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Nelson Tebbe

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# Witchcraft and Statecraft: Liberal Democracy in Africa

NELSON TEBBE\*

*This Article addresses the prospects of liberal democracy in non-Western societies. It focuses on South Africa, one of the newest and most admired liberal democracies, and in particular on its efforts to recognize indigenous African traditions surrounding witchcraft and related occult practices. In 2004, Parliament passed a law that purports to regulate certain occult practitioners called traditional healers. Today, lawmakers are under pressure to go further and criminalize the practice of witchcraft itself. This Article presses two arguments. First, it contends that the 2004 statute is compatible with liberal principles of equal citizenship and the rule of law. Second, it warns against outlawing witchcraft as such. Subjecting suspected sorcerers to criminal punishment based on governmental determinations of guilt that many will perceive to be unprincipled would work too much damage to individual autonomy and national unity, among other values. These arguments are designed to contribute to a wider discussion about the capacity of liberalism to respond to the global resurgence of religious traditionalism, especially in countries where traditionalists may comprise a large majority of the citizenry.*

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## INTRODUCTION

What are the prospects of liberal democracy in traditional societies? New states everywhere are embracing familiar ideas and institutions, including popular sovereignty, constitutionalism, individual rights, separation of powers, and judicial review. Yet they are refiguring those concepts to fit societies that differ dramatically from those of the West. Worldwide liberalism's fundamental challenges therefore may come not only from the culture war in the United States, significant as that conflict may be, but equally from struggles to adapt democracy to religious and cultural conditions in Africa, Asia, and the Middle East. This Article focuses on the encounter between liberal democracy and African traditions in South Africa. It argues that while liberalism has enormous capacity to accommodate African traditions—far greater, in fact, than has generally been acknowledged—that political form nevertheless cannot tolerate every local accommodation of religion and culture. Many such efforts should be welcomed by liberals, but others ought to be vigorously resisted.

South Africa is among the newest and most celebrated of the world's democracies. Its government has wholeheartedly embraced constitutionalism in the context of remarkable diversity. Various African groups share the land with Afrikaners, English-speaking whites, South Asians, and so-called colored people of mixed ancestry, among others. Eleven languages enjoy official status. That cultural dissensus has been sharpened recently by a critical ideological shift—a resurgence of traditionalism that reflects global developments.

Today, new political movements are challenging some of the basic tenets that drove the struggle against the apartheid regime. When the constitution came into force in 1996, it committed the nation to liberal ideas that had been central to the opposition, especially “non-racialism and non-sexism,” equal citizenship, individual rights, and the rule of law.<sup>1</sup> Now many people feel that the democracy has failed to protect citizens, to unite the country, and to enforce constitutional rights. One feature that unifies these contemporary movements—variously called Africanization, the African Renaissance, and African jurisprudence<sup>2</sup>—is a demand for greater legal accommodation of African traditions. Prominent politicians and intellectuals are moving away from a philosophy of non-racialism understood as governmental blindness toward differences

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1. S. AFR. CONST. 1996 §§ 1, 3.

2. See ADAM ASHFORTH, WITCHCRAFT, VIOLENCE, AND DEMOCRACY 150, 285–86 (2005) (discussing the African Renaissance in particular and the legal accommodation of traditionalism in general); John L. Comaroff & Jean Comaroff, *Criminal Justice, Cultural Justice*, 31 AM. ETHNOLOGIST 188, 189 (2004) (discussing African jurisprudence); Johannes Harnischfeger, *Witchcraft and the State in South Africa*, in WITCHCRAFT, VIOLENCE AND THE LAW IN SOUTH AFRICA 40, 66 (John Hund ed., 2003) (discussing Africanization); Khaukanani N. Mavhungu, *Heroes, Villains and the State in South Africa's Witchcraft Zone*, 7 AFR. ANTHROPOLOGIST 114, 117 (2000) (referencing “calls for a strong Africa . . . and [for an] African Renaissance”).

of culture.<sup>3</sup> They are demanding African solutions to what they see as uniquely African problems.<sup>4</sup>

Witchcraft tops the list of those unique problems. In colonial times, witchcraft was thought to be “the outstanding problem of the lawgiver in Africa.”<sup>5</sup> Today it remains central to statecraft. Fear of the occult<sup>6</sup> has not faded with apartheid but, surprisingly to many, has only intensified during the transition to democracy.<sup>7</sup> Witch killings rose dramatically in the early 1990s,<sup>8</sup> and since then ethnographic accounts have described an occult epidemic affecting rural and urban areas throughout the country.<sup>9</sup> Whether or not magical practices themselves are on the rise, certainly attacks on suspected witches continue today,<sup>10</sup> and locals have reported a widespread sense of vulnerability to bewitchment in both city and country.<sup>11</sup> A large majority of the citizenry believes in witchcraft.

One measure of witchcraft’s perceived prevalence is the frequency with which people defend against it. In daily life, citizens guard against attack not primarily by hunting down witches but by hiring traditional healers (a term that has replaced the pejorative “witch doctors”). These specialists—also commonly known as *inyangas* and *sangomas*—sell security by purporting to harness occult forces for good, to defend against supernatural harm and sometimes even to

3. Jean Comaroff & John Comaroff, *Reflections on Liberalism, Policulturalism, and ID-ology: Citizenship and Difference in South Africa*, 9 SOC. IDENTITIES 445, 449 (2003) [hereinafter Comaroff & Comaroff, *Reflections on Liberalism*] (noting that these leaders have begun to “revise the ‘post-ethnic’ universalism to which most of the [ANC leadership] was once fervently committed”); John Comaroff & Jean Comaroff, *Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa*, 29 LAW & SOC. INQUIRY 513, 522 (2004) [hereinafter Comaroff & Comaroff, *Policing Culture*].

4. John Hund, *Witchcraft and Accusations of Witchcraft in South Africa: Ontological Denial and the Suppression of African Justice*, 33 CILSA 366, 385 (2000); Isak Niehaus, *Witchcraft in the New South Africa: A Critical Overview of the Ralushai Commission Report*, in WITCHCRAFT, VIOLENCE AND THE LAW IN SOUTH AFRICA, *supra* note 2, at 93, 103.

5. MARTIN CHANOCK, *THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902–1936: FEAR, FAVOUR AND PREJUDICE* 321 (2001) (internal quotation marks and citations omitted).

6. Throughout, I use the noun “occult” to mean the realm of the supernatural, specifically of witchcraft and traditional healing. The adjective “occult,” similarly, means of or pertaining to the supernatural power involved in witchcraft or traditional healing.

7. Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 514; Isak Niehaus, *Witches and Zombies of the South African Lowveld: Discourse, Accusations, and Subjective Reality*, 11 J. ROYAL ANTHROPOLOGICAL INST. 191, 199 (2005) (“Discourses about witches and zombies have remained prominent, even in recent times . . .”) (citation omitted).

8. Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 513; Comaroff & Comaroff, *Reflections on Liberalism*, *supra* note 3, at 448 & 467 n.7; *Witchcraft in South Africa*, ECONOMIST, Dec. 9, 1995, at 85.

9. See Adam Ashforth, *An Epidemic of Witchcraft? The Implications of AIDS for the Post-Apartheid State*, 61 AFR. STUD. 121, 122 (2002); Jean Comaroff & John Comaroff, *Alien-Nation: Zombies, Immigrants, and Millennial Capitalism*, 101 S. ATLANTIC Q. 779, 779 (2002) (noting that belief in zombies had reached “epic, epidemic proportions”).

10. See, e.g., Prega Govender, *Witch-Hunting Youths Burn Dozens of Homes After Sportsmen Die*, SUNDAY TIMES (South Africa), Feb. 27, 2005, at 8 (reporting on an attack on scores of suspected witches); *Suspected Witch Dies After Mob Attack*, INDEP. ONLINE (South Africa), Oct. 15, 2006 (describing the death of a woman accused of witchcraft and stoned by a mob in the Eastern Cape).

11. See ASHFORTH, *supra* note 2, at 17–18 (discussing vulnerability in the city); Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 514 (discussing vulnerability in the country).

retaliate against witches themselves.<sup>12</sup> Traditional healers, who number in the hundreds of thousands, claim to derive their curative power from otherworldly forces and from special relationships with the ancestors.<sup>13</sup> According to the South African Department of Health, some eighty percent of the population consults them.<sup>14</sup>

Witchcraft presents a problem of justice. To see this, consider a basic definition: A witch is a human being who secretly uses supernatural power for the purpose of harming others. Occult aggression is always believed to be caused by another human being acting out of malevolence.<sup>15</sup> Belief in the occult therefore gives ordinary misfortune a moral significance: Once hardship is attributed to sorcery, it is transformed from something senseless into the meaningful result of human volition. Witchcraft, in other words, is seen to cause not simply *suffering*, which can result from a natural disaster or an illness, but *harm*, understood as the product of intentional action.<sup>16</sup> Consequently, sorcery is perceived to be unjust in much the same way as physical violence. And when citizens are subject to injustice at the hands of others, whether by physical or occult means, they call on government to punish, retaliate, and deter. Many Africans feel that such a governmental imperative is particularly strong in a democracy because that form of government carries a special obligation to serve the people and to guarantee them the personal security necessary for the full exercise of political freedoms.<sup>17</sup> Because disappointed citizens may comprise a significant majority of the population, their complaints could weaken the government's legitimacy and stability.

Existing law only exacerbates their sense of injustice. The Witchcraft Suppression Act, an apartheid-era statute based on earlier colonial models that remains on the books today, outlaws a wide variety of occult-related practices, including accusing someone of witchcraft and practicing traditional medicine.<sup>18</sup> Although the Act also criminalizes the practice of witchcraft, that provision has generally not been enforced, due to the difficulty of prosecuting a crime for which there is

12. The Zulu terms *inyanga* and *sangoma* are the most widespread, but the Sotho *ngaka* and Xhosa *igqirha* are also common. Although academic and elite discourse distinguishes between the two terms—*inyanga* meaning an herbalist who does not possess clairvoyant powers and *sangoma* referring to a diviner who is able to communicate with ancestors—everyday discourse uses the two terms interchangeably. Many *inyangas* also claim spiritual authority for their medicinal powers and often *sangomas* will use traditional medicine or *muthi*. ASHFORTH, *supra* note 2, at 52–53, 54.

13. *Id.* at 295; Jasper Raats, *People's Medicine*, MAIL & GUARDIAN (South Africa), Apr. 26, 2005 (estimating 200,000 traditional healers in South Africa).

14. Claire Keeton, *Sangomas to Join Formal Medical Fraternity*, SUNDAY TIMES (South Africa), May 9, 2004, at 4. This figure, commonly repeated, has been questioned. See ASHFORTH, *supra* note 2, at 51.

15. PETER GESCHIERE, *THE MODERNITY OF WITCHCRAFT: POLITICS AND THE OCCULT IN POSTCOLONIAL AFRICA* 22 (1997) (“[I]t is . . . a basic tenor to these discourses that they explain each and any event by referring to human agency.”).

16. ASHFORTH, *supra* note 2, at 10, 17.

17. *Id.* at 18; Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 541.

18. Witchcraft Suppression Act 3 of 1957, as amended by Act 50 of 1970. On the colonial roots of the statute, see CHANOCK, *supra* note 5, at 326. See also Cape of Good Hope Act 24 of 1886; Witchcraft Suppression Act of 1895.

no hard evidence.<sup>19</sup> Many Africans therefore view the Act as an unjust attempt to deny and denigrate a central aspect of their traditions.<sup>20</sup> Some have called for the law to be replaced with new legislation.

Now Parliament has taken a bold step toward occult regulation. The Traditional Health Practitioners Act of 2004 establishes a state agency tasked with overseeing traditional healers.<sup>21</sup> The Act directs the agency to screen out illegitimate healers, to license legitimate ones, and to punish the unauthorized practice of traditional medicine. Apparently, the idea is to bolster order and stability by reducing the need for citizens to resort to lawlessness in order to protect themselves against sorcery. For the first time, the government can claim that it is providing a state-sanctioned defense against bewitchment. Critically, it has achieved this by moving national policy away from culture-blindness and toward the sort of accommodation of traditional beliefs demanded by movements like Africanization.

Prominent proposals for additional legislation would draw the state further into combating witchcraft itself. Several of these proposals grew out of a government inquiry into witchcraft violence. The African National Congress (ANC) established a commission on occult-related violence in one of its first governmental acts after coming into power in 1994.<sup>22</sup> The Ralushai Commission, as it came to be known, conducted an investigation and ultimately proposed a Witchcraft Control Act that would subject suspected witches to criminal arrest, prosecution, and trial in state courts.<sup>23</sup> That proposal gained force in 1998, when the Commission on Gender Equality, an agency of the national government, held a conference on witchcraft violence that was attended by prominent leaders including then-Deputy President Thabo Mbeki. Delegates to the conference largely endorsed the Ralushai Commission's proposal to

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19. Hund, *supra* note 4, at 368 ("Anyone brought before the courts for practising witchcraft is set free for lack of concrete evidence.").

20. See ASHFORTH, *supra* note 2 at 265; Niehaus, *supra* note 4, at 107; N.V. Ralushai, *Summary of the Ralushai Commission Report, in WITCHCRAFT VIOLENCE AND THE LAW IN SOUTH AFRICA*, *supra* note 2, at 124, 127.

21. See Traditional Health Practitioners Act 35 of 2004 s. 4(1). In 2006, the Constitutional Court invalidated the Act, along with three other statutes, on the ground that certain legislators had not followed adequate procedures for facilitating public involvement. See *Doctors for Life Int'l v. Speaker of the Nat'l Assembly and Others*, 2006 (12) BCLR 1399, at \*169–70, 177, 189 (CC); see also *id.* at \*175 (noting that the Traditional Health Practitioners Bill had generated "huge interest"). The court gave Parliament eighteen months to re-enact the legislation, during which time the Act would remain in place. *Id.* at 189, 196. Recently, Parliament introduced a new Bill, the text of which is identical to that of the 2004 Act. Traditional Health Practitioners Bill, 20-2007; see also *id.* Memorandum on the Objects of the Traditional Health Practitioners Bill s (1)(b)(iii) (resolving that the text of the 2004 Act would serve as the text for the 2007 Bill); Wendy Jasson da Costa, *SA Consults China, India on Traditional Medicines*, CAPE TIMES (South Africa), July 5, 2007. Passage appears likely.

22. N. V. RALUSHAI ET AL., REPORT OF THE COMMISSION OF INQUIRY INTO WITCHCRAFT VIOLENCE AND RITUAL MURDERS IN THE NORTHERN PROVINCE OF THE REPUBLIC OF SOUTH AFRICA 1 (1996); see also Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 514.

23. RALUSHAI ET AL., *supra* note 22, at 54–55, 61 (recommending the criminalization of witchcraft); Niehaus, *supra* note 4, at 108 (describing the Ralushai Commission's recommendation).

criminalize witchcraft.<sup>24</sup> Although the idea has yet to be enacted, certain steps have already been taken toward state policing of supernatural offenses.<sup>25</sup>

Neighboring Zimbabwe recently banned bewitchment.<sup>26</sup> In 2006, lawmakers passed a statute that outlawed the use of practices “commonly associated with witchcraft.”<sup>27</sup> Courtroom evidence of witchcraft now may be given by experts, presumably including traditional healers,<sup>28</sup> who have long been subject to regulation there.<sup>29</sup> The BBC took the new law as “another sign that Zimbabwe’s government is continuing to move away from Western values and placing more emphasis on the country’s own traditions.”<sup>30</sup>

How do South Africa’s efforts to accommodate African witchcraft traditions cohere with the liberal political tradition? This Article argues that the regulation of traditional healers can be endorsed by liberals—provided the 2004 Act is amended in one critical respect—but that going further and criminalizing witchcraft itself would too deeply entwine the state in a particular religio-cultural tradition, seriously straining principles of equal citizenship and the rule of law. Getting this right is of critical importance both to the legitimacy of democracy in southern Africa and to the character of worldwide liberalism.

The argument unfolds in six parts. Part I, which defines and describes witchcraft beliefs and practices, also explains why liberals should remain agnostic on the question of witchcraft’s reality. Part II lays out the Article’s theoretical orientation. Liberal democracy is the political form that South Africa has adopted—that much is uncontroverted. In order to understand how recent occult-related laws relate to the liberal tradition, this Article starts with the framework of John Rawls, an orientation that it selects for good theoretical reasons. Yet it also suggests that Rawls’s theory of political liberalism should be compromised at critical points, and it accepts arrangements as consistent with liberalism that Rawls himself would have rejected.

Parts III through V evaluate three governmental strategies toward the occult from the perspective of liberalism. Part III endorses common law accommoda-

24. Harnischfeger, *supra* note 2, at 61. The Hund volume purports to be a collection of papers first read at the 1998 conference. John Hund, *Preface* to WITCHCRAFT VIOLENCE AND THE LAW IN SOUTH AFRICA, *supra* note 2, at 7–8; *cf.* COMMISSION ON GENDER EQUALITY, THE THOHAYANDOU DECLARATION ON ENDING WITCHCRAFT VIOLENCE (Sept. 10, 1998), available at <http://70.84.171.10/etools/newsbrief/1999/news0325>, at 2, 3–4 [hereinafter THOHAYANDOU DECLARATION] (endorsing the recommendations of the Ralushai Commission while not explicitly urging criminalization of occult attacks).

25. The South African Police Force formed an Occult-Related Crimes Unit to train officers who handle forensics at witchcraft-related crime scenes. *Devil Busters Go Bust?*, MAIL & GUARDIAN (South Africa), Mar. 19, 1999. Although the unit mainly investigates attacks on suspected witches, some police officers have investigated allegations of witchcraft. Niehaus, *supra* note 4, at 99.

26. Criminal Law Codification and Reform Act 23 of 2004 §§ 97–102 (Zimbabwe) (effective July 1, 2006); see also Steve Vickers, *Witchcraft Ban Ends in Zimbabwe*, BBC NEWS, July 2, 2006.

27. Criminal Law Codification and Reform Act 23 of 2004 § 98(1) (Zimbabwe).

28. *Id.* § 98(4).

29. See Traditional Medical Practitioners Act 38 of 1981 (Zimbabwe); Traditional Medical Practitioners Act 14 of 2002 (Zimbabwe).

30. Vickers, *supra* note 26.



tion, a practice through which courts have long eased punishments for witchcraft-related crimes, but it warns that the judicial practice alone may not do enough to give Africans a sense of equal citizenship. Part IV then defends the Traditional Health Practitioners Act on liberal grounds, contingent on one amendment: Parliament should make the law's licensing scheme permissive, not mandatory, so that dissenting healers—those who disagree with agency determinations—may practice without a license. Part V contends that outlawing witchcraft itself would risk too much damage to core commitments and ought to be strenuously resisted. Jailing accused witches would appear capricious to many citizens, not least some accused sorcerers, and thus would weaken the rule of law, among other values. The Article concludes by warning that if liberal democracy is to retain its attractiveness and legitimacy outside the West, it must not only accept certain accommodations of majority traditions but also reject those that push beyond its limits.<sup>31</sup>

## I. WITCHCRAFT AND HEALING

### A. WHAT IS WITCHCRAFT?

Witchcraft can be difficult to define, largely because beliefs and practices surrounding the occult vary from place to place. Even within a single community, beliefs are not typically organized into a coherent system. Still, the term retains a measure of conceptual coherence in practice. I propose the following definition, which I believe many Africans would accept: A witch is a human being who secretly uses supernatural power for nefarious purposes. Witchcraft, then, is the practice of secretly using supernatural power for evil—in order to harm others or to help oneself at the expense of others.<sup>32</sup>

Three features are critical to understanding witchcraft beliefs. First, sorcery is thought to be practiced in secret.<sup>33</sup> Unlike American Wicca, African witchcraft is not a faith that people openly profess. Rather, it is a second-order term of accusation or suspicion. Anxiety over secret wrongdoing is stoked by the belief that occult practitioners are invisible, operating at night or in the shape of familiars.<sup>34</sup> People who somehow do witness an act of sorcery are often said to suffer amnesia.<sup>35</sup> Some believe that bewitchment happens subconsciously, so

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31. I owe the phrase "the limits of liberalism" and similar formulations to conversations with John Comaroff.

32. Cf. Ashforth, *supra* note 9, at 126 ("Witchcraft in the South African context typically means the manipulation by malicious individuals of powers inherent in persons, spiritual entities and substances to cause harm to others."); ASHFORTH, *supra* note 2, at 12; E.E. EVANS-PRITCHARD, *WITCHCRAFT, MAGIC, AND ORACLES AMONG THE AZANDE* 1 (1976). Not only does this definition resonate with the academic literature, both classical and contemporary, but it also reflects my personal experience of common usage in South Africa.

33. GESCHIERE, *supra* note 15, at 22 ("By definition, witchcraft is practiced in secret . . .").

34. RALUSHAI ET AL., *supra* note 22, at 57 ("The most vexing problem surrounding witchcraft is that the activities of a witch cannot be witnessed by naked eyes.")

35. ISAK NIEHAUS, *WITCHCRAFT, POWER, AND POLITICS: EXPLORING THE OCCULT IN THE SOUTH AFRICAN LOWVFIELD* 111 (2001).

that the perpetrator may not even know whether he or she has directed unseen forces against others.<sup>36</sup> A witchcraft defendant in Cameroon told the court that he could not say whether he was culpable because, as he put it, "I am not God."<sup>37</sup> However, an accused witch will sometimes confess, an act that is considered the surest sign of guilt.<sup>38</sup>

A second feature is that witchcraft is a form of human rather than divine action. Witches are not spirits or gods but ordinary mortals who act against their victims out of mundane motivations such as jealousy or revenge.<sup>39</sup> Occult forces are themselves supernatural, yet they are always directed by humans.<sup>40</sup> For instance, occult medicine, or *muthi*, is occasionally said to have inherent agency in the sense that spiritual power works within it.<sup>41</sup> Yet it is always set in motion against its victim by some mortal actor.<sup>42</sup> Witchcraft therefore is rightly considered a worldly injustice even though it involves otherworldly forces.

Third, witchcraft is invariably wicked.<sup>43</sup> Witches are believed to act out of jealousy, or to further their own success at the expense of others, or even out of an inherent craving for causing harm.<sup>44</sup> Generally witches are accused of

36. RALUSHAI ET AL., *supra* note 22, at 4; cf. CHANOCK, *supra* note 5, at 324 (discussing findings of an expert who was uncertain whether witches were "conscious of their doings as witches." (citing HENRI JUNOD, *THE LIFE OF A SOUTH AFRICAN TRIBE* (1912)); EVANS-PRITCHARD, *supra* note 32, at 58 (assuming "a possessor of bad teeth [considered similar, but not identical, to witches] injures people's possessions without malice and perhaps also without intent").

37. GESCHIERE, *supra* note 15, at 78; see also EVANS-PRITCHARD, *supra* note 32, at 61 (noting that in certain circumstances "a man might well be a witch and yet not know that he is one").

38. See, e.g., ASHFORTH, *supra* note 2, at 259 ("Nothing satisfies the demand for justice in cases of witchcraft as much as confession."); NIEHAUS, *supra* note 35, at 116 ("Confessions . . . were the most authoritative evidence of witchcraft."); RALUSHAI ET AL., *supra* note 22, at 19 (recounting a case of confession). A complex relationship exists between confession and the belief that people may practice witchcraft without knowing it. Evans-Pritchard surmised that people unaware of their guilt may nevertheless perform a ritual confession, perhaps in order to soothe the social tension or because they doubt their own innocence. EVANS-PRITCHARD, *supra* note 32, at 59–60.

39. ASHFORTH, *supra* note 2, at 70.

40. GESCHIERE, *supra* note 15, at 22 ("[I]t is . . . a basic tenor to these discourses that they explain each and any event by referring to human agency.").

41. ASHFORTH, *supra* note 2, at 139.

42. There is an interesting tension between the universal belief that witchcraft is the product of human volition and the more occasional idea that it is practiced subconsciously. Evans-Pritchard, in a classic discussion, remarked that the beliefs of the Azande in this regard were simply "inconsistent." EVANS-PRITCHARD, *supra* note 32, at 57. People in that society firmly believed that witches were conscious agents. Yet when accused sorcerers were unable to recall performing the acts of which they are charged, sometimes they would conclude that they had acted without awareness. *Id.*

43. According to Ralushai, a witch is "a person who is believed to be endowed with powers of causing illness or ill luck or death to the person that he wants to destroy." TRUTH AND RECONCILIATION COMMISSION, 6 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, § 1, ch. 3, at 333 (2003), available at <http://www.info.gov.za/otherdocs/2003/trc/> [hereinafter TRC REPORT] (quoting Ralushai testimony); see also EVANS-PRITCHARD, *supra* note 32, at 1, 18; Monica Hunter Wilson, *Witch Beliefs and Social Structure*, 61 AM. J. SOC. 307, 307–08 (1951).

44. EVANS-PRITCHARD, *supra* note 32, at 13–14 (defining *moloi* as someone who "destroys property, brings disease, or misfortune, and causes death, often entirely without provocation, to satisfy his inherent craving for evil doing"). Evans-Pritchard's account, which observes that witches often strike randomly out of inherent evilness, contrasts with some others, which stress instead that although

attacking people within their spheres of intimacy like family members or neighbors.<sup>45</sup> They are said to employ various forms of harmful magic, including potions, lightning, familiars, and zombies.<sup>46</sup> Although they may use occult forces for seemingly innocuous purposes—such as to fly from Pretoria to Cape Town in a single night or to travel to Johannesburg on a slice of brown bread, using a spoon to steer<sup>47</sup>—nevertheless these acts of magic ultimately serve malicious objectives.<sup>48</sup>

Accused witches can be young or old, though they are generally not children, and they can be men or women, although women are generally thought to outnumber men.<sup>49</sup> Some ethnographers have found that people suspected of

witches always act wrongly or illegally, they do not attack without cause. A classic study found that witches attacked those with whom they had quarreled. Those who were on good terms with their neighbors would have no reason to fear witches. Wilson, *supra* note 43, at 308.

45. See ASHFORTH, *supra* note 2, at 70–71.

46. RALUSHAI ET AL., *supra* note 22, at 15, 18–21.

47. *Id.* at 23.

48. Anthropologists working elsewhere in Africa have warned against too easily associating witchcraft with immorality. GESCHIERE, *supra* note 15, at 12–13. English and French terms for witchcraft, according to this scholar, carry a moralizing connotation that is not present in corresponding African words. *Id.* at 194–95. Occult forces, they say, can be used for good as well as for evil—for instance, to protect oneself from danger or else to succeed in work or love. *Id.* at 13. Two responses should dispel these concerns. First, Western terms like witchcraft and *sorcellerie*, along with whatever moralistic connotations they may carry, are commonly used by Africans themselves. *Id.* at 14. For that reason, virtually every serious writer on the subject employs the Western terms as well. Second, the English term witchcraft does in fact seem to refer exclusively to nefarious uses of occult power (at least in southern Africa if not elsewhere on the continent). Now admittedly occult forces can work both to harm people and also to heal them, and so ambiguity does pervade this discourse. Whether protecting one's wife against seducers by giving her a medicine that will purportedly cause any adulterer to waste away constitutes healing or sorcery may depend on one's perspective. See David Simmons, *African Witchcraft at the Millenium: Musings on a Modern Phenomenon in Zimbabwe*, 7 J. INT'L INST. 1, 2 (2000), available at <http://www.umich.edu/iinet/journal/vol7no2/simmons.htm>. Nevertheless, a fairly clear analytic distinction separates the evil manipulation of those forces, called witchcraft, from their use for healing or defense, which is referred to as traditional healing. See also NIEHAUS, *supra* note 35, at 17, 26, 31 (suggesting that before 1960 the term witchcraft was morally ambiguous in South Africa, but that today there are only two discrete categories: evil witches and good healers).

African terms for witch can correspond imperfectly with the English word in other ways as well. In northern provinces, for instance, “witch” translates to several non-Western terms, including *muloyi* (Venda), *moloi* (Northern and Southern Sotho, Setswana), and *noyi* (Tsonga). See RALUSHAI ET AL., *supra* note 22, at 4; see also Niehaus, *supra* note 7, at 191 (defining the Northern Sotho term *moloi*). Some of these signify only people who inherit occult ability from their mothers and not those who acquire it, while others include both. Niehaus, *supra* note 7, at 191; RALUSHAI ET AL., *supra* note 22, at 14–15. Yet again although the equivalence is not perfect, the English term witch is commonly used by Africans alongside African terms.

Finally, this Article's definition blurs a classic distinction between witches and sorcerers. E.E. Evans-Pritchard first drew this distinction, which was meant to separate out those who have inherited supernatural powers, or witches, from those who actively learn forms of magic and potion-making, namely sorcerers. See EVANS-PRITCHARD, *supra* note 32, at 1; Wilson, *supra* note 43, at 307. Although the difference between these two has some currency among academics and intellectuals, it does not appear to be common in everyday discourse in contemporary South Africa and therefore it is not observed here. Cf. GESCHIERE, *supra* note 15, at 225 n.1 (using terms “witchcraft” and “sorcery” interchangeably).

49. RALUSHAI ET AL., *supra* note 22, at 14, 58.

casting spells tend to be elderly, poor, or otherwise marginalized within their societies.<sup>50</sup> But others have observed exactly the reverse: that witchcraft accusations target elites who are suspected of having used occult power to achieve their success.<sup>51</sup> One aspect of the tradition seems fairly certain: White people are not accused of practicing witchcraft, nor are they victimized by it.<sup>52</sup>

Belief in the occult is widespread. Africans comprise some seventy-five or eighty percent of the population of South Africa,<sup>53</sup> and among them fear of the occult is commonplace. This is true even among people who also observe Christianity.<sup>54</sup> The Ralushai Commission reported that “belief in witchcraft is as prevalent as ever” and it “form[s] part of a basic cultural, traditional, and customary principle of Africans in South Africa and Africa as a whole.”<sup>55</sup> That report has been criticized for faulty scholarship,<sup>56</sup> but here its conclusion is not particularly controversial. Witchcraft beliefs are not limited to a particular economic class, to rural areas, to non-professionals, or to older generations, but instead are widely (although perhaps not evenly) held across contemporary Africa.<sup>57</sup> Recognition of these beliefs therefore may well impact the legitimacy of democratic experiments in southern Africa.

Modernization and democratization do not seem to have weakened occult convictions.<sup>58</sup> On the contrary—and fascinatingly—violence against witches exploded *after* the transition to democracy in South Africa began. By one estimate, for example, 676 suspected witches were killed in Limpopo Province alone in the first half of 1996, the year the final constitution was adopted.<sup>59</sup> By

50. Niehaus, *supra* note 4, at 113–14.

51. ASHFORTH, *supra* note 2, at 97–100 (recounting the story of Moleboheng, whose mother was accused of using witchcraft to obtain a house that actually was built with money supplied by Moleboheng); GESCHIERE, *supra* note 15, at 5. Jean and John Comaroff resolve the tension by saying that suspects are often “people of conspicuous, unshared wealth and undue influence” but that “it is old, defenseless females who tend to be attacked” because the rich and powerful are difficult to reach. Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 525.

52. RALUSHAI ET AL., *supra* note 22, at 23–24. *But see* Simmons, *supra* note 48, at 3 (reporting one case of a white victim of alleged bewitchment in Zimbabwe).

53. *See* South African Government Information, *The Land and Its People*, available at <http://www.info.gov.za/aboutsa/landpeople.htm#population>.

54. *See* *Bishops Warn Priests Against Witchcraft*, INDEP. ONLINE (South Africa), Aug. 16, 2006 (reporting that the South African Catholic Bishops Conference had warned priests against combating witchcraft by calling on ancestors); *Worshipping the African Way*, INDEP. ONLINE (South Africa), Dec. 21, 2006 (describing one instance of blending of beliefs in Christianity and in witchcraft).

55. RALUSHAI ET AL., *supra* note 22, at 57; *see also* Gordon L. Chavunduka, *Notes on African Witchcraft*, in WITCHCRAFT VIOLENCE AND THE LAW IN SOUTH AFRICA, *supra* note 2, at 136, 137 (confessing his own belief in witchcraft); Leo Igwe, *A Skeptical Look at African Witchcraft and Religion*, 11 SKEPTIC 72, 72 (2004).

56. Niehaus, *supra* note 4, at 94–95.

57. *See* JEAN COMAROFF & JOHN COMAROFF, MODERNITY AND ITS MALCONTENTS: RITUAL AND POWER IN POSTCOLONIAL AFRICA XXV (1993); Hund, *supra* note 4, at 384 (concluding from admittedly unscientific research that about eighty percent of southern African students believe in witchcraft, regardless of sex, age, ethnicity, or level of formal education).

58. *See* COMAROFF & COMAROFF, *supra* note 57, at xxv; GESCHIERE, *supra* note 15, at 2.

59. *See* Comaroff & Comaroff, *Reflections on Liberalism*, *supra* note 3, at 467 n.7 (citing *Northern Province Targets “Witch” Killers*, MAIL & GUARDIAN (South Africa), Sept. 27, 1996).

another, 146 occult-related deaths occurred there during the last ten months of 1996.<sup>60</sup> Ethnographic accounts since that time have suggested that there may be a witchcraft “epidemic.”<sup>61</sup> Even when suspicions do not break out into violence, they affect ordinary lives in quotidian but still powerful ways, leading people to worry that enchanters will attack them, their families, or members of their communities.<sup>62</sup>

#### B. TRADITIONAL HEALERS

Traditional healers treat physical and mental ailments by harnessing the same occult forces that witches use, but for good rather than evil—to defend against supernatural harm and sometimes even to retaliate against witches themselves.<sup>63</sup> The term traditional healer only recently replaced the colonial phrase witch doctor. Many Africans supported the change because they felt that the older term wrongly associated healing with witchcraft—a connection that they found insulting—and because they felt that the colonial term harkened back to a general disrespect for African traditions.<sup>64</sup> The new term, however, has difficulties of its own. Chiefly, the adjective “traditional” evokes an unchanging timelessness, when in fact many contemporary healers are modern figures who embrace technology, dress in business suits, drive luxury automobiles, and continually develop new techniques. These *sangomas* and *inyangas* innovate freely, dispensing substances that often have little connection to ancient wisdom.<sup>65</sup> Yet the new term arguably remains appropriate to the degree that it signifies that healers still ultimately derive their power from relationships with the ancestors.<sup>66</sup>

Older academic literature conventionally described two types of healers: herbalists or *inyangas* and diviners or *sangomas*. Herbalists specialize in traditional medicine (*muthi*), while diviners enjoy clairvoyant powers and have a more spiritual aura.<sup>67</sup> (Interestingly, herbalists’ medicines are now being studied

60. *Witchcraft in South Africa*, *supra* note 8. Another source indicates that at least 389 suspects were killed between 1985 and 1995 but that figure is likely to be vastly understated. See Niehaus, *supra* note 4, at 105.

61. See Ashforth, *supra* note 9, at 122; see also ASHFORTH, *supra* note 2, at 255 (“Hardly a week passes in South Africa without press reports of witches being killed or of mutilated bodies being found with organs removed for purposes of sorcery.”); Comaroff & Comaroff, *supra* note 9, at 779 (noting that belief in zombies had reached “epic, epidemic proportions”).

62. ASHFORTH, *supra* note 2, at 66 (describing how, although public action against witches is rare, accusations nevertheless circulate through everyday types of discourse such as gossip).

63. Like witchcraft, however, traditional healing carries some moral ambiguity. See *supra* note 48 (discussing the moral quality associated with witchcraft).

64. See ASHFORTH, *supra* note 2, at 138–39; Jerome Cartillier, *Sangomas Revel in New Status*, MAIL & GUARDIAN (South Africa), Sept. 10, 2004.

65. See ASHFORTH, *supra* note 2, at 59, 296 (describing “the general innovation featured by successful healers”).

66. See *id.* at 295; Hund, *supra* note 4, at 386 (“In order to cure people it is necessary to enter the world of the ancestors.”) (internal quotation marks and citation omitted).

67. See ASHFORTH, *supra* note 2, at 52–53; Parliament of the Republic of South Africa, National Council of Provinces, Report of the Select Committee on Social Services on Traditional Healers 6

by the government as an effort to better appreciate the efficacy of indigenous knowledge systems.<sup>68</sup>) Diviners enjoy the unique ability to detect witchcraft, according to one conventional account.<sup>69</sup> Newer ethnographic evidence, however, suggests that the distinction between these two types is not sharp in ordinary parlance. Many *sangomas* use traditional medicine, particularly when treating members of the public for a fee, and virtually all *inyangas* claim ancestral or supernatural authority for their healing power.<sup>70</sup> Everyday discourse therefore uses the two terms almost interchangeably.<sup>71</sup> Some distinctions arguably remain, such as that only *sangomas* participate in drumming and dancing rituals.<sup>72</sup> But for most practical purposes the two terms are synonymous and are covered by the English term traditional healer.

Markets for traditional healing are vibrant today. According to the National Department of Health, again, some eighty percent of the population consults traditional healers.<sup>73</sup> Other government officials have estimated that eighty-five percent of African households<sup>74</sup> and between sixty and eighty percent of African communities<sup>75</sup> patronize *inyangas* or *sangomas*. Parliament's Select Committee on Social Services reported that 350,000 traditional healers are practicing today, as opposed to 250,000 Western doctors.<sup>76</sup> And according to an influential report by the monitoring group NGO Traffic, one-third of health care services in the province of KwaZulu-Natal are based on indigenous medicine.<sup>77</sup> In the nation as a whole, more than 27 million people are reported to use traditional medicines.<sup>78</sup> To be sure, many of these figures fall short of scientific certainty. What does seem certain, however, is that many South Africans regularly seek treatment from traditional healers. And because those healers function largely to protect against witchcraft, their popularity also indicates the ubiquity of witchcraft beliefs.

(1998) [hereinafter Report of the Select Committee on Social Services]. Other African terms are the Sotho *ngaka* and Xhosa *igqirha*, though *inyanga* and *sangoma* are the most commonly heard in national media and politics. See ASHFORTH, *supra* note 2, at 52.

68. See generally Madhavi Sunder, *The Invention of Traditional Knowledge* (Feb. 24, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=890657>.

69. Anthony Minnaar et al., *Witch Killing with Specific Reference to the Northern Province of South Africa*, in *VIOLENCE IN SOUTH AFRICA: A VARIETY OF PERSPECTIVES* 175, 182–83 (Elireza Bornman et al., eds., 1998).

70. "The powers underpinning virtually every kind of nonmedical healing in South Africa derive from personal relationships with ancestors and other spiritual beings." ASHFORTH, *supra* note 2, at 294. Even fees are often decided according to relationships with invisible beings. See *id.* at 297.

71. See ASHFORTH, *supra* note 2, at 55–56, 292. Terms in Sotho carry no distinction between herbalists and diviners. NIEHAUS, *supra* note 35, at xiii.

72. These drumming rituals are central to the *ngoma* cult. See ASHFORTH, *supra* note 2, at 55–56.

73. Report of the Select Committee on Social Services, *supra* note 67, at 3; see also Keeton, *supra* note 14. This figure, commonly repeated, has been questioned. See ASHFORTH, *supra* note 2, at 51.

74. Niehaus, *supra* note 4, at 106 (quoting RALUSHAI ET AL., *supra* note 22, at 48–49).

75. Report of the Select Committee on Social Services, *supra* note 67, at 3.

76. *Id.*

77. Raats, *supra* note 13 (discussing the findings of NINA T. MARSHALL, *SEARCHING FOR A CURE: CONSERVATION OF MEDICINAL WILDLIFE RESOURCES IN EAST AND SOUTHERN AFRICA* (NGO Traffic 1998)).

78. *Id.*

## C. WITCHCRAFT AND INJUSTICE

Because witchcraft discourses attribute adversity to the wrongful acts of other citizens, they transform ordinary misfortune into a matter of justice. Some influential Africans therefore think the government has a responsibility to address occult violence in just the same way that it protects people against physical violence.

Witchcraft works like a theodicy—it explains misfortune and answers perennial human questions: Why are we suffering? Why us? Why now?<sup>79</sup> Traditional belief in sorcery answers these questions by attributing hardship to the malevolent actions of another.<sup>80</sup> According to this view, any seemingly natural affliction can ultimately be attributed to a hex, *muthi*, zombies, or the like. When ordinary troubles occur with extraordinary ferocity, in noticeable patterns, or in a strange manner, people begin to suspect an underlying occult cause.<sup>81</sup> Lightning bolts, for instance, are commonly credited to sorcery, as are automobile crashes and illnesses. Of course most everyone understands that pneumonia is caused by a virus. But that superficial explanation leaves open the question of deeper malice: What caused the virus to strike this particular person at this particular time? Moreover, supernatural accounts function not only to explain but also to evaluate. They provide a moral vocabulary that people use to ask and answer fundamental questions about evil.<sup>82</sup>

Occult interpretations have the potential to explain not only natural calamities but also social and political misfortunes. Loss of popularity, being fired from a job, or even failing to win an election can be ascribed to witchcraft. Although some reportedly believe that *every* affliction is the result of enchantment,<sup>83</sup> this sort of determinism is far from universal. Nevertheless, much social adversity is loosely linked to the occult. As the leading ethnographer of daily life in contemporary Soweto put it, “[i]n a world of witches, all conflicts have an occult dimension.”<sup>84</sup>

## D. POLICING WITCHCRAFT

Currently, the perceived injustices caused by witchcraft are redressed, if at all, by a rough hodge-podge of public and private authorities—a situation that has left most Africans dissatisfied and that has intensified calls for legislative action.

79. See Ashforth, *supra* note 9, at 127; EVANS-PRITCHARD, *supra* note 32, at 18 (“[T]he concept of witchcraft provides [Azande people] with a natural philosophy by which the relations between men and unfortunate events are explained . . .”).

80. ASHFORTH, *supra* note 2, at 10; EVANS-PRITCHARD, *supra* note 32, at 1.

81. See RALUSHAI ET AL., *supra* note 22, at 58.

82. Steffen Jensen & Lars Buur, *Everyday Policing and the Occult: Notions of Witchcraft, Crime, and “the People,”* 63 AFR. STUD. 193, 193 (2004) (“The occult is, in other words, a moral language, as well as a practical ideology . . .”). For a classic account of witchcraft discourse as a language of values, see Wilson, *supra* note 43, at 309; see also EVANS-PRITCHARD, *supra* note 32, at 18.

83. See Igwe, *supra* note 55, at 74; see also Minnaar et al., *supra* note 69, at 180.

84. ASHFORTH, *supra* note 2, at 313.

Government has the authority to police witchcraft under the Witchcraft Suppression Act of 1957.<sup>85</sup> That law, which has its roots in colonial-era legislation that aimed to stamp out the practice altogether, criminalizes virtually all witchcraft-related conduct, including accusing anyone of practicing witchcraft, engaging in divination techniques designed to detect witches, and the practice of witchcraft itself.<sup>86</sup> Critically, the 1957 Act effectively prohibits all forms of private policing because it bans divination, which is the only recognized technique for detecting witches. And the prohibition against witchcraft accusations makes trying witches virtually impossible. For instance, one woman was brought before a *kgoro* (traditional court), where she was accused of causing lightning to strike a neighbor. The court expelled her from the village. Later, the villagers who had accused her of casting spells were themselves tried in state court and charged with violating the 1957 Act.<sup>87</sup> As a result of that law and other social factors, traditional tribunals that once adjudicated accusations of witchcraft have ceased to operate.<sup>88</sup>

In theory, the Act might be read to compensate for its ban on customary courts by asserting a governmental monopoly over the policing of sorcery itself. Yet in practice, the anti-witchcraft provisions of the Act are seldom enforced. Police have refused to investigate and prosecute suspected witches because of difficult problems of proof: How is it possible to root out a suspect who operates in secret and cannot be detected without assistance from the ancestors?<sup>89</sup> Police have sometimes arrested witch accusers but more often they have avoided local disputes, acting only to the extent necessary to protect accused witches from physical harm (and often not even to that extent).<sup>90</sup>

What results is perhaps the worst possible combination of government policies from the perspective of many Africans: On the one hand, traditional techniques of resolving witchcraft disputes have been outlawed, while, on the other hand, those seen as committing acts of occult aggression have escaped both governmental and traditional punishment. During apartheid, many people inferred from this combination of policies that the government had sided with witches and was even relying on them to bolster its power. Citizens still view the Witchcraft Suppression Act as an unjust remnant of colonial law that badly denigrates African religion and culture.<sup>91</sup>

In the absence of police protection and traditional courts, various private actors have taken up the struggle against witchcraft. Chief among these actors

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85. Witchcraft Suppression Act 3 of 1957, as amended by Act 50 of 1970.

86. *Id.*

87. RALUSHAI ET AL., *supra* note 22, at 136. The accusers were ultimately acquitted.

88. Hund, *supra* note 4, at 387.

89. See ASHFORTH, *supra* note 2, at 314.

90. See Niehaus, *supra* note 4, at 99.

91. See, e.g., RALUSHAI ET AL., *supra* note 22, at 54 ("This Act is regarded by the traditional courts as a very unjust piece of legislation, because its aim is not to punish witches, but those individuals who name others as witches."); see also Ralushai, *supra* note 20, at 127.



are young militants—or “comrades” as they are known—who may spontaneously and informally assemble in large groups to hunt down and punish suspected witches.

Often witch hunts by these young activists have a political character. During the anti-apartheid struggle, young militants sought to punish people whom they suspected of killing fellow protesters by means of nefarious enchantment.<sup>92</sup> In 2000, the Truth and Reconciliation Commission (TRC) granted amnesty to more than thirty young people who had been convicted of murder and other crimes in connection with witch killings in the early 1990s.<sup>93</sup> Under the statutory standard for granting amnesty, an applicant’s crime had to be political—it had to have been “associated with a political objective” and it must have concerned “conflicts of the past.”<sup>94</sup> The TRC Amnesty Committee found that several young militants had indeed acted to further political aims.<sup>95</sup> Chiefs had effectively formed a tier of local government at the time and had been closely aligned with the apartheid regime. Traditional leaders “were perceived by the youth to be a front for the South African Government,”<sup>96</sup> and in fact had helped to administer the apartheid regime at the local level.<sup>97</sup> In some cases, victims of witch hunts were directly involved in government and were overtly opposed to the liberation movement.<sup>98</sup> The Amnesty Committee held that liberation forces had “used cases of witchcraft . . . to politicise communities.”<sup>99</sup> It found a prevalent belief among those who “sought democratic change” that traditional authorities had used witchcraft for counter-democratic purposes.<sup>100</sup> Failure of

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92. See TRC REPORT, *supra* note 43, at 41.

93. See Truth and Reconciliation Commission, Amnesty Committee Decision, Application in Terms of Section 18 of the Promotion of National Unity and Reconciliation Act 34 of 1995, In re: Ndwamato Amos Muhadi and 39 Others 6 (2000), available at <http://www.doj.gov.za/trc/decisions/2000/ac20094.htm> [hereinafter TRC Amnesty Committee Decision]; see also TRC REPORT, *supra* note 43, § 1, ch. 3.

94. See Promotion of National Unity and Reconciliation Act 34 of 1995, § 20(1)(b) (requiring, *inter alia*, that a TRC amnesty application concern a crime that was “associated with a political objective committed in the course of the conflicts of the past”).

95. TRC REPORT, *supra* note 43, at 40. The TRC conclusion that these witch hunts were politically motivated is contestable. Much of the evidence shows only that the killers used vague political language and that they associated their victims with the apartheid regime in some way or another while also claiming that they had been involved in witchcraft. At the very least, their motives were complex.

96. TRC Amnesty Committee Decision, *supra* note 93, at 4; see also TRC REPORT, *supra* note 43, at 333 (“Apartheid legislation had largely transformed traditional leaders into political functionaries who were seen not only as corrupt and self-serving but also as lackeys of the apartheid regime.”).

97. TRC Amnesty Committee Decision, *supra* note 93, at 4–5.

98. See, e.g., *id.* at 6 (describing a case where the suspected witch came from a prominent family that was affiliated with the apartheid regime—the man had repeatedly interfered with meetings of supporters of the liberation movement). In the *Magoro* case, however, the Committee indicated only that the suspected witch had some sort of government affiliation. *Id.* at 15 (“The deceased held a leadership position connected to government.”).

99. *Id.* at 41.

100. *Id.* at 4–5. The TRC seemed to think that this was a finding of the Ralushai Commission. Presumably it received that impression from Prof. Ralushai’s testimony. It wrote: “It seems that it was one of the findings of the [Ralushai] commission that the chiefs in general did believe in witchcraft.

authorities—traditional and governmental alike—to prosecute suspected witches had fed a belief that the government was protecting witches.<sup>101</sup>

Today, students still lead campaigns against witchcraft—though their objectives are not always as overtly political as in the past. For instance, in February 2005 three teenage soccer players were killed when their pickup truck overturned on the way home from a match outside their village in the northern province of Limpopo.<sup>102</sup> Community members blamed their deaths on witchcraft. Later that day, some one hundred young people rampaged through the village torching the homes of suspected witches.<sup>103</sup> By the time the police arrived, twenty-nine houses had been burned to the ground. Targets included chiefs and headmen, Christian pastors, and African traditional healers. Police officers arrested over one hundred youths and formed two task forces to address the burnings. The mayor of the village warned that “[a] lot of the villagers still believe in witchcraft. There is talk that the people want to kill the witches.”<sup>104</sup> Gangs of young people operate not only in the countryside but also in urban areas like the Johannesburg township of Soweto.<sup>105</sup>

Although a great many Africans fear witches, they do not always welcome protection by the youth. Some community members regard young comrades as heroes, but others view their uncontrolled prosecution of witches as a dangerous threat to law and order and to the authority of elders.<sup>106</sup> Probably the majority worries that young militants are punishing sorcerers in a lawless manner.<sup>107</sup>

Few other actors have the power to combat perceived occult aggression, however. Traditional authorities occasionally punish occult wrongdoing even though their central anti-witchcraft techniques are illegal under the Witchcraft Suppression Act. Chiefs and headmen interact in complex ways with local police, comrades, and other private authorities such as the church.<sup>108</sup> Some evidence suggests that state officials have referred witchcraft disputes to tradi-

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Coupled with this, was the bona fide belief in the area that the chiefs were associated with ritual murders which flowed from witchcraft.” *Id.* at 5. However, the claim that chiefs were seen to use witchcraft to bolster their political authority does not appear in the final version of the Ralushai Commission Report. Only one short paragraph addresses the role of traditional leaders in witchcraft activity, and it only finds that chiefs were associated with the apartheid state and that they therefore “became a target of the now politicized youth.” See RALUSHAI ET AL., *supra* note 22, at 49; see also TRC REPORT, *supra* note 43, at 40 (relying on a similar passage in the Ralushai Commission’s interim report). It does not support the assertion that chiefs were seen to bolster their political power by occult means.

101. TRC REPORT, *supra* note 43, at 41.

102. Govender, *supra* note 10, at 8.

103. *Police Arrest 90 After Limpopo “Witch-Hunt,”* MAIL & GUARDIAN (South Africa), Feb. 25, 2005.

104. Govender, *supra* note 10, at 8.

105. See ASHFORTH, *supra* note 2, at 243–48 (recounting a mob killing of a suspected witch in Soweto).

106. See NIEHAUS, *supra* note 35, at 151–52.

107. See RALUSHAI ET AL., *supra* note 22, at 15, 30, 51.

108. On the role of the church in combating witchcraft, see *Worshipping the African Way*, *supra* note 54.

tional leaders.<sup>109</sup> The inverse has also occurred: Traditional authorities have handed accused conjurers over to state authorities, often for their own protection.<sup>110</sup> Non-state entities also interact with one another entirely apart from government involvement. Chiefs, for instance, have asserted themselves against young militants with varying degrees of confidence, depending on the strength of their political alliances with other civic actors.<sup>111</sup>

Empirical accounts do not support the supposition that democratization will bring more consistent enforcement of uniform laws without regard to religion or culture. On the contrary, available evidence suggests the opposite—that traditional authorities are becoming increasingly involved in adjudicating witchcraft disputes, and that customary techniques of detection are blending with state legal apparatuses in more open ways.<sup>112</sup> The existing patchwork of state and non-state enforcement of anti-witchcraft norms has satisfied few. It has put serious strain on democratic commitments to the rule of law, to security of the person, and to an undifferentiated citizenship. As a consequence, popular calls for government intervention have intensified—leading to the 2004 Healers Act and to further proposals for the criminalization of witchcraft itself.

#### E. WITCHCRAFT AND LIBERALISM

How might liberal democrats think about the problem of occult injustice? Some will suggest that it is not necessary to consider difficult questions of whether and how to regulate occult practices because witchcraft does not exist. On this view, government ought not act in the realm of the imaginary because it has no business accommodating or even cognizing majority beliefs that are plainly mistaken. Of course the state may and should enforce general laws

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109. Take the case of Elisa Boloka, who went to the police after a woman and her daughter came to Boloka's home and accused her of bewitching the daughter. A prosecutor investigated and, having decided not to pursue the case, referred Elisa Boloka to a tribal court. *RALUSHAI ET AL.*, *supra* note 22, at 129 (citing magistrate court records from 1995 and also noting that the prosecutor did not possess the authority to refer the case to a tribal court). In another case dating from 1994, a woman accused two other villagers, Annah Sebola and Annah Lhaka, of being witches and threatened to take them to a witch doctor to prove the charge. *Id.* at 144. When community members assembled to discuss the situation, they decided that there was no evidence of witchcraft and that the accusers should be reported to the police. However, the prosecutor declined to pursue the matter, which he instead referred to a tribal court. *Id.* at 145 (again reiterating that the prosecutor lacked the power to do so).

110. For instance, Wilheminah Mokgawa allegedly accused another person of going to a witchdoctor to learn how to bewitch others. When the accused complained to the local headman, the headman directed her to the police. Subsequently, Wilheminah Mokgawa was arrested, tried, and ultimately acquitted of leveling an accusation of witchcraft in violation of the Witchcraft Suppression Act. *Id.* at 126 (relying on judicial records from 1993).

111. One new chief bolstered his authority by joining the Zion Christian Church (ZCC), the most powerful Christian sect in the area and one of the largest and fastest-growing in the nation. He held revivalist meetings at his residence and appointed senior members of the ZCC as advisors in his court. In this way, he succeeded in shoring up his newfound authority to the degree that he was able to take stronger positions against accusations of witchcraft and to establish his court as the primary forum for adjudicating conflicts over occult activity. See *ASHFORTH*, *supra* note 2, at 186.

112. See Comaroff & Comaroff, *supra* note 2, at 197–98 (describing ways in which state officials have increasingly accommodated occult beliefs and practices).

against murder and the destruction of property in the context of occult practices—as in all other contexts—but it should hesitate to go further because occult beliefs are false.<sup>113</sup>

Others may take exactly the opposite approach: If witchcraft is real, then government ought to treat occult aggression identically to physical aggression and assert a monopoly over its legitimate policing. A democracy should not hesitate to implement the will of the strong majority of the people, who wish to be protected against harm by wrongdoers so that they can feel secure and may pursue their private ends free of fear for their safety.<sup>114</sup> Many Africans treat the occult not as the object of belief, but as a matter of knowledge.<sup>115</sup> Crediting their worldview would entail outlawing supernatural harm.

On either of these views, government should tailor its policies to its position on the reality of witchcraft. But liberal democrats take a different approach: They cultivate neutrality on the question of witchcraft's reality, just as they seek to remain neutral with respect to other religious and cultural convictions. Exemptions from drug laws for Native Americans who use peyote in sacred rituals, for instance, would not be rejected (or implemented) for the sole reason that the Native American belief in the spiritual efficacy of peyote was deemed to be false (or true).<sup>116</sup> Similarly, Prohibition-era laws that allowed Catholics to use wine in communion, despite the general ban on alcohol, would not have been condemned (or lauded) on the ground that the Catholic belief in transubstantiation was wrongheaded (or sensible).<sup>117</sup> Examples like these could be multiplied—more than 2,000 statutes in the United States accommodate religious beliefs in similar ways.<sup>118</sup> South Africans could decide whether to accommodate witchcraft convictions using similarly neutral rationales.

Some South African leaders, including a few non-Africans, do say that government ought to embrace the reality of occult powers and legislate accordingly. For instance, John Hund, a law professor at the University of South Africa, argues that because witchcraft is real, fines ought to be imposed on people found guilty of practicing it.<sup>119</sup> Likewise, Africanists sometimes advocate the criminalization of witchcraft by maintaining that occult forces are not in fact imaginary.<sup>120</sup> Presumably many others deny that witchcraft exists and

113. I owe this point to participants at the New York Junior Faculty Colloquium at Fordham Law School, where I presented this Article in draft form. *See also* Mavhungu, *supra* note 2, at 116–17 (citing examples of witchcraft denials).

114. I am grateful to Brian Tamanaha for raising this possible perspective in a private conversation.

115. My thanks for this point go to John Comaroff, who raised it in an e-mail message.

116. *See* 21 U.S.C. § 812(c) (2000).

117. *See* National Prohibition Act, ch. 85, Title II, § 6, 41 Stat. 305, 311 (1919).

118. Michael McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 5 (2000) (including both state and federal statutes in the 2,000 figure).

119. Hund, *supra* note 4, at 388 (“There is . . . reason to believe . . . that African witchcraft is something real and not just imaginary. State enforcement of a Western world view which denies the reality of African witchcraft has not worked, and is not the answer.”).

120. RALUSHAI ET AL., *supra* note 22, at 61 (“The reason for bringing any of these practitioners within the scope of the criminal law is that the practice of witchcraft, and of witch-finding, do actually

oppose any occult-related legislation on that ground.

Liberalism is designed to manage just this sort of dissensus on fundamental questions of religious, philosophical, and moral ontology. Its solution is to remove the state from questions of ultimate reality, so that political control of the government does not become synonymous with control over the religious and cultural life of the citizenry.<sup>121</sup> Democracy of that sort lowers the stakes of conflict over political control so that the group in power is not also able to impose its comprehensive views. That does not mean, however, that the state is prohibited from accommodating the beliefs of a large majority of the people. So long as it can do so without violating the rights of dissenters or other principles of justice, it is permitted (and sometimes required) to protect private commitments concerning matters of ultimate value. In fact, modern democracies do so all the time.

## II. LIBERALISM IN AFRICA

This Part begins by explaining why it makes sense to adopt a liberal standpoint—chiefly because that political form was almost certainly adopted in the 1996 constitution. It then justifies the choice of a Rawlsian starting-point, explaining why Rawls's theory of political liberalism offers a defensible framework for the limited project of this Article. Yet it also cautions that Rawls's theory cannot be applied rigidly. Certain solutions that political liberalism would reject can and should be seen as consistent with African liberalism—even as other firm limits to that form of democracy are drawn and defended.

Liberalism is widely thought to characterize the underlying political approach of the post-apartheid constitutional democracy. Framers of the 1996 constitution surveyed the basic laws of several liberal democracies—particularly Canada, Germany, India, and the United States—as well as the major post-war international human rights instruments.<sup>122</sup> It adopted many of these: Familiar provisions include those establishing a bill of rights, separation of powers, judicial review, popular sovereignty, and equal citizenship. The Preamble envisions “a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law” and “a society based on democratic values, social justice, and fundamental human rights.”<sup>123</sup> Section 1 constitutes “one, sovereign, democratic state” founded on liberal-democratic principles including “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms,” “[n]on-racialism and non-

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cause death or injury.”); *id.* at 56 (“[N]o one can now argue that witchcraft is a myth . . .”); Chavunduka, *supra* note 55, at 137 (“[I]t is . . . true that some people become sick or die as a result of witchcraft . . .”). I describe these views in detail below in Part V.

121. JACOB T. LEVY, *THE MULTICULTURALISM OF FEAR* 30–31 (2000).

122. *See, e.g.*, Nelson Tebbe, *Religion, Culture, and Liberal Democracy in South Africa* 196 (2006) (unpublished Ph.D. dissertation, University of Chicago) (on file with author) (describing how the religious freedom provision borrowed from such sources).

123. S. AFR. CONST. 1996 pmb1.

sexism,” and “[s]upremacy of the constitution and the rule of law.”<sup>124</sup> Although it was not always clear during the transition that framers would place their charter so squarely in the liberal tradition—the interim constitution of 1993 stood in some tension with it—nevertheless today there is little doubt that the final constitution of 1996 implements basic principles of liberal democracy.

What this Article sets out to discover is the extent to which government regulation of occult practices conforms to those basic values. Do startling measures like the 2004 Act adapt liberalism to conditions of post-colonial religious and cultural pluralism in ways that are defensible from within that political tradition?

This Article sets out to answer those questions, as an initial matter, by reference to Rawls’s theory of political liberalism—a choice that needs to be justified.<sup>125</sup> In order to assess how occult-related laws relate to the liberal tradition, it is helpful to begin with some prominent account of what liberalism requires. Rawls’s later work does not offer the only plausible choice, or even necessarily the best one. But his theory of political liberalism does provide one defensible framework for evaluating tensions between self-rule and cultural pluralism. Whatever the independent attractiveness of his theory—something I question below—it doubtless stands among the leading interpretations of liberal democracy in the West. What’s more, it has strongly influenced theorists of multiculturalism, many of whom have criticized Rawls at different points but virtually all of whom stand in some relationship, however fraught, to his theory. Admittedly, South African constitutional actors may not have understood themselves to be implementing Rawlsian liberalism—in fact, they almost certainly have had conflicting allegiances to that account and even to liberalism generally. But the object of this Article, again, is not only to assess whether these actors have obeyed their own political-theoretical commitments. Rather, it adopts a more global perspective, from which it aims to evaluate the ways in which lawmakers there have interpreted or extended the liberal political tradition generally. In that way, this Article’s project is self-consciously comparative.

Yet even if Rawls’s philosophical system provides a defensible starting-point, it cannot rigidly control the assessment of laws regulating occult-related practices. This Part argues that African liberalism ought to be able to accept certain practical measures that pure Rawlsians would otherwise reject as violating specific ideals of political liberalism. Section A begins by outlining Rawls’s theory as it relates to these questions.

Section B then acknowledges certain critiques of Rawls from prominent religionists and multiculturalists. Subsequent parts go on to evaluate witchcraft-related laws from the perspective of that political form, but the Article does not insist on a philosophical coherence that is unlikely to be achieved in the context of African democracy—if it is possible in practice anywhere. Of course diffi-

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124. *Id.* § 1.

125. I owe much in this paragraph to a conversation with Robert Tsai.

culty inevitably arises whenever an ideal theory gets applied to actual political practices. Yet although compromises to political liberalism can be expected any time that theory is operationalized, the Part ends by laying out good reasons to think that a more serious, first-order adjustment is required.<sup>126</sup> Obviously that larger claim cannot be fully defended in this Article, which instead simply suggests its possibility. It then focuses on the second-order problem of how well or badly specific laws and policies cohere with core liberal commitments. That problem can be addressed independently of the larger question of whether the encounter with African traditions reveals a more fundamental difficulty with political liberalism. This Article's only essential claim is that if liberal democracy is to have a future in South Africa, it must be willing to strike workable compromises on particular policies in order to maximize overall adherence to its values.

#### A. POLITICAL LIBERALISM AND PUBLIC REASON

Rawls begins by asking, "How is it possible for there to exist over time a just and stable society of free and equal citizens who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"<sup>127</sup> Implicit in this question (and explicit elsewhere) is a factual assumption that citizens in any modern democracy will be divided by permanent and irreconcilable differences over fundamental worldviews.<sup>128</sup> Rawls's challenge in the face of that diversity is to articulate a political conception that is capable of supporting a just and stable government.<sup>129</sup>

Rawls's initial answer is simple. He thinks that reasonable citizens must recognize that they share the political order with others who hold views on fundamental questions that are at once different from their own and reasonable. Having understood the fact of pluralism, members of the polity should not advocate government coercion based on any one comprehensive conception, not even their own, because they ought to understand that such a system would be unstable and unfair.<sup>130</sup> From this basic answer, Rawls spins out his vision of political liberalism.

Five distinctions seem to me to characterize his solution. First, he differentiates between *comprehensive* and *political* doctrines. Comprehensive doctrines guide all of a person's life and contain the whole truth, while political doctrines are tailored to a realm where divergent comprehensive doctrines interact. While people run their lives according to comprehensive visions of the good, they nevertheless are capable of adapting those doctrines to the realities of difference when thinking about politics. Political doctrines therefore should be designed to

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126. Again, I am indebted to Robert Tsai for this insight.

127. JOHN RAWLS, *POLITICAL LIBERALISM* xxxvii (expanded ed. 2005).

128. *Id.* at 216–17, 441.

129. KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 120 (1995).

130. RAWLS, *supra* note 127, at 135.

be accessible independent of any particular religion, philosophy, or moral system.<sup>131</sup> Previous liberalisms—of Kant and Mill for instance, but also Rawls's own prior theory of justice as fairness—were comprehensive.<sup>132</sup> They advocated forms of liberalism that were incompatible with other comprehensive doctrines that might reasonably exist in democratic societies, especially religious ones.<sup>133</sup> Realizing this, Rawls sets out to formulate and defend a liberalism that is political, not comprehensive. As he puts it at one point, “[t]here is, or need be, no war between religion and democracy.”<sup>134</sup>

Second, Rawls distinguishes between *liberal* and *nonliberal* theories and advocates the former. Political liberalism is liberal in the sense that it sets out to solve the problem of pluralism by articulating a political conception of justice based on the priority of certain rights enjoyed by all citizens.<sup>135</sup> Many reasonable comprehensive doctrines held by citizens will be nonliberal, he realizes.<sup>136</sup> Members of some religious communities, for instance, hold a view of divine authority that does not tolerate or respect individual freedom of conscience. What Rawls seeks to achieve is a democratic order that will be acceptable to these doctrines, if only on the political level.<sup>137</sup>

Third, Rawls limits the scope of political liberalism to the basic structure of society.<sup>138</sup> On questions that pertain to it, Rawls imagines a political conception of justice that is freestanding of any particular comprehensive religious, philosophical, or moral view but nevertheless able to win agreement of all such reasonable conceptions—an overlapping consensus.<sup>139</sup> This political conception does set out moral ideals but it strives to articulate moral ideals that all reasonable citizens can accept regardless of their fundamental differences of conscience. A liberal political conception of justice can win an overlapping consensus once citizens adopt its principles from within their own comprehensive doctrines.<sup>140</sup>

131. *Id.* at 223, 452–53; see also Martha C. Nussbaum, *A Plea for Difficulty, in* IS MULTICULTURALISM BAD FOR WOMEN? 105, 110–11 (Joshua Cohen et al., eds., 1999).

132. RAWLS, *supra* note 127, at xxxvii, xl, 486.

133. Robert B. Talisse, *Rawls on Pluralism and Stability*, 15 *CRITICAL REV.* 173, 174–75 (2003). Enlightenment liberalism was secular, too, whereas political liberalism does not mandate secularism or take any position on fundamental questions of religion. RAWLS, *supra* note 127, at xxxviii, 486.

134. RAWLS, *supra* note 127, at 486.

135. *Id.* at xlvi, 223, 450.

136. *Id.* at xlv.

137. Rawls recognizes that there will also be many reasonable political conceptions of justice—many liberalisms—but these various liberalisms will be united by the need to satisfy the criterion of reciprocity. *Id.* at 450; see *infra* note 274 and accompanying text. Justice as fairness is only one of these possible liberalisms. *Id.*

138. *Id.* at xli. Rawls defines “basic structure” to mean “a society’s main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next.” *Id.* at 11. Elsewhere he uses somewhat different formulations, saying for instance that limitations on comprehensive doctrines should apply only to constitutional essentials, and to matters of basic justice. *Id.* at 214, 227, 229 n.10. Apparently these phrases are equivalent.

139. *Id.* at 134.

140. See *id.* at 482 (“[I]t is central to political liberalism that free and equal citizens affirm both a comprehensive doctrine and a political conception.”) (emphasis added).



So a political conception is not adopted merely because it is workable under certain political conditions, but also because it is independent of fleeting political circumstances. That sort of principled agreement will lead to deeper unity and more lasting stability.<sup>141</sup> A group of citizens will not withdraw its support if contingencies change and it turns out that the group now has the political might to impose its view of the whole truth on others. Rather, a political conception of justice that is capable of achieving lasting stability—and this is Rawls's fourth distinction—must be an overlapping consensus and not “a mere *modus vivendi*.”<sup>142</sup>

Fifth and finally, political liberalism only aims to attract *reasonable* comprehensive doctrines that carry reasonable political conceptions. What is reasonableness? Rawls devotes much thought to this question.<sup>143</sup> I will mention only one central feature of reasonableness—the criterion of reciprocity. Rawls's idea is that citizens should promote political values that they reasonably expect other citizens could reasonably endorse.<sup>144</sup> Terms of social cooperation are fair and reasonable when citizens offering them “reasonably think that those citizens to whom such terms are offered might also reasonably accept them.”<sup>145</sup> This reflects Rawls's initial intuition that reasonable people will recognize the fact of pluralism and act accordingly, at least in the political sphere.<sup>146</sup> Public reason is the style of argument that reasonable citizens will adopt when formulating a political conception of justice for the whole society.

Rawls struggles with the idea of public reason and writes about it in at least three different places.<sup>147</sup> He contrasts it to non-public reasons, which are not meant for governance of the society as a whole, but instead are reasons used by churches, universities, professional organizations, and other associations.<sup>148</sup>

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141. Rawls was deeply concerned with unity and stability in his later work. See, e.g., *id.* at xxxvii, xlvii.

142. *Id.* at 218, 147–48; Talisse, *supra* note 133, at 187–88.

143. See, e.g., John Rawls, *The Idea of Public Reason Revisited*, in RAWLS, *supra* note 127, at 440–90.

144. See RAWLS, *supra* note 127, at xlvi, 253, 446.

145. *Id.* at xlii; see also *id.* at 446.

146. A comprehensive doctrine without a reasonable political conception, by contrast, is itself not reasonable. *Id.* at 59.

147. See *id.* at xlvi (in the introduction to the paperback edition, written in 1995); *id.* at 223 (in Lecture VI, *The Idea of Public Reason* § 4, first delivered in 1990); *id.* at 440 (in the essay *The Idea of Public Reason Revisited* (1997)).

148. *Id.* at 215, 220; see also GREENAWALT, *supra* note 129, at 108. Rawls avoided the term private reason because he believed that political conceptions of justice could apply also to the so-called “private.” True, public reason applies only to what he called “the public political forum,” and not to background culture or civil society. RAWLS, *supra* note 127, at 443. So obviously, public reason should govern in legislatures, political campaigns, and judicial reasoning. But also, less obviously, public reasons should guide citizens' voting. *Id.* at 215. Therefore Rawls is concerned not simply about public or open reasoning, but also about quite intimate decisionmaking. *Id.* at xlvi, liii, 444–45; GREENAWALT, *supra* note 129, at 111. He therefore rejects the distinction between public and private, at least as that differentiation is conventionally understood. See RAWLS, *supra* note 127, at 220 n.7 (no private reasoning); *id.* at 470–71 (no private sphere).

Originally, Rawls thought that comprehensive commitments ought to play no role in public reasoning.<sup>149</sup> After debating the matter with other thinkers, he later modified that view and allowed that reasonable comprehensive doctrines could be invoked in politics, but only if they were ultimately redeemed with public reasons.<sup>150</sup> But his basic idea remained unaltered—namely, that the legitimacy of a democracy is closely related to its ability to offer public reasons for its basic arrangements. A political conception is legitimate if and only if citizens advocating it can offer reasons to support it that they think might reasonably be accepted by other citizens.<sup>151</sup> Civility likewise means that citizens have the duty to be able to explain to other citizens how their actions on fundamental questions can be justified by “political values of public reason.”<sup>152</sup>

One implication of these five distinctions for thinking about religious diversity and multiculturalism is that government should not decide basic questions on the basis of a religious, philosophical, moral, or cultural conception that is specific to an individual or group.<sup>153</sup> Rawls says at one point “there is no reason why any citizen, or association of citizens, should have the right to use state power to decide constitutional essentials as that person’s, or that association’s, comprehensive doctrine directs.”<sup>154</sup> Under the criterion of reciprocity, “no citizen could grant to another person or association that political authority.”<sup>155</sup> For example, a Christian legislator could not give solely theological reasons to explain his or her support for a particular bill because that legislator could not reasonably expect that non-Christian people could reasonably accept those justifications. And African traditional leaders could not impose a ban on witchcraft on the sole ground that occult harm is real, because people who reject African traditional beliefs (and yet might be subject to the law) could not accept that reason. More generally, members of religious or cultural groups should not seek to govern according to principles that make sense only within that group’s worldview. I think of this prohibition on governance according to any particular tradition as a rule of religio-cultural anti-establishment.

#### B. CRITIQUES OF PUBLIC REASON

Rawls’s political liberalism has been criticized both by religionists and by multiculturalists. Both critiques bolster the view that it is not necessary to reject settlements concerning African traditions simply because they do not satisfy the criterion of reciprocity or otherwise qualify for inclusion in an overlapping consensus.

Scholars of religion have tended to focus on Rawls’s requirement of public

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149. See RAWLS, *supra* note 127, at 223, 224–25.

150. He referred to this exception as “the proviso.” *Id.* at xlix–l, 453.

151. *Id.* at xliv, 217, 446–47; see also JEFFREY STOUT, *DEMOCRACY AND TRADITION* 65 (2005).

152. RAWLS, *supra* note 127, at 217.

153. *Id.* at 460.

154. *Id.* at 226.

155. *Id.*

reason, which excludes a wide range of religious reasons from playing any significant role in public life. Jeffrey Stout, a leading scholar of religion, thinks the primary difficulty is that Rawls's criterion of public reason is *itself* an idea that reasonable people could reasonably reject.<sup>156</sup> Citizens know that society includes a diversity of comprehensive doctrines, but it does not follow that they will elect to offer only public reasons that they think reasonable people could not reasonably reject. Rawls imputes unreasonableness to anyone who opts out of the project of public reason, as he defines that term. So someone who rejects the very idea that legitimacy depends on the ideal of agreement could count as unreasonable.<sup>157</sup> Stout's objection is that many reasonable people in a democracy—particularly religious people—will reject the idea that a just and stable order depends on a common justificatory basis for government.<sup>158</sup> He predicts, in other words, that the quest for agreement on a political conception of justice is not likely to meet with success.<sup>159</sup> Nor should it. Reasonable people can and will reject the project of seeking common principles that could form a consensus of any sort, including an overlapping one. Citizens can be reasonable, on this view, without appealing to a free-standing conception of justice. Isn't it possible, Stout asks, to imagine a (relatively) just and stable democratic order without any sort of reasonable consensus?

Rawls's prohibition on offering religious reasons for legislation or voting strikes Stout as counterintuitive and odd in a society that values freedom of expression.<sup>160</sup> Moreover, imposing that requirement could have undesirable effects. Stout worries that religious people who think Rawlsian reasonableness is an accurate description of what democratic culture requires will see it as a reason to withdraw from that culture.<sup>161</sup> He thinks that is already happening in the U.S.: Traditionalists who reject liberalism are becoming dominant in religious communities. And Stout may well be correct that political theorists do not see this as clearly as scholars of religion, who are closer to the nation's pulpits. The danger that traditionalists will reject a liberal democracy that they think does not welcome their reasoning in public life is a real concern not only in the U.S. but even more so in Africa.

Kent Greenawalt, another leading scholar in the area, likewise questions the necessity and feasibility of agreement on a broad ideal of public reason.<sup>162</sup> Fairness and stability are rightly prized by Rawls, he says, but they might be achievable without entirely excising religious arguments from political life,

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156. STOUT, *supra* note 151, at 66–67.

157. *Id.* at 67.

158. *Id.* at 67–68.

159. *Id.*

160. *Id.* at 68.

161. *Id.* at 75.

162. GREENAWALT, *supra* note 129, at 120. However, he does think that public political discourse with those that hold different comprehensive commitments can and should not rest on religious reasons. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 216–17 (1988).

especially where citizens trust and respect one another. Greenawalt argues that any consensus on constitutional essentials will necessarily be quite abstract.<sup>163</sup> What is more, people's *interpretation* of constitutional essentials will often be influenced by their comprehensive commitments. Their judgments will not be limited to what public reason would allow, but instead will be "infused by their transcendent perspectives."<sup>164</sup> He thinks that is unavoidable and acceptable: There is no compelling reason why people should reach interpretations of essentials that conform only to public reason, even when their comprehensive doctrines would suggest another understanding.

Stout and Greenawalt argue, each in his own way, that excluding all comprehensive views from political life is quixotic, needless, and unappealing.<sup>165</sup> If these critiques are generally persuasive, as I believe they are, then liberal democrats ought to remain open to at least some practical-political settlements that do not qualify for inclusion in an overlapping consensus simply because they do not conform to the Rawlsian ideal of public reason.

Multiculturalists, like religionists, have resisted the ideal of public reason. Prior to their work, much liberal theory had assumed that law ought not to cognize religious, cultural, ethnic, or other ascriptive group identities as a matter of justice.<sup>166</sup> Extending ideas developed in the context of the American civil rights movement, liberals conventionally had believed that democracies ought to remain blind to a wide variety of identity characteristics that were thought to be morally irrelevant to law. Just as government should avoid discriminating on the basis of race, so too it should avoid classifying citizens along lines of religion or culture. The first wave of multiculturalism argued to the contrary that questions of religio-cultural pluralism deserve a central place in normative political theory, especially liberal theory, and further that certain protections for traditional cultures are permitted and even required as a matter of right.<sup>167</sup> Questions surrounding language policy, the rights of indigenous peoples, special representation for ethnic minorities, and exemptions for religious exercise were taken to be of genuine interest for philosophy.<sup>168</sup> Will Kymlicka has led the movement, showing that Rawls's liberal theory insufficiently appreciated the plurality of cultures that characterized many modern

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163. GREENAWALT, *supra* note 129, at 114–15.

164. *Id.* at 117.

165. For a related critique that addresses not just religious comprehensive doctrines, but utilitarianism as well, see Talisse, *supra* note 133, at 239.

166. See Jacob T. Levy, *Contextualism, Constitutionalism and Modus Vivendi*, in MULTICULTURALISM AND POLITICAL THEORY 19 (Anthony Laden & David Owens eds., forthcoming Oct. 2007), available at <http://ssrn.com/abstract=851906>; see also WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 4 (1991) [hereinafter KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE]; WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 3–4 (1995) [hereinafter KYMLICKA, MULTICULTURAL CITIZENSHIP] (stating that liberals believed in a "separat[ion] of state and ethnicity"). I rely heavily on Jacob Levy's thoughtful work on multiculturalism throughout the remainder of this section.

167. Levy, *supra* note 166, at 19.

168. *Id.* at 1.

democracies.<sup>169</sup> He contends that minority cultures that wish to place internal restrictions on their members—such as bans on apostasy, internal proselytizing, and public education of children—will not be able to argue for those restrictions if they must observe the restrictions on public reasoning that are central to Rawls's political liberalism.<sup>170</sup> "Many religious communities," he concludes, "would object to political liberalism on its own terms, as a theory of citizenship."<sup>171</sup> Distinguishing between political and comprehensive liberalism will not appease religious groups because political liberalism is just as hostile to certain nonliberal groups as is comprehensive liberalism.<sup>172</sup> Kymlicka ends up arguing for a comprehensive liberalism that guarantees the individual rights of internal dissenters<sup>173</sup>—but not without the hope that his more robust form of liberalism can win a consensus of reasonable citizens, as opposed to a contingent majority. But what matters here is that certain multiculturalists, like some leading religionists, think that strict Rawlsian liberalism is unworkable in practical situations of extreme religious and cultural variegation.

If liberal democracy is to work in southern Africa, it must be willing to compromise on matters such as public reason, the criterion of reciprocity, and the need for an overlapping consensus. Recent theorists have been particularly critical of the ideal of an overlapping consensus—and they have shown increased appreciation for the power of contingent, *modus vivendi* solutions to complex problems of group conflict.<sup>174</sup> Second-wave multiculturalists have turned their attention away from ideal theory and toward specific political contexts, arguing that actual practices in socially differentiated democracies are not likely to satisfy the requirements for inclusion in an overlapping consensus—yet that those settlements between democracy and tradition may nonetheless be relatively stable and fair.<sup>175</sup>

My sense is that difficulties presented by laws concerning the occult are not

169. KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE, *supra* note 166, at 137–52; *see also* KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 166, at 128–29, 158–63.

170. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 166, at 160–61.

171. *Id.* at 231 n.8.

172. *Id.* at 164 ("The fact that Rawls's theory is less comprehensive does not make his theory more sympathetic to the demands of non-liberal minorities.").

173. *See id.* at 165 ("I believe that the most defensible liberal theory is based on the value of autonomy, and that any form of group-differentiated rights that restricts the civil rights of group members is therefore inconsistent with liberal principles of freedom and equality.").

174. Joseph A. Carens, *A Contextual Approach to Political Theory*, 7 ETHICAL THEORY & MORAL PRAC. 117, 130–31 (2004) (explaining why the institutionalization of normativity is not necessarily desirable in culturally variegated societies); Bernard P. Dauenhauer, *A Good Word for Modus Vivendi*, in THE IDEA OF A POLITICAL LIBERALISM 204 (Victoria Davison & Clark Wolf eds., 2000); Levy, *supra* note 166, at 26; Claudia Mills, *Not a Mere Modus Vivendi*, in THE IDEA OF A POLITICAL LIBERALISM 190 (Victoria Davison & Clark Wolf eds., 2000) (criticizing Rawls's narrow view of *modus vivendi* solutions as temporary and suggesting the possibility of more permanent *modus vivendi* solutions); Talisse, *supra* note 133.

175. Levy, *supra* note 166, at 1–2, 20. Of course someone might object that ideal political liberalism is not workable in practice anywhere—not even in Western democracies—because it is designed to solve problems on the level of philosophy rather than of practical politics. Whatever the truth of this

likely to be resolved on the level of first-best political liberalism.<sup>176</sup> Evaluating those laws must proceed on a lower level of abstraction.<sup>177</sup> That is not to say that liberal theory should not play a role in evaluating new laws. The remainder of the Article draws on liberal theory to evaluate particular policies from the perspective of liberal democracy. What it resists is the imperative to reject a political compromise between liberal democracy and African tradition simply because it fails to satisfy the criterion of reciprocity or otherwise cannot qualify for inclusion in an overlapping consensus. It will argue for example that the Traditional Health Practitioners Act of 2004 meets minimum requirements of liberal justice (with one important caveat) even though the Act would violate any political conception capable of winning an overlapping consensus. Yet the method followed here is also capable of identifying normative limits. Criminalization of witchcraft, for example, is incompatible with liberal democracy even as a second-best solution.

### III. COMMON LAW ACCOMMODATION

In one way, government has long accommodated witchcraft beliefs without compromising basic liberal principles. For years, South African criminal courts have eased punishments on Africans who committed crimes because of a sincere belief in the occult.<sup>178</sup> Judges have taken witchcraft beliefs into account under general categories of criminal law—for instance, by ruling that the defendant was operating under a mistake of fact or by finding that the beliefs constituted an extenuating circumstance that could be considered at sentencing.<sup>179</sup> In other words, courts have used this technique to recognize African

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claim, it is nonetheless compatible with the approach here, which only highlights the degree of difficulty satisfying Rawlsian conditions in an African context.

176. By “first-best” I mean ideal from the perspective of political philosophy, untroubled by practical circumstances such as the existence of actual divisions within a given society. Cf. Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 540 (“[P]ostcolonial nation-states cannot but live with both sides of an unresolvable equation . . .”); ASHFORTH, *supra* note 2, at 17 (describing a similar conundrum).

177. Cf. RAWLS, *supra* note 127, at lix (explaining that his theory is meant to address philosophical questions of the more general kind).

178. See *S v Phama* 1997 (1) SACR 485 (EC) at 487 (S. Afr.) (describing a long history in South Africa of mitigating sentences when the accused came from a “primitive society steeped in superstition”); ASHFORTH, *supra* note 2, at 259; RALUSHAI ET AL., *supra* note 22, at 57 (“Whereas the witchcraft motive was previously concealed in evidence as far as possible, as an aggravation in the eyes of the law bent on stamping it out, it has now become advantageous to rely on it, or even to pretend to believe in it in order to obtain a more lenient sentence.”); Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 533; Hallie Ludsin, *Cultural Denial: What South Africa’s Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 BERKELEY J. INT’L L. 62, 92 (2003) (noting that courts are willing to mitigate if the accused “honestly believes the deceased intended to use witchcraft to harm the defendant or his relations”); Niehaus, *supra* note 4, at 100 (“Judges often treated the belief in witchcraft as an extenuating circumstance [in sentencing].”). This common law practice has now been legitimated by statute in Zimbabwe. See Criminal Law (Codification and Reform) Act 23 of 2004, § 101 (effective July 1, 2006).

179. Historically, courts have oscillated between twin desires to civilize indigenous Africans by severely punishing witchcraft-motivated murders, on the one hand, and to ease punishments for

witchcraft beliefs and practices within a common legal framework.<sup>180</sup> My sense is that judicial application of general common law categories to witchcraft-related activities is best viewed as a purposive exception for African traditions rather than as the application of one or another general legal category in the pursuit of formal neutrality or culture-blindness.<sup>181</sup> But regardless of whether this judicial technique is seen as formally neutral as to religion and culture, it is defensible in a liberal polity because it eases burdens on African beliefs while preserving the unity of the rule of law and remaining relatively administrable. This Part will conclude, however, that common law accommodation may not do enough to convince Africans that their customs enjoy equal recognition and dignity.<sup>182</sup>

#### A. THE TECHNIQUE IN PRACTICE

Naledzani Netshiavha, twenty-five years old and newly married, was living in a house that he had built next to the homes of his two brothers.<sup>183</sup> One night, he and his wife California were awoken by a scratching sound at the door to their home. They arose and noticed a large bat hanging from the rafters.<sup>184</sup> Naledzani swung an axe at the creature, landing a blow that caused it to fall to the ground. He and his wife then ran next door to alert his brother. On the way, they saw two strange animals traveling down the road.<sup>185</sup>

Joined now by the brother and his wife, the Netshiavhas returned home, where they saw what looked like a small donkey moving in the darkness at the edge of the yard.<sup>186</sup> Naledzani crossed to the animal and struck it with his axe. It lay still. At that moment, Naledzani's second brother drove up in an automobile. With the help of its headlights, the group could see that the creature lying on the ground had the head of an adult human and the body of a small child.<sup>187</sup> They recognized its face—it belonged to an elderly villager named Jim Nephalama.<sup>188</sup> A traditional leader, the local headman, was summoned. During the time it took him to arrive, the dead body morphed into the adult Jim Neph-

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defendants who sincerely believed either that they had not killed a human being or that they had committed murder in order to protect themselves, their families, or their communities from occult assault, on the other hand. CHANOCK, *supra* note 5, at 326–27.

180. See LEVY, *supra* note 121, at 188.

181. For a treatment of this distinction, see Lawrence G. Sager, *The Free Exercise of Culture: Some Doubts and Distinctions*, 129 *DAEDELUS* 193, 204 (2000).

182. See LEVY, *supra* note 121, at 188.

183. See *State v Netshiavha* 1990 (3) SACR 331 (A) (S. Afr.). The facts of the case are also reported—with some differences and in somewhat greater detail—in RALUSHAI ET AL., *supra* note 22, at 191–92. For other accounts of *Netshiavha*, see Comaroff & Comaroff, *supra* note 2, at 188, 193–95; Niehaus, *supra* note 4, at 100.

184. *Netshiavha*, 1990 (3) SACR at 332.

185. RALUSHAI ET AL., *supra* note 22, at 191.

186. *Netshiavha*, 1990 (3) SACR at 332.

187. *Id.* at 333.

188. RALUSHAI ET AL., *supra* note 22, at 191.

lama.<sup>189</sup> Witnesses were astounded by the transformation, but they were not shocked to learn that Jim Nephalama was a witch, for he had often boasted of his unusual power over people.<sup>190</sup>

Naledzani Netshiavha was arrested and charged with murder.<sup>191</sup> After negotiations with the prosecutor, he entered a plea of guilty to the lesser charge of culpable homicide, saying that he had struck at the victim because he thought that his target was a bat rather than a human being.<sup>192</sup> The court imposed a sentence of ten years' imprisonment.<sup>193</sup>

The appeal was heard by Richard Goldstone, a left-leaning jurist who would later become a noted Justice of the Constitutional Court. Judge Goldstone took issue with the trial court, which he said "in effect held that the appellant did intend to kill the deceased and on that basis imposed what is clearly a heavy sentence."<sup>194</sup> But Judge Goldstone could see no ordinary motive for the killing. All evidence pointed instead to the conclusion that Naledzani Netshiavha had "what appeared to be a genuine belief in witchcraft."<sup>195</sup> He could see no reason to disbelieve Netshiavha's statement that he had not intended to kill a human being.<sup>196</sup>

Netshiavha had admitted to acting unreasonably when he struck and killed the strange creature. Judge Goldstone acknowledged this and conceded that "[o]bjectively speaking, the reasonable man so often postulated in our law does not believe in witchcraft."<sup>197</sup> To that extent, all individuals were to be treated in the same way. Nevertheless, Judge Goldstone noted that under well-established law a subjective belief in witchcraft could mitigate the severity of a sentence.<sup>198</sup> Here, a belief in witchcraft offered the only rationale for the killing because uncontroverted evidence had established that Netshiavha and Nephalama were

189. Gideon Netshiavha was "shocked" to see that the body had transformed into a normal adult. *Netshiavha*, 1990 (3) SACR at 333.

190. RALUSHAI ET AL., *supra* note 22, at 192.

191. *Netshiavha*, 1990 (3) SACR at 332.

192. *Id.* (In support of that plea, he submitted a written statement which read in part: "I deny that I unlawfully and intentionally caused the death of the said John Nephalama Gumani [sic]. . . . I plead guilty to culpable homicide in that I unlawfully and negligently caused the death of the said deceased. I had mistaken the deceased to be a bat and it was only later that I realized that what I had struck was a human being.")

193. Niehaus, *supra* note 4, at 100.

194. *Netshiavha*, 1990 (3) SACR at 332.

195. *Id.* at 333.

196. *Id.*

197. *Id.*

198. *Id.* The full passage reads:

Objectively speaking, the reasonable man so often postulated in our law does not believe in witchcraft. However, a subjective belief in witchcraft may be a factor which may, depending on the circumstances, have a material bearing upon the accused's blameworthiness. As such it may be a relevant mitigating factor to be taken into account in the determination of an appropriate sentence.

*Id.* (internal citations omitted).



neighbors on good terms.<sup>199</sup> He therefore reduced the term of imprisonment from ten years to the four that had already been served.<sup>200</sup> Justice Goldstone later recalled "I let him go."<sup>201</sup> Again, that ruling stands in a long line of cases accommodating witchcraft traditions through general common law categories.<sup>202</sup>

Courts' willingness to accommodate occult beliefs has oscillated over time. The early years of the transition saw a particularly brutal spate of witch killings. Judges during that period felt compelled to deter further violence by imposing strict sentences.<sup>203</sup> As the democracy matured, however, courts felt freer to accommodate African traditions.<sup>204</sup> In 1995, for instance, the High Court in the North West Province sentenced five young men who had killed a prominent villager, Motlhabane Makolomakwa.<sup>205</sup> They had burned him to death, claiming that he had murdered their fathers and turned them into zombies. Each was convicted of murder. At sentencing, the judge considered two mitigating factors: that the killings had been motivated by "a belief in witchcraft," and that "on the

199. *Id.*

200. Niehaus, *supra* note 4, at 100.

201. Comaroff & Comaroff, *supra* note 2, at 195 ("In recollecting the case, Justice Goldstone said to us, 'I let him go.'").

202. *See, e.g., Rex v Mbombela* 1933 A.D. 269 at 275 (S. Afr.) (holding that defendant should not have been convicted of murder because he was operating under a mistake of fact—namely, that the victim was an evil spirit—and therefore replacing the murder conviction with a conviction of culpable homicide, and altering the sentence from death to twelve months' imprisonment); *Rex v Fundakubi* 1948 (3) SA 810, 821 (A) (S. Afr.) (treating a belief in witchcraft as an extenuating circumstance); *S v Nxele* 1973 (3) SA 743, 757 (A) (S. Afr.) (recognizing that sentences for witchcraft-related crimes may be eased under the general rule of "blameworthiness"); *see also* Niehaus, *supra* note 4, at 102 (discussing *Rex v Mbombela*).

203. *See, e.g., S v Lukhwa en n' Ander* 1994 (1) SACR 53 (A) (S. Afr.) (English headnote) (overturning a death sentence imposed for deterrence reasons). In *Lukhwa*, the judge observed that witch hunts had been frequent in the homeland of Venda during 1990–1991 but had since abated. Based partly on the fact that the crisis had passed and deterrence was no longer as critical, the court commuted a death sentence for the killing of a suspected sorcerer to life imprisonment. *Id.* at 54; *see also* TRC REPORT, *supra* note 43, at 333–34. However, the Ralushai Commission Report does not mention any reduction in witch killings since that period anywhere in the Northern Province. On the contrary, it stresses the continuing need to combat anti-occult violence. RALUSHAI ET AL., *supra* note 22, at i ("The government was also under pressure to release the report within this short period of time as the Province continued to burn. Something had to be done, and very fast.") (characterizing the situation around 1995).

One possible interpretation of *Netshiavha* is that the court of appeal heard the case later than the trial court and after the crisis in Venda had eased. But the timing of the appellate decision does not seem to support that theory, since it was handed down in 1990, when the situation in Venda was near its worst. Also, the Ralushai Commission did not attribute the trial court's severe judgment to deterrence. Rather, the Commission argued that the trial judge in *Naledzani* "did not understand the facts before him . . . and simply came to the conclusion that Naledzani should have realized that [the bat-like creature] was a human being." RALUSHAI ET AL., *supra* note 22, at 192. What happened on appeal may have as much to do with the fact that it was heard in Bloemfontein, at some distance from violent witch hunts that had reached crisis proportions in the former Venda.

204. *See* Comaroff & Comaroff, *supra* note 2, at 196–97.

205. *See id.* at 184 (reporting data collected from interviews and court records).

day in question the [defendants] had also drunk liquor.”<sup>206</sup> Today, common law accommodation is regularly employed, but Africanists have called on courts and legislatures to do more to fully recognize African traditions.<sup>207</sup>

#### B. GENERAL LAW'S INSUFFICIENCY

How should common law accommodation be evaluated from a liberal perspective? Theorists have identified a tension between, on the one hand, maintaining social unity and a sense of common citizenship through a uniform legal structure and, on the other, recognizing distinct religio-cultural commitments in law. Going too far in either direction can be harmful to the unity and stability of a pluralistic society. My view is that common law accommodation comports with liberal principles as far as it goes, but might be supplemented with fuller measures in order to better promote those principles. The remainder of this Part defends that position.

##### 1. Preserving Legal Universalism

A great strength of common law accommodation is its legal generality. Traditionally, many liberals have recoiled against singling out religious or cultural traditions, considering this a form of discrimination. *Neutralists*, as I will call them, think the best approach is simply to extend to each individual citizen the same set of civil and political rights, without regard to religious or cultural identity. Citizens have a right not to suffer state discrimination on the basis of religion or culture, identity characteristics that are morally arbitrary and ought to remain irrelevant to citizenship. Non-discrimination is the rule for neutralists not only in the sense that government may not single out members of traditional groups for special burdens, but also in the further sense that government may not target them for special exemptions. One way of thinking about neutralism is that it requires state disregard of differences of religion or culture—what Charles Taylor calls “difference blindness.”<sup>208</sup> Will Kymlicka similarly describes this classic liberal position as requiring “benign neglect” of difference.<sup>209</sup>

Cognizing religious or cultural traditions is both unnecessary and unattractive

206. *Id.* The defendants were each sentenced to twenty years' imprisonment.

207. See Niehaus, *supra* note 4, at 103. But see Ingrid Oellermann, *Five Life Terms for Witchcraft "Massacre,"* MERCURY (S. Afr.), Nov. 16, 2006, at 4 (reporting that a court had imposed a heavy sentence despite claims that defendants had acted out of a belief in witchcraft).

208. Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM AND “THE POLITICS OF RECOGNITION” 25, 43 (Amy Gutmann ed., 1992); see also Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105, 109 (1992). For a contemporary proponent of something close to neutralism, see generally BRIAN BARRY, *CULTURE & EQUALITY* (2001). For a position close to neutralism with respect to free exercise doctrine, see Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY 203–04 (Stephen M. Feldman ed., 2000). Sager has extended aspects of this argument beyond religious freedom to cultural rights as well. See Sager, *supra* note 181, at 205–07.

209. KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 166, at 3.

for neutralists. It is unnecessary because universal rights to religion, speech, and assembly already adequately protect people who wish to enjoy their culture or practice their religion.<sup>210</sup> It is unattractive for two reasons. First, privileging certain religious and cultural groups is seen as unfair. Accommodating members of one tradition often means disproportionately burdening members of other traditions or arbitrarily denying them similar rights. For instance, preferential hiring policies may prevent members of non-preferred groups from being hired when they otherwise would have been. Even if another group will not be burdened by an accommodation, its members may think that protecting religious and cultural groups, but not other social groups, is inherently unfair. Allowing, say, Rastafarians to use marijuana while prohibiting secular libertarians from doing so is seen as violating basic standards of fairness among individuals.<sup>211</sup> Second, allowing the government to differentiate among people based on religious or cultural characteristics is unattractive because it encourages individual citizens to take into account morally irrelevant identity characteristics in their private lives, which has the effect of dividing the citizenry. Measures that differentiate in this way are seen as “inherently discriminatory.”<sup>212</sup>

If they endorsed any measure of cultural recognition, neutralists would favor common law accommodation, because it maintains the basic universalism of the criminal law, recognizing African traditions only at the level of interpretation and application of general rules. Judges reduce sentences for occult-related crimes only by applying legal concepts that apply to everyone regardless of religion or culture, such as “culpable homicide,” “extenuating circumstance,” and even “blameworthiness.” Easing burdens on criminal defendants by applying those categories retains the authority of the general legal framework and risks relatively little division among the citizenry. The constitution aspires to “non-racialism”<sup>213</sup> and establishes “One Law for One Nation.”<sup>214</sup> Common law methods of accommodating African traditions do relatively little damage to those aspirations.

To be sure, some neutralists might oppose the technique out of a suspicion that courts actually aim to single out members of African traditions for special treatment, even if they do so using general legal categories. Presumably, African tradition worked in Netshavha’s favor in a way that a more idiosyncratic belief—say, that the victim had taken the form of a space alien—would not

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210. See Kukathas, *supra* note 208, at 107.

211. See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 166, at 107.

212. Taylor, *supra* note 208, at 55.

213. S. AFR. CONST. 1996 § 1. Non-racialism is a central commitment of the democracy. See John Sharp, “Non-racialism” and Its Discontents: A Post-apartheid Paradox, 50 INT’L SOC. SCI. J. 243, 243 (1998) (describing non-racialism as “the official credo of the South African state”); see also Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 522 (“The dominant ideological trope in the fight against the old regime . . . was ‘nonracialism.’”).

214. See Comaroff & Comaroff, *supra* note 2, at 189; Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 540.

have. And any such judicial purpose to provide special treatment would promote, not hinder, segregation in the criminal law. Nevertheless, most neutralists probably would support common law accommodation. What they certainly would resist is going further and creating statutory exceptions for African practices surrounding the occult. That would complicate and balkanize the criminal law, perhaps even to the point of creating distinct legal regimes for distinct groups.<sup>215</sup>

## 2. Avoiding Ossification

Another virtue of applying general legal categories to individual cases is that it avoids excessive ossification of traditional practices. Determining traditional beliefs on a case-by-case basis means that they need not become hardened into a state-run system of customary law. Under the apartheid regime, customary law was applied by state courts, which rationalized its rules in ways that did not always allow for evolution. A split developed between “official customary law” and the system of rules that was actually customary according to the practices of living African communities—“true customary law” or “living customary law.”<sup>216</sup> By contrast, common law accommodation allows traditional beliefs and practices to evolve free of state systematization. Courts determine the content of these beliefs only to decide how they might fit doctrinal categories in each individual case.

## 3. Individual Dissent

Finally, this longstanding technique permits individual dissent from the traditions of any particular African group.<sup>217</sup> Because judges establish the content of individual beliefs anew in each case, rather than working from a predefined understanding of customary law, they remain open to idiosyncratic variations on group beliefs. What matters for the general criminal law is, say, whether the defendant was operating under a sincere belief in witchcraft, not whether that belief comported with generally-held views within an African group. Preserving that sort of individual liberty of conscience is prized by liberal democrats of all stripes.

## 4. A Drawback

Common law accommodation’s principal difficulty is that it may not go far enough toward giving African traditionalists reason to feel that they are regarded as full members of the political community. Granting certain criminal defendants some limited sentencing relief risks doing too little to make believers feel that the state is taking an active role in protecting them from occult aggression. For certain Africanists—who may form a large sector of the popula-

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215. LEVY, *supra* note 121, at 187.

216. *Bhe v. Magistrate Khayelitsha* 2005 (1) BCLR 1 (CC) at 86–87 (S. Afr.).

217. See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001).

tion—supernatural injustice deserves the same sort of state response as ordinary criminal injustice does.<sup>218</sup> Merely lessening punishments for private citizens who engage in self-help to protect their communities against enchantment cannot satisfy them that the government is ensuring individual security, administering retribution against wrongdoers, and guaranteeing law and order.<sup>219</sup> Although common law accommodation in the criminal law enjoys widespread support as a necessary minimum of state recognition for traditional beliefs, many Africans will feel that simply easing punishment of witch hunters does not sufficiently recognize their traditions. As a consequence, they may not experience a sense of shared citizenship, but instead may resent police and government officials who are not allies, and may even be enemies, in the fight against sorcery.

My conclusion is that this longstanding and widely accepted judicial practice is rightly embraced as a basic measure by which a liberal democracy can recognize traditional African beliefs and practices surrounding the occult without seriously compromising the uniformity or stability of the general legal system. While strict neutralists might complain that the technique wrongly sensitizes government to religio-cultural identifications, any resulting harm to equal citizenship has been minimal. If anything, this method has not gone far enough toward making traditionalists feel valued as equal citizens. Consequently, Africanists have urged Parliament to do more to assure people that the government is sensitive to their feelings of vulnerability to the occult. Legislators recently heard their plea and passed landmark legislation regulating traditional healers.<sup>220</sup>

#### IV. REGULATING TRADITIONAL HEALERS

Traditional healing has long been formally illegal in South Africa. Under the Witchcraft Suppression Act and its colonial predecessors, divination or so-called white magic is banned along with more sinister occult practices.<sup>221</sup> Divination, an ancestor-based form of detecting enchantment, lies at the root of much traditional healing. Outlawing it, therefore, effectively criminalizes virtu-

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218. See ASHFORTH, *supra* note 2, at 17–18.

219. See KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 166, at 192 (pointing out that refusal to accommodate traditional beliefs can be destabilizing to a liberal society because it fosters resentment toward the state). Levy makes a similar argument with respect to the incorporation of indigenous law:

Common law recognition . . . may well not satisfy the feeling among indigenous peoples that they ought to be recognized as distinct peoples. It may leave many members of indigenous communities feeling alienated and distant from a state that does not grant them their due. Perhaps they will never feel like full citizens in a state which does not fully acknowledge their distinctive status.

LEVY, *supra* note 121, at 185–86.

220. See Traditional Health Practitioners Act 35 of 2004 (effective 2005) (S. Afr.).

221. CHANOCK, *supra* note 5, at 323–24.

ally all of traditional medicine.<sup>222</sup> Other health care laws likewise purport to outlaw traditional healing.<sup>223</sup> Even though these laws were not historically enforced against healers, and thus traditional medicine has flourished in practice,<sup>224</sup> traditional health practitioners have long denounced the expressive impact of criminal bans.<sup>225</sup> Practitioners feel that they have been “degraded and dehumanized” by such laws, which not only communicate state opprobrium, but also have the effect of associating healers with witches in the eyes of the public.<sup>226</sup> Healers view their stigmatization as part of a more general denigration of African culture that persists in the post-apartheid democracy.

Citizens who depend on traditional healers for security against enchantment also feel unsatisfied with government policy that denigrates the *inyangas* and *sangomas* on whom they depend for protection.<sup>227</sup> Laws outlawing traditional healing contribute to a sense of alienation from the criminal justice system, which seems insensitive to the fact that fear of enchantment is a primary source of personal insecurity for many Africans.<sup>228</sup> Dissatisfaction with witchcraft laws dovetails with growing criticism of the democratic state’s failure to adequately protect communities against various forms of violence.<sup>229</sup> In the mid-1990s, African traditionalists began urging Parliament to address occult beliefs and practices by recognizing traditional healers. Legislators obliged in 2004 by passing the Traditional Health Practitioners Act, which aims to license and regulate African healers for the first time.<sup>230</sup>

How does this startling new law comport with the principles of liberal democracy? My argument is that the Act harmonizes with that tradition because, on balance, it does more to promote principles of equal citizenship and individual freedom of conscience than it does to harm central commitments to the rule of law. Moreover, it bolsters democratic legitimacy by recognizing a belief held to some degree by the vast majority of citizens. This Part describes the genesis and structure of the Act. It then argues that even though the Act depends on criteria that make sense only from within a particular religio-

222. ASHFORTH, *supra* note 2, at 54, 57, 286.

223. For instance, the Health Professions Act 56 of 1974 § 36(d) criminalized the practice of traditional healing. *See* ASHFORTH, *supra* note 2, at 286, 298; REPORT OF THE SELECT COMMITTEE ON SOCIAL SERVICES, *supra* note 67, at 3, 14. The Homeopaths, Naturopaths, Osteopaths, and Herbalists Act 52 of 1974 did the same. *See* REPORT OF THE SELECT COMMITTEE ON SOCIAL SERVICES, *supra* note 67, at 14. Finally, the South African Medicines and Medical Devices Regulatory Act 132 of 1998 requires registration and regulation of all “traditional medicines.”

224. *See* REPORT OF THE SELECT COMMITTEE ON SOCIAL SERVICES, *supra* note 67, at 3; *see also* ASHFORTH, *supra* note 2, at 286 (noting that traditional healers have seldom if ever been prosecuted for practicing their trade).

225. *See, e.g.*, Cartillier, *supra* note 64 (describing the perceptions of healers).

226. REPORT OF THE SELECT COMMITTEE ON SOCIAL SERVICES, *supra* note 67, at 3.

227. *Cf.* ASHFORTH, *supra* note 2, at 286–87 (describing the sentiments of clients and political elite about the laws).

228. *See* Comaroff & Comaroff, *Policing Culture*, *supra* note 3, at 530 (noting a perception that the “state ha[s] failed to protect its citizenry from a clear and present danger”).

229. *Id.* at 522.

230. *See* Traditional Health Practitioners Act 35 of 2004 (effective 2005) (S. Afr.).

cultural tradition, and therefore it cannot qualify for inclusion in a Rawlsian overlapping consensus, it nevertheless ought to be supported as a feasible second-best solution.

#### A. GENESIS AND STRUCTURE OF THE ACT

Shortly after winning the country's first national elections in 1994, the ANC released "A National Health Plan for South Africa."<sup>231</sup> The plan was developed with the help of the WHO and UNICEF, both of which had been calling on African governments to recognize traditional healers and regulate traditional medicine along with "western" or "allopathic" drugs.<sup>232</sup> The Plan declared that "[p]eople have the right of access to traditional practitioners as part of their cultural heritage and belief system" and that traditional healers ought to be "controlled by a recognised and accepted body so that harmful practises can be eliminated and the profession promoted."<sup>233</sup> It called for "[l]egislation to change the position and status of traditional practitioners" and for "[a] regulatory body for traditional medicine."<sup>234</sup> These declarations and proposals resonated with the new political dispensation, for, as one expert put it, "[a] government committed to the multicultural principles enshrined in the South African Constitution must be prepared to respect the practices of healing widespread among the population."<sup>235</sup> But tension also existed between the proposal to recognize witchcraft beliefs and the ANC's constitutional commitment to "non-racialism."<sup>236</sup>

Public hearings on traditional healers were held in 1997,<sup>237</sup> and the following year the Select Committee on Social Services submitted a report to Parliament that followed much of the earlier National Health Plan.<sup>238</sup> Meanwhile, traditional healers had begun to form professional associations in anticipation of new legislation. These organizations, which tended to be organized along ethnic lines, became actively involved in the development of government oversight.<sup>239</sup>

Ultimately, the Traditional Health Practitioners Act was enacted.<sup>240</sup> The Act

231. AFRICAN NAT'L CONG., A NATIONAL HEALTH PLAN FOR SOUTH AFRICA (1994), available at <http://www.anc.org.za/ancdocs/policy/health.htm> [hereinafter A NATIONAL HEALTH PLAN].

232. ASHFORTH, *supra* note 2, at 287-88.

233. A NATIONAL HEALTH PLAN, *supra* note 231.

234. *Id.*

235. ASHFORTH, *supra* note 2, at 289.

236. S. AFR. (Interim) CONST. 1993 § 1.

237. See NAT'L PROGRESSIVE PRIMARY HEALTH CARE NETWORK, SUMMARY BRIEF: PUBLIC HEARINGS ON TRADITIONAL HEALERS (1997), available at [http://www.healthlink.org.za/pphc/Phila/summary/vol3\\_no23.htm](http://www.healthlink.org.za/pphc/Phila/summary/vol3_no23.htm) [hereinafter SUMMARY BRIEF].

238. ASHFORTH, *supra* note 2, at 291.

239. *Id.* at 195 n.7; Kanya Ndaki, *Law Catches Up with Traditional Medicine*, MAIL & GUARDIAN (S. Afr.), Aug. 30, 2004 ("Currently traditional healers are organised and 'licensed' by up to 100 organisations . . . . Although their members subscribe to a certain code of ethics, these associations cannot enforce this code.").

240. Traditional Health Practitioners Act 35 of 2004 (effective 2005).

establishes a regulatory agency, the Traditional Health Practitioners Council,<sup>241</sup> tasked with registering and regulating healers.<sup>242</sup> It explicitly acknowledges the supernatural basis of traditional healing, though it downplays that feature. Thus, it does not exclusively employ religio-ethnically neutral categories, although it uses them predominantly, but instead it references specific African beliefs surrounding occult and ancestral power. For instance, it defines “traditional health practice” as “the performance of a function, activity, process or service based on a traditional philosophy.”<sup>243</sup> Traditional philosophy, in turn, refers to “*indigenous African techniques, principles, theories, ideologies, beliefs, opinions and customs and uses of traditional medicines communicated from ancestors.*”<sup>244</sup> In practice, everyone understands that traditional healers rely on spiritual powers to do their work.<sup>245</sup> And although the Act models itself on laws regulating Western medicine, it nonetheless does acknowledge the supernatural basis for traditional healing.<sup>246</sup>

Newspaper articles on the passage of the Act reported that traditional healers were celebrating their newfound status. One *sangoma* explained: “Under apartheid, we were referred to as witch doctors, which is something that is opposite to what we do. We concentrate on curing. Witches are people who manipulate people’s health.”<sup>247</sup> Others healers said they were happy to have been recognized by the state in the same way as western physicians.<sup>248</sup> Local papers reported that the purpose of the Act, in addition to dignifying traditional healing, was to distinguish between legitimate and illegitimate healers—between real *inyangas* or *sangomas* and “quacks” or “charlatans”—by licensing the former and prohibiting the latter from practicing on pain of imprisonment of up to twelve months.<sup>249</sup>

241. *Id.* s. 4(1).

242. *Id.* s. 19(c). The Council’s purposes are, *inter alia*, to “ensure the quality of health services within the traditional health practice” and to “protect and serve the interests of members of the public who use or are affected by the services of traditional health practitioners.” *Id.* s. 5(b)–(c).

243. *Id.* s. 1.

244. *Id.* (emphases added). In addition to herbalists and diviners, the law regulates traditional surgeons, birth attendants, and tutors. *Id.*

245. See ASHFORTH, *supra* note 2, at 54. Ashforth elaborates:

Virtually all healers communicate with and utilize the power of ancestors or other invisible beings in some way. Indeed, healing in Africa generally is inconceivable without the healer invoking spiritual beings of some variety as part of the healing practice, either as the source of diagnosis and prescription or as the origin of medicinal remedies.

*Id.* (internal quotations and citations omitted).

246. Traditional Health Practitioners Act 35 of 2004 s. 1. The Act gives the agency little guidance on the substance of its regulations. For instance, it prohibits those not registered as traditional healers from diagnosing or treating cancer, AIDS, or any other terminal disease but it says nothing about whether registered healers may do so, leaving that contentious issue to the Council. *Id.* s. 49(g).

247. See Cartillier, *supra* note 64 (“The body will also act as a watchdog against quacks.”); see also Keeton, *supra* note 14 (“Traditional doctors have long been recognised by the World Health Organisation (WHO) and in other countries in Africa, but we were called names like witchdoctors under apartheid. This Bill will be a revolution.”) (quoting a traditional healer).

248. Cartillier, *supra* note 64.

249. Ndaki, *supra* note 239.



And in fact the law does assert strong government control over all aspects of traditional healing. People who are not registered with the Council are prohibited from practicing traditional healing.<sup>250</sup> The unauthorized practice of traditional medicine for gain, or even holding oneself out as a traditional health practitioner without being registered, is a criminal offense punishable by fine and imprisonment for up to one year.<sup>251</sup>

#### B. A QUALIFIED ENDORSEMENT

Several liberal principles support the Act. Regulating traditional healers fosters a sense of equal citizenship for African traditionalists, helps to remedy perceived injustice, shores up law and order, and bolsters the legitimacy of the young democracy. This section assesses these four arguments in greater detail. Admittedly, the Act involves government in drawing distinctions between legitimate and illegitimate healers that make sense only within African traditions—thereby disqualifying it for inclusion in an overlapping consensus and risking a violation of the rule of law. Nevertheless, the Act should be promoted by liberals as part of a second-best compromise. But this conclusion is subject to one critical caveat, issued in the next section: To comply with liberal traditions, Parliament must amend the Act to make its licensing scheme optional rather than mandatory in order to protect the right of individual dissenters to exit from the state's official conception of African religion and culture. Only then can Parliament pursue its legitimate goals of accommodating African culture and bolstering security without exceeding liberalism's limits.

#### 1. Equal Citizenship

Parliament's approach to the problem of witchcraft deserves support chiefly because it promotes a sense of equal citizenship among traditional Africans. For too long, colonial and apartheid governments promoted policies that maligned African traditions in general and occult beliefs in particular. A primary purpose of the 2004 law therefore was to "restor[e] the dignity of traditional medicine."<sup>252</sup> Zimbabwe passed similar legislation shortly after independence in 1980 in order to remedy past discrimination against healers there.<sup>253</sup> To many people, democracy means that government will recognize customs that remain central to those people's identities. And the danger that people will feel alienated from public life is real. Africanization seeks to counteract exactly that sort

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250. Traditional Health Practitioners Act 35 of 2004 s. 21(1).

251. *Id.* s. 49(1)(a)–(f), (4). Whether traditional healers will in fact obey any regulations is far from clear. Healers have ignored a similar 1998 law that requires the registration and regulation of all traditional medicines. See ASHFORTH, *supra* note 2, at 299 (describing noncompliance with the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998).

252. REPORT OF THE SELECT COMMITTEE ON SOCIAL SERVICES, *supra* note 67, at 3.

253. *Id.* at 10–11. The Select Committee noted some weaknesses of the Zimbabwe approach, but concluded that the law had significant strengths, particularly in the treatment of psychiatric patients. *Id.* at 11.

of alienation among Africans.

Of course, neutralists will oppose the regulation of traditional healers because the Act employs religio-cultural classifications. But neutralism is not the only plausible interpretation of the liberal tradition. Another liberal approach to questions of religious and cultural pluralism is what I will call *culturalism*. On this view, liberalism can—and perhaps even must—cognize differences of religion and culture among the citizenry. More and more, political philosophers are arguing that religio-cultural difference has a place in liberal theory.<sup>254</sup> Culturalism argues that simply ignoring traditional groups will often allow the dominant group to enact government policies that discriminate implicitly or incidentally against non-dominant traditions.<sup>255</sup> Because standard discourses of human and civil rights simply give no answers to problems of multiculturalism, they often have the unintended effect of sanctioning de facto inequality.<sup>256</sup> Moreover, culturalists point out that whatever contemporary liberals say, all nations in fact recognize certain group differences in their actual policies. The only practical question is which accommodations should be supported, not whether any ought to be.<sup>257</sup> Culturalists may well endorse the Traditional Health Practitioners Act because it conveys a message of political belonging that has long been denied to Africans.

Dignity is not only an important liberal value; it is also guaranteed under the constitution.<sup>258</sup> Traditional healers drew on that provision when they lobbied members of Parliament in favor of the Act. *Sangomas* and *inyangas* argued to lawmakers that the bill of rights “embodied freedom of choice in terms of culture, beliefs and retention of human dignity,” and they “stressed that their

254. See Levy, *supra* note 166, at 19–20 (describing the development of “multicultural theorizing”).

255. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 166, at 108; Taylor, *supra* note 208, at 43.

256. I avoid the term multiculturalism as a name for this theoretical position because that term has been used in many different and conflicting ways. In what follows, I use the term culturalism to refer to a specific type of liberal theory that I define. Multiculturalism, for me, describes an empirical social situation in many countries where multiple cultures or nations share a single country or state.

257. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 166, at 129. Culturalism has at least three varieties: culturalism of rights, of fear, and of recognition. Culturalists of rights, promoted most effectively by Will Kymlicka, argue that traditional communities are valuable to liberalism because they provide individuals with the sense of dignity and meaningfulness that is necessary for the exercise of rational choice among competing ends. See *id.* at 83; Will Kymlicka, *Liberal Complacencies*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 31, 33 (Joshua Cohen et al. eds., 1999). Because Kymlicka’s approach results in certain privileges against the state that are guaranteed as a matter of justice, it is a culturalism of rights. Second, Jacob Levy has developed a culturalism of fear. LEVY, *supra* note 121, at 12. He focuses not on a theory of justice, but instead on a pragmatic liberal fear of violence and humiliation toward groups. Religion and culture should be important to liberal democracies not as a matter of justice or right, but instead because they form the basis of group membership that can lead to horrifying evils such as cruelty and terror. *Id.* Third, Charles Taylor has endorsed (part of) a culturalism of recognition. Here, religio-cultural groups think that they deserve not just certain rights against the government, but also state recognition of their tradition’s value and worth. Taylor himself has a difficult time saying *a priori* that every culture is worthy of equal respect, but he allows that every such group deserves at least a presumption of worthiness. Taylor, *supra* note 208, at 66.

258. S. AFR. CONST. 1996 § 10.

dignity had been eroded by colonial and apartheid powers.”<sup>259</sup> A democracy, if it is to function well, requires that each citizen feels that she or he is regarded by the state as having inherent worth. The 2004 Act sends this message not only to health practitioners themselves, but also to the millions of people who consult them seeking protection from occult harm.

## 2. Security of the Person and Individual Freedom

Witchcraft beliefs cause many citizens to feel intensely vulnerable to volitional attack by others. In the language of the constitution, occult harm endangers security of the person. Section 12 guarantees such security, including “the right . . . to be free from all forms of violence from either public or private sources.”<sup>260</sup> Many Africans feel that they have a right to be protected against assault by others, and that the democratic state so far has failed to provide the justice and security necessary for its populace to flourish. Traditional healing promises security in various forms, including restitution, defense against future harm, and even limited retaliation.<sup>261</sup> Regulating healers allows the government to claim that it is providing some state-sanctioned response to occult insecurity.

Without relief from phantasmal vulnerability, moreover, citizens may feel they are unable to exercise newfound democratic freedoms.<sup>262</sup> Young activists claimed that by killing witches they either were expunging witches who had helped to bolster the apartheid regime or, sometimes, that they were ridding local government of superstition. In either case, they sometimes understood themselves to be working to advance *political* freedom for the local community as a whole.

Moreover, the current alternative to state regulation, self-help in the form of mob retaliation, threatens law and order in obvious ways. Supporters of the Act have suggested that regulating traditional healers will help restore the state’s monopoly over legitimate coercion.<sup>263</sup> To the degree that normalizing traditional healing can lessen the need for private actors to resort to force, the Act may work to secure stability in this additional way.

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259. REPORT OF THE SELECT COMMITTEE ON SOCIAL SERVICES, *supra* note 67, at 4.

260. S. AFR. CONST. 1996 § 12 (“Everyone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources . . .”).

261. The exact form of justice that traditional healing guarantees is unclear. Ashforth has remarked that “[i]raditional healing promises a limited form of justice akin to revenge: in treating a victim of witchcraft, healers promise that the evil forces will be returned to their source to kill the witch who dispatched them.” ASHFORTH, *supra* note 2, at 313.

262. *See id.* at 16 (“I focus upon these problems of insecurity from the conviction, grown out of years living in Soweto, that it is only when the forces threatening harm are either mastered or kept at bay that there is any possibility of freedom and autonomy.”).

263. *Cf. Hund, supra* note 4, at 385, 389 n.99 (advocating the regulation of traditional healers, along with criminalization of witchcraft itself, and warning that “many people fear that if new legislation is not adopted soon the problem of witchcraft-related violence will spiral out of control”).

### 3. Popular Sovereignty and Democratic Legitimacy

One critical difference between cultural accommodation in South Africa and in many other modern democracies is that followers of African traditions comprise the great majority of the population there. Democracy at root means, of course, that the government ought to obey the principle of self-determination. And under the 1996 constitution, self-determination is defined to mean not only that the general citizenry has a right to govern itself, but also that specific communities enjoy a right to determine their own cultural policies.<sup>264</sup> Questions of multiculturalism therefore have different implications in South Africa, where members of non-Western traditions comprise a large majority.

A government that is unresponsive to the concerns of its citizenry—or that fails to protect them from injustice—may face a serious problem of legitimacy. Such difficulty has been particularly acute under the Witchcraft Suppression Act, which bans all forms of private protection against witchcraft without providing a viable public enforcement system. Now, the Traditional Health Practitioners Act allows the state to claim that it is being sensitive to the insecurity felt by the people and taking steps to combat occult harm.

In sum, basic principles of liberal democracy favor the Act. Many neutralists will take issue with this conclusion and argue that a democracy has no business involving itself in the tenets of a particular religio-cultural group. These concerns have real force and the next section will examine them carefully—ultimately arguing that the Act must be amended. Should that amendment be adopted, the Act deserves support from those within the liberal tradition because it promotes equal citizenship for long-denigrated traditional communities, works to ensure justice in the eyes of many Africans, and furthers self-determination and governmental legitimacy.

#### C. AMENDING THE ACT

Two principles weigh against the Traditional Health Practitioners Act. First, the statute threatens the rule of law because it involves the government in making determinations that may appear arbitrary to non-Africans. Second, it could impose an official conception of what African traditions require on people who identify with witchcraft traditions but dissent from that state-sanctioned interpretation of what their own culture's rules require. For instance, an individual applicant who is denied a healer's license may disagree with the criteria that the agency is using to make its determinations. Preserving a right of individual dissent from group-differentiated rules is critical to virtually all versions of liberal thought. Consequently, liberals should press for the Act to be amended so that it guarantees the right to exit.

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264. S. AFR. CONST. 1996 § 235 (protecting “the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation”).

### 1. The Rule of Law

The 2004 Act requires the Council, a government agency, to distinguish between legitimate and illegitimate practitioners of traditional medicine. Yet it does not provide criteria for minimum training, qualifications, or competency, instead delegating the development of such guidelines to regulators.<sup>265</sup> Apparently legislators were unable to resolve a fierce debate on the question of qualifications.<sup>266</sup> Conflict over credentials is hardly surprising. After all, traditional healing in Africa is thoroughly otherworldly.<sup>267</sup> In Soweto, for instance, *inyangas* are thought to be “African scientists whose secret knowledge allows them to perform ‘miracles.’”<sup>268</sup> Moreover, healers are ambiguous figures whose legitimacy is always problematic.<sup>269</sup> Yet the central responsibility of the Council is to license only competent healers.

The Act cannot win support from a political conception of justice capable of attracting an overlapping consensus. That is because its rationale relies on a particular comprehensive doctrine, namely the belief in occult power that is common to many African worldviews. Everyone understands that traditional medicine carries meaning only within African groups. Supporters of the Act might reasonably hope that outsiders to African traditions could support some limited accommodation based on general democratic principles outlined above, including equal citizenship, justice and order, and self-determination. But non-Africans could not be expected to endorse particular licensing determinations. Therefore agency rulings in particular cases will fail to satisfy the requirements of public reason, will violate the criterion of reciprocity, and cannot qualify for inclusion in a Rawlsian overlapping consensus.<sup>270</sup>

The Act raises rule of law concerns for similar reasons. A formal conception of the rule of law—the understanding that has long dominated among liberals—holds that law ought to be certain and predictable. Equality and autonomy alike are thought to be promoted by stable rules because citizens both feel freer to plan their affairs around predictable government action and they receive a message of equal citizenship.<sup>271</sup> In other words, both freedom and equal citizenship are promoted when capricious state action is banned.<sup>272</sup> Joseph Raz

265. See Traditional Health Practitioners Act 35 of 2004 s. 22, 47 (S. Afr.) (delegating authority to develop criteria).

266. See ASHFORTH, *supra* note 2, at 293, 294 n.6.

267. See *id.* at 54, 294.

268. *Id.* at 297.

269. See GESCHIERE, *supra* note 15, at 197.

270. Such determinations also surely implicate constitutional essentials. Whether a practitioner of traditional medicine will be prohibited from exercising his or her beliefs by the criminal law surely implicates basic rights to the freedom of conscience and to the enjoyment of culture. See S. AFR. CONST. 1996 §§ 15, 31 (§ 15 (freedom of conscience), § 31 (enjoyment of culture)).

271. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 93–94, 119 (2004) (discussing this conception of the rule of law).

272. As one prominent theorist puts it, “to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals.” *Id.* at 122; see also *id.* at 95; RONALD DWORKIN, A MATTER

explains that “[t]he rule of law is often rightly contrasted with arbitrary power.”<sup>273</sup> Here, ruling on the legitimacy or illegitimacy of any particular applicant will require the government to draw inherently spiritual distinctions that cannot make sense to non-Africans.

One way of thinking about non-arbitrariness is that it prohibits one group from governing according to norms that have meaning only within that tradition. To outsiders, rule under a particular religio-cultural system may be impossible to fathom. Non-arbitrariness thus links up with a key idea for liberalism, namely that the comprehensive view of one group should not be imposed on others.<sup>274</sup> Anti-establishment is a way of managing pluralism once sovereignty is located in the people as a whole. Critically here, it promotes the rule of law conceived of as non-arbitrariness.

A difficulty with the Traditional Health Practitioners Act is that it seems to involve a government agency in making determinations between qualified and unqualified healers that only hold within a particular worldview. How will it be possible for the Council to establish criteria for competent traditional healing?<sup>275</sup> Recall that in practice a traditional healer is seen to be competent if she or he has experienced a genuine call from the ancestors, among other spiritual qualifications. Certainly, healers are sometimes trained by more senior members of the profession who serve as ad hoc mentors who may vouch for their powers. But ultimately there is no worldly authority who can gainsay a healer’s claim to legitimacy.<sup>276</sup> The Council has not yet said how it will identify bona fide healers, but whatever criteria it adopts may seem senseless and arbitrary to outsiders. In other words, the Act, by employing arbitrary criteria, risks violating the rule of law.

Applying African norms might not at first appear troubling because people

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OF PRINCIPLE 11 (1985); JOSEPH RAZ, *THE AUTHORITY OF LAW* 214 (1979); JUDITH N. SHKLAR, *POLITICAL THOUGHT AND POLITICAL THINKERS* 22, 25 (Stanley Hoffman ed., 1998).

273. RAZ, *supra* note 272, at 219, 224; *see also* MICHAEL OAKESHOTT, *ON HISTORY AND OTHER ESSAYS* 137 (1983).

274. For example, Rawls remarks at one point that:

[T]hose who believe that fundamental political questions should be decided by what they regard as the best reasons according to their own idea of the whole truth—including their religious or secular comprehensive doctrine—and not by reasons that might be shared by all citizens as free and equal, will of course reject the idea of public reason.

RAWLS, *supra* note 127, at 447. At another point he says, “There is no reason why any citizen . . . should have the right to use state power to decide constitutional essentials as that person’s, or that association’s, comprehensive doctrine suggests.” *Id.* at 226. The criterion of reciprocity embodies for Rawls the basic concept behind anti-establishment: A particular religious or cultural group should not be able to impose rules that outsiders could not reasonably endorse. *Id.* at xlv, 446–47. Rawls’s criterion of reciprocity also connects to the rule of law as non-arbitrariness. The criterion of reciprocity is the key concept that embodies non-arbitrariness: Citizens must be able to reasonably accept the reasons given for the exercise of coercive government power, but they will be unable to do so if those reasons hold only within a particular tradition but appear arbitrary outside it.

275. *See* ASHFORTH, *supra* note 2, at 295.

276. *Id.*

who apply for licenses to practice traditional healing presumably already subscribe to those norms. The risk that seemingly arbitrary rules will be applied to outsiders seems small and therefore the rule of law concerns here might also seem minor. Yet this initial impression, which is sound as far as it goes, misses a related concern—the treatment of dissenters.

## 2. The Problem of Individual Dissent

The Act predictably will stifle dissent within the community of traditional practitioners. Africans who are denied healing licenses—or who are prosecuted for practicing without a license—may well object to the government's conception of what African traditions require of *sangomas* and *inyangas*. Imagine, for instance, an older woman who regularly dispenses healing herbs to family and neighbors, perhaps in exchange for other services.<sup>277</sup> She may resist the government's determination that she is practicing traditional medicine at all.<sup>278</sup> Dissenters like her may feel that the Council has applied criteria that are capricious or irrational. Government here risks exercising coercive power—prohibiting her from practicing on pain of criminal punishment—in a manner that interferes with individual autonomy and communicates a message of disfavored status. Laws that restrict choice in this way also risk ossifying African traditions.<sup>279</sup>

Whatever else the liberal tradition requires in the context of regulating religion and culture, it certainly mandates protecting dissent, even if only through a right of individual exit.<sup>280</sup> Even writers who defend an unusual degree of autonomy for minority groups—for instance, preserving the power of groups to insist that dissenting members follow internal rules—invariably qualify their recommendations by insisting that government protect the right of members to criticize group rules and to leave the group free of unusual coercion.<sup>281</sup> Cultural rights themselves are often defended as legal mechanisms that promote the

277. See *id.* at 295–96.

278. I owe this hypothetical to a conversation with Noah Feldman.

279. Reification may be one consequence of legalizing beliefs around traditional practices. See KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 166, ch.3 (discussing what he calls “internal restrictions”); LEVY, *supra* note 121, at 189–90.

280. Rawls argues that although private associations can be internally illiberal, the state cannot enforce apostasy or heresy. RAWLS, *supra* note 127, at 468–69; see also LEVY, *supra* note 121, at 191 (“Although Kymlicka and Chandran Kukathas disagree to a certain extent about the validity of conservative rules within a minority group when exit is possible, they certainly unite in condemning such rules when it is not.”); Sunder, *supra* note 217, at 505 (“[L]iberals have argued that cultural rights wrongly place the autonomy of the group over the autonomy of the individual . . . Building on these critiques . . . I seek to present a sustained polemic for legal recognition of autonomy and plurality within cultural identity—that is, cultural dissent.”).

281. See, e.g., Kukathas, *supra* note 208, at 116 (arguing that indigenous groups should be left alone to govern their own affairs but insisting that “[i]f there are any fundamental rights, then there is at least one right which is of crucial importance: the right of the individual to leave a community or association by the terms of which he or she no longer wishes to live”); Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 *Soc. Res.* 491, 491–92 (2004) (arguing that the state must sometimes abandon its neutrality and actively assist cultural groups, even illiberal ones, but insisting on a right to exit).

ability of individual citizens to exercise their ability to choose to associate with others in a community—and conversely to disassociate.<sup>282</sup> Failing to protect objectors undermines one of the best democratic rationales for vigorous cultural and religious rights in the first place.

Why should traditional healers be able to dissent from government licensing decisions? After all, Western doctors enjoy no comparable right, even though they might disagree with state medical standards. And as a general matter, we do not tolerate individual disagreement with criminal laws. Yet matters are different where the government accommodates specific religio-cultural groups by using state power to enforce group-differentiated rules, such as those that identify legitimate traditional healers according to inherently supernatural criteria. When government bolsters group rules in this way, protecting an individual right to exit becomes critical.

What is even more troubling about the Traditional Health Practitioners Act is that it not only authorizes the use of state power to impose a particular conception of traditional healing on members of African traditions, thereby stifling heterodoxy *within* the community, but it also criminalizes any practice of traditional healing even *outside* that group. Government officials will police the unauthorized practice of traditional medicine not only by self-identified healers—itsself a control on dissent—but also by people who do not claim to be *inyangas* or *sangomas* but nevertheless fall under the Act's wide definition of traditional healer as anyone who uses "indigenous African techniques."<sup>283</sup>

### 3. A Proposed Amendment

The Act must be amended in order to better protect the individual right of exit if it is not to exceed the limits of liberalism. Instead of imposing a mandatory licensing regime with accompanying criminal sanctions, Parliament might make the Act's provisions permissive. That would allow healers who dissent from the state's licensing determinations to continue to practice. Much of the existing law could be retained, including the Council's core power to distinguish between authentic and inauthentic healers, but its licenses would merely inform those seeking services in the open market rather than restricting client choice. Citizens could consider whether healers are licensed by the state when deciding whether to enlist their services. Yet clients who disagree with the government's criteria would be free to hire unaccredited practitioners.<sup>284</sup> Parliament would

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282. Will Kymlicka takes this view, which has been influential in the literature. See, e.g., Kukathas, *supra* note 208, at 116.

283. Traditional Health Practitioners Act 35 of 2004 s. 1.

284. Amending the Act in this way may hamper its effectiveness, admittedly, because it will weaken Parliament's claim to be doing something to address the problem of witchcraft, but that cost must be borne in order to protect critical rights.



simply enrich the market for occult medicine by providing information.<sup>285</sup> Of course, to the degree that *inyangas* or *sangomas* engage in behavior that is objectively harmful—for instance, by prescribing herbs or medicines that cause physical illness—government should (and does under existing drug laws) have the power to regulate traditional medicine, including the ability to punish wrongdoers under the criminal law.<sup>286</sup> Yet to the extent that government seeks to impose criteria for legitimate healing that violate the criterion of reciprocity, in the sense that they appear arbitrary or irrational to outsiders to the tradition or dissenters within it, Parliament should make those rules permissive rather than mandatory. A voluntary licensing scheme would bolster individual autonomy of both healers and their clients.<sup>287</sup> At the same time, it would serve many of Parliament's legitimate purposes: dignifying African culture and promoting equal citizenship, giving citizens a sense of state-aided security, answering the call of the majority for cultural self-determination, and bolstering law and order.

## V. CRIMINALIZING WITCHCRAFT

### A. CURRENT PROPOSALS

Prominent African politicians and intellectuals have called on Parliament to outlaw the practice of witchcraft. Virtually no one is happy with the Witchcraft Suppression Act—the law is seen to be a vestige of colonial policies that disparaged indigenous beliefs. Consequently, African traditionalists are pressing legislators to repeal the 1957 Act and impose a state monopoly on the policing of occult wrongdoing. According to one local commentator, the Department of Justice is under “serious pressure” to draft new legislation.<sup>288</sup> Zimbabwe's passage of a criminal ban in 2006 can only have increased that pressure.

The Ralushai Commission first urged lawmakers to criminalize “any act which creates a reasonable suspicion that [one] is engaged in the practice of witchcraft” and to impose a sentence of four years' imprisonment and/or a fine

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285. This proposal is analogous in certain ways to an administrative mechanism whereby agencies, instead of prohibiting harmful conduct, recommend best practices. See David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294 (2005).

286. South African Medicines and Medical Devices Regulatory Act 132 of 1998.

287. Amending the law may also aid enforcement. Ashforth questions the Act's workability, calling it “pure fantasy” to think that traditional healers will voluntarily submit to regulatory control. ASHFORTH, *supra* note 2, at 288, 298. He points out that traditional healers have made no move to submit their medicines to regulatory review by the Medicines Control Council as required by the Medicines Act. *Id.* at 299. Making the 2004 Act permissive rather than mandatory might give healers a market-based incentive to seek accreditation. Because clients may prefer a licensed healer to an unlicensed one, healers may attract more business if they obtain government approval. There is a critical theoretical distinction between requiring conformity to certain cultural rules and incentivizing it in this way.

288. Hund, *supra* note 4, at 385; see also *id.* at 389 n.99 (“Pressure is building on the Department of Justice. The South African Law Commission is also under pressure to draft new legislation to replace the 1957 Act.”).

of up to R4,000.<sup>289</sup> That proposal has been politically influential to some degree. In 1998 and 1999, the Commission on Gender Equality, a national agency, held conferences on witchcraft violence.<sup>290</sup> At the first of those meetings, Seth Nthai, former minister of Safety and Security for the Northern Province, told participants that it “goes without saying that practitioners of witchcraft should be brought to trial.”<sup>291</sup> He proposed that sorcerers be arrested by traditional police and tried in traditional courts with an emphasis on mediation and other alternative forms of dispute resolution common in African traditional societies. “We should build on the African experience,” he urged, “and make our justice system more responsive to the plight of victims of witchcraft-related crimes.”<sup>292</sup> At the end of the 1998 conference, delegates approved the Thohoyandou Declaration. While it did not unambiguously endorse criminalization, the declaration did urge new legislation under which “those who are engaged in harmful practices can be separated out from those who are falsely accused” so that witchcraft issues will no longer be handled “outside the criminal justice system.”<sup>293</sup> Later, the Institute for Multi-Party Democracy, a non-governmental organization, recommended special state courts for the prosecution of witches and sorcerers.<sup>294</sup> Intellectuals working in the area have likewise called for witches to be tried in state criminal courts.<sup>295</sup>

Efforts like these to criminalize sorcery ought to be resisted by liberals. This Part warns that their success would damage liberal-democratic principles including the rule of law, equal citizenship, and individual freedom. After comparing the sobering experience of Cameroon, a country that already prosecutes witches in state courts, the Part argues that the potential dangers of criminalization far outweigh its potential contributions to the achievement of liberal aspirations.

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289. RALUSHAI ET AL., *supra* note 22, at 55; *see also* ASHFORTH, *supra* note 2, at 262–63. The Ralushai proposal is based on a belief in the reality of witchcraft. *See supra* Part II.E.

290. Proceedings from the 1998 conference were published in a volume titled *Witchcraft Violence and the Law in South Africa*. *See* Hund, *supra* note 24, at 7–8; *see also* Hund, *supra* note 4, at 385; ASHFORTH, *supra* note 2, at 264–65.

291. Seth A. Nthai, *Witchcraft Violence and the Need for New Legislation*, in *WITCHCRAFT VIOLENCE AND THE LAW IN SOUTH AFRICA*, *supra* note 2, at 131, 135.

292. *Id.*

293. THOHUYANDOU DECLARATION, *supra* note 24, 3–4, *reprinted in* ASHFORTH, *supra* note 2, at 325. Some have reported that conference delegates did indeed recommend that witchcraft itself be outlawed. Harnischfeger, *supra* note 2, at 61; Hund, *supra* note 4, at 369. According to another source, the “conference rejected outlawing witchcraft.” Gilbert A. Lewthwaite, *South Africans Go on Witch Hunts*, *BALT. SUN*, Sept. 27, 1998, at 1A.

294. These would not be traditional African courts, but rather specialized government tribunals. *See* John Hund, *African Witchcraft and Western Law*, in *WITCHCRAFT VIOLENCE AND THE LAW IN SOUTH AFRICA*, *supra* note 2, at 9, 34–35.

295. In addition to Nthai and members of the Ralushai Commission, John Hund discourages the use of traditional courts, which he says “are no longer held in high esteem by most African people” and in any case “have all but collapsed.” *Id.* at 34; *see also* Hund, *supra* note 4, at 387. Traditional healers would have a central role in state-court trials, serving as expert witnesses that could identify sorcerers. Hund, *supra* note 294, at 35.

## B. CRIMINALIZATION IN CAMEROON

Anxiety about witchcraft is so widespread in Africa that citizens across the continent have been calling on governments to protect them against occult aggression.<sup>296</sup> This section looks at the experience of Cameroon for two reasons. First, that country has long been conducting well-documented trials of suspected witches. Second, Cameroon's law has influenced some South African proponents of criminalization.<sup>297</sup>

Cameroon, like a few other countries, outlawed witchcraft shortly after it gained independence from colonial rule in 1960.<sup>298</sup> Yet for twenty years officials hesitated to enforce the statute, fearing that guilt of witchcraft would be impossible to establish by objective proof.<sup>299</sup> As post-colonial Cameroon matured, its reluctance to prosecute witches slowly eased and it began to conduct witchcraft trials around 1980.<sup>300</sup> Judges in the East Province led the way, often convicting witches on the uncorroborated expert testimony of a single traditional healer.<sup>301</sup> A leading ethnographer called these early trials "surprising—not to say shocking—because they constitute[d] a dramatic reversal of the preceding jurisprudence," under which healers, not witches, had been at risk of prosecution.<sup>302</sup>

For many Cameroonian officials, modernization did not bring disenchantment but instead an effort to better combat occult aggression.<sup>303</sup> Today, prosecution of witches is still most common in the East Province, but it is increasingly prevalent in other regions as well.<sup>304</sup> A state prosecutor explained that the

296. GESCHIERE, *supra* note 15, at 169.

297. *See, e.g.*, Hund, *supra* note 4, at 385.

298. *See generally* Cyprian F. Fisiy, *Containing Occult Practices: Witchcraft Trials in Cameroon*, 41 AFR. STUD. REV. 143 (1998). Section 251 of Cameroon's 1967 Penal Code reads in pertinent part:

Whoever commits any act of witchcraft, magic or divination liable to disturb public order or tranquility, or to harm another person, property or substance, whether by taking a reward or otherwise, shall be punished with imprisonment for from two to ten years and with a fine of five thousand to one hundred thousand francs.

*Id.* at 144. Other literature on witchcraft trials in Cameroon includes GESCHIERE, *supra* note 15, at 169–97; Diane Ciekawy & Peter Geschiere, *Containing Witchcraft: Conflicting Scenarios in Postcolonial Africa*, 41 AFR. STUD. REV. 1 (1998); Cyprian F. Fisiy & Peter Geschiere, *Judges and Witches, or How is the State to Deal with Witchcraft?: Examples from Southeast Cameroon*, 118 CAHIERS D'ÉTUDES AFRICAINES 135 (1990); Cyprian F. Fisiy & Michael Rowlands, *Sorcery and Law in Modern Cameroon*, 6 CULTURE & HIST. 63 (1989); Peter Geschiere & Cyprian Fisiy, *Domesticating Personal Violence: Witchcraft, Courts and Confessions in Cameroon*, 64 AFR. 323 (1994); Harnischfeger, *supra* note 2, at 48–50.

299. *See* GESCHIERE, *supra* note 15, at 169.

300. *Id.* at 5–6.

301. *Id.*

302. *Id.* at 6; *see also* Geschiere & Fisiy, *supra* note 298, at 329.

303. *See* Fisiy, *supra* note 298, at 151 ("The new elite implicitly recognize the existence of witchcraft in the sociocultural context in which they live, but they have sought to sanitize it by incriminating such practices.")

304. GESCHIERE, *supra* note 15, at 184, 186 (describing some local variation in the frequency of witchcraft trials).

government had an obligation to resist witchcraft: "We should not pretend that witchcraft does not exist. It is very much alive here in the East Province. . . . It is witchcraft that is drawing back development in this province."<sup>305</sup> Another prosecutor felt more ambivalent. On the one hand, he agreed that the state must respond to popular calls for containing witchcraft because the only alternative—private enforcement—was utterly unacceptable.<sup>306</sup> On the other hand, he was reluctant to charge witches without tangible proof of their guilt sufficient to satisfy the "positivism" of the "letter of the law."<sup>307</sup> Tension between these two governmental objectives—addressing occult harm and upholding the rule of law—reflects what one leading scholar has called "a much deeper crisis of the postcolonial state."<sup>308</sup>

Cameroon's criminal ban on witchcraft has drawn sharp criticism from outside observers.<sup>309</sup> They have worried that occult aggression, which is undetectable by ordinary methods, is impossible to prove in any principled way.<sup>310</sup> A survey of some forty witchcraft cases showed no pattern of outcomes that could be correlated to identifiable fact patterns.<sup>311</sup> Whether a witch was convicted seemed to depend solely on testimony from traditional healers and the "firm conviction" of the judge.<sup>312</sup> (Today traditional healers in Cameroon often also initiate prosecutions, bringing accused witches to the attention of the state courts.) Courts, in sum, have been heavily criticized for irrationality and arbitrariness.

### C. AGAINST A WITCHCRAFT BAN

This section explains why averting a criminal ban on witchcraft is critical to the future of liberal democracy in southern Africa. After acknowledging some attractive features of criminalization, it ultimately warns of four overriding perils: to public reason and the rule of law, to equal citizenship, to the ability of individual members to dissent from African traditions, and finally to the flexibility of those same traditions.

#### 1. Advantages

Criminalization would seem to serve many of the same values that support the Traditional Health Practitioners Act. Like that law, a criminal statute would

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305. Fisiy, *supra* note 298, at 160.

306. GESCHIERE, *supra* note 15, at 185.

307. *Id.*

308. Fisiy, *supra* note 298, at 157.

309. *See, e.g., id.*; GESCHIERE, *supra* note 15, at 195.

310. *See* GESCHIERE, *supra* note 15, at 169, 177–79; Fisiy, *supra* note 298, at 161.

311. *See* Fisiy, *supra* note 298, at 160.

312. *Id.* at 156 (quoting *Ministere Public & Mvondo c/ N. Jacqueline*, Arret No. 355/COR of March 22, 1984, Bertoua Court of Appeal). Reportedly the use of traditional healers as expert witnesses is more prevalent in the Francophone part of the country, which uses an inquisitorial procedure for gathering evidence, than in the Anglophone region, where common law rules of evidence are much less likely to tolerate the use of a "witch-doctor" as an expert witness. *Id.* at 160.

promote self-determination for Africans.<sup>313</sup> Presumably, policing occult aggression would do a great deal to make citizens feel secure, thereby strengthening the legitimacy of the government against the criticism that it is not doing enough to protect the populace against all forms of violence.<sup>314</sup> Such a law might also work to restore the equal citizenship of indigenous people.<sup>315</sup> New proposals to ban occult harm recognize African beliefs and aim to return to them a sense of dignity and belonging.<sup>316</sup> They also promote the right to culture.<sup>317</sup> Finally, acting decisively to address occult concerns may discourage violent self-help. Whatever the strengths of these advantages, however, they are overbalanced by the perils of criminalization.

## 2. The Rule of Law

Identifying, charging, and convicting witches depends on divinatory techniques that only make sense within a particular comprehensive viewpoint. Proposals to criminalize witchcraft therefore violate the Rawlsian criterion of reciprocity: They cannot be accepted by reasonable people who are not adherents of that culture. Methods that traditional healers use to detect the secret practice of sorcery necessarily involve supernatural practices whose logic is opaque to observers.

Divination involves just the sort of governmental arbitrariness prohibited by virtually all versions of the rule of law. One way to think of the rule of law, I have suggested, is as a concern with state establishment of a particular religious-cultural system. Here, subjecting accused witches to state trials involving phantasmal evidence threatens to impose African customs on disbelievers. Evidence from Cameroon suggests that judicial reliance on expert testimony from traditional healers has become virtually exclusive. Subjecting defendants to state coercion that they view as senseless strikes at the heart of individual dignity and autonomy.

A skeptic might wonder why the Traditional Health Practitioners Act, which I have endorsed to a degree, does not present much the same difficulty for the rule of law. Two differences separate the statutes. First, people who apply for a license to practice traditional healing will themselves presumably subscribe to

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313. S. AFR. CONST. 1996 § 235 (protecting “the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation”).

314. *See id.* § 12 (“Everyone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources . . .”).

315. At least one theorist argues that the state has no business strengthening feelings of belonging among religious or cultural groups. *See Chandran Kukathas, Cultural Toleration, in ETHNICITY AND GROUP RIGHTS: NOMOS XXXIX 69* (Ian Shapiro & Will Kymlicka eds., 1997); Chandran Kukathas, *Liberalism, Communitarianism, and Political Community*, 13 *SOC. PHIL. & POL’Y* 80–104 (1996). My sense is that bolstering equal citizenship may well be appropriate in a liberal democracy—for instance, that is one chief benefit of the Traditional Health Practitioners Act.

316. *See KYMLICKA, MULTICULTURAL CITIZENSHIP, supra* note 166, at 192; LEVY, *supra* note 121, at 185–86.

317. S. AFR. CONST. 1996 § 31 (protecting the right to culture).

African traditions—and to the extent that they do not, the amendment I have urged will protect them from the worst government coercion—whereas defendants who face witchcraft charges may well be outsiders. There is no workable way to exempt outsiders or dissenters from a criminalization scheme. Therefore government coercion may well impact people who think its actions violate the rule of law.

Second, the consequences of any arbitrary government action under criminalization proposals are much more severe than under the 2004 Act. Imprisonment is obviously a harsher consequence than the denial of a license to practice traditional medicine, particularly if the Act is altered in the way I have suggested. Convicting someone who claims to be innocent of witchcraft, and who perhaps even denies its reality, imposes a cost that ought to be intolerable in a liberal democracy. Thus, proposals to criminalize witchcraft present much more serious difficulties for the rule of law than does the 2004 Act.

### 3. Equal Citizenship

While criminalization proposals might assuage longstanding feelings of subordination among members of African communities, they nevertheless might impose heavy citizenship costs on non-Africans. Constitutional law commits the country to a “common South African citizenship,”<sup>318</sup> as well as to “non-racialism”<sup>319</sup> and to “one, sovereign, democratic state.”<sup>320</sup> Those commitments cut against criminalization, on balance.

Non-Africans may experience Parliament’s accommodation of witchcraft beliefs as an endorsement of the majority culture that alienates them from the political community. Numerical minorities—Afrikaners, English-speaking whites, Indians, and so-called colored people—may feel that the country exists to serve the African majority. For similar reasons, the ANC has long recognized that a feeling of inclusiveness among non-Africans is critical to the success of the democracy. Yet outlawing witchcraft might send an official message to individuals in these groups that they are disfavored members of the political community.

Creating the perception of an African nation within the larger state, complete with its own criminal law, is potentially destabilizing, adversely impacting both Africans and non-Africans.<sup>321</sup> Self-determination of this extreme sort may partly detach a group from the general law, undermining its fidelity to the wider nation.<sup>322</sup> Laws criminalizing occult harm might lead whites, coloreds, and Indians to experience enervated political membership. That would damage equal citizenship for non-Africans and fracture national unity for everyone.

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318. S. AFR. CONST. 1996 § 3.

319. *Id.* § 1.

320. *Id.*

321. See KYMLICKA, *supra* note 166, at 192; LEVY, *supra* note 121, at 185.

322. See LEVY, *supra* note 121, at 186.

#### 4. Individual Dissent

A distinct difficulty is that members of African traditions who disagree with the government's determination of criminal culpability cannot opt out of a system of criminal punishment. Protestations that a diviner has erred and identified the wrong person would have to be assessed from within the criminal trial in the same manner as any other plea of innocence. Certainly dissenters in this context would be able to argue that subjecting them to prosecution violates fundamental rights of conscience. Yet for criminalization to have any bite at all, it would have to apply to everyone, including to people who object that they are not in fact sorcerers, once sorcery is understood in the right way. Individual dissent could not be tolerated—and that intolerance counsels against a criminal ban.

#### 5. Ossifying Culture

Finally, incorporating rules of customary law into the state criminal justice system risks reifying African traditions. That risk may be mitigated by the use of expert testimony from traditional healers, who will remain free to alter their judgments in individual cases. But the body of case law that will develop around witchcraft trials cannot help but impede the free evolution of African customs. State enforcement of indigenous criminal laws ought to be avoided.

In sum, then, liberal democrats should strenuously resist efforts to criminalize occult practices. Central liberal commitments to the rule of law, to equal citizenship, to the right of individual dissent, and to avoiding state stultification of traditional culture cut against the idea, ultimately. Outlawing witchcraft itself as part of a move toward Africanization would push beyond the limits of liberal democracy.

### CONCLUSION

Democratic South Africa has arrived at a critical moment in its short history. Liberal ideas central to the constitution—especially non-racialism and a unified rule of law for all citizens—are now being challenged by the politics of Africanization. Calls for greater accommodation of African traditions have concerned several areas of law, perhaps none as incendiary as the state regulation of occult-related practices. Measures concerning witchcraft confront the nation with questions that go to the heart of its constitution as a liberal democracy. This Article has argued that certain ideals must be compromised if that political form is to have a future in southern Africa. At the same time, liberalism must defend its limits. With respect to witchcraft laws, this Article has drawn the line at criminalization of sorcery itself. Others might demur. What matters most is the legitimacy and character of liberal democracy in Africa and globally.