



# The Law of the Latke

*Eugene Kontorovich*

**W**HAT'S GREAT ABOUT THE Latke – Hamantash Debate is that at a time when so much academic inquiry is spent on esoteric and irrelevant matters, the Debate focuses our energies on the Big Questions. But there is a danger here too. There is something about the Debate that creates the temptation for otherwise sober scholars to fudge facts, perhaps even to make things up. I'm not saying it's ever happened – only that it's a danger. It is hard to say what it could be about the Debate that creates such incentives – perhaps it's the absence of double-blind peer review. As law professors have long known, if you only have to satisfy a group of students with your argument, you can get away with anything.

So I would like to assure you that all legal citations you are about to hear are accurate. Look 'em up!

In 1789, as part of the statute creating the federal courts, the First Congress passed the Alien Tort Act, now codified at 28 U.S.C.

§ 1350. It allows district courts to hear Alien Tort cases involving violations of international law. No one knows exactly what this means: the statute has no legislative history. As Judge Friendly put it, it is a legal Longherin, no one knows whence it came. This makes it attractive to law professors, who can say anything about it without any danger of refutation.

So opaque was the statute that only one or two lower court cases used it as basis of jurisdiction in the first 180 years after its enactment. But in 1980, a federal court dusted it off, and said the statute authorized it to decide cases involving human rights abuses even if they were committed abroad and have no relation to America or Americans. So, for example, Paraguayans could use U.S. courts as a forum for adjudicating the human rights abuses of that country's military junta.

This was, to put it mildly, a broad reading of the statute – broad enough, perhaps to encompass the current controversy between

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*Eugene Kontorovich is a Visiting Assistant Professor of Law at the University of Chicago Law School and an assistant professor at George Mason University School of Law. This article is based on a speech he delivered at the 59th Annual Latke – Hamantash Debate at the University of Chicago last autumn. Copyright 2005 Eugene Kontorovich.*

the Latke and the Hamantashen.

Latkes and hamantashen are clearly Tortes. It is hard to say which is more of a torte. On one hand, the hamantashen shares the tortuous feature of sweetness. Yet the latke is, as torte should be, a type of cake – a pancake. And both are certainly *Alien* Torts – one coming from Poland, the other from Persia.

And eating them is certainly an “Act.” Thus so far all of the requirements have been satisfied: *Alien – Tort – Act*. This must be precisely what Congress had in mind.

The only question left is whether either or both of these Alien Torts violate international law.

A good way to frame the question, while casting light on current debates, is to ask whether it would violate customary international law or the Geneva Conventions to feed enemy combatants latkes and/or hamantashen.

Some international law scholars have complained that wrapping detainees in Israeli flags constitutes torture, or at least inhuman and degrading treatment. (These detainees must be real self-hating Jews!) So what about feeding them latkes? Surely a symbol of the victory of the hated Jews would not be digested too well by the detainees, especially if by chance they happen to be Syrians. Indeed, one might argue that it would be forcing them to participate in the religious practices of their foes, a gross insult, and a probably a violation of the Geneva Convention’s Art. 3, prohibiting “outrages upon personal dignity, in particular, humiliating and degrading treatment,” as well as a violation of the religious protections in Article 34 of the Third Geneva Convention and Articles 38(3) and 93 of the Fourth Geneva Convention.

However, this argument can not stand. The status of latkes is controlled by the Supreme Court decision in *County of Allegheny*, the Court’s most recent and definitive pronouncement on potato pancakes. It suggested that the latke is a *cultural*, not religious food.<sup>1</sup> Thus surely no harm can come from feeding them to the detainees.

What about the hamantashen? Surprisingly, no court has ever ruled on its status – it has managed to entirely escape judicial scrutiny. We thus have what lawyers call a cake of first impression.

How would today’s Court rule on its status? Well, as the first Hispanic justice, Benjamin Cardozo said, “Prophecy, however honest, is generally a poor substitute for experience,” and so lawyers must analogize from precedent. So if Hanukah is cultural, Purim is cultural *a fortiori*, as the lawyers would say, or *kal vachomer*, as the Talmudists would say. Hanukah involves a miracle, while G-d isn’t even mentioned in the Book of Esther. So on this score, both Tortes are not tortuous.

But that brings us back to torture. Could the administration of latkes or hamantashen count as torture? Let us try, as some jurists urge, to look to “original meanings.” Hamantashen means pockets filled with Hayman. Isn’t it weird – Esther and Mordechai save the Jews, they don’t even get a condiment named after them. Hayman, he gets honored with a treat. Who names a pastry after their enemies? Today we’d call it the Freedom-tashen, or Liberty Triangles. Of course, the point of calling it hamantashen is that we’re devouring Haman. While the latke is a reminder of the Jews’ victory, the hamantashen is a reminder of their enemies’ defeat.

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1 See *County of Allegheny v. ACLU*, 492 U.S. 573, 585 n. 26 (1989) (noting the “custom to serve potato pancakes or other fried foods on Chanukah because the oil in which they are fried is, by tradition, a reminder of the miracle of Chanukah”).

Imagine feeding that to a detainee – the message it sends: “We eat our enemies! Last guy who messed with us, swung from a tree.” So Haman-tashen, from an originalist perspective is a threat... and threatening to kill detainees is prohibited both by the Geneva Conventions and U.S. law – even if one is kidding.<sup>2</sup> So maybe hamantashen are out.

What about latkes? Well, as you know, the administration has interpreted the international law prohibition on torture quite narrowly – it has to result in, or cause pain comparable to, death or organ failure. Latkes can sure cause organ failure, through arterial congestion. Indeed, why would a detaining power feed prisoners these oily menaces? Surely latkes are the edible equivalent of rubber hoses.

So both latkes and hamantashen look bad under international treaties governing the treatment of detainees.

But what about customary international law? Customary international law is just as important a source of international law as

treaties. Where does CIL come from? According to the natural law tradition, it comes from G-d. According to the statute of the International Court of Justice, law professors get to make it up.<sup>3</sup> This is a really nice perk of the job. It’s like getting to write the exam before you take it. So let’s proceed.

Let us look to the behavior of countries. Not one single nation has rejected the use of latkes or hamantashen. Indeed, one state, Israel, vigorously and repeatedly uses hamantashen in a variety of contexts, and this has registered no objection from other nations. Thus, following conventional principles of international law, if we see state practice without express objection, we assume the other nations have acquiesced, and hamantashen have taken on a legally permissible character.

I would reinforce this conclusion by appealing to the great source of international law principles – my personal view of the Good. So – Hamantashen all the way. Especially with an almond paste filling. Or poppy. Gotta love poppy. *GP*

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<sup>2</sup> See 18 U.S.C. § 2340(2)(A) *et* (D).

<sup>3</sup> See Art. 38(1)(d) (listing as a basis for determining rules of law “the teachings of the most highly qualified publicists of the various nations”).