), <https://www.economist.com/prospero/2017/09/26/the-salzburg-festival-is-a-boon-to-the-local-economy> [<https://perma.cc/AV9N-GR29>]. The festival thereby secures 2,800 full-time jobs in Salzburg. WIRTSCHAFTSKAMMER SALZBURG, SALZBURGER FESTSPIELE: MOTOR FÜR DIE WIRTSCHAFT, EXZELLENZ-INFUSION FÜR DEN STANDORT 31 (2017), [https://www.salzburgerfestspiele.at/cms/wp-content/uploads/2018/11/2017\\_wks\\_standortreport\\_salzburgerfestspiele.pdf#page=33](https://www.salzburgerfestspiele.at/cms/wp-content/uploads/2018/11/2017_wks_standortreport_salzburgerfestspiele.pdf#page=33) [<https://perma.cc/9J5L-R6FP>]. Through their effects on other sectors, they directly and indirectly provide the public sector with approximately 77 million euros of taxes and duties. *Id.*

29. See MICHAEL ROZANSKY, ANNENBERG PUB. POL’Y CTR. OF THE UNIV. OF PA., SUICIDE RATE IS LOWEST DURING THE HOLIDAY SEASON, BUT NEWS STORIES CONTINUE TO SAY THE OPPOSITE (2014), <https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/The-holiday-suicide-myth-12-09-14.pdf> [<https://perma.cc/3BBG-HNK9>] (showing that the suicide rate drastically goes down around holidays, contrary to long-held beliefs and often erroneous media coverage).

30. Wiessner, *supra* note 18, at 119, 126–28. The term “big man” is derived from the languages of New Guinean tribes and literally means “man of influence.” *Id.* It is worth noting

was the German Christmas used by Hitler to impose the Nazi's ideology.<sup>31</sup> This Article deals with these issues in the following Parts.<sup>32</sup> However, the advantages of feasts far outweigh the disadvantages in the studies discussed.<sup>33</sup>

On the other hand, if festivals are not celebrated, no festival benefits will accrue to society. Communities will experience less tourism, less commerce, and fewer opportunities to compensate for transgressions, create alliances, foster commerce, or produce other societal benefits that come from feasts. It is fair to assume that substantial restrictions to feasting can produce regrettable effects. Some critical cases demonstrate this.

### B. Key Cases

Perhaps more than realized, many people are unable to feast due to severe restrictions or because it is impossible to do so. This is an everyday reality in jail, for instance. Some years ago, newspapers focused their attention on the case of Jeffrey Mark Deskovic, a prisoner who was wrongfully convicted in 1990 at the age of seventeen of raping, beating, and strangling a fifteen-year-old high school classmate.<sup>34</sup> The Westchester County District Attorney's Office denied seven requests to reopen his case.<sup>35</sup> In 2006, however, Deskovic, supported by the Innocence Project, was finally allowed to run a DNA test that ruled out his presence at the crime scene and identified the actual perpetrator.<sup>36</sup> That same year, after sixteen years in prison and at the age of

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that the followers, incapable of repaying the big man's gifts, stand metaphorically as beggars to him. *Id.*

31. Samuel Koehne, *Were the National Socialists a Völkisch Party? Paganism, Christianity, and the Nazi Christmas*, 47 *CENT. EUR. HIST.* 760, 777–78 (2014).

32. See *infra* Sections III.B.1, III.B.4, IV.B.3.

33. Each festival has its own issues. For example, regarding the problems of nonprofit festivals, see *infra* note 85. Regarding the problems of discrimination and subsidies of Salzburg Musical Festival, see *supra* note 28 and the discussion in Section III.B.2, explaining the actual solutions that authorities give to these problems. Each author of the 423 papers mentioned in Getz, *supra* note 6, studies one specific kind of festival and its difficulties and possible solutions at the same time.

34. See Fernanda Santos, *Playing Down DNA Evidence Contributed to Wrongful Conviction, Review Finds*, *N.Y. TIMES* (July 3, 2007), <https://www.nytimes.com/2007/07/03/nyregion/03dna.html?auth=login-facebook> [<https://perma.cc/6RGK-BTY5>]; Fernanda Santos, *DNA Evidence Frees a Man Imprisoned for Half His Life*, *N.Y. TIMES* (Sept. 21, 2006), <https://www.nytimes.com/2006/09/21/nyregion/21dna.html> [<https://perma.cc/8BWW-7V8P>].

35. Santos, *supra* note 34.

36. *Id.* Significantly, the forensic DNA was found to match that of an inmate already serving time for murder. *Id.* The latter man confessed to the attack on Angela Correa and was convicted of her murder. *Id.*

thirty-two, he was exonerated and released.<sup>37</sup> One of his gloomiest memories was spending Christmas in jail, which he described as “worse than you can imagine.”<sup>38</sup> Deskovic described in detail what it was like:

During the holidays, a day in prison was no different for me than every other day: routines, violence, staying alert, verbal abuse by guards, tolerance of abusive guards by their co-workers and the prison administration. For company, I had a variety of other victims of injustice: wrongfully convicted prisoners. . . . Of course there was no shortage of guilty men in prison on Christmas Day, both the repentant and the non. I hated living around real, cold-blooded prisoners over the holidays, but I had no choice. . . . It was extremely difficult to get on the prison phone: too many people wanted to use it, too many calls went on for an inconsiderately long time, too many people passed it on to their friends only. There just weren't enough ways to phone home to your family because, in prison, they want you to be disconnected on Christmas. . . . Holiday meals in prison were downright terrible. . . . During the prison's staff holiday party, while guards were “working” on state time, we would often be locked in our cells. Sometimes I would cry myself to sleep.<sup>39</sup>

Deskovic's holiday experience in prison is not uncommon among inmates. The United States has the largest prison population in the world: 10.7 million people cycle through jails each year.<sup>40</sup> Many prisoners are living the same tragedy as Deskovic, not only on Christmas but also on birthdays, wedding anniversaries, Thanksgiving, and every other occasion that people normally celebrate. As mentioned before, when people can celebrate their important feasts, suicides drastically decline.<sup>41</sup> Conversely, when celebrations are banned, dark consequences can result. At least since 2000, suicide has consistently been the leading cause of death in local jails, making up roughly more

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37. *Id.*

38. Jeffrey Deskovic, *Christmas in Jail Is Worse than You Can Imagine. Now Imagine If You've Been Wrongfully Convicted*, *GUARDIAN* (Dec. 25, 2014, 1:45 EST), <https://www.theguardian.com/commentisfree/2014/dec/25/christmas-in-jail-wrongfully-convicted> [https://perma.cc/V3PJ-M82Y].

39. *Id.*

40. BUREAU OF JUST. STAT., U.S. DEPT OF JUST., *JAIL INMATES IN 2018* (2020), [https://www.bjs.gov/content/pub/pdf/ji18\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/ji18_sum.pdf) [https://perma.cc/JTK3-TNDS]. In 2018, jails reported 10.7 million admissions. *Id.* This number includes multiple admissions of some individuals. *Id.* Nations or territories with the most prisoners per one hundred thousand inhabitants are the United States (655), El Salvador (590), Turkmenistan (552), Thailand (541), Palau (522), Rwanda (511), Cuba (510), Maldives (499), US Northern Mariana Islands (482), UK Virgin Islands (447), the Bahamas (442), Grenada (429), St. Vincent and the Grenadines (426), Panama (418), Guam (411), Seychelles (399), US Virgin Islands (394), St. Kitts and Nevis (393), Costa Rica (374), and Anguilla (367). *Countries with the Largest Number of Prisoners per 100,000 of the National Population, as of June 2020*, *STATISTA* (June 15, 2020), <https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/> [https://perma.cc/SUP4-QD87].

41. See ROZANSKY, *supra* note 29.

than a third of all deaths in jails.<sup>42</sup> High depression rates appear especially on those days when people expect to have—or formerly used to have—some particular joy from celebrating with friends and family.<sup>43</sup> Christmas can produce enormous nostalgia in jail when inmates remember the happy holidays of their childhood. The mental disorder known as the “holiday blues” is a complex psychological phenomenon that appears on days that are supposed to be a time of joy and celebration but, for some, evoke feelings of loneliness, stress, and anxiety.<sup>44</sup> The severity of its effects depends on the personal, financial, and social circumstances of an individual. Social isolation exacerbates this phenomenon, as it is one of the most significant predictors of depression.<sup>45</sup>

Although prisoners must pay for their crimes, prisons should not create an additional “Christmas punishment” for inmates. It would be an unusual punishment that could violate some penitentiary constitutional standards.<sup>46</sup> If one of the main purposes of prison is to

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42. MARGARET NOONAN, HARLEY ROHLOFF & SCOTT GINDER, BUREAU OF JUST. STAT., U.S. DEPT OF JUST., MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013 - STATISTICAL TABLES 1 (2015), <https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf> [<https://perma.cc/XUR6-MH4E>]. In an effort to solve this problem, Cook County, Illinois, appointed a psychologist to run the county jail, which is at the moment one of the nation’s largest mental health institutions. See Frank Main, *Psychologist Hired to Run Cook County Jail*, CHI. SUN TIMES (May 19, 2015, 11:58 AM), <https://chicago.suntimes.com/2015/5/19/18446924/psychologist-hired-to-run-cook-county-jail> [<https://perma.cc/CFG4-LKBH>].

43. See *Holiday Blues That Linger Could Be Warning Sign of Depression*, AM. PSYCH. ASS’N (2009), <https://www.apa.org/news/press/releases/2009/12/holiday-blues#> [<https://perma.cc/93ML-P3AK>]. Many people maintain high expectations during holidays for gift giving, decorating, feasting, and family gathering. See *id.* In some circumstances, particularly at a time when worries about money, loss of loved ones, isolation, social or familiar tensions arise, these feelings could cause disappointment, sadness, fatigue, or frustration. See *id.* Inmates meet most of these problematic circumstances. In any case, the American Psychological Association (APA) differentiates between the holiday blues, “which are often temporary and go away once the season ends,” and “more serious conditions such as depression, seasonal affective disorder and anxiety disorders. . . . for those who already have a psychological problem, the stresses of the holiday season can make things worse.” *Id.* Sometimes these effects could be delayed. Cf. Libby MacCarthy, *What’s Behind the Post-Holiday Funk & How to Snap out of It*, PSYCOM (Aug. 17, 2020), <https://www.psychom.net/post-holiday-depression#:~:text=According%20to%20the%20National%20Alliance,physical%20stress%20of%20the%20season> [<https://perma.cc/Y3Q5-2URG>].

44. *Holiday Blues That Linger Could Be Warning Sign of Depression*, *supra* note 43.

45. See MacCarthy, *supra* note 43.

46. The Eighth Amendment to the US Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The Supreme Court outlined four factors that are relevant in determining the reasonableness of a prison regulation: (1) “there must be a valid, rational connection between the prison regulation and the legitimate governmental interest;” (2) whether the inmate has an “alternative means of exercising the right” at issue; (3) the burden that the accommodation would impose on prison resources; and (4) “the absence of ready alternatives.” *Turner v. Safley*, 482 U.S. 78, 89–91 (1987).

rehabilitate criminals—as jurists sometimes point out—measures that foster an inmate’s depression will never hit the mark. Allowing at least a minimal opportunity to participate in communal feasts would give prisoners a sense of belonging to a community and concern for others. Thus, prisoners should be allowed to celebrate their principal feasts in some way, including the possibility of communicating with their families and having some capacity to send and receive gifts, another privilege that is often forbidden in many places.<sup>47</sup> Without such opportunities, prisoners, like Deskovic, will continue to experience increased feelings of exclusion, disappointment, sadness, and perhaps depression around the holidays.

Prison inmates are not the only individuals who suffer the loss of festivals. Soldiers in service, mariners at sea, night-shift workers, low-income families that cannot afford a wedding or cultural feast (such as a feast to mark the entrance to adulthood), locals who cannot attend expensive traditional festivals, as well as immigrants who cannot celebrate their community festivals because there is no time in their work schedules are all groups who would likely cherish the chance to celebrate their anniversaries, their religious feasts, or the births and birthdays of their relatives. The law can probably better accommodate these groups to give them some room for celebration. Military chaplains should be allowed to celebrate religious feasts among the soldiers of their religion. Parents should have the right to celebrate the births of their children, and married couples must have the right to celebrate their weddings.<sup>48</sup> These examples demonstrate the necessity of the right to feast.

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47. In the United States, each prison regulates what can be sent to a prisoner. 28 C.F.R. § 553.10 (2020). In Australia, inmates’ mail can contain photos and newspaper clippings but not the whole newspaper, and even fewer other kinds of gifts. *Prisoner Mail*, GOV’T OF S. AUSTRALIA: DEP’T OF CORR. SERVS., <https://www.corrections.sa.gov.au/prison/prison-life/prisoner-mail> [<https://perma.cc/GS8E-6J2Q>] (last visited Feb. 10, 2021). In totalitarian regimes, prisoners’ gifts usually are forbidden. Anna Fifield, *Life Under Kim Jung Un*, WASH. POST (Nov. 17, 2012), <https://www.washingtonpost.com/graphics/2017/world/north-korea-defectors/> [<https://perma.cc/26J6-QUS9>]. Although there could be security reasons for these policies, the usual security standards allow this kind of exchange, as evidenced in most prisons. See UNION SUPPLY DIRECT, <http://www.unionSupplydirect.com> [<https://perma.cc/TX9E-N7G7>] (last visited Feb. 13, 2021). Thus, higher restrictions on nondangerous prisoners do not meet the standard of reasonability.

48. As an example of a good policy, the Ecuadorian Congress is now discussing a bill that would give workers some hours off on anniversaries or birthdays to encourage families to celebrate those days. See *Asambleístas de Ecuador presentan proyecto de ley para fortalecer la familia* [*Assembly Members of Ecuador Present a Bill to Strengthen the Family*], ACIPRENSA, <https://www.aciprensa.com/noticias/asambleistas-de-ecuador-presentan-proyecto-de-ley-para-fortalecer-la-familia-80854> (last updated Jan. 24, 2020, 9:49 AM).

### III. RATIONAL FOUNDATIONS

Rights are coins with two sides: one favorable side—the interest, title, or ownership of the holder—and the other unfavorable with duties or obligations of others.<sup>49</sup> On the whole, Section III.A focuses on the favorable side, justifying why people must have the right to feast. Section III.B focuses on the unfavorable side, explaining what things people must obey, fulfill, or respect.

#### A. *Why Feasts Should Be Protected*

It is well known that there are many theories about the notion of rights. Among the liberal political philosophers, the Israeli professor Joseph Raz understands that rights are primarily individual interests;<sup>50</sup> the American professor John Rawls bases them in the most extensive liberty balanced with equality;<sup>51</sup> his compatriot Ronald Dworkin follows the latter, putting the accent on equality.<sup>52</sup> On the Aristotelian-Thomistic natural law tradition, the Australian professor John Finnis grounds the core notion of rights in basic aspects of human flourishing,<sup>53</sup> while other authors, like the Spaniard canonist Javier Hervada, primarily ground the right directly on natural and conventional titles.<sup>54</sup> Taking these various perspectives into account, this Article offers four arguments to justify why the right to feast must be protected: (1) the argument from the ultimate aim of the legal

49. This binary vision of rights is shared by many scholars, such as Savigny or Windscheid. Hohfeld conceives that rights have “opposites” and “correlatives.” Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Fazzalari distinguishes active and passive positions, related to the active and passive subject of law. ELIO FAZZALARI, NOTE IN *TEMA DI DIRITTO E PROCESSO* 65–91 (1957). Authors normally agree that, sooner or later, rights must have some duties as counterparts: any holder of a serious or real right at some stage must be able to require from another some duty (such as respect, an act, or an omission). There is a discussion about which has priority—the right or the duty—in which this Author will not engage here. Cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 180–86 (1986); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 205–10 (2d ed. 2011).

50. See RAZ, *supra* note 49, at 165–68, 180–86.

51. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

52. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (2005).

53. See FINNIS, *supra* note 49, at 205, 210, 218. It is essential to distinguish this natural law tradition, from the modern rationalistic tradition of natural law, with the perspective of authors such as Samuel von Pufendorf, Thomas Hobbes, or Christian Wolff, who do not consider the artistic or practical dimension of the law deeply.

54. See JAVIER HERVADA, *INTRODUCCIÓN CRÍTICA AL DERECHO NATURAL* 25–27, 48–50 (11th ed. 2001). Following the Roman tradition, Hervada considers that every right has its “title,” and titles can be conventional or natural. See *id.* at 25–26, 81. For example, one “conventional title” that justifies the ownership of a building is a selling agreement. Cf. *id.* at 107. A “natural title” that justifies parents’ right to take care of their children is their birth. See *id.* at 121.

system—the pursuit of happiness; (2) the utilitarian argument based on general welfare; (3) the argument from the well-being of the person, which includes interests, liberty, and equality; and (4) the principle of full protection of the person.

### 1. The Pursuit of Happiness

“Life, liberty, and the pursuit of happiness” is one of the most famous phrases in the Declaration of Independence and has been echoed in many other countries.<sup>55</sup> Traditionally, this phrase has been attributed to US founding father Thomas Jefferson, who replaced the third term in English philosopher John Locke’s triad, “life, liberty, and property.”<sup>56</sup> In a 1690 essay, Locke considered the same idea when he affirmed the necessity of pursuing happiness, a “true and solid happiness,” because it is the only possible “foundation of liberty.”<sup>57</sup> Other scholars credit Samuel Johnson for the Declaration’s reference to happiness, as he wrote several pieces about this notion.<sup>58</sup>

However, Locke, Jefferson, Johnson, and most of the founders of the United States were very familiar with the Greek notion of *eudaimonia* (happiness), developed by Socrates, Plato, and Aristotle, and by the Stoics, Skeptics, and Epicureans.<sup>59</sup> In this line of Greek thinking, happiness is more than individual pleasure and is not equivalent to wealth or honor.<sup>60</sup> It is something deeper that justifies all life. It is an end in itself, not a means to an end. For the ancient classics, the notion of happiness is connected with the “ultimate end,” with the sense of the whole existence, with the notion of a fulfilled life, and the flourishing of all human aspects.<sup>61</sup>

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55. Japan’s Constitution recognizes the “right to pursue happiness.” NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13 (Japan). South Korea’s Constitution indicates in the Preamble the centrality of this notion. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], pmbl (S. Kor.).

56. See *History of Happiness: John Locke*, PURSUIT OF HAPPINESS, <https://www.pursuit-of-happiness.org/history-of-happiness/john-locke/> [<https://perma.cc/Q2H3-LAFP>] (last visited Feb. 10, 2021).

57. JOHN LOCKE, 1 AN ESSAY CONCERNING HUMAN UNDERSTANDING 348 (1690) (“[T]he highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness; so the care of ourselves, that we mistake not imaginary for real happiness, is the necessary foundation of our liberty.”).

58. See Carol V. Hamilton, *Why Did Jefferson Change “Property” to the “Pursuit of Happiness”?*, HIST. NEWS NETWORK (Jan. 27, 2008), <https://historynewsnetwork.org/article/46460> [<https://perma.cc/9ZFP-9UAZ>].

59. See *id.*; Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JUR. REV. 195, 203, 236, 253 (2015).

60. See *id.* at 200, 235 n.186.

61. *Id.* at 235 n.186.

Some rights are grounded in the “pursuit of happiness.” This phrase has been cited in some of the US Supreme Court’s landmark decisions. For example, in *Meyer v. Nebraska*,<sup>62</sup> the Court found that the freedoms contained in the Fourteenth Amendment entitled one “generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>63</sup> Some of the rights contained there are freedom from restraint, freedom to engage in contracts, to hold an occupation, to learn and gain knowledge, to marry and raise children, and to demonstrate faith and participate in religion.<sup>64</sup>

The right to feast can be grounded there as well. The bliss at stake in this matter is not little because festivals are a crucial part of any happy life. Happiness can be deconstructed analytically to compare its elements and identify the principal part of bliss. Happiness in the company of others seems to be larger than solitary joys.<sup>65</sup> There are three kinds of “others”: persons, animals, and things. Generally speaking, humans are happier sharing time with beloved persons than with those who cannot share intimate thoughts, like animals or material things.<sup>66</sup> Greater happiness, then, requires two or more persons.<sup>67</sup> During times shared with others, people can have good or bad attitudes, face-to-face contact or distant relationships, work or leisure interactions, dynamic or static relations, joyful or sad feelings, or important or trivial dealings. Feasts and festivals embrace the best of these things: they imply face-to-face meetings with people who are in good relations, in a leisurely and festive atmosphere, with a dynamic joy that celebrates the most important things in their lives. Therefore,

62. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

63. *Id.* at 399.

64. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

65. Countless studies demonstrate that festivals promote culture, alliances, welfare, tourism, economy, and business. *See supra* Section II.A.

66. *See* Robert Waldinger, *What Makes a Good Life? Lessons from the Longest Study on Happiness*, TED (Nov. 15, 2015), [https://www.ted.com/talks/robert\\_waldinger\\_what\\_makes\\_a\\_good\\_life\\_lessons\\_from\\_the\\_longest\\_study\\_on\\_happiness?referrer=playlist-ted](https://www.ted.com/talks/robert_waldinger_what_makes_a_good_life_lessons_from_the_longest_study_on_happiness?referrer=playlist-ted) [<https://perma.cc/9MLS-FHQZ>] (explaining Harvard’s longest study of adult life, which showed that “good relationships keep us happier and healthier,” and “the people who fared the best were the people who leaned into relationships, with family, with friends, with community”).

67. *See id.* The famous British writer, C. S. Lewis states that “if, of three friends (A, B, and C), A should die, then B loses not only A but ‘A’s part in C,’ while C loses not only A but ‘A’s part in B.’” CLIVE STAPLES LEWIS, *THE FOUR LOVES* 61 (1991). Something similar happens with joy. *See* Emma Seppälä, *The Science Behind the Joy of Sharing Joy*, *PSYCH. TODAY* (July 15, 2013), <https://www.psychologytoday.com/us/blog/feeling-it/201307/the-science-behind-the-joy-sharing-joy> [<https://perma.cc/4PWR-NYU2>]. Person A will enjoy not only the joke of B, but also the funny smile of C after that joke. *Cf.* LEWIS, *supra*; *id.* (identifying research validating that happiness parallels the idea of “the more the merrier”). Joy is multiplied when more people share it.



it can be argued that feasts and festivals are a principal part of happiness. As Frank Capra suggests in his classic 1946 Christmas film, the phrase “[i]t’s a wonderful life” makes sense only if we can festively celebrate our principal feasts.<sup>68</sup> If the law allows the pursuit of happiness, festival behavior must be allowed too, because festivals themselves are an expression of happiness,<sup>69</sup> produce<sup>70</sup> and multiply<sup>71</sup> happiness, and are a principal part of happiness.

The right to feast is not the first of all rights guaranteed by the legal system, but in some sense, it could be understood as the last. Following the order traced in the phrase “life, liberty, and the pursuit of happiness,” and simultaneously following Locke’s argument that happiness is the “foundation of liberty,”<sup>72</sup> one can trace the chronological order in which fundamental rights may be exercised.<sup>73</sup> First comes the right to life: without existence, no right can be exercised. With life, liberty is possible, and freedom can be exercised. Nevertheless, liberty is more than a random activity, irrational decisions, or spontaneous election between many possibilities without purpose. It is not a ball rolling in roulette that may equally fall in black, white, or in any number without the croupier incurring any liability. Liberty has a purpose, is directed towards something, is reasonable, and is rationally oriented. Liberty should be founded in the “pursuit of the happiness,” as Locke says;<sup>74</sup> if liberty is not founded in the pursuit of happiness, then freedom has no sense.<sup>75</sup> With life people can move

68. IT’S A WONDERFUL LIFE (Liberty Films 1946); See John Farr, *Why It’s a Wonderful Life Still Resonates*, HUFFINGTON POST, [https://www.huffpost.com/entry/why-its-a-wonderful-life-\\_b\\_77684](https://www.huffpost.com/entry/why-its-a-wonderful-life-_b_77684) [<https://perma.cc/T23B-AE49>] (last updated Dec. 6, 2017) (“*It’s A Wonderful Life* explores . . . the values of basic goodness and sacrifice, the gift of friendship, the pitfalls of greed and commercialism, the sense of community and belonging that helps us feel truly connected in a society.”).

69. See *infra* Section III.A.3. An ancient proverb says, “the cheerful heart has a continual feast.” *Proverbs* 15:15. Feasts are one of the best moments to express feelings, to say what was forgot or was never said. Therefore, it is not unusual to give prizes, awards, gifts, and support during feasts. See *infra* Section III.A.3 and note 93. Some of these behaviors can be traced back to the Mesolithic and Neolithic periods. See *supra* Section II.A; *supra* note 20.

70. See *supra* note 65.

71. See *supra* note 67.

72. LOCKE, *supra* note 57.

73. See *id.*

74. *Id.* at 342, 349.

75. *Id.* at 348–49. One of the most eminent contemporary interpreters of Aquinas is the Belgian-Dominican, Servais Pinckaers, who distinguishes many types of liberties: the “negative liberty” or *freedom from* (from interference in personal matters); the “positive liberty” or *freedom to* (freedom to realize some greater good in history); the freedom of indifference, which is a non-sense power to choose between good and evil, and *freedom for excellence*, that points to human happiness, to the fulfillment of human destiny. SERVAIS PINCKAERS, *THE SOURCES OF CHRISTIAN ETHICS* 351, 394, 414 (Mary Thomas Noble trans., 3d ed. 1995). According to Pinckaers, the

freely, and with freedom they can pursue happiness; but happiness will never be fully reached if people cannot express their joys to each other—that is to say, if people cannot feast. Happiness and feasts are absolutely connected because feasts are the communal expression of happiness. Therefore, the protection of happiness is connected with the protection of the feast. On the other hand, if life, liberty and any other right have a purpose in human existence, finally there must be a right to feast.

The Aristotelian principle that happiness is a result of a good life<sup>76</sup> is still used in many countries. For example, the Ecuadorian Constitution includes the indigenous notion of *sumak kawsay*, which aims “to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living.”<sup>77</sup> The Bolivian Constitution includes a similar principle.<sup>78</sup> Both legal systems link good life and happiness, as the Greeks did in the past.<sup>79</sup> From this standpoint, constitutions, laws, and regulations are seen as a means to promote a good life and, ultimately, to promote happiness (and, as a consequence, its expression).

The main conclusion of the above is that feasts could be considered an implicit aim of the whole legal system. If any legal system promotes life, freedom, fundamental rights, or general welfare, it also promotes what those things are for—that is to say the pursuit of happiness, happiness itself, and its expression (in feasts). Laws and rights make sense only if they point to happiness and its expression. Thus, some right to feast must exist in the deepest roots of the legal system. Courts are not required to create *ex nihilo* a new right. They

negative liberty makes no sense without a positive notion of liberty, and both should be grounded on the freedom for excellence. *Cf. id.* at 354–415.

76. See 1 ARISTOTLE, NICOMACHEAN ETHICS 36–39 (Harris Rackham trans., 2014) (where he describes “the happy man as one who ‘lives well’ or ‘does well’; for it has virtually identified happiness with a form of good life or doing well”).

77. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, pmb. (Ecuador).

78. See CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] Feb. 7, 2009, art. 8 (Bol.). The first part of the Bolivian Constitution of 2009, and especially Article 8, incorporates the indigenous principles of *suma qamaña* (good living), *ñandereko* (harmonic life), *teko kavi* (good life), *ivi maraei* (immaculate earth), and *qhapaq ñan* (noble way of living). *Id.*

79. See RENÉ RAMÍREZ GALLEGOS, LA FELICIDAD COMO MEDIDA DEL BUEN VIVIR EN ECUADOR: ENTRE LA MATERIALIDAD Y LA SUBJETIVIDAD 3 (2007), <https://www.flacsoandes.edu.ec/en/agora/la-felicidad-como-medida-del-buen-vivir-en-ecuador-entre-la-materialidad-y-la-subjetividad> [https://perma.cc/2TZN-9SJ6]. The link between Aristotle and the indigenous cosmopolitanism appears explicitly in some official documents of Ecuador. CONSEJO NACIONAL DE PLANIFICACION, PLAN NACIONAL PARA EL BUEN VIVIR 2013-2017 11 (2015), <https://www.controlhidrocarburos.gob.ec/wp-content/uploads/MARCO-LEGAL-2016/Registro-Oficial-Suplemento-78-Resolucio%CC%81n-2.pdf> [https://perma.cc/AJ5Z-PGV7].

only have to discover<sup>80</sup>—or uncover—what is covered beneath other fundamental rights, aims, and values.

## 2. General Welfare

Many constitutions around the world include, at their beginning, the objective to “promote the general welfare.”<sup>81</sup> Supported by this provision, many holidays and a number of legal limitations on work hours were instituted by federal and state laws under the premise that free time is part of society’s welfare.<sup>82</sup> If welfare is “the general health, happiness, and safety of a person, an animal or a group,”<sup>83</sup> then festivals must also be included, not only because, as noted, they express and produce happiness but also because they promote economic welfare. As underscored in Part II, it is well understood that small feasts and big festivals increase the welfare of society by fostering the economy, business, tourism, conflict resolution, alliances, and profits, among many advantages.<sup>84</sup> With these benefits, communities usually recover much more money than they spend supporting the festival organization.<sup>85</sup> Furthermore, communities obtain other intangible goods, like branding, approval of the people, the uniting of the citizenry, and peace. Precisely because of these benefits, countries, cities, and communities are often tempted to commercialize their festivals; yet, great festivals could lose their essence and be transformed in street markets. Christmas is a good example, as are the Salzburg Festival, the Holland Festival, and other successful artistic festivals where supply can become overwhelming and maintaining artistic autonomy and

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80. Here the etymological meaning of the word is used, which came from Middle English meaning “make known”; then from Old French *descovrir*; then from late Latin *discooperire*, that mix the Latin word *dis-* (expressing reversal) and *cooperire*, “cover completely.” *Discover*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/discover> [<https://perma.cc/YJR3-9S5V>] (last visited Feb. 10, 2021). In some sense, any discovery is an act of taking off the covers.

81. See, e.g., U.S. CONST. pmb.; Pmb., CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). Others include some provisions later. See, e.g., CONST., (1987), art. II, § 5, (Phil.); NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 12 (Japan); CONSTITUTION OF NIGERIA (1999), art. 14.

82. See, e.g., Exec. Order No. 11394, 33 Fed. Reg. 2429 (Jan. 30, 1968); FOR FREE MEN IN FREE WORLD: A SURVEY OF HUMAN RIGHTS IN THE UNITED STATES 157 (1969).

83. *Welfare*, in OXFORD ADVANCED LEARNER’S DICTIONARY (6th ed., 2004).

84. See *supra* Section II.A.

85. See Eliza Grames & Mary Vitcenda, *Community Festivals—Big Benefits, But Risks, Too*, UNIV. MINN. EXTENSION (2012), <https://extension.umn.edu/vital-connections/community-festivals-big-benefits-risks-too> [<https://perma.cc/PEM4-9WPF>]. As in any business, benefits are not ensured. See Keith Acheson, Christopher J. Maule & Elizabeth Filleul, *Cultural Entrepreneurship and the Banff Television Festival*, 20 J. CULTURAL ECON. 321, 321–39 (1996) (studying nonprofit festivals).

quality is difficult.<sup>86</sup> In any case, under a radical economic utilitarian perspective—under the “ruling theory of law,” as Dworkin says—the beneficial effects of festivals largely justify the protection of the right to feast because the government must promote the general welfare.<sup>87</sup>

To some extent, the utilitarian argumentation can be rechanneled to a classical scheme if economic welfare is renamed the “common good.” It is not the brute sum of the well-being of all citizens, conceived in an individualistic, utilitarian, or liberal way, nor is it the state’s welfare conceived in a totalitarian way, unrelated to the individual.<sup>88</sup> Traditionally, the common good is understood as a middle point between both conceptions—that is, the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment.<sup>89</sup> It is plausible to consider feasts as one of those social conditions that allows happiness and fulfillment of individuals. Thus, feasts are part of the common good. As the promotion of the common good is the aim of the law and a duty of government, consequently, authorities must respect the right to feast.<sup>90</sup>

Especially in those countries where the general welfare or common good is consecrated in the constitution, festivals—as part of this—should be considered aims of the legal system, as legal values to be protected by the law, and authorities should be responsible for not only protecting them but encouraging them where possible.

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86. See, e.g., Dragan Klaić, *The Future of Festival Formulae: A Holland Festival Symposium in De Baile 3–6* (June 19, 2002). Regarding the Salzburg Festival, Frey observes that an inadequate distribution of public subsidies given by the government to increase the spectacle and attract tourism could work against the artistic quality. Cf. Bruno S. Frey, *The Rise and Fall of Festivals: Reflections on the Salzburg Festival* 33 (Inst. for Empirical Resch. in Econ, Univ. of Zurich, Working Paper No. 48, 2000); see *infra* Section III.B.2.

87. See DWORKIN, *supra* note 52, at vii.

88. For the differences between them, see Waheed Hussain, *The Common Good*, STAN. ENCYC. PHIL. ARCHIVE (Feb. 26, 2018), <https://plato.stanford.edu/archives/spr2018/entries/common-good/> [<https://perma.cc/X4CJ-AWAW>].

89. This influential definition—a synthesis of a tradition that began in Aristotle Nicomachean ethics—was developed in the last century by the Catholic Church. Cf. SECOND VATICAN ECUMENICAL COUNCIL, GAUDIUM ET SPES 26 (1966); cf. CATECHISM OF THE CATHOLIC CHURCH 1905–12 (1992); JOHN XXIII, ENCYCLICAL LETTER MATER ET MAGISTRA 52 (1961); JOHN XXIII, ENCYCLICAL LETTER PACEM IN TERRIS 139 (1963); PAUL VI, APOSTOLIC LETTER OCTOGESIMA ADVENIENS 46 (1971).

90. See FINNIS, *supra* note 49, at 210, 218 (linking rights and duties, and duties and common good).

### 3. The Well-Being of the Person

A famous medieval adage states that *bonum diffusivum sui*, that good is self-diffusive, that good deeds are contagious.<sup>91</sup> Aristotle said that people need to share their joys with friends and relatives.<sup>92</sup> Moreover, people feel the need to celebrate with someone if their team wins the Super Bowl, if a sibling wins the lottery, if they receive an award, if a child is born to them, if they marry, if an unemployed parent finds a great job, or if a prodigal son comes back home.<sup>93</sup> On these occasions, people need to celebrate, to express their joys in some way, sharing it with friends and relatives. This is precisely what feasts are: a communal expression of happiness and hopes. Celebrations are part of the ordinary life of any person, and because of that, the law should protect feasts as a part of individuals' well-being.

While the general welfare argument underlines the *social* dimension of the feast, this argument stresses its *private* dimension. According to Raz, an individual interest can justify a right if the interest requires an action by another person.<sup>94</sup> In the same vein, the interest to celebrate can justify a right to feast if this interest requires the respect of the individual's well-being.

In his famous Four Freedoms speech of 1941, US President Franklin Roosevelt proposed freedom from want—the third freedom—as a fundamental freedom that people “everywhere in the world” ought to enjoy.<sup>95</sup> Norman Rockwell depicted this freedom in 1943 as a cheery family Thanksgiving celebration surrounding a large turkey

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91. Bernhard-Thomas Blankenhorn, *The Good as Self-Diffusive in Thomas Aquinas*, 79 *ANGELICUM* 803, 803 (2002).

92. See Nancy Sherman, *Aristotle on Friendship and the Shared Life*, 47 *PHIL. & PHENOMENOLOGICAL RSCH.* 589, 596 (1987).

93. Cf. *Luke* 15:23. This is the biblical example of the joyful father who has recovered his lost son and says, “Bring the fattened calf and kill it. Let’s have a feast and celebrate.” *Id.* The Quran, the Sutras, the Vedas, and the Bible describe numerous feasts, many as a duty. See *Esther* 9:22; *Qur’an* 5:112–113; ARTHUR ANTHONY MACDONNELL, *EXCERPTS FROM A VERDIC READER FOR STUDENTS* (1917); *THE LOTUS SUTRA* 110 (Burton Watson trans., 1993). Religious and secular motifs can justify this duty. For example, Purim commemorates the day when Esther, Queen of Persia, saved the Jewish people from execution by Haman, the adviser to the Persian king. *Esther* 9:20–22. In this feast, people had “to observe the days as days of feasting and joy and giving presents of food to one another and gifts to the poor.” *Esther* 9:22.

94. RAZ, *supra* note 49, at 180 (“To assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, *i.e.*, that an aspect of his well-being is ground for a duty to another person.”).

95. President Franklin D. Roosevelt, *Four Freedoms to Congress* (Jan. 6, 1941) (transcript available in the Franklin D. Roosevelt Presidential Library and Museum). According to his words, this “means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.” *Id.*

dinner.<sup>96</sup> This painting was used as war propaganda to explain why the United States should be involved in the Second World War;<sup>97</sup> the poster included the words, “Ours . . . to fight for. Freedom from Want.”<sup>98</sup> Countless copies were made of this nostalgic depiction.<sup>99</sup> In the Museum of Fine Arts in Houston, where Rockwell’s masterpieces are hanging, one finds many replicas of the same Thanksgiving celebration but with different people of today’s world and with two titles: “Freedom from Want” on the top of each painting and “Take a seat at the table” on the bottom.<sup>100</sup> These pieces of art aid the conclusion that the United States fought the Second World War to defend the right to celebrate, healthily and peacefully, important events in life.

The ideas enunciated in Franklin Roosevelt’s famous speech served to outline the new international order of the United Nations. Through the work of Eleanor Roosevelt, freedom from want was included in Article 25.1 of the Universal Declaration of Human Rights (UDHR) as the right to an adequate standard of living.<sup>101</sup> Although this

96. Norman Rockwell, *Freedom from Want* (1943). Rockwell had misgivings about depicting such a large turkey when Europe was starving, overrun, and displaced as World War II raged. Cf. CYNTHIA SOOHOO, CATHERINE ALBISA & MARTHA F. DAVIS, BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 42 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2007).

97. *75 Years Ago, Norman Rockwell’s ‘Four Freedoms’ Inspired a Generation*, PARK W. GALLERY: ART & GALLERY NEWS (Feb. 2, 2018), <https://www.parkwestgallery.com/75-year-norman-rockwell-four-freedoms-anniversary/> [https://perma.cc/S4EB-79KU]. Several artists were commissioned to promote the war, including Jean Carlu, Hugo Ballin, and Walter Russell, who created a Four Freedoms Monument of New York City. JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 57 (2012); PAUL S. BOYER, CLIFFORD E. CLARK, JOSEPH F. KETT, NEAL SALISBURY, HARVARD SITKOFF & NANCY WOLOCH, THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE 3 (5th ed., 2003); Mary M. Rider, *Images of Propaganda: World War I and World War II Posters*, QUEEN CITY HERITAGE, Fall 1983, at 31, 33. The Four Freedoms of Rockwell was the most famous and widespread work for that purpose. Upon publication of the *Saturday Evening Post* over the course of four consecutive weeks in 1943, the paintings received millions of reprint requests. *75 Years Ago, Norman Rockwell’s ‘Four Freedoms’ Inspired a Generation*, *supra*. Only after the public demanded reprints did the Office of War Information get involved by producing 2.5 million sets of Four Freedoms posters. *Four Freedoms Didn’t Come Easy for Norman Rockwell*, NEW ENGLAND HIST. SOC’Y, <https://www.newenglandhistoricalsociety.com/four-freedoms-didnt-come-easy-norman-rockwell/> [https://perma.cc/6BAT-8W2W] (last visited Feb. 11, 2021). Approximately 1.2 million people throughout the United States viewed the paintings at that time. *U.S. at War: Gap Narrowed*, TIME, May 24, 1943.

98. Rockwell, *supra* note 96.

99. See *75 Years Ago, Norman Rockwell’s ‘Four Freedoms’ Inspired a Generation*, *supra* note 97.

100. See Lily Rothman, *Norman Rockwell’s Vision of the Four Freedoms Left Some People Out. These Artists Are Trying to Fill Those Gaps*, TIME (Oct. 12, 2018, 1:13 PM), <https://time.com/longform/four-freedoms/> [https://perma.cc/4TLX-UKDL].

101. See Josh Zeitz, *How FDR Invented the Four Freedoms*, POLITICO MAG. (July 4, 2015), <https://www.politico.com/magazine/story/2015/07/roosevelt-four-freedoms-119728> [https://perma.cc/E8CJ-KCZN].

provision never mentions the right to celebrate, we can presuppose it behind the proclamation of the “well-being of himself and of his family.”<sup>102</sup> As a part of the ordinary life of any person and family, feasts are part of his well-being.

Finnis—who, incidentally, does not give much credence to the Aristotelian doctrine of the ultimate end—grounds natural rights and the whole legal system in seven basic goods of human flourishing.<sup>103</sup> For Finnis, a fulfilled life is a life that develops these goods as much as possible.<sup>104</sup> These basic goods are practical reflection, life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion.<sup>105</sup> Feasts are a development of three of these goods: sociability, because feasts are an expression of happiness with those who are close,<sup>106</sup> and play and aesthetic experience, because both are necessary for a festive celebration—an essential element of the feast.<sup>107</sup> It is nearly impossible to conceive of a flourishing human life without the possibility of feasting. Festival behavior is a direct expression of human flourishing and a part of human well-being. If the aim of the legal system is to protect human flourishing, then feasts should be protected.

#### 4. The Principle of Full Protection

In one of the most influential articles of US legal literature, Samuel D. Warren and Louis Brandeis began their defense of the right to privacy by saying:

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102. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 25 (Dec. 10, 1948) [hereinafter UDHR]. The whole article states:

[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

*Id.*

103. FINNIS, *supra* note 49, at 100.

104. *Id.* at 91–92.

105. See *id.* at 85–97.

106. See *id.*; LAFUENTE, *supra* note 3, at 21. According to Lafuente, the feast has two characteristics: its social dimension, because it is a ludic manifestation of life in community—the party is lived in a group—and its temporal dimension, because it serves to incorporate rest periods in order to break the routine; it is, therefore, an extraordinary time. LAFUENTE, *supra* note 3, at 21.

107. Indeed, one Spanish philosopher identifies feast, play, and freedom. See LEONARDO POLO BARRENA, 19 PERSONA Y LIBERTAD 151 (2017) (The game is the fiesta. What is God? Glory, and glory is the supreme festival, the pure festival, the absolute festival. And what is the absolute festival? The absolute freedom).

[t]hat the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the “right to life” served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man’s spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone, the right to liberty secures the exercise of extensive civil privileges.<sup>108</sup>

In the same way, the right to feast is implied in the common law principle that individuals shall have full protection in person. Three reasons support this argument. First, as it was stated in the quote above, this principle protects the right to enjoy life, and feasts are a certain expression of that joy. If someone cannot express his or her joy, it will decrease. Second, the principle of full protection covers all human aspects, including both mental and physical well-being. If the festive behavior is a feature so long rooted in humankind,<sup>109</sup> and if feasts are part of the human well-being,<sup>110</sup> then the principle should cover the right to feast. And third, full protection of the person includes seeking the largest amount of liberty possible for all people, in an ambience of “equal concern and respect,” as Rawls and Dworkin suggest.<sup>111</sup> On the topic of feasts, this means that full protection should be given to ensure the largest liberty to feast, ensuring that all people are granted the same extent of liberty, with the same possibilities to organize the feasts that they want to organize, and to attend the festivals that they want to attend.

Once again, parallel to Warren and Brandeis’s argument, it is suitable to define anew the exact nature and extent of such protection in the field of human festival behavior. This is the purpose of the next Section.

### *B. What Should Be Protected*

Deskovic spent sixteen Christmases in prison, but none of them were celebrated in a festive way with friends or relatives.<sup>112</sup> Each

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108. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV., 193, 193–94 (1890).

109. See *supra* Section II.A.

110. See *supra* Section III.A.3.

111. DWORKIN, *supra* note 52, at 150–68, 181; see RAWLS, *supra* note 51.

112. Deskovic, *supra* note 38.



December, he was not allowed to celebrate friendship, fraternity, or the Nativity. For him, what should have been the most joyful time of the year became the saddest—his “blue holiday” was an additional punishment for a crime that he never committed.

To fully protect Deskovic’s rights, the feast itself should be protected. This Article has defined the feast as “a celebration of the momentous events and values in a festive way with friends, relatives and neighbors.”<sup>113</sup> This definition has four essential elements: (1) the reason to celebrate; (2) the people involved in the celebration; (3) the act of celebration; and (4) the festive way of celebrating.<sup>114</sup> The protection of the feast implies the protection of each of these elements. This Section briefly analyzes each.

### 1. A Reason to Celebrate

The millenarian wisdom of the Bible says that “a feast is made for laughter.”<sup>115</sup> Conversely, on the “day of disaster” we cannot “enter a house where there is feasting and sit down to eat and drink.”<sup>116</sup> In the same line, philosophers and theologians agree that the reason for the feast is always something positive, an affirmation of existence, a “Yes” pronounced to the whole life.<sup>117</sup> Nevertheless, a quick glimpse of

113. See *supra* Part I.

114. These elements are related to each of the four classical causes: the reason to celebrate is the final cause, the celebration (as a verb) is the agent cause, the people are the material cause, and the “festival way” of celebrating is the formal cause. This Author has developed this argument in Juan C. Riofrio, *Teoría general de la fiesta y su dimensión jurídica*, in LIBER AMICORUM DR. NARCISO MARTÍNEZ MORÁN. DE LEGIBUS, SCIENTIA ET AMITICIA (forthcoming) (on file with author). Of course, there are different definitions, with different elements. However, probably all of those other elements could be aligned with the four mentioned here. For example, Dietler says that “‘feast’ is an analytical rubric used to describe forms of ritual activity that involve the communal consumption of food and drink.” Michael Dietler, *Theorizing the Feast: Rituals of Consumption, Commensal Politics, and Power in African Contexts*, in FEASTS. ARCHAEOLOGICAL AND ETHNOGRAPHIC PERSPECTIVES ON FOOD, POLITICS, AND POWER, *supra* note 7, at 65, 65. And Wiessner proposes that feasts should have an aggregation of people, food sharing and food distribution, abundance, a specific occasion, some form of display, and a place. Wiessner, *supra* note 18, at 116–17. This Author understands food, abundance, and symbolic displays as part of the festival way of celebrating. Abundance is also part of the reason to celebrate. See *id.* at 117.

115. *Ecclesiastes* 10:19.

116. *Jeremiah* 16:8.

117. See JOSEF PIEPER, IN TUNE WITH THE WORLD: A THEORY OF FESTIVITY 19–20 (Richard Winston & Clara Winston trans., 1999). Pieper interpreted the nature of festivals as affirmations of the world: whenever I am able to say “Yes,” I can celebrate a feast; whenever I am able to say “Yes,” I am (to that extent) free, liberated. *Id.* at 20–21. We cannot celebrate any birth of a child if we hold to Sartre’s dictum, “It is absurd that we are born.” *Id.* at 19. Life as a whole must be seen positively to feast. *Id.* at 20. The idea can be traced by Nietzsche, who affirms that “to have joy in anything, one must approve everything.” *Id.* See also JOSEPH CARDINAL RATZINGER, THE FEAST OF THE FAITH: APPROACHES TO A THEOLOGY OF THE LITURGY 27 (Graham Harrison trans., 1986).

cultural festivals throughout history reveals that people mark with ceremony and ritual, in specific places and times, their triumphs, joys, and even sorrows—such as wars, massacres, or deaths.<sup>118</sup> While this may seem contradictory as some of these events are not positive, there is no contradiction because sorrowful events are commemorated in the hope that the attendant pains will one day disappear or that there is some good underneath all of this.<sup>119</sup> This hope is present in the annual commemoration of the apartheid massacre carried out in Sharpeville, South Africa on March 21, 1960, now known as the International Day for the Elimination of Racial Discrimination.<sup>120</sup> On this day, the people of Sharpeville celebrate their hope for a day when discrimination will disappear from the face of the earth. A similar hope appears in the feasts of the dead celebrated in many countries across all five continents. The Huron Feast of the Dead in Ontario, Canada, the Mexican feast Día de Muertos, and All Souls' Day, the religious feast celebrated in the Roman Catholic Church in November to pray for the souls of those deceased, are three examples of this celebration.<sup>121</sup> If there is no hope at all and if there is nothing after death, “it is better to go to a house of mourning than to go to a house of feasting, for death is the destiny of everyone; the living should take this to heart.”<sup>122</sup> The aforementioned feasts of the dead evidence celebrating the hope that attendant pain will pass.

There could be several reasons to celebrate feasts, each with different levels of significance. The level of significance depends on objective and subjective factors. Objectively, it is beyond doubt that the

Happiness claims a feast. If the whole of life is not an absurdity, our little parties predict that a special feast should be organized at the end of days. *See id.* “[A] religious festival, a New Moon celebration or a Sabbath day . . . are a shadow of the things that were to come.” *Colossians* 2:16–17. The just men have “their places at the feast with Abraham, Isaac and Jacob in the kingdom of heaven.” *Matthew* 8:11. Otherwise, we are just flesh for death. *See Romans* 8:6–13.

118. *See* Victor Turner, *Introduction to the Exhibition*, in *CELEBRATION: A WORLD OF ART AND RITUAL*, *supra* note 8, at 15, 15.

119. *See* PIEPER, *supra* note 117, at 21–22. In this sense, Pieper explains that “[e]ven celebrations for the dead, All Souls and Good Friday, can never be truly celebrated except on the basis of faith that all is well with the world and life as a whole. If there is no consolation, the idea of a funeral as a solemn act is self-contradictory. But consolation is a form of rejoicing. . . . Consolation exists only on the premise that grief, sorrow, death, are accepted, and therefore affirmed, as meaningful in spite of everything.” *Id.*

120. *See International Day for the Elimination of Racial Discrimination 2019*, S. AFR. GOV'T (Mar. 21, 2019), <https://www.gov.za/EliminationofRacialDiscrimination2019#> [<https://perma.cc/FKC6-85AG>].

121. *See* Thomas F. McIlwraith, *The Feast of the Dead: Historical Background*, 6 *ANTHROPOLOGICA* 83, 83–86 (1958); *see also* Iván Román, *Day of the Dead: How Ancient Traditions Grew into a Global Holiday*, HISTORY, <https://www.history.com/news/day-dead-dia-de-muertos-origins> [<https://perma.cc/M78T-VFLV>] (last updated Oct. 30, 2020).

122. *Ecclesiastes* 7:2.

original event is more important—and deserves more celebration—than recurring anniversaries: the day a country gains its independence, as well as births or wedding days, surpass their anniversaries in importance. On the other hand, not all events deserve an annual commemoration—only the most significant events are remembered annually. However, subjective factors should be considered too. One person, family, or community could give special consideration to some events and celebrate with special pomp and ceremony. Events such as the beginning of a business project, the launching of a ship, the miraculous healing of a child, or some specific communal tradition continue to be commemorated every year with special festivities.

The different levels of significance of feasts can also be seen in the religious field. Religions have a large number of feasts in their calendars, but only a few of them become particularly important. For instance, at the core of Judaism are the Shabbat and the three “pilgrimage” feasts—Pesach, Shavuot, and Sukkot.<sup>123</sup> Meanwhile, the Christian liturgical year revolves around Holy Week and Christmas, while Islam has two official holidays, Eid Al-Adha and Eid Al-Fitr, the latter celebrated at the end of Ramadan.<sup>124</sup>

Because not all feasts have equal relevance, feasts are deserving of different protective regulations. Their relevance is marked by the reason for celebration and the personal perception of the importance of the event. It is not the same to celebrate Independence Day and a small marginal war fought to maintain the borders of the country. The most prominent feasts deserve a day off from work so that people can celebrate with those closest to them. Such feasts can even defeat the law at times. In *Frank v. State of Alaska*, the Supreme Court of Alaska justified the hunting of moose notwithstanding the fact that hunting season had ended.<sup>125</sup> The legal prohibition of hunting was defeated by a specific right to a religious feast. The court reasoned that the meat was necessary for a funeral potlatch, as the Athabascan people believe strongly that the body cannot be buried until a sufficient quantity of the proper food is prepared for the post-burial feast.<sup>126</sup>

As mentioned above, there can be either personal reasons or communitarian reasons for feasting. If communities are homogeneous, the authorities can promote more communitarian festivals. As a matter

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123. See *Exodus* 23, 34; *Deuteronomy* 16; *Isaiah* 33:20.

124. See *The Liturgical Calendar: Calendar of the Church Year*, EPISCOPAL CHURCH, <https://www.episcopalchurch.org/calendar-church-year/> [<https://perma.cc/Z2DB-4JFR>] (last visited Feb. 12, 2021); *Eid Al-Adha: Why Are There Two Eids?*, BBC NEWSROUND (Aug. 12, 2019), <https://www.bbc.co.uk/newsround/41124480> [<https://perma.cc/HF2W-CF69>].

125. *Frank v. State*, 604 P.2d 1068, 1074–75 (Alaska 1979).

126. See *id.* at 1072–73.

of fact, if the entire community shares the same values, a discussion about the political convenience of celebrating these values is irrelevant. This is why it is easier to maintain the sabbath as a day off in Israel where there is a Jewish majority, than in traditionally Christian countries; at the same time, in the United States, it is easier to maintain Sunday as a day off than in Israel. The same argument can be applied to other kinds of feasts. Traditionally Christian states can authorize some days off at Easter, at the feast of the dead, and at Christmas because most of the citizens regularly celebrate those feasts, whether for religious purposes or not. The problem arises when the community is very divided and there is no tradition of a certain celebration.<sup>127</sup>

For example, several lawsuits were filed when Good Friday was declared a day off of work in some parts of the United States.<sup>128</sup> The solution for determining which festivals should be celebrated in each place is not to ban all celebration—that would be similar to trying to resolve political problems by banning politics. Avoiding festivals for cultural diversity reasons will never be a solution for the minority, nor for the majority—on the contrary, it stifles diversity and does not allow others the opportunity to learn from other cultures. Rather, the best policy in these cases would be to allow each person to select the feasts that they want to celebrate. Spain has found an exemplary way to protect this right. There, the Moscoso's law allows any public worker to choose three days off, at his or her discretion and convenience, not attributable to his or her vacation days.<sup>129</sup> In very divided states, where communities have members from quite diverse cultures, in cosmopolitan cities, and in institutions with multicultural workers, the

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127. As mentioned above, the detractors of any celebration will always appear. See Section III.B.1. For example, in Latin America, there still remains a Spanish movement against the independence of each state. One's right of opinion cannot counterbalance the right to feast in a widely homogeneous community.

128. See *McGowan v. Maryland*, 366 U.S. 420 (1961); *Metzl v. Leininger*, 57 F.3d 618, 623 (7th Cir. 1995); *Granzeier v. Middleton*, 173 F.3d 568, 571 (6th Cir. 1999); *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 796 (7th Cir. 1999); *Koenick v. Felton*, 190 F.3d 259, 261 (4th Cir. 1999). *Metzl* is the only US Court of Appeals case in which a Good Friday holiday has been struck down. 57 F.3d at 621–23. See generally Justin Brookman, *The Constitutionality of the Good Friday Holiday*, 73 N.Y.U. L. REV. 193 (1998); Megan E. Kleinfelder, *Good Friday, Just Another Spring Holiday?*, 69 U. CIN. L. REV. 329 (2000); Diana McCarthy, Comment, *The Establishment Clause and Good Friday as a Legal Holiday: Has Accommodation Run Amok?*, 65 TEMP. L. REV. 195 (1992); Joanne Yasus, *What's in a Name - Nothing Good if It's Friday: The Seventh Circuit Invalidates Good Friday Public School Holiday*, 29 J. MARSHALL L. REV. 1031 (1996).

129. See Presidencia del Gobierno, *Instrucción de la Secretaría de Estado para la Administración Pública, por la que se dictan normas sobre jornada y horario de trabajo, licencias y vacaciones del personal*, BOE, Dec. 22, 1983, at 34292, 34292–93. This law takes the last name of Minister Javier Moscoso, who in 1983 approved six days off for every public worker. See *id.* In 2012, President Rajoy reduced these days to three. Real Decreto-ley [Royal Decree Law] § 1 (B.O.E. 2012, 168) (Spain).

Moscoco solution seems to be the most suitable policy to solve festival issues. Furthermore, this solution also helps to resolve problems in associations, companies, and institutions because every social organization has individuals with their own reasons to feast.

Each person, family, or community has the right to decide freely which events or values should be celebrated. Conversely, no one should be forced to celebrate things that are against his or her conscience or preferences. Celebrations can be promoted by anyone, but no one can be forced to feast. Any official imposition here is an act of corruption and abuse of power. Regrettably, this took place with the corruption of Christmas by the Nazis, who changed the reason for the feast to promote the party's racist ideology. Because of Jesus's Jewish origins, the German government attempted to change many aspects of this celebration.<sup>130</sup> Nazi ideologists claimed that the feast's Christian elements had been superimposed upon ancient Germanic traditions: the feast was not the birth of Christ but the celebration of the winter solstice, and Santa Claus was the Germanic god Odin.<sup>131</sup> The official holiday posters depicted Odin as the "Christmas or solstice man," riding a white charger, sporting a thick grey beard, wearing a slouch hat, and carrying a sack full of gifts.<sup>132</sup> Among other things, Christmas carols were also changed—in "Silent Night" and "Unto Us a Time Has Come" all references to God, Jesus, or religion were removed.<sup>133</sup> To promote the regime, housewives were prompted to bake cookies in the shape of birds, wheels, and swastikas for their children.<sup>134</sup> However, private celebrations remained Christian in nature.<sup>135</sup>

## 2. The People

An integral part of festivals is people gathering together. This may not always be possible due to external and internal factors. An external factor is, for example, a governmental restriction to freedom of assembly, as seen in totalitarian states, or when curfews are imposed

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130. See Tony Paterson, *How the Nazis Stole Christmas*, INDEPENDENT (Dec. 21, 2009, 1:00 PM), <https://www.independent.co.uk/news/world/europe/how-the-nazis-stole-christmas-1846365.html> [<https://perma.cc/5KLL-P3F2>].

131. See *id.* There are several historical studies of the actions of "Nazifying Christmas," as Perry said. Joe Perry, *Nazifying Christmas: Political Culture and Popular Celebration in the Third Reich*, 38 CENT. EUR. HIST. 572, 575–76 (2005). For a well-done, long study, see Koehne, *supra* note 31, at 760–90.

132. Paterson, *supra* note 130.

133. *Id.*

134. *Id.*

135. *Id.*

during times of war or pandemic.<sup>136</sup> If meetings are prohibited, the feast is canceled or reduced to its most minimal expression. For instance, most of the major music festivals around the world were canceled in April 2020 due to COVID-19 restrictions,<sup>137</sup> and just a few of them subsist in a virtual space as a television show without an in-person audience.<sup>138</sup> Internal or personal factors that can hinder the festival are marginalization, selfishness, and other characteristics of an individualistic society, which separates individuals from each other. In his pessimism, the German existentialist philosopher Friedrich Nietzsche observed that festivals are nothing but spectacles without spectators, tables full of gifts without recipients.<sup>139</sup> He realized that “the trick is not to arrange a festival, but to find people who can enjoy it.”<sup>140</sup> American art has various paintings with the motif of a lonely Christmas, usually portraying deserted landscapes full of snow and leafless trees and, noticeably, missing people.<sup>141</sup> Classical literature also represents this feeling of solitude, such as Charles Dickens’s lonely, selfish, and stingy Ebenezer Scrooge in *A Christmas Carol*.<sup>142</sup> Unfortunately, because of the selfishness of people, the same story is repeated every Christmas, every New Year’s Eve, and every Thanksgiving Day, in jails, parks, streets, bridges, and other places where homeless, orphaned, and marginalized people have no “freedom from want” and no opportunity to “take a seat at the table.”<sup>143</sup>

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136. As is well known, when COVID-19 cases increased, almost all countries around the world increased measures to avoid the risk of contagion. The first measures were the closures of cafes, bars, and restaurants and bans on massive meetings. See Michael Daventry, *Curfews and Restrictions Imposed Across Europe as COVID-19 Cases Soar*, EURONEWS, <https://www.euronews.com/2020/10/23/curfews-and-restrictions-imposed-across-europe-as-covid-19-cases-soar> [<https://perma.cc/T2CJ-V6F9>] (last updated Oct. 24, 2020). Then were the closures of borders for states at risk; bans on meetings with more than twenty, ten, or even five people; and curfews which require the population to stay indoors during the night. See *id.*

137. See *Billboard Has Compiled an Ongoing List of Major Concerts and Events That Have Been Postponed or Canceled Due to the Outbreak*, BILLBOARD (Aug. 24, 2020), <https://www.billboard.com/articles/business/touring/9323647/concerts-canceled-coronavirus-list/> [<https://perma.cc/TG5U-BJXZ>].

138. See *How Music Festivals Are Surviving Coronavirus Cancellations*, DEUTSCHE WELLE (July 30, 2020), <https://www.dw.com/en/how-music-festivals-are-surviving-coronavirus-cancellations/a-54374343> [<https://perma.cc/E7M8-FST4>].

139. FRIEDRICH WILHELM NIETZSCHE, 9 GESAMMELTE WERKE 480 (Musarionausgabe ed. 1922).

140. *Id.*

141. See *Lonely Christmas Art*, FINE ART AM., <https://fineartamerica.com/art/lonely+christmas> [<https://perma.cc/H5CY-DNCH>] (last visited Feb. 11, 2021) (showing examples of these paintings).

142. CHARLES DICKENS, *A CHRISTMAS CAROL* (1843).

143. See SOOHOO ET AL., *supra* note 96, at 33; see also Rothman, *supra* note 100.

Who has the right to celebrate a feast? As a general rule, everyone who shares the same joy should have the right to celebrate that joy. However, the right to celebrate is not automatically the right to be invited to any party or festival event. When some festivity is organized and an invitation is provided, two specific rights appear: the right to attend the desired event and the right not to attend the undesired event. The next paragraphs consider this first right in more detail.

It is evident that those who are the cause of the celebration (e.g., the bride at the wedding or the hero of the battle) have a natural right to be invited, as do those who are intrinsically involved in that cause (the parents of the newlyweds<sup>144</sup> or the soldier's family).<sup>145</sup> While a dead person cannot have a place at the feast as a literal guest, they can certainly be present as the reason for the feast. The dead are the reason for the feast of the dead, and in that feast they can ask "remember me / each time you hear a sad guitar," as a song from a movie about the Mexican Feast of the Dead goes.<sup>146</sup> In the same way, fallen soldiers are a principal reason for celebrating the success of independence wars, and Christ is the reason for celebrating Christmas. It is important to note the many feasts are celebrated without those who are being celebrated. People have a moral duty—not a legal obligation—to remember their predecessors in their feasts. At the same time, celebrants who want to remember them have a claim right<sup>147</sup> to do this, to put them in the center of the feast, because without them there is no feast. No authority should force celebrants to replace the person of their celebration, as the Nazi regime did with Christ and Christmas.<sup>148</sup>

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144. See HÉCTOR FRANCESCHI F. & JOAN CARRERAS, *ANTROPOLOGÍA JURÍDICA DE LA SEXUALIDAD* 5–6 (2000), <http://bibliotecanonica.net/docsab/btcabn.pdf> [<https://perma.cc/G49X-Q4TL>]. Franceschi and Carreras affirm the relatives' natural right to be invited to the wedding feast because marriage intrinsically affects all family members, generating new linkages among each of them. *Id.*

145. A warrior's family also takes part in the battle, in a sense, by supporting the soldier in many direct and indirect ways. Perfectly understandable is the provision that orders "the celebration of the American military family during a specific period of each year to give full and proper recognition to those families." National Defense Authorization Act, Pub. L. No. 108–136, 117 Stat. 1489 (2003) (codified as amended at 10 U.S.C. § 1781).

146. Miguel & Natalia Lafourcade, *Remember Me (Dúo)*, on *COCO: ORIGINAL MOTION PICTURE SOUNDTRACK* (Walt Disney Records 2017) (from the movie, *Coco*). This artistic musical is a beautiful complaint against a society that forgets *at their own feast* those who passed away. See *COCO* (Pixar Animation Studios 2017).

147. See Hohfeld, *supra* note 49, at 30–32. According to Hohfeld's scheme of rights, a claim right—called by him "right *stricto sensu*"—is the right of A that has its correlative duty of B. *Id.*

148. See *supra* Section III.B.1.

The organizers of festivities can freely invite other people who share the same joys. However, if the organizer is a community or an entity supported by taxpayers, there is a special responsibility to offer everyone the opportunity to feast. This equality of access accords with the general principle of equality.<sup>149</sup> Unfortunately, in many places, when a folk or art festival gains success, a large part of the local community is excluded. In the Wexford Festival Opera, for example, some surveys revealed local people's dissatisfaction and a sense of exclusion because the festival prioritized visiting audiences.<sup>150</sup> The general sense of dissatisfaction was accompanied by a sense that the priorities and policies of the festival organization were not for local people but rather for international media attention, corporate sponsorship, and the presence of high-profile visitors.<sup>151</sup> The Galway Arts Festival faced this issue too, when locals argued that the festival "must be kept as it used to be: meeting the needs of ordinary Galwegians" and disapproved of it becoming "elitist . . . [to promote an] image . . . for people outside of Galway."<sup>152</sup>

Some years ago, the Salzburg Festival was also criticized for poor distribution of festival subsidies—covered by Austrian taxpayers—which benefited only the public directorate, employees, artists, and a select group of visitors while increasing the cost of the spectacle for the local populace.<sup>153</sup> At the beginning, the organizers took a defensive position. For example, Werner Oppitz, head of the Salzburg State Tourism Board, declared that "the festival is unique so you cannot subject it to normal bookkeeping standards."<sup>154</sup> The organizers demonstrated that still, even if the festival shows deficits for the government, every year Salzburg—a small city of 140,000 residents—"benefits through the influx of some 100,000 music lovers, most of them big-time spenders, who patronize the priciest hotels, restaurants, and stores when they are not attending one of the

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149. See Norman E. Bowie, *Taking Rights Seriously*. By Ronald Dworkin. *Massachusetts: Harvard University Press*. 1977. Pp. 563., 26 CATH. U. L. REV. 908, 911 (1977). Dworkin conceives the principle of equality as the principle of "equal concern and respect." *Id.*

150. See Bernadette Quinn, *Symbols, Practices and Myth-Making: Cultural Perspectives on the Wexford Festival Opera*, 5 TOURISM GEOGRAPHIES 329, 340–41, (2003); Bernadette Quinn, *Problematising "Festival Tourism": Arts Festivals and Sustainable Development in Ireland*, 14 J. SUSTAINABLE TOURISM 288, 299–301 (2006).

151. *Problematising "Festival Tourism," supra* note 150, at 299.

152. *Id.* at 300.

153. Frey, *supra* note 86, at 10–12.

154. Peter Lewis, *Music on a High Scale*, MACLEAN'S ARCHIVE (Nov. 5, 1984), <https://archive.macleans.ca/article/1984/11/5/music-on-a-high-scale> [<https://perma.cc/2AH9-UHBV>].



festival's 130 performances."<sup>155</sup> In the end, however, the people's claims prevailed, and today these festivals have special tariffs, quotas, and subsidies for locals.

Finally, people who have consciously and directly attacked the reason for the celebration are naturally not welcomed to the feast. No one invites their enemies into their home to celebrate their birthdays and family parties, and no lawyer invites his defeated counterparts to feast and applaud his favorable judgment. At the same time, the defeated counterparts will not be eager to celebrate with the winners. The reason is clear: as was mentioned, any feast is always an affirmation of the things celebrated,<sup>156</sup> and by celebrating these things, people confirm to some extent the positive aspects of those things. If anyone is seriously against the object of the celebration, they exclude themselves from the feast.<sup>157</sup> The participation of enemies in the celebration implies some acceptance of at least one aspect of the feast, or even a complete repentance, concession, and change of mind.<sup>158</sup> On the other hand, the celebrant community usually will accept the individual who has had a radical conversion and follows their ideals.

### 3. The Celebration

Feasts are more than mere aggregations of individuals. People can gather in the supermarket or on public transit without there being a feast. At festivals, people should co-participate in the celebration freely, with joy and peace; there is a collective joy, a mutual recognition of the beautiful things being celebrated, as well as a common sharing of

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155. *Id.* From 1981–1982, the wages of the festival's administrative staff were less than four million Austrian schillings. Frey, *supra* note 86, at 11–12. The benefits at that time were not clear. See WIRTSCHAFTSKAMMER SALZBURG, *supra* note 28 (explaining the extremely positive balance for all the community in 2017).

156. See *supra* Section III.B.1.

157. See *Proverbs* 5:10. This self-exclusion principle is very ancient and can be traced back to the Scriptures, where it is written that it is not good that “strangers feast on your wealth.” *Id.* It is “better a dry crust with peace and quiet than a house full of feasting, with strife.” *Proverbs* 17:1. God often rebukes the participation of sinners in their feasts: “Your New Moon feasts and your appointed festivals I hate with all my being,” *Isaiah* 1:14; “when they celebrate their New Moon feasts, he will devour their fields,” *Hosea* 5:7; and about the Eucharistic feast, Saint Paul adds that “whosoever shall eat this bread and drink this cup of the Lord unworthily, shall be guilty of the body and blood of the Lord,” *1 Corinthians* 11:27.

158. See *1 Corinthians* 11:27. On the same biblical vein, there is the parable of the marriage feast of a king whose invitations were not accepted. See *Matthew* 22:1–4. The king “became angry and said to his slave, ‘Go out at once into the streets and lanes of the town and bring in the poor, the crippled, the blind, and the lame. . . . For I tell you, none of those who were invited will taste my dinner.’” *Luke* 14:21–24.

the symbology.<sup>159</sup> In this Section, “celebration” is specifically understood as “the act of celebrating something,”<sup>160</sup> which means “to show that a day or an event is important by doing something special on it,”<sup>161</sup> or “to observe a notable occasion with festivities.”<sup>162</sup> Anthropologists and philosophers stress that festivals disrupt ordinary life as a time of freedom—a break of the quotidian behavior patterns.<sup>163</sup> Sports, theater, play, and hiking are also breaks from daily life, yet they are not festivals. The difference between these breaks and feasts is the notable occasion that brings people together to rejoice in commonly held beliefs.

After defining the third element of the feast, the celebration, it is now possible to consider how this element could be attacked. Freedom of celebration can be infringed upon in two ways: imposing an unwanted celebration or banning a wanted celebration.

Technically speaking, a celebration cannot be imposed: whoever disagrees about the object of the celebration, as a matter of fact, cannot properly celebrate. An atheist could accompany his friends or relatives to the Pesach, Eid Al-Adha, Easter, or any religious feast but could not properly “celebrate” in his heart things that he does not believe. Governmental imposition of attendance at any feast is a quasi-physical act of violence against the conscience. In both colonial times and totalitarian regimes, such imposition was not unusual and could be understood as a form of “ethnic genocide.”<sup>164</sup> However, other kinds of requirements for celebrations should be considered on a case-by-case basis. For example, parents have the authority to ask their minor children to accompany them to some festivals because of their parental mission, and religious groups can ask their members to attend some ceremonies because of the members’ assumed duties within their religious community.<sup>165</sup>

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159. See RICARDO YEPES STORK & JAVIER ARANGUREN ECHEVARRÍA, FUNDAMENTOS DE ANTROPOLOGÍA 314 (5th ed. 2001)

160. *Celebration*, in OXFORD ADVANCED LEARNER’S DICTIONARY, *supra* note 83.

161. *Id.*

162. *Celebrate*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/celebrate> [<https://perma.cc/G7D2-9426>] (last visited Feb. 11, 2021). The “festivities” are the *festival way of celebrating*, the fourth element of the feast. *See id.*

163. *See* LAFUENTE, *supra* note 3, at 21.

164. *See* Hayden & Vuong, *supra* note 24, at 41–42; *see supra* Section II.A.

165. Sometimes there could be commercial or political pressure. *See* The Ben Shapiro Show, *Our Dumb Culture Wars*, SOUNDCLOUD, at 23:19 (Nov. 18, 2019), <https://soundcloud.com/benshapiroshow/ep899> [<https://perma.cc/5WL3-RHWH>]. This case is suggested by Ben Shapiro, who observes that “unless you celebrate the Left’s cultural goals, they will boycott you, and then . . . they will get your restaurants banned from the cultural spaces.” *Id.* Then, he adds that

History offers many examples of prohibitions against festivals. From the mid-1640s until 1660, Christmas was banned in England, Wales, and Scotland by the Puritans.<sup>166</sup> During these times, Christmas could be spent in contemplation, but celebrations were banned.<sup>167</sup> In 1647, Easter and Whitsun (Pentecost) were also banned.<sup>168</sup> Later, Christmas was again banned during the French Revolution and in the Soviet Union. Today, some companies restrict the right to feast by pressuring employees in a way that makes it impossible for them to celebrate the principal events of their lives with their families. Some of these employers have been sued on the basis of workers' religious rights, and courts have sometimes instructed companies to allow workers to attend their feasts.<sup>169</sup> However, religious rights are not the only justification for the right to attend feasts. A general right to feast would give the same right to atheists and agnostics, as well as to believers who have some secular reason to feast.

Almost all festivals likely have their followers and their detractors. Christmas holidays, Good Friday, Martin Luther King Jr. Day, some national holidays, and Pride Day all have people who either support them, are indifferent to them, or oppose them. Nevertheless, this fact should not be used to support an argument for the abolition of any festival, much less for enshrining a "right" to boycott feasts. If that were the case, no one would be allowed to express the most important things rooted in their hearts. Most of the time, the best policy here is not to ban any possibility to celebrate but to foster them all.

#### 4. The Festive Way of Celebrating

Calendars are filled with many feasts, but they can pass without any celebration. Deskovic passed many Decembers in prison without celebrating Christmas in a festive way. There is no specific form of celebration that all feasts must fulfill because each feast has its reason

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probably the Right would do the same thing. *Id.* at 20:33. The legality of each kind of commercial or political pressure should be analyzed case by case.

166. Ross McGuinness, *The Year That Christmas Was Cancelled in England, Ireland, Scotland and Wales*, YAHOO NEWS (Dec. 25, 2020), <https://in.news.yahoo.com/year-christmas-cancelled-england-scotland-wales-ireland-075805590.html#:~:text=Christmas%20continued%20to%20be%20banned,Puritan%20Parliament%20was%20in%20power> [https://perma.cc/45UG-GKHQ].

167. *Id.*

168. Leah Lefler, *When Easter and Christmas Were Banned: The Rise of Puritan Beliefs*, OWLCATION (Mar. 30, 2018), <https://owlcation.com/humanities/When-Easter-Was-Banned-The-Rise-of-Puritan-Beliefs> [https://perma.cc/DHQ5-XFD3].

169. *See, e.g.*, *EEOC v. Chemsico, Inc.*, 216 F. Supp. 2d 940, 942 (E.D. Mo. 2002); *Favero v. Huntsville Indep. Sch. Dist.*, 939 F. Supp. 1281, 1284–85 (S.D. Tex. 1996); *Di Pasquale v. Bd. of Educ. Williamsville Cent. Sch. Dist.*, 626 F. Supp. 457, 457 (W.D.N.Y. 1985); *Am. Motors Corp. v. Dep't of Indus., Lab. & Hum. Rels.*, 305 N.W.2d 62, 64–65 (Wis. 1981).

and its symbols, and happiness can be expressed in so many ways. Even so, feasts must have some festival form.

As noted, festivals are communal expressions of happiness or hope. To share and communicate these expressions in the community, people use symbols—in feasts, symbols of happiness and hope. Symbols are vehicles to share ideas, values, feelings, and wishes. Victor Turner, the renowned anthropologist, points out that during a celebration, “people think and feel more deeply than everyday life. They express the meanings and values of their societies in special, often vivid ways. Among these is the creation of beautiful or striking objects, which exist just because humankind celebrates its own existence.”<sup>170</sup>

These striking objects assign a new meaning to the ordinary things they reference. Happiness and hope can be symbolized with ornaments (e.g., garlands, flowers, lights, fireworks, crowns, crèche, or trees) and selected locations; drinks and food (e.g., surpluses of the harvest, special recipes); gifts, prizes, and diplomas; singers, music, and dance; signs, banners, paintings, poetry, readings, speeches, performances, unusual behavior, videos, and many other special elements.

In the most remarkable feasts, these symbols pervade all kinds of objects and areas, including homes, meals, activities, faces, bodies, and even across the sky. A good example is the Fourth of July, on which fireworks, flags, videos, news, anthems, and other symbols blanket the entire United States in patriotism. Religious feasts usually contain rites and rituals, which are a repetition of some of the mentioned elements (e.g., reiterations of readings, speeches, or performances). The abundance of food was one of the principal elements of ancient feasts.<sup>171</sup> Now, symbology has become more spiritualized because symbols tend to be progressively more dematerialized, especially in this digital era,

170. Turner, *supra* note 118.

171. See Hayden, *supra* note 16. For Aristotle, cooking is the most elementary art. In his *Metaphysics* (I, 1–2), Aristotle distinguishes between those arts geared towards human subsistence and knowledge sought for its own sake; in *De anima* II, 3–4, he will posit the nutritive capacity (θρεπτικόν) as the first, fundamental psychic capacity, that any plant, animal, or human needs to survive. See LEONARDO POLO, *ÉTICA: HACIA UNA VERSIÓN MODERNA DE LOS TEMAS CLÁSICOS* 13 & n.15 (2d ed. 1997). Jones agrees that “[e]ating is a unique sensory and intellectual experience, one that is intensely personal while also often social. It is a physiological requirement as well; by being met frequently and repetitively, it results in the formation of habit and custom, of ‘performances,’ that in turn may become symbolic.” Michael Owen Jones, *Afterword: Discovering the Symbolism of Food Customs and Events*, in “WE GATHER TOGETHER” FOOD AND FESTIVAL IN AMERICAN LIFE, *supra* note 6, at 235, 236. Richards adds that “food itself becomes symbolic of the human relationships which it brings into being.” AUDREY I. RICHARDS, *HUNGER AND WORK IN A SAVAGE TRIBE: A FUNCTIONAL STUDY OF NUTRITION AMONG THE SOUTHERN BANTU* 213 (Routledge 2004) (1932). In fact, the title of the final chapter in Richards’s book is “Food as a Symbol.” *Id.* at 162.

and because people continuously attribute more meaning to the symbols. While the ancient feast symbology was focused on abundant and special food,<sup>172</sup> nowadays music, digital and graphic symbols, speeches, and ideas stand out more in the feasts. In addition, the same symbols have acquired more meaning over centuries, as the meaning of a country's flag was enriched by each won war.

Symbology matters in law because without symbols, festivals are not possible. That is why ancient feasts ended when the surpluses of foods were consumed.<sup>173</sup> In prison, Deskovic had very few objective and subjective avenues to celebrate Christmas in a festive way. In a depressing atmosphere, he lacked any of the typical Christmas symbols used during the holiday, was isolated, and, principally, had no internal resources to celebrate anything.<sup>174</sup> No one would expect jails to be transformed into dance clubs for a night to celebrate a feast. However, it is very human to aspire to at least one little symbol—in some sense, symbols are always little<sup>175</sup>—to highlight the celebration. This is not a romantic vision of life. Indeed, there are some prisons in which authorities allow inmates to celebrate a number of feasts, selected by the inmates with special meals, but only for the sake of religious rights. Here, this Article seeks to justify this possibility on a general right to feast in order to give the same right to atheists and agnostics, as well as believers who may have secular reasons to celebrate.

Along this line, several prison policies were amended and approved after the passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.<sup>176</sup> For example, the West Virginia Division of Corrections Policy Directive 511.00(F) provides that members of a specific faith group may request one special meal observance per year.<sup>177</sup> All members of that group should agree on one holiday per year on which to feast and must either pay for the feast or find a donor or donors to cover the cost.<sup>178</sup> Another example is the

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172. See HAYDEN, *supra* note 7, at 8; Hayden, *supra* note 16.

173. Cf. Wiessner, *supra* note 18.

174. See Deskovic, *supra* note 38.

175. Symbols are signs with a meaning. The sign (i.e., the word “dog,” a receipt, a hundred-dollar bill) is worth less than the signified (the dog itself, the amount paid, the value of a hundred dollars). In feast, the rose is worth less than the love, and the Christmas tree is worth less than Nativity itself.

176. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000).

177. W. VA. DIV. OF CORR., POLICY DIRECTIVE 511.00(F) (May 1, 2014). This West Virginia Division of Corrections Policy Directive was discussed in *Browning v. Seifert*, where the District Court for the Northern District of West Virginia recommended granting some kosher meals on certain feasts and denied some special recipes asked by the inmates. *Browning v. Seifert*, No. 1:13-cv-23, 2015 U.S. Dist. LEXIS 35075, at \*12–13 (N.D. W. Va. Feb. 11, 2015).

178. See *id.* at \*12–13, 17.

Pennsylvania Department of Corrections Policy DC-819, which is written in more detail. Among other things, it stipulates that, in order to participate in either the Eid-at-Fitr or Eid-al-Adha feasts, an inmate “shall have participated in Ramadan for the entire month and must pay the cost of the fast with a cash slip,” and “[a]ny inmate who is in the RHU in Disciplinary Custody (DC) cannot participate in the either [*sic*] of the Ramadan feasts.”<sup>179</sup> However, the same department denied a request by Christian inmates for permission to congregate for special feasts at Christmas and Easter.<sup>180</sup> The Pennsylvania Department of Corrections justified this conclusion on the basis that feasting was not mandated by Christian scripture.<sup>181</sup> Problems like this are frequent in jails, but only a few of these cases go to trial. Today, there are dozens of cases in lower courts where inmates demand the right to attend more religious feasts, supported by RLUIPA and the First Amendment.<sup>182</sup> Most of these cases are dismissed, and very frequently the judges hold that the constitutional establishment clause does not apply.<sup>183</sup>

Historically, people who have surpluses, resources, or power are responsible for organizing the festivities of the community: aggrandizers in the transegalitarian societies, royalty in their reigns, the liege in his fief, and so on.<sup>184</sup> Conversely, people with low incomes cannot support the biggest or more expensive festivities. Government and other authorities play a leading role in this area,<sup>185</sup> especially when poverty is rife. If they do not provide some support to

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179. See *Peele v. Klemm*, 664 F. App'x 127, 129 n. 1 (3d Cir. 2016) (explaining how Pennsylvania Department of Corrections Policy DC-819 and the RLUIPA apply in a US court).

180. See *Thompson v. Smeal*, 513 F. App'x 170, 171 (3d Cir. 2013).

181. *Id.*

182. David L. Hudson, Jr., *Prisoners' Rights*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/free-exercise-clause-overview/prisoners-rights/> [<https://perma.cc/7AEZ-3ZRJ>] (last updated Oct. 2008). In general, plaintiffs belong to a branch of some traditional religion and ask for a way to obey the typical diet and festival precepts. See *id.* As an incredible exception, in *Lindell v. Casperson*, inmates requested a new religious practice concerning Wotanism, which foresees forty-three ceremonial feasts to be celebrated with special food and costly items, such as gold, silver, iron, horn medallions, pendants, rings, or religious tapestries. *Lindell v. Casperson*, 360 F. Supp. 2d 932, 942 (W.D. Wis. 2005). The inmates also requested conjugal visits with women “for purposes of sexual magic and divination.” *Id.* The court only said that inmates should submit their petition through the Division of Adult Institutions Religious Policy Advisor and Coordinator. See *id.* at 945.

183. See generally *Corrections Law for Jails, Prisons and Detention Facilities: Religion*, AELE L. LIBR. OF CASE SUMMARIES, <http://www.aele.org/law/Digests/jail125.html> [<https://perma.cc/X6UP-A9EB>] (last visited Feb. 11, 2021) (providing many different examples of inmates bringing suits to demand certain religious freedoms and showing that the courts frequently dismiss these suits and hold that the establishment clause does not apply).

184. Cf. Dietler & Hayden, *supra* note 7, at 14–16.

185. King David was praised because “he added beauty to the feasts and solemnized the seasons of each year.” *Ben Sira* 47:10; *accord Ecclesiastes* 47:9.

establish the feast, this right will become nothing but an empty shell. Government is justified not only in promoting communitarian festivals but also in fostering the general welfare by supporting some individual feasts. Latin American authorities and indigenous communities around the world fund local feasts of towns and churches, as well as other folk festivals,<sup>186</sup> and occasionally some collective wedding feasts, for the sake of supporting a less prosperous population. This kind of public support for religious festivals and private people is hardly conceived of in the United States.<sup>187</sup>

Finally, festivals can be dissolved by annulling the meaning of their symbols. There are two ways of doing this: through absolutizing and through dilution. The first way, the conversion of the symbol into an absolute goal to be achieved—which obscures the feast’s reason—is a moral problem. When people seek symbols (such as food, songs, or diversions) as ultimate ends, forgetting that they are just symbols of something higher, then these symbols work like drugs as a means of escape from a dull and painful world, and “parties burst the bounds of middle-class entertainment and become bacchanalia.”<sup>188</sup> There is no longer celebration, just bacchanalia—meaningless diversions and festivities without purpose.

The dilution of symbols is more problematic in law and even banned in trademark law, especially when it is intentionally promoted.<sup>189</sup> Successful festivals tend to spread their symbols to many cultures and places, including those that may not ascribe to the symbols their original meaning. This happened, for example, with the Sicilian figure Befana, who originally was associated with the birth of Jesus but now functions throughout Italy much like Santa Claus,<sup>190</sup> or with the lanterns of the Chinese New Year festival, which for many Chinese

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186. See *supra* Section IV.B.3.

187. As it is well known, the last judgments of the US Supreme Court, which apply rigorously the *lemon test*, developed in *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971), restrict the governmental possibility of funding religious activities. Cf. JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 154–72, 189–202 (4th ed. 2016).

188. RATZINGER, *supra* note 117, at 64.

189. See Federal Trademark Dilution Act, 15 U.S.C. § 1125(c). In general, trademark dilution is a reduction in brand equity, in a way that would lessen its uniqueness, due to the unauthorized use of the trademark by third parties (junior brands). See *id.* Under the Federal Trademark Dilution Act, which preempts state law, a trademark owner need not prove a likelihood of confusion to protect the mark. *Id.* Thus, he can bring a dilution action even if the junior brand involves goods or services totally unrelated to the goods or services associated with the famous mark. See *id.* However, if the confusion that dilutes the uniqueness of the trademark is caused by society’s spontaneous evolving of the language, his owner will have no action. See *id.*

190. See Nikki Crowell, *The Story of Befana, the Italian Santa Claus*, CULTURE TRIP (May 8, 2017), <https://theculturetrip.com/europe/italy/articles/the-story-of-befana-the-italian-santa-claus/> [https://perma.cc/4U8J-6L7Y].

symbolize vitality, social status, and good luck, but for others become mere decorations.<sup>191</sup> Culture is not static and can evolve. However, it should be developed freely by people and not by any imposition from authorities, like the Nazi promotion of a secularized Christmas. In this Author's opinion, a similar governmental promotion of an ultra-secularized culture could be fostered by some judgments of the US courts. According to one jurisprudential approach,<sup>192</sup> holiday religious displays on public forums are possible only if their religious meaning is diluted or "secularized."<sup>193</sup> Following this approach, the majority of US citizens, who identify as Christians,<sup>194</sup> will be in serious trouble if they want to celebrate Christmas or Easter in the public space with non-secularized symbols, for example, placing a solitary crèche in a public building or singing traditional religious carols in a public school.<sup>195</sup> Jews—the second biggest religious community in the United States<sup>196</sup>—will deal with similar problems celebrating Hanukkah, for example, placing a menorah in a park or street without diluting its religious meaning in a collage of multireligious symbols.<sup>197</sup> That was precisely the case of *Amancio v. Town of Somerset*, where the US District Court for the District of Massachusetts banned a holiday display because "there is no superabundance of secular symbols to dilute the religious message of the creche, only a rather forlorn Santa Claus stationed on the perimeter of the display."<sup>198</sup> It means that Jews

191. See Aulia Rachmat, *Lantern: Symbol of Brightness, Love*, JAKARTA POST (Feb. 4, 2008, 12:48 PM), <https://www.thejakartapost.com/news/2008/02/04/lantern-symbol-brightness-love.html#:~:text=Made%20of%20paper%2C%20the%20lantern,is%20a%20symbol%20of%20wealth.&text=The%20Chinese%20lantern%20is%20really%20at%20the%20heart%20of%20the%20celebration> [https://perma.cc/Z5S2-52F2].

192. See *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Cnty of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573 (1989). There is no uniform criterion in courts, as will be explained in Section IV.B.3.

193. *Cnty. of Allegheny*, 492 U.S. at 574–75; cf. WITTE, JR. & NICHOLS, *supra* note 187, at 166–67.

194. *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RSCH. CENTER (Oct. 17, 2019), <https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/> [https://perma.cc/32NG-Z78Q]. In the whole country, 65 percent is Christian, 2 percent is Jewish, 1 percent is Muslim, 1 percent is Buddhist, 1 percent is Hindu, and members of other non-Christian religions 3 percent. *Id.* People without a particular religion make up 17 percent. *Id.* On the other side, agnostics are 5 percent, and atheists are 4 percent. *Id.*

195. An explanation and discussion of each one of these cases is provided in Section IV.B.3.

196. See *In U.S., Decline of Christianity Continues at Rapid Pace*, *supra* note 194.

197. See *Cnty. Of Allegheny*, 492 U.S. at 575. In *County of Allegheny*, the Supreme Court voted 5–4 to strike down a crèche display but voted 6–3 to uphold the constitutionality of an eighteen-foot Chanukah menorah next to the town's Christmas tree because the combination of a menorah, a secular Christmas tree, and a message of goodwill sufficiently mitigated the menorah's religious significance so that it would not reasonably be seen as endorsing Judaism. *Id.* at 574–75.

198. *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677, 681 (D. Mass. 1998).



can only celebrate Hanukkah in the public space using their menorah amalgamated between many secular and Christian symbols, and vice versa. This is a serious restriction to celebrate freely one's personal values in the public space. A professor of constitutional law at Oklahoma City University, Andrew C. Spiropoulos, expressed his disappointment in an article, saying that the court had stolen Christmas.<sup>199</sup> He observes that the government's policies are not consistent with the Constitution when they "allow secular holiday displays and ban religious ones. This difference in treatment constituted discrimination against speakers with a religious viewpoint."<sup>200</sup>

The discussion of the dilution of symbols will continue later in the analysis of cultural rights.<sup>201</sup> However, in this Section it is possible to conclude that the right to feast will be seriously restricted if authorities do not allow people to celebrate freely with their authentic—non-diluted—festival symbols of their political, ideological, or religious beliefs. No authority can force anyone to use any symbol or to dilute their symbols to be able to celebrate their feasts. The best policy here is not to ban any festival display, nor require their dilution, but to foster citizens' freedom to choose and display any symbol they want. The public space is too big and there is room for all beliefs, for all displays, for all feasts.

#### IV. LEGAL FOUNDATIONS

According to classical positivism, rights are creations of the law, and the law is simply a command of the sovereign.<sup>202</sup> Although this Article presupposes that any fundamental right must have some rational foundation, it accepts too that positive law partially shapes the content of rights. In this last Part, this Article tests whether the right

199. See Andrew C. Spiropoulos, *The Constitutionality of Holiday Displays on Public Property (or How the Court Stole Christmas)*, 68 OKLA. BAR J. 1897 (1997); see also cases and sources cited *infra* note 243. Some years ago, Nebel affirmed that the misery of this present age is man's incapacity for festivity. See Gerhard Nebel, *Die Kultischen Olympien*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 20, 1960, at 194. Maybe his words have not lost their relevance.

200. Spiropoulos, *supra* note 199, at 1901.

201. See *infra* Section IV.B.3.

202. See *Legal Positivism*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/legal-positivism/> [<https://perma.cc/6BHQ-4VFF>] (last updated Dec. 17, 2019). In this sense, Bentham affirms in his book *Anarchical Fallacies* that, properly speaking, there are no rights anterior to government. See Hugo Adam Bedau, "Anarchical Fallacies": *Bentham's Attack on Human Rights*, 22 HUM. RTS. Q. 261, 270 (2000). The idea is present in Kelsen, who also identifies state, rights, and law. See Hans Kelsen, *Sovereignty*, in *NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES* 525 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., Bonnie Litschewski Paulson, Stanley L. Paulson & Michael Sherberg trans., 1998).

to feast is enshrined directly or indirectly in US law, and whether it can be grounded in a diffuse foundation on the legal system.

### A. Direct Recognition

No treaty, statute, or regulation in any country or community explicitly enshrines a general right to celebrate feasts. Although many laws enact the observance of specific festivals, like the Martin Luther King, Jr. holiday, the Fourth of July, or Human Rights Day, these laws never recognize a general right to feast.

### B. Indirect Recognition

If no law overtly proclaims the right to feast, perhaps it can be derived from another recognized right, article, or principle of law—just as the US Supreme Court determined that the right to privacy is supported by the Fourth Amendment of the US Constitution and that many other rights are supported by the due process clause of the Fourteenth Amendment.<sup>203</sup> In this way, some Spanish jurists justify the right to folk festivals.<sup>204</sup> The same argument can be used to justify the right to any feast.

In Part III, this right was justified by the provisions for the “general welfare” stated in many constitutions; by the “pursuit of happiness” phrase or related notions that appear in the Declaration of Independence and in some Andean constitutions; by the right to an adequate standard of living declared in Article 25.1 of the Universal Declaration of Human Rights; and, finally, by the common law principle of the full protection of the person.<sup>205</sup> It still remains to be examined whether this right could be included in, associated with, or derived

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203. The Fourth Amendment to the US Constitution ensures that:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fourteenth Amendment declares that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV. Although the word “privacy” is never used in the text of the US Constitution, the Supreme Court recognized both clauses as providing a substantive due process right to privacy. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that there is a constitutional right to privacy that protects a married couple’s rights to contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that there is a constitutional right to privacy that protects a woman’s right to an abortion).

204. *See* LAFUENTE, *supra* note 3, at 26–27; BLANQUER & GUILLÉN, *supra* note 3, at 36–47; *infra* note 262.

205. *See supra* Section III.A.

from<sup>206</sup> other recognized rights. If feasts are a communal expression of happiness, some rights can be considered connected with the notion, such as freedom of association or assembly, freedom of expression, freedom of religion, cultural rights, and the right to leisure. After testing these rights and verifying the limits of this argument, this Part considers a diffuse legal justification of the right to feast.

### 1. Freedom of Expression

Freedom of expression is a well-known right in human rights documents.<sup>207</sup> The UDHR states that everyone has the “right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>208</sup> As a rule, later human rights declarations include the three mentioned faculties contained in this Article.<sup>209</sup> These provisions allow people to express not only their ideas, feelings, speeches, and opinions but also themselves and their identities. International covenants distinguish this right neatly from the right of assembly or association.<sup>210</sup>

If feasts are an expression of happiness, it seems natural to conclude that freedom of expression covers the right to feast. Indeed, some scholars ground the right of certain holiday displays on this fundamental freedom.<sup>211</sup> In this line, festivals should be protected as means of communication. However, it must be said that feasts are more than a means of expression. Remember, again, Deskovic. Even

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206. See RAZ, *supra* note 49, at 168–69 (distinguishing “core rights” and “derivative rights,” grounded with sound arguments in the first rights); HERVADA, *supra* note 54, at 92 (talking about “primary” and “derivative natural rights”); FINNIS, *supra* note 49, at 81–92 (talking about the basic values that ground law and rights).

207. See, e.g., UDHR, *supra* note 102, art. 19; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 19 (Dec. 16, 1966) [hereinafter Civil and Political Rights]; G.A. Res. 44/25, Convention on the Rights of the Child arts. 12–13 (Nov. 20, 1989) [hereinafter Rights of the Child]; G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 13 (Dec. 18, 1990) [hereinafter Rights of Migrant Workers]; G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities art. 21 (Jan. 24, 2007) [hereinafter Rights of Persons with Disabilities].

208. UDHR, *supra* note 102, art. 8.

209. See e.g., Civil and Political Rights, *supra* note 207 (specifying that “this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.”); Rights of the Child, *supra* note 207.

210. Compare UDHR, *supra* note 102, art. 19 (the right of expression), with UDHR, *supra* note 102, art. 20 (the right of assembly and association).

211. See William A. Zolla, *Religious Expression on Public Property During the Holiday Season: What Does the Constitution Allow*, CBA REC., Jan. 2013, at 12, 12; Susan L. Trevarthen & Johanna Lundgren, *Merry Litigation and Happy Attorneys’ Fees: Holiday Displays on Downtown Public Property*, 85 FLA. BAR J. 19, 19 (2011).

if Deskovic had been able to express himself in prison through some kind of celebration, by singing Christmas carols, for example, communication with his relatives and friends was still banned.<sup>212</sup> Although he might have had freedom of expression in jail, he was still unable to celebrate feasts in a festive way with close persons—that is to say, he was not able to feast. All of these things are not protected by freedom of expression, at least by the international understanding of this freedom.

Nevertheless, the US approach to freedom of expression differs substantially from international standards. It is more complex because the First Amendment recognizes five connected rights (freedom of speech, press, and religion, and the rights of assembly and petition), and courts tend to link these rights to each other, as the next Section shows.<sup>213</sup>

## 2. Freedom of Association, Freedom of Assembly, and the Opportunity to Make Friends

The UDHR states that “everyone has the right to freedom of peaceful assembly and association.”<sup>214</sup> Both rights appear in several later covenants.<sup>215</sup> In general, these freedoms could protect the communal aspect of feasts but hardly their festive expression. In most nations, festive behavior is not protected by associational or assembly rights.

Things could be different in the United States. According to the Supreme Court, the Constitution protects two types of associative freedom: the right to expressive association and the right to intimate association.<sup>216</sup> “Expressive association” refers to the right to associate

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212. See *supra* Section II.B (explaining the Deskovic case).

213. See U.S. CONST. amend I; *infra* Section IV.B.2.

214. UDHR, *supra* note 102, art. 20.

215. See, e.g., Civil and Political Rights, *supra* note 207, arts. 21–22; Rights of the Child, *supra* note 207, art. 15; Rights of Persons with Disabilities, *supra* note 207, art. 29(b)(i); Rights of Migrant Workers, *supra* note 207, arts. 26, 40; G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women art. 7(c) (Dec. 18, 1979); G.A. Res. 2106 (XX) International Convention on the Elimination of All Forms of Racial Discrimination art. 5(ix) (Dec. 21, 1965) [hereinafter Racial Discrimination].

216. See Collin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 237 (1998). Freedom of association is not a right listed in the Constitution but is recognized by the courts as a fundamental right, sometimes supported on First Amendment grounds, sometimes on Fourteenth Amendment grounds. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (grounding the right of association for expressive purposes on the First Amendment without authoritatively determining the source of the right to intimate association); *City of Dallas v. Stanglin*, 490 U.S. 19, 23–25 (1989) (citing the First Amendment in embracing

for express beliefs and ideas, often political,<sup>217</sup> while “intimate association” refers to the right of individuals to maintain close familial or other private associations free from state interference—the rights to marriage, to rearing of children, and to living with relatives to name a few.<sup>218</sup> Recognizing that the Supreme Court includes symbolic speech under the freedom of speech clause,<sup>219</sup> it is not difficult to imagine the four essential elements of the feast being protected in an expansive interpretation of the First Amendment. Considering those elements, it is possible to conclude, roughly speaking, that (1) freedom of expression would protect two essential elements of the feast—the action of celebrating (as an expression) and the festive way of celebrating (the festival displays could be considered a symbolic expression); (2) the right of intimate or expressive association would protect celebration with people who are close; and (3) the reason for the feast would be protected indirectly by both the right of expression and the right of association. Nevertheless, a 1989 Supreme Court decision should be considered.

In *City of Dallas v. Stanglin*, the Supreme Court determined that social dancing is not a form of association or expression protected by the First Amendment.<sup>220</sup> The case arose when the city of Dallas passed an ordinance that created teens-only dance halls, for young people between fourteen and eighteen years old, that could operate only during specific hours.<sup>221</sup> The Supreme Court said that these rules did not infringe on the minors’ right of association and that social dancing was not an association protected by the First Amendment.<sup>222</sup> What is

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both associations); *Lyng v. Int’l Union, UAW*, 485 U.S. 360, 364–66 (1988) (considering a claimed denial of both associational (family) and expressive rights under the First Amendment).

217. See *NAACP v. Patterson*, 357 U.S. 449, 460 (1958) (recognizing expressive associations and stating that “it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech”).

218. See *Roberts*, 468 U.S. at 617 (recognizing intimate associations). Some courts place this right under the due process clause, but others in the First Amendment. See generally Udell, *supra* note 216 (explaining that courts have fit the intimate association right into both the due process clause and the First Amendment).

219. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376 (1968); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 516 (1969). Symbolic speech consists of nonverbal, nonwritten forms of communication, such as flag burning, wearing of armbands, and burning of draft cards. See *O’Brien*, 391 U.S. at 382; *Tinker*, 393 U.S. at 505–06. The First Amendment generally protects these symbolic acts unless they cause a specific, direct threat to another individual or public order. See *O’Brien*, 391 U.S. at 380; *Tinker*, 393 U.S. at 508–09.

220. *Stanglin*, 490 U.S. at 19–20, 25.

221. *Id.* at 19–20.

222. *Id.* at 28.

noteworthy is the Court's understanding of social dancing. Chief Justice William H. Rehnquist wrote the following:

These opportunities might be described as “associational” in common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect. The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment. . . . It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment. Thus this activity qualifies neither as a form of “intimate association” nor as a form of “expressive association.”<sup>223</sup>

With this reading of the First Amendment, neither small parties nor big festivals can be understood as intimate or expressive associations. Although these activities might be described as “associational,” guests of festivals are not typically members of any organized association.

The plaintiff in *Stanglin* probably erred in supporting his petition on the grounds of associational rights rather than “the right of the people peaceably to assemble.”<sup>224</sup> It is evident that social dancing is not a sort of association but a kind of assembly. While an association is a group of persons more organized, official, permanent, and structured for a specific purpose,<sup>225</sup> an assembly is just a meeting of people that could be occasional, unexpected, unofficial, and sometimes without a well-defined purpose.<sup>226</sup> Perhaps *Stanglin* asked for freedom of association because just five years earlier the Supreme Court had distinguished the right to expressive and intimate association, and the scope of both associations was not well developed.<sup>227</sup> On this basis, *Stanglin* challenged the ordinance of the city, and the court rejected it

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223. *Id.* at 24–25.

224. U.S. CONST. amend. I.

225. *See Association*, in OXFORD ADVANCED LEARNER'S DICTIONARY, *supra* note 83 (defining “association” as “an official group of people who have joined together for a particular purpose”); *Association*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/association> [<https://perma.cc/ZL6L-QQVC>] (last visited Feb. 11, 2021) (defining “association” as “an organization of persons having a common interest”).

226. *See Assembly*, in OXFORD ADVANCED LEARNER'S DICTIONARY, *supra* note 83 (defining “assembly” as “the meeting together of a group of people for a particular purpose; a group of people who meet together for a particular purpose”); *Assembly*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/assembly> (last visited Feb. 11, 2021) (defining “assembly” as “a company of persons gathered for deliberation and legislation, worship, or entertainment”).

227. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

without considering the right to assemble.<sup>228</sup> It would have been better for Stanglin to challenge the ordinance on the basis of freedom of assembly. It seems evident that feasts are always related to the freedom of assembly, and rarely to the right of expressive or intimate association (e.g., in familiar parties).

However, the case ends with a short, separate concurring opinion from Justice Stevens, joined by Justice Blackmun, which states:

[i]n my opinion the opportunity to make friends and enjoy the company of other people—in a dance hall or elsewhere—is an aspect of liberty protected by the Fourteenth Amendment. For that reason, I believe the critical issue in this case involves substantive due process rather than the First Amendment right of association.<sup>229</sup>

Justice Stevens realized that “the critical issue” here is not the right of association but “involves substantive due process” under the Fourteenth Amendment.<sup>230</sup> This principle allows courts to prevent government interference with fundamental rights. Justice Stevens spoke about the right to “the opportunity to make friends and enjoy the company of other people [anywhere].”<sup>231</sup> Later jurisprudence would quote this phrase, admitting this right in an *obiter dictum*.<sup>232</sup> This “liberty” protected by the Fourteenth Amendment is very similar to the right to celebrate common joys with close people in a festive way—Stevens’s right lacks only the elements of the celebration in a festive way. From this point, there is only a small step to recognizing a fundamental, legal right to feast.

### 3. Cultural Rights

Human rights treaties recognize several cultural rights, including the right to “participate in the cultural life”<sup>233</sup> (or in “cultural activities”),<sup>234</sup> “enjoy” culture,<sup>235</sup> “cultural development” (linked with

228. See *Stanglin*, 490 U.S. at 24, 28 (mentioning freedom of assembly only one time, in an *obiter dictum* within a quotation of another case).

229. *Id.* at 28.

230. *Id.*

231. *Id.*

232. See *Adler v. Pataki*, 185 F.3d 35, 42 n.5 (2d Cir. 1999).

233. UDHR, *supra* note 102, art. 27. (“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”).

234. See *Racial Discrimination*, *supra* note 215, art. 5(e)(vi) (explaining the right to equal participation in cultural activities); see also *Rights of Persons with Disabilities*, *supra* note 207, art. 30.1(b) (recognizing the right to enjoy access to television programs, films, theater and other cultural activities, in accessible formats).

235. See UDHR, *supra* note 102, art. 27.1.

“the right of self-determination”),<sup>236</sup> and the rights to the “conservation” and “diffusion” of culture.<sup>237</sup> Particularly relevant to the current discussion is Article 2.2 of the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), which explicitly includes “social practices, rituals, and festive events” as part of intangible cultural heritage<sup>238</sup> that must permanently be protected. Therefore, any “festive event” must be considered a “cultural good”—a legally protected value.

Folk festivals and popular celebrations are usually protected by national regulation.<sup>239</sup> Most countries support them officially, even economically, in part because they attract mass tourism. In some places, like Spain, statutory law requires some conditions for giving public economic support to festivals: originality of the celebration, traditionality, periodicity, and some period of persistence (between ten and forty years, at least), among others.<sup>240</sup> If these conditions are fulfilled, secular and religious feasts receive governmental support. The situation is quite different in the United States, at least for religious festivals in the last decades.<sup>241</sup> Christmas, the most ancient and

236. See Civil and Political Rights, *supra* note 207, art. 1.1 (“All peoples have the right of self-determination . . . by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”); see also G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights art. 1.1 (Dec. 16, 1966) [hereinafter Economic, Social and Cultural Rights] (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

237. See Economic, Social and Cultural Rights, *supra* note 236, art. 15.1(a) (explaining that this covenant contains the right of everyone “to take part in cultural life,” and that states “shall include those necessary for the conservation, the development and the diffusion of science and culture”).

238. See Convention for the Safeguarding of the Intangible Cultural Heritage art. 2.1, Oct. 17, 2003, 2368 U.N.T.S. 42671 [hereinafter Intangible Cultural Heritage].

The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.

*Id.*

239. See generally LAFUENTE, *supra* note 3 (explaining how folk festivals are covered by national regulations).

240. See BLANQUER & GUILLÉN, *supra* note 3, at 30–36. In Spain, each region (Comunidad Autónoma) has its own partial regulation about festivals. *Id.*

241. See *What Are the Rules on Funding Religious Activity with Federal Money?*, U.S. DEPT HEALTH & HUM. SERVS., <https://www.hhs.gov/answers/grants-and-contracts/what-are-the-rules-on-funding-religious-activity-with-federal-money/index.html#:~:text=Basically%2C%20it%20means%20you%20cannot,social%20services%20that%20they%20provide.&text=It%20simply>



traditional festivity in the United States, is under attack in courts and the media.<sup>242</sup> Authorizations to display symbols of any traditional festival in schools, parks, counties, and public offices are easy to obtain, but since the 1980s, this right has been restrained by some courts in the case of Christmas.<sup>243</sup> On one side, in *Lynch v. Donnelly*, the Supreme Court authorized a crèche exhibition in a private park, complete with Santa Claus, a sled with reindeer, animals, colored lights, and other secular elements, on the basis that this mixture of elements could have a secular purpose.<sup>244</sup> The decision held that these religious elements are part of the traditional American heritage used on holidays to which each person can attribute a personal meaning,<sup>245</sup> and that they could be

%20means%20you%20can,taxpayer%20dollars%20to%20fund%20them [https://perma.cc/5FS8-CDFX] (last visited Feb. 12, 2021) (explaining how there are rules in the United States barring religious festivals from receiving federal governmental support).

242. See Zolla, *supra* note 211. Zolla notices that “debates over a perceived ‘War on Christmas’ are now a regular staple of cable news and talk radio during the holiday season.” *Id.*

243. See *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Cnty of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573 (1989). See also *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677, 678, 681 & n.9 (D. Mass. 1998); *Ritell v. Vill. of Briarcliff Manor*, 466 F. Supp. 2d 514, 517, 525 (S.D.N.Y. 2006); *Am. Civ. Liberties Union of N.J. v. Schundler*, 168 F.3d 92, 95, 104 (3d Cir. 1999); *Doe v. City of Clawson*, 915 F.2d 244, 245 (6th Cir. 1990); *Elewski v. City of Syracuse*, 123 F.3d 51, 54 (2d Cir. 1997); *Chabad of Mid-Hudson Valley v. City of Poughkeepsie*, 907 N.Y.S.2d 286, 289–291 (N.Y. App. Div. 2010); *Am. Civ. Liberties Union v. City of Florissant*, 186 F.3d 1095, 1099 (8th Cir. 1999). Today, it is unclear what the standard in this matter could be. For the literature, see Gregory J. Blackburn, *Government, the Holiday Season, and the Establishment Clause: A Perspective on the Issues*, 20 STETSON L. REV. 217 (1990); Bruce M. Zessar, *Government Participation in Holiday Religious Displays: Improving on Lynch and Allegheny*, 41 DEPAUL L. REV. 101 (1991); Jay F. McKirahan, *Religious Holiday Symbols: To Display or Not to Display*, 22 U. TOL. L. REV. 415 (1991); Spiropoulos, *supra* note 199; Trevarthen & Lundgren, *supra* note 211; Zolla, *supra* note 211; Gregory M. Lipper, *First Amendment Limits on Government Holiday Displays*, 66 PLANNING & ENVTL. L. 4 (2014).

244. *Lynch*, 465 U.S. at 671, 685–87.

245. *Id.* at 676–78. In the opinion of the Court, Justice Burger said that:

[w]e are satisfied that the city has a secular purpose for including the creche. . . . even the traditional, purely secular displays extant at Christmas, with or without a creche, would inevitably recall the religious nature of the Holiday. The display engenders a friendly community spirit of goodwill in keeping with the season. The creche may well have special meaning to those whose faith includes the celebration of religious Masses, but none who sense the origins of the Christmas celebration would fail to be aware of its religious implications.

*Id.* at 685. Justice O’Connor stated in her concurring opinion that:

the holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood. The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.

*Id.* at 692.

exhibited as “hundreds of religious paintings in governmentally supported museums.”<sup>246</sup> Moreover, in *Capitol Square Review and Advisory Board v. Pinette*, the Supreme Court implicitly accepted the separated displays of a state-sponsored lighted tree during the Christmas season, a privately sponsored menorah during Hanukkah, and other arts festivals’ displays on Capitol Square, when the majority opinion accepted—on the bases of equal access—the application of the Ohio Ku Klux Klan to place its cross on the same square.<sup>247</sup> A third case is *Town of Greece v. Galloway*, where the Supreme Court admitted the constitutionality of the town’s practice of beginning each legislative session with a prayer by a volunteer chaplain—during holidays, by the way, these prayers were related to the specific religious feasts.<sup>248</sup> In lower courts, the case *American Civil Liberties Union v. Wilkinson* upholds a fifteen-foot stable “furnished with a manger, two large pottery jugs, a ladder, railings, and some straw, but not with the figurines or statues commonly found in a crèche,” located on the grounds of the state capitol, one hundred yards from a Christmas tree, that bears a disclaimer stating that “[t]his display . . . does not constitute an endorsement by the Commonwealth of any religion.”<sup>249</sup> And in *Freedom from Religion Foundation, Inc. v. City of Warren*, the US Court of Appeals for the Sixth Circuit upheld the constitutionality of a nativity scene with a lighted tree, ribbons, ornaments, reindeer, wreaths, snowmen, a mailbox for Santa, elves, wrapped gift boxes, nutcrackers, poinsettias, candy canes, and a “Winter Welcome” sign.<sup>250</sup> None of these displays were a collage of multireligious symbols.

Conversely, a more restrictive criterion appears in *County of Allegheny v. American Civil Liberties Union*,<sup>251</sup> where an installation in a county tribunal’s hall of a solitary crèche was prohibited by the Supreme Court, and some carols were challenged because they “were more likely to augment the religious quality of the scene than to secularize it.”<sup>252</sup> Many lower courts follow this direction. For example,

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246. *Id.* at 683.

247. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 757–59, 769–70 (1995). It is important to note that Stevens’ dissenting opinion considers that the display of the cross and the menorah are “equally objectionable.” *Id.* at 808–09. However, the majority did not agree with that. *See id.* at 779–80.

248. *See Town of Greece v. Galloway*, 572 U.S. 565, 569–71 (2014).

249. *See Am. Civ. Liberties Union of Ky. v. Wilkinson*, 895 F.2d 1098, 1099, 1104 (6th Cir. 1990).

250. *Freedom from Religion Found., Inc. v. City of Warren*, 707 F.3d 686, 690 (6th Cir. 2013).

251. *See generally* *Cnty. of Allegheny v. Am. Civ. Liberties Union*, 492 U.S. 573 (1989).

252. *Id.* at 599.

in *American Jewish Congress v. Chicago*,<sup>253</sup> the US Court of Appeals for the Seventh Circuit held that the city could not display a nativity scene in the lobby of city hall where the crèche was not accompanied by any other religious or holiday symbols.<sup>254</sup> Furthermore, in *Ritell v. Village of Briarcliff Manor*,<sup>255</sup> a federal trial court in New York prohibited a city from displaying a menorah in a public park, even though it appeared next to a “lighted, naturally-growing evergreen tree.”<sup>256</sup> The court determined that the display was improperly “dominated by religious iconography, without a neutralizing, secular background.”<sup>257</sup>

Still today, there is significant confusion in these contradictory lines of jurisprudence, one more open to supporting religious holiday displays in the public space that follows *Lynch*, *Capitol Square Review and Advisory Board*, and *Town of Greece*, and a more restrictive line that follows *County of Allegheny*. However, one conclusion is clear—while secular displays in the public space during holidays are always legal, religious displays are only sometimes legal. Some courts might allow all religious displays, while others might require the secularization of them, while still others might ask for their inclusion on a collage of multireligious displays.

It is true is that the Christmas holiday season means different things for different people: the celebration of Jesus’s birth, the proximity of Hanukkah, or mere friendship.<sup>258</sup> It is also true, however, that courts are not empowered to change the original meaning of any festive symbol—as the Nazi regime did deliberately—which would mean voiding the feast itself and, ultimately, dissolving essential elements of American cultural heritage. Once again, the best policy here is not to ban any feast but to foster all of them.<sup>259</sup> Here, this means not banning any festive display or secularizing it to change the symbols’

253. *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120 (7th Cir. 1989).

254. *Id.* at 121–23, 128. In the same line, in *Amancio v. Town of Somerset*, the US District Court for the District of Massachusetts prohibited a town from displaying an exhibition of a crèche with some secular items like “holiday lights, a wreath, a Christmas tree, and a plastic Santa Claus” because the crèche was “the focal point of the display and there [was] no signage suggesting that anything is being celebrated other than the birth of Jesus.” *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677, 678, 681 (D. Mass. 1998). For the court, the secular symbols were too subtle: “the tree [was] barely visible from the vantage of the creche.” *Id.* at 681.

255. *Ritell v. Vill. of Briarcliff Manor*, 466 F. Supp. 2d 514 (S.D.N.Y. 2006).

256. *Id.* at 517.

257. *Id.* at 525.

258. Symbols are signs with meaning and conventional representation of objects. What does the Moon mean in literature? The Moon can signify very different things: romance, nostalgia, the terror of vampires, a light of hope in the night. What is permanent is the sign, not the meaning. That is why languages can evolve. Thus, the same symbol or the same feast can mean different things for different people.

259. *See supra* Section III.B.3; *see also supra* Section III.B.1 (discussing Moscoso’s law).

meanings but to foster all displays that people from all creeds want to exhibit in a public space.<sup>260</sup> Regarding the festival's support, the government is not legally required to support anyone, but if it does, it must do so on a nondiscriminatory, content-neutral basis.<sup>261</sup>

Cultural rights validate traditional festivals,<sup>262</sup> which are part of an intangible cultural heritage that should be protected. Occasional celebrations are likely not part of this heritage because they cannot be “transmitted from generation to generation.”<sup>263</sup> However, if “culture” is understood in a broader sense, such as “the characteristic features of everyday existence (such as diversions or a way of life) shared by people in a place or time,”<sup>264</sup> then cocktail parties could also be based on other cultural rights. In this sense, a cultural right to party is possible because parties are diversions from ordinary life. Yet, by the same token, one could also talk about the cultural rights to marry or to make contracts, notwithstanding the fact that the essences of marriage, contracts, and feasts are not just a matter of culture. Cultural rights protect only the cultural way of marrying, contracting, and feasting (the form of doing) but not the right to marry, contract, or feast as such. One is the right to marry someone and another the right to marry in a particular form—for instance, wearing Kippahs or Yarmulkes in front of a rabbi, reading the Sheva Brachot or Seven Blessings, men and women celebrating separately, following all rules of an ultra-Orthodox Jewish community.<sup>265</sup> Equally, one is the right to celebrate the founding of a town, and a quite different one is the right to celebrate with specific cultural festivities—for example, traditional recipes, folk music, and typical communal performances.

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260. See *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 765–66 (1995).

261. See Trevarthen & Lundgren, *supra* note 211, at 21; see also Spiropoulos, *supra* note 199, at 1901 (adding that “[t]he lessons to be drawn, then, regarding requests to place religious displays in a forum that has not been opened fully to the public is, first, that if the government wishes to ban holiday displays, it must ban both secular and religious displays.”).

262. See generally Intangible Cultural Heritage, *supra* note 238; Economic, Social and Cultural Rights, *supra* note 236, art. 15.1(a). Spanish authors often resort to cultural rights to justify folk festivals, but not other kinds of celebrations. Cf. BENACHES, *supra* note 3, at 26–27; BLANQUER & GUILLÉN, *supra* note 3, at 36–47; Javier Escalera, *La fiesta como patrimonio*, 21 ESPECIAL MONOGRÁFICO: PATRIMONIO INDUSTRIAL 53 (1997).

263. Intangible Cultural Heritage, *supra* note 238.

264. *Culture*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/culture> [<https://perma.cc/X4G7-KSS2>] (last visited Feb. 12, 2021).

265. See Gabrielle Kaplan-Mayer, *The Seven Blessings (Sheva Brachot) and Other Wedding Rituals*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/the-sheva-berakhot/> [<https://perma.cc/Q8SM-87N8>] (last visited Feb. 12, 2021) (explaining the rituals and cultural customs inherent in a traditional Jewish wedding ceremony).

#### 4. Right to Rest and Leisure

The UDHR states that “[e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”<sup>266</sup> Here, “holidays” are conceived in the British sense, as “vacations” or “time off.”<sup>267</sup> Similarly, when the International Covenant on Economic Social and Cultural Rights regulates the “just and favourable conditions of work,” this document includes the right to “[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”<sup>268</sup> Both provisions protect only “periodic holidays,” the first one as part of the right to rest and leisure and the second one as a favorable condition of work.

Although the right to leisure has experienced a range of criticisms after its first recognition in 1948,<sup>269</sup> and even though some nations have yet to ratify the covenant, laws about holidays, vacations, and limitations on hours and days of work have increased in number throughout the world in the last two centuries.<sup>270</sup> From the beginning of the twentieth century, this issue was an important legal and ethical issue in the United States.<sup>271</sup>

Since 1948, this fundamental right to rest and leisure has been broadly interpreted to include not only “vacant” or “free time” but also

266. UDHR, *supra* note 102, art. 24.

267. See Becky Fulton, *American Vacation vs. British Holiday*, ODYSSEY: LIFESTYLE (July 18, 2016), <https://www.theodysseyonline.com/american-vacation-vs-british-holiday> [<https://perma.cc/SL7H-WB43>]. In the United States, a holiday is a single day fixed by law when people do not have to go to school or work. The translations of the UDHR to the other five official languages of the UN clarify this: “vacaciones periódicas pagadas” in Spanish, “des congés payés périodiques” in French, “оплачиваемый периодический отпуск” in Russian, 定期给薪休假的权利 in Chinese, and إجازات دورية مأجورة in Arabic. In this sense, holidays have no relation to any feast or celebration. UDHR, *supra* note 102.

268. Economic, Social and Cultural Rights, *supra* note 236, art. 7. Article 31 of the Convention on the Rights of the Child (1989) also recognizes the right to rest and leisure, to “play” and to have “recreational activities,” although it never says a word about holidays. Rights of the Child, *supra* note 207, art. 31.

269. See David L. Richards & Benjamin C. Carbonetti, *Worth What We Decide: A Defense of the Right to Leisure*, 17 INT’L J. HUM. RTS. 329 (2013) (summarizing these criticisms of the rights to leisure, rest, and paid holidays in the view that these rights could appear as unnecessary for human dignity, or too expensive from a cost-benefit perspective, or something undeserved by some constituency of humans, regardless of purpose or cost).

270. See *id.* at 36, 40–41. A milestone in history is the Ten Hour Act of 1847 of Great Britain, which reduced workday hours for women and children. See *id.* at 340. Walzer considers that primitive societies did not need to ensure a right to vacations because their modes of production did not require them, and even today not everyone requires a vacation with pay. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 184–96 (1983).

271. See FLORENCE KELLEY, SOME ETHICAL GAINS THROUGH LEGISLATION 105 (1910).

a cluster of positive possibilities to fill that time. As Marshall said, days off from work make sense when it is possible “to choose your activities according to your own preferences and your own standards of what is best.”<sup>272</sup> Free time is not just for sleep. If there is a true right to leisure, there should be some right to do certain things during free time.

Vacations and free time could be used to celebrate feasts, as well as to rest, play, travel, drink, sleep, or do whatever one wants. However, no one affirms that the right to rest and leisure necessarily includes the right to celebrate momentous events and valuable things.<sup>273</sup> From a philosophical<sup>274</sup> and a theological<sup>275</sup> point of view, feasts could be seen as the most relevant part of the right to rest and leisure, and this right could include the right to feasts. But today, neither the laws, the courts, nor legal literature have developed this argument well.<sup>276</sup>

### 5. Other Rights That Justify Specific Festivities

Many other rights might occasionally and indirectly justify a gamut of festivities. The right to marriage may hypothetically include the right to a wedding feast, and perhaps the right to citizenship implicitly embraces the right to celebrate national holidays. The right to the city<sup>277</sup> can also be linked with traditional town festivals as

272. THOMAS H. MARSHALL, *CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT: ESSAYS* 159 (1964).

273. See WALZER, *supra* note 270, at 185, 196. There is just one author who connects the right to leisure with the right to feast in an *obiter dictum*. When Walzer remembers that the etymological root of the Greek *skholè* (σχολή), and the Hebrew *Shabbat*, is the verb “to cease” or “to stop,” he adds: “presumably, it is work that is stopped, and the result is quiet, peace, rest (also enjoyment, play, celebration).” 270*Id.* at 185.

274. On vacations people want to read, play sports, sing, dance, see movies, or go to the theater; festivals include all of those things that people usually do in their spare time, but harmonized in a unity, where such things receive a more profound sense and are enjoyed in the company of relatives and friends.

275. See generally JOSEPH RATZINGER, *supra* note 117. Theologians say that our lives are ordered to the liturgical feast, and the feast is ordered to eschatology. *Id.* at 65. Scott Hahn adds that the Mass, heaven, and the Apocalypse are all of the same feast. See SCOTT HAHN, *THE LAMB’S SUPPER: THE MASS AS HEAVEN ON EARTH* xi (1999).

276. See Richards & Carbonetti, *supra* note 269.

277. See Henri Lefebvre, *Le droit à la ville*, 1 CANADIAN J. OF POL. SCI. 472, 472–74 (1968); see also Neil Brenner & Christian Schmid, *The ‘Urban Age’ in Question*, 38 INT’L J. URB. REG’L. RSCH. 731, 750 (2014). This right is conceived on the ground that a city is a human construction, a historical-social product, a materialized work accumulated by several generations—the city is a “common good” that serves as an infrastructure enabling the “pooling” of city inhabitant actions, energies, resources, and the cooperation among city inhabitants. See Lefebvre, *supra*. The principal aim is to reach the sharing city, recovering the original foundation of the city as the sharing space *par excellence*. See *id.*

elements of cohesion within the city.<sup>278</sup> In best-case scenarios, these rights validate some specific festivals, but likely not all of them.<sup>279</sup>

Human rights widely recognize freedom of religion,<sup>280</sup> which one can exercise “alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.”<sup>281</sup> Most traditional feasts are religious or have a religious origin.<sup>282</sup> The symbolic element of festivals is well connected with the rite, symbols, and mysteries of faith. Each religion has its calendar of feasts, and most of them focus heavily on one or two particular feasts.<sup>283</sup> If freedom of religion is recognized, it must include the right to feast—principally to observe the core festivals of each religion. Thus, freedom of religion can only validate religious feasts, not a general right to celebrate.

### C. Diffuse Foundation

None of the aforementioned rights fully protect festivals, although each of them could protect some aspects of the feast. For example, the freedom of expression protects festive displays and the expression of joy, cultural rights cover the cultural manner of this expression, freedom of assembly (and maybe freedom of association) could protect the celebration in the company of close persons, and the right to rest and leisure—where it is recognized—would protect the festive way of celebrating. Thus, it is possible to consider a diffuse justification for the right to feast as underpinned by five or six rights.

Rights are always interconnected and supportive of each other. Indeed, the “universal declaration model” posits that all rights outlined

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278. See Javier Marcos Arévalo, *El fuego ritual y la purificación. Caracterización de las fiestas de las candelas en Extremadura*, 26 ZAINAK: CUADERNOS DE ANTROPOLOGÍA-ETNOGRAFÍA 247, 249 (2004). The feast, as no other activity congregates the members of the community, neighborhood or any other territorial or social unit, in emblematic spaces that acquire, along the festive celebrations, a special symbolic meaning. *Id.*

279. Strictly speaking, the right to marry, as defined by the law, never includes the right to celebrate nor does the right to citizenship include the right to national holidays, and no feast is necessarily included in the right to the city.

280. See Civil and Political Rights, *supra* note 207, art. 18; see also Rights of the Child, *supra* note 207, art. 14; Rights of Migrant Workers, *supra* note 207, art. 12.

281. UDHR, *supra* note 102, art. 18.

282. See Linwood Fredericksen, *Feast: Types and Kinds of Feasts and Festivals*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/feast-religion/Types-and-kinds-of-feasts-and-festivals> [<https://perma.cc/H6EC-F3ED>] (last visited Feb. 12, 2021) (“Feasts and festivals vary greatly in type. Though most are religious in background and character, other types have flourished in both ancient and modern civilizations.”).

283. See *supra* Section III.B.1.

in the UDHR are part of an interdependent and indivisible whole.<sup>284</sup> For this reason, violations of privacy usually have consequences for the right to fame and honor; injuries harm the right to work and leisure; and killing a person destroys all of their rights. Hypothetically, if one country never established the right to life in its legal system, but its laws recognize the rights to health, food and work, that country would implicitly be recognizing the right to life in three separate ways. There could not be any right to health without life, and the dead can neither eat nor work. This doctrine helps support that there necessarily must be a right to feast, because if someone bans the possibility of celebrating the principal feasts, that ban simultaneously harms five or six interconnected rights. No right subsists alone.

However, even with this diffuse foundation on the mentioned rights, some other aspects of the feast mentioned in Section III.B would still remain unprotected, such as the natural right to the invitation, the right to a lower price for admittance, the claim right to be remembered, and especially the right to celebrate itself (for example, eating special food for the occasion or marking the momentous events). This Article has quoted many cases in which plaintiffs sued to protect their feasts, supported by some of the six mentioned rights. Sometimes they won, and sometimes they did not.<sup>285</sup> Festivals of indigenous communities often win, while other religious feasts sometimes do not.<sup>286</sup> On the other hand, parties and private secular festivals are not adequately protected. At least in courts, the usual justification for the right to feast is grounded in religious rights,<sup>287</sup> and the RLUIPA is frequently invoked in US courts.<sup>288</sup> Atheists, agnostics and nonadherents should have the same right to celebrate momentous events in their lives.

In summary, although the right to feast exists in the deepest roots of the legal system, it should be better protected. At least three kinds of protections are required. First and foremost, the right should be singled out to differentiate it from other rights. Second, the right should be given general legal recognition as a fundamental right in the legal system. Finally, this right deserves more robust and coherent protection of its four essential elements in constitutional law and the international framework of human rights.

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284. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 23 (2d ed. 2003).

285. See discussion *supra* Section IV.B.3; cases cited *supra* notes 243-255 (discussing whether the right to feast at Christmas is supported by freedom of expression, freedom of religion, or due process, among other rights).

286. See *supra* Section IV.B.3.

287. See cases cited *supra* note 243.

288. See, e.g., *Peele v. Klemm*, 664 F. App'x 127 (3d Cir. 2016).



Constitutions and human rights treaties usually have an “open clause” which admits other rights not literally included in the document. These clauses usually declare that “no restriction upon or derogation from any of the fundamental human rights recognized or existing” in any country (in virtue of law, conventions, or regulations) shall be admitted “on the pretext that the present Covenant does not recognize such rights.”<sup>289</sup> The Ninth Amendment to the US Constitution also declares that individuals have other fundamental rights in addition to those declared in the Constitution.<sup>290</sup> Written regulations always fail in listing all fundamental rights explicitly and exhaustively, and it is suitable to have a *numerus apertus* clause to open the door for new circumstances. Life and history are richer than mere words. The Supreme Court has found that unenumerated rights include such relevant rights as the right to travel, to vote, to privacy, and to make important decisions about family, speech, health care or one’s own body.<sup>291</sup> The door seems to be open to a general right to feast.

## V. CONCLUSION

This Article’s main conclusion is that, in the legal system, there exists a fundamental right to feast that should be formally singled out as a fundamental right and deserves a more robust recognition in the human rights constellation. This right is deeply grounded in factual and rational foundations. A considerable amount of archaeological evidence proves the ancient festival behavior of humankind, at least from the

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289. Civil and Political Rights, *supra* note 207, art. 5.2; Economic, Social and Cultural Rights, *supra* note 236, art. 5.2.

290. U.S. CONST. amend IX.

291. *See e.g.*, United States v. Guest, 383 U.S. 745 (1966) (finding a constitutional right to travel); Saenz v. Roe, 526 U.S. 489 (1999) (finding a constitutional right to travel); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (finding a constitutional right to vote); Wesberry v. Sanders, 376 U.S. 1 (1964) (finding a constitutional right to vote); Meyer v. Nebraska, 262 U.S. 390 (1923) (finding a constitutional right to rear children in accordance with parental values and beliefs); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (finding a constitutional right of association); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (finding a constitutional right to hold one’s own beliefs); NAACP v. Button, 371 U.S. 415 (1963) (finding a constitutional right to use the federal courts and to advise others to use them); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a constitutional right to marry); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (finding a constitutional right to receive information); Zablocki v. Redhail, 434 U.S. 374 (1978) (finding a constitutional right to marry or not to marry); Lawrence v. Texas, 539 U.S. 558 (2003) (finding a constitutional right to personal autonomy); Obergefell v. Hodges, 576 U.S. 644 (2015) (finding a constitutional right to same sex marriage). *But see* Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that there is no unenumerated constitutional right to die).

Upper Paleolithic period;<sup>292</sup> yet, not many rights register in the account of this long history. There are strong economic, humanitarian, and legal reasons to better protect those people hindered from celebrating the most important events of their lives with friends and relatives. In this regard, many persons lack the minimal protection, such as inmates in prison, soldiers on duty, workers subjected to pressure from employers, locals who cannot attend expensive traditional festivals, immigrants living in a different culture, individuals with low income who cannot afford a wedding feast, or anyone deprived of the chance to “take a seat at the table.” In some cases, the right to feast has been recognized but uniquely based on religious rights at the expense of nonbelievers who have no right to feast in jails, public institutions, companies, or other places.

No treaty, statute, or regulation in any country or community explicitly enshrines a general right to celebrate feasts as such. However, US constitutional jurisprudence came very close to discovering this right. The Supreme Court needs to take one step forward—just a small one—to formally recognize the right to feast. The right should also be recognized by other courts and powers. This recognition would help to more precisely develop the legal status of the right to feast and better protect festivals. Courts do not need to create *ex nihilo* a new right, they only have to discover—uncover—a right that is covered beneath other fundamental rights, aims, and values. No one knows how far the civil rights movement will go, nor how many new rights will appear in the coming centuries. However, if the pursuit of happiness is not utopic, then the battle for improving human rights is worth it. Each achievement deserves a celebration. Then, the right to feast is a kind of last right to exercise after all these battles. If ultimately we cannot celebrate past or hoped-for victory, all our efforts are vain, our lives an absurdity, and our actual festivals no more than senseless applauses.

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292. See Robin McKie, *How Stone Age Man Invented the Art of Raving*, GUARDIAN (May 12, 2012, 7:06 PM), <https://www.theguardian.com/science/2012/may/13/scientists-stone-age-boom-festivals> [<https://perma.cc/X9XJ-A48W>].