Irrational Exuberance About Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction

José Gabilondo

Abstract: This article targets a flying buttress of normative heterosexuality: its physical reproduction via procreation and its symbolic propagation through parents' pre-natal preferences for heterosexuality in future children. While the parental “taste for heterosexuality” is often asserted for the sake of future children themselves, this justification overlooks the role of parental self-interest, including anticipated social gains to parents from heterosexuality in children. Hence the taste sets the stage both for sexual orientation-based abuse of future children and the devaluation of sexual minority adults. Courts too have a taste for heterosexuality, shown here in two state court cases denying gays and lesbians the right to marry. These courts hold that homosexuals reproduce deliberately while heterosexuals may do so recklessly, leading the courts to conclude that only heterosexuals require marriage to ensure stable homes for children. These decisions “subsidize” normative heterosexuality and its reproduction by conferring symbolic capital on both. Apart from the burdens it places on sexual minorities, this symbolic privilege comes at a cost to heterosexuals and children alike. By privileging the reproduction of normative heterosexuality, this symbolic economy discourages heterosexuals from fully appreciating the long-term consequences of reproduction. This economy also gives them a pretext for avoiding lifestyle competition with homosexual parents, to the detriment of children who might benefit from the improved parenting technique that such competition would encourage.
ESSAYS FROM THE INNOCENCE PROJECT

Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look

Shawn Armbrust

[pages 75–104]

Abstract: Courts have generally disfavored evidence from recanting witnesses. This article examines the standards laid out in Berry v. State and Larrison v. United States that courts use when considering motions for new trials based on new evidence. It next explores some of the reasons courts have disfavored recantations. Recent cases involving DNA exonerations present useful lessons for evaluating recantations and weaken many of the reasons courts have used to reject such evidence. Because DNA evidence is not readily available in most cases, however, the current framework has led to incarceration of innocent defendants. Given these lessons, courts must find new means of assessing the testimony of recanting witnesses. Courts should adopt a modified version of the Larrison standard, which would require corroboration rather than proof of truth. Appellate courts should not apply a deferential standard of review to summary denial of motions for new trials based on recantations.

Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted

Jennifer L. Chunias
Yael D. Aufgang

[pages 105–128]

Abstract: Twenty-two states, the District of Columbia, and the Federal Government currently have statutory mechanisms in place to provide compensation for wrongfully convicted individuals. Most of these statutes focus on the need for monetary compensation for individuals who have spent years in prison for crimes they did not commit. Only three of these statutes also provide meaningful post-release services. This is despite the fact that these programs are critical to address the unique reentry obstacles that face wrongfully convicted individuals and to ensure successful reintegration into society. This article examines the need for all states to provide meaningful post-release services to wrongfully convicted individuals. Focusing on the Massachusetts statute—the first compensation
statute to include a meaningful services provision—the authors also assert that non-monetary “compensation” should include reentry services immediately upon release that are at least comparable to those received by parolees, but yet are tailored to the distinct needs of wrongfully convicted individuals.

Shedding the Burden of Sisyphus: International Law and Wrongful Conviction in the United States

Robert Schehr

[pages 129-166]

Abstract: Efforts to address the scourge of wrongful conviction in the United States would benefit from a theoretical framework for applying international law. Mythology has long been acknowledged as perhaps the most effective way to propagate values within a culture and to the external world. A new sort of mythology—one that can seamlessly accommodate local cultural variations—should be mobilized to enforce transcultural values and norms. This conception of mythology calls for the primacy of justice, the abrogation of sovereignty to the extent it precludes justice, and cultural variation within the parameters of human rights. Although the United States was founded on the law of nations and the U.S. Supreme Court has long extended comity to international law, in recent years American jurisprudence—particularly in the Supreme Court—has assumed an isolationist approach. This regrettable development is largely responsible for the systemic failures in the criminal justice system that have allowed wrongful conviction to become the pervasive problem that it is today.

NOTES

Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights

Margaret Bichler

[pages 167-202]

Abstract: Ever since gay marriage was legalized in Massachusetts in 2003, the gay marriage debate has consumed much of the American political conscience. While many important questions concerning equal protection, the institution of marriage, and modern conceptions of
family have been asked, few have stopped to question what (aside from Judeo-Christian moral issues) makes homosexuals so wrong—so undeserving of the right to marry and have a family. The process of deviant identity construction and the optional “closet” must be comprehended in order for the gay claim to equal protection and suspect classification to be fully considered and appropriately evaluated. Once gays are properly regarded as a suspect class, laws prohibiting gay marriage will, in all likelihood, fail strict scrutiny analysis.

JUSTICE FOR THE FORGOTTEN: SAVING THE WOMEN OF DARFUR

Rebecca A. Corcoran

Abstract: Since 2003, Darfur has lost nearly half of its six million inhabitants. As many as 500,000 people have been slaughtered, 2.2 million have been displaced, and an untold number have been savagely raped—all victims of a brutal five-year genocide orchestrated by the Sudanese government. The women of Darfur have borne the brunt of the violence: constantly targeted for rape, left physically and emotionally broken. The use of rape as a weapon of war should have shocked the conscience of the world, but we have failed to act, and instead have allowed the women of Darfur to be victimized repeatedly. This note argues that the international community must take two steps to save the women of Darfur: (1) continue criminal prosecutions of those responsible for the genocide in the International Criminal Court and (2) immediately undertake humanitarian solutions in Darfur, including aid disbursement, reparations, military intervention, and political pressure. It is only by combining legal and restorative solutions that the forgotten women of Darfur will truly receive justice.

MASSACHUSETTS CHILDREN IN NEED OF SERVICES: TRAPPED BY THE LEGACY OF ISAAC AND JEREMY

Eleanor L. Wilkinson

Abstract: In 1995, the Supreme Judicial Court of Massachusetts severely limited the power of courts to review Department of Social Services (DSS) decisions regarding children in its care, in companion cases Care and Protection of Isaac and Care and Protection of Jeremy. All Massachusetts children in DSS’ care are affected by these cases. Isaac and Jeremy may
conflict with the federal Adoption and Safe Families Act, which mandates regular review of out-of-home placements for children. In addition, these decisions disproportionately affect children of color. To protect the interests of children in DSS care, the negative impact of Isaac and Jeremy must be addressed by judicially or legislatively overruling them. Other states provide useful statutory examples of addressing this problem.
IRRATIONAL EXUBERANCE ABOUT BABIES: THE TASTE FOR HETEROSEXUALITY AND ITS CONSPICUOUS REPRODUCTION

José Gabilondo*

Abstract: This article targets a flying buttress of normative heterosexuality: its physical reproduction via procreation and its symbolic propagation through parents’ pre-natal preferences for heterosexuality in future children. While the parental “taste for heterosexuality” is often asserted for the sake of future children themselves, this justification overlooks the role of parental self-interest, including anticipated social gains to parents from heterosexuality in children. Hence the taste sets the stage both for sexual orientation-based abuse of future children and the devaluation of sexual minority adults. Courts too have a taste for heterosexuality, shown here in two state court cases denying gays and lesbians the right to marry. These courts hold that homosexuals reproduce deliberately while heterosexuals may do so recklessly, leading the courts to conclude that only heterosexuals require marriage to ensure stable homes for children. These decisions “subsidize” normative heterosexuality and its reproduction by conferring symbolic capital on both. Apart from the burdens it places on sexual minorities, this symbolic privilege comes at a cost to heterosexuals and children alike. By privileging the reproduction of normative heterosexuality, this symbolic economy discourages heterosexuals from fully appreciating the long-term consequences of reproduction. This economy also gives them a pretext for avoiding lifestyle competition with homosexual parents, to the detriment of children who might benefit from the improved parenting technique that such competition would encourage.

* © 2008, José Gabilondo, Associate Professor, Rafael Díaz-Balart Hall, College of Law, Florida International University, Miami, Florida, Jose.Gabilondo@fiu.edu. B.A., Harvard College, 1987, J.D., University of California, Berkeley, 1991. Feedback I received at the University of Jyväskyla’s (Helsinki) conference on the philosophy of gender and at George-town Law Center’s Socioeconomics Conference improved these arguments, as did readers who helped with mortification of the text: ¡Schlegel!, Tom Gallanis, Ruthann Robson, Penny Pether, Larry Catá Backer, Nan Hunter, Bill Turner, Heather Hughes, Hannibal Travis, Tim Canova, Adele Morrison, Natalia Gerodetti, Joe Dayball, and, in particular, Diane Klein, John Gordon, Jorge Esquirol, and Bob Chang. I dedicate this article to the integrity of Chief Judge Kaye’s dissent in Hernandez v. Robles.
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INTRODUCTION

People have babies for many reasons and sometimes for no apparent reason at all. We tend to celebrate having babies with equal zeal, though, regardless of whether the baby is intended or accidental. Indeed, we celebrate even the abstract idea of having babies. Economist Gary Becker introduced an economic model to explain why heterosexuals, in particular, have babies. He suggests that babies, like other commodities, give their parents “income” in the broad sense in which economists use that term.¹ He asserts that, just as with other commodities, the number and type of children one has are functions of the would-be parent’s “tastes.”²

² Becker, Fertility, supra note 1, at 211. Becker notes that ultimately it is personal (and class) taste that determines the demand for children: “The utility from children is com-
Putting to one side the morality of thinking about human life in the instrumental terms which Becker attributes to parents, Becker’s view that reproduction is a lifestyle choice helps illustrate how market dynamics bear on reproduction and, in particular, on parental preferences about outcomes in children. One place to see such reproductive tastes at work is in the over-the-counter markets for babies that legal and business scholars have noted. These “baby markets” reflect a wide range of parental tastes, including the race discount which Michele Goodwin has noted in the adoption market.

Might there also be a taste for heterosexuality in offspring, like the racialized taste addressed by Goodwin? Indeed. It is my contention that some heterosexual would-be parents apply a “gay discount” or a “straight premium” when thinking about future children and that the prospect of capturing social approval through the anticipated heterosexuality of children encourages reproduction. In other words, 

pared with that from other goods via . . . a set of indifference curves. The shape of the indifference curves is determined by the relative preference for children, or, in other words, by ‘tastes.’” Id.

3 For example, Becker suggests that “[t]he net cost of children is reduced if they contribute to family income by performing household chores, working in the family business, or working in the marketplace.” Becker, Family, supra note 1, at 138–39. Then an increase in the “earning” potential of children would increase the demand for children. See id.


5 See Goodwin, supra note 4, at 66–69. Goodwin observes that:

[D]irectly and indirectly, market forces or economic considerations influence adoptions . . . . Conventional wisdom and early legislation held the best interest of children at the center of all adoptions . . . . Contemporary adoption services, however, resemble free markets where aesthetic profiles of race, hair texture, eye color and other market variables determine the welfare of children or, at least, their likelihood of placement.

Id. at 62. Specifically, Goodwin points out that black infants may be adopted for only $4000 while the costs of adopting a similar white infant can exceed $50,000. Id. at 67; see also Ruthann Robson, Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective, 64 ALB. L. REV. 915, 932–36 (2001) (discussing parental efforts to impose heterosexuality upon their children).
for some, the demand for children involves a demand for heterosexuality and its symbolic pay off of social approval. There is nothing natural about this straight premium; its value gets soft-wired through cultural conditioning as reinforced by legal and economic rewards. This article supports these claims and examines their implications.6

Although the trend in baby markets is towards accommodating would-be parents’ commodity preferences about children, pre-implantation genetic determination of sexual orientation has yet to develop, and data is not yet available about how sexual minority children fare in adoption markets.7 Therefore one must look elsewhere for information about any prenatal preferences for heterosexuality. One way to observe a straight premium is to see how much people would “pay” for the trait of heterosexuality in their kids in what is called a “when-, if-, and as-issued market”—one in which buyers and sellers price a forthcoming asset.8 I informally simulate such a pricing environment in a game that I made up for use in our school’s “Women and the Law” course. The game simulates an auction in which I am the auctioneer and the students are “purchasers” who must choose between alternative trade-offs in their future children. The game encourages bidders to make their

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6 Because differences in the reproductive economies and legal standing between homosexuals and heterosexuals exist, substantive consideration of homosexual reproduction requires a separate analysis, beyond the scope of this article. Heterosexuals and homosexuals face different reproductive economies because heterosexuals may choose between coital or other means of reproduction and because homosexuals face legal hurdles as well. Gary J. Gates, et al., Adoption and Foster Care by Gay and Lesbian Parents in the United States 3 (Mar. 2007), http://www.urban.org/UploadedPDF/411437_Adoption_Foster_Care.pdf (summarizing state law restrictions on adoption and fostering by gays, lesbians, and bisexuals). For example, legal obstacles to reproduction—including obstacles such as the Florida statute providing that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual”—can place substantial barriers in the way of homosexual would-be parents. See Fla. Stat. Ann. § 63.042(3) (2005).

7 See Spar, supra note 4, at 99–100, 118–27. Spar notes the initial resistance to facing up to parents’ commodity preferences about their children:

As people—as parents—we don’t like to think of children as economic objects. They are products, we insist, of love, not money; of an intimate creation that exists far beyond the reach of any market impulse. And yet, over the past thirty years, advances in reproductive medicine have indeed created a market for babies, a market in which parents choose traits, clinics woo clients, and specialized providers earn millions of dollars a year.

Id. at xi.

8 For example, in the context of the U.S. government securities market, the “when issued” market “occurs during the period between the time a new Treasury issue is announced and the time it is actually issued.” H.R. Rep. No. 102-722, pt. 1, at 12 (1992). What a government security trades for in the “when issued” market suggests what its price will be when it is actually issued.
preferences explicit and precisely quantified. To test for the gay discount, I use heterosexuality in offspring as a unit of account to measure competing trade-offs in offspring.

Round one: I announce what is going to be priced—“Would you rather have a gay baby or a straight one missing a ______?” The bidding starts with the extremities, which are divisible and easy to compare. I ask whether the players would—all else being equal—prefer a straight baby missing a small toe over a gay one with ten toes. Eventually, a player will say: “Well, who needs two little toes?” Then I make heterosexuality more “expensive” by removing enough of the straight baby’s toes until the players prefer the gay one. I next look for the price points against what are commonly perceived to be other reproductive trade-offs, for example, sterility, ugliness, cleft-lip, and blindness or deafness (in one eye or ear, first, and then in both).

It was the pattern of price points that caught my attention. An opposable thumb seemed to be a price point; a mere pinkie, like a small toe, was not. So it seemed that some people had a “taste” for straight children and that the taste was elastic, in that it would yield if the price were right, for example, a thumb. Don’t take my word for any of this. The auction makes a good party game, so play it in the company of friends.

People may distance themselves from responsibility for the taste by saying: “It’s for the child’s sake, not my own.” Given what players might be willing to inflict on future children for their sake, though, the auction left me wondering about the meaning of this preference: could it lend legitimacy to devaluing existing homosexuals? And does the taste suggest that the prospect of social approval plays an important role in one’s demand for children? Despite the tentativeness of empirical data on these claims, my answer to both questions is “yes.” I wrote this article to expose these claims to scholarly contestation or affirmation. Granted, we know little about the meaning of pregnancy to individuals, so appreciating this nuance may be out of the question until our general knowledge about pregnancy grows.\(^9\) For example, many people seem not to appreciate the actual costs which are associ-

\(^9\) It is even difficult to measure females’ intentions about reproduction—intentions that are themselves highly variable. See, e.g., John Santelli et al., The Measurement and Meaning of Unintended Pregnancy, 35 PERSP. ON SEXUAL & REPROD. HEALTH 94 (2003) (noting problems such as the limited usefulness of retrospective measures of intent to reproduce, the need to adjust research approaches used for aggregate data to the individual level, and the importance of taking into account the preferences of the male partner).
ated with having a baby. So, as with other pricing anomalies, I am less “bullish” about reproduction as an abstract concept, as suggested by the title’s paraphrase of former Federal Reserve Chairman Alan Greenspan’s warning about “irrational exuberance” (leading to over-investment) in a rising stock market.

The taste shows up in law too, including two recent state court decisions which this article examines. These cases exclude homosexuals from marriage because of that institution’s supposed special role in helping heterosexuals mitigate the unintended effects of their coitus. In *Morrison v. Sadler*, the Indiana Court of Appeals claimed that heterosexuals needed marriage to procreate “responsibly” and to avoid “child abuse, educational failure, and poverty.” In *Hernandez v. Robles*, New York’s Court of Appeals followed a similar rationale. In effect, the court proposed that the New York legislature could bribe...
heterosexuals into getting their impulses under control for the sake of their children. It is pure alchemy.

Courts invent many reasons for excluding homosexuals from marriage, but in these cases it is the carelessness of heterosexuals which founds their title to the institution. Statistics on unintended pregnancy and abortion vindicate the factual predicate for these holdings. But what struck me about these cases—apart from their cheekiness—was how each took reckless coitus as a fact of heterosexual life, a fact which justified the special rights of marriage. This is what humanities scholar Lee Edelman has wryly called heterosexuality’s “Ponzi scheme of reproductive futurism,” an analogy which suggests that parents may not fully appreciate what drives them to reproduce until it is too late to do anything about it.

16 See Hernandez, 855 N.E.2d at 7.
19 Lee Edelman, No Future: Queer Theory and the Death Drive 4 (2004). Lee Edelman takes the credit for introducing this useful phrase in his polemic against reproduction. Id. (“[W]e might do well to attempt what is surely impossible—to withdraw our allegiance, however compulsory, from a reality based on the Ponzi scheme of reproductive futurism . . . .”). A Ponzi scheme is a venture which funds payments to current investors using the proceeds of new investors rather than from operating profits of the venture. Jerry W. Markham, A Financial History of Modern U.S. Corporate Scandals from Enron to Reform 23–25 (2006) (describing Charles Ponzi’s original fraud using postal coupons). The arrangement creates an illusion of profit from what is really just recycling of new capital. Id.
There is no accounting for taste or its reproduction, granted, but let me try nonetheless. Katherine Bartlett has noted about feminist methods that a question repeated becomes a method.\ Footnote{Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 837 (1990) (“A question becomes a method when it is regularly asked.”).} That is the hope of this article, that it be an example of “situated theory”—written as a system outsider, despite owing my own existence to heterosexual coitus, and demonstrating that the taste for heterosexuality reflects an inappropriate over-valuation of heterosexuality and its reproduction.\ Footnote{“Situated theory” is another way to refer to the way that Marxian theory locates the generation of theory itself in dynamic social processes which connect political aspirations with lived experience. See, e.g., Knowledge and Class: A Marxian Critique of Political Economy 2 (Stephen A. Resnick & Richard D. Wolff eds., 1987) (“Marxian theory has a distinctive concept of what theory is . . . . Theory is a process in society. It comprises the production, deployment, and organization of concepts.”). Resistance to this type of dialogue is most likely to come from those with something to lose if the power to generate norms from their position was called into question: “The anxiety about engaged theory is particularly marked among those whose particularities formed the prior universal. What they face from this critique is not losing a dialogue but beginning one, a more equal and larger and inclusionary one.” Catherine A. MacKinnon, Toward a Feminist Theory of the State, at xv–xvi (1989).} I may not persuade you of these claims; it is enough that you take them seriously.

Part I argues that the taste exists in the minds of would-be parents and in courts. First I relate the prenatal gay discount to existing critical and feminist scholarship about “heterosexual reproductivism.” It is an -ism not because it includes “existence-inducing acts”\ Footnote{The phrase belongs to Melinda Roberts. See generally Melinda A. Roberts, Present Duties and Future Persons: When Are Existence-Inducing Acts Wrong? 14 L. & Phil. 297 (1995).} like coital and other forms of reproduction but because it privileges so-called “heterosexual complementarity” as a moral and legal rationale. I then show how Morrison and Hernandez reflect and perpetuate a taste for heterosexuality when resolving the central dilemma each case presents: how to extol heterosexuality as a reproductive norm despite judicial declarations against interest about the social costs of heterosexual coitus.

After explaining these two manifestations of the taste—the parental one and the judicial one—Part II offers one explanation for what drives its reproduction, generation after generation. The argument about causation rests on Pierre Bourdieu’s theory of social reproduction, which explains individual action as a function of the pursuit of economic capital according to one’s taste.\ Footnote{See infra notes 185–205, 218–222 and accompanying text.} A whistle-blower on the elite, Bourdieu has an analytical model ideal for examining (and teasing) the moneyed classes, whose reproductive projects often escape
adequate scrutiny.\textsuperscript{24} Rules of the game like those suggested by \textit{Morrison} and \textit{Hernandez} establish the symbolic value of heterosexuality (and its reproduction) and facilitate social competition by gain-seeking parents through their offspring.\textsuperscript{25} In this social economy, the income return from a straight child exceeds that from a gay one, helping to keep Edelman’s Ponzi scheme in perpetual motion.\textsuperscript{26}

Once the central argument has been stated, Part III considers some implications, mostly for heterosexuals.\textsuperscript{27} First, the prenatal taste for heterosexuality is a eugenic preference which may portend sexual orientation abuse by parents and other forms of “conceptual liquidation” of homosexuals and other sexual minorities.\textsuperscript{28} Straight couples might be able to avoid complicity in such gender cleansing campaigns by taking some cues from same-sex couples. Unfortunately, though, \textit{Morrison} and \textit{Hernandez} (and other forms of law like them) help to keep heterosexuals in the dark about reproduction by giving them a

\textsuperscript{24} See infra notes 197–202 and accompanying text.


\textsuperscript{26} See \textit{Edelman}, \textit{supra} note 19, at 4.

\textsuperscript{27} This article is the second in a research series on heterosexual subject formation, the scope of which was announced in the first article. José Gabilondo, \textit{Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual}, 21 \textit{Wisc. Women’s L.J.} 1, 29 (2006) (“[T]he point of critical heterosexual studies is to focus more closely and comprehensively on the relationship between heterosexuality and heteronormativity with an eye to improving the quality and moral stature of heterosexuality.”). That article argued that academic scrutiny of these questions should be embedded in the study of heterosexuality rather than being sidelined to gay and lesbian or queer studies. \textit{Id.} at 29–31. This article expands on these themes by considering the relationship between heterosexuality and reproduction. The next piece in this series will examine the ways in which heterosexuality lets different fundamentalist religious sects overcome collective action problems in order to form multi-sectarian alliances that operate in globalized religious markets.

\textsuperscript{28} See Glenda M. Russell, \textit{Voted Out: The Psychological Consequences of Anti-Gay Politics} 5 (2000) (analyzing the psychological impact on gay people of an amendment to the Colorado Constitution that made antidiscrimination protections for sexual minorities unconstitutional). Conceptual liquidation is a totalizing strategy to erase an identity:

[A] group is conceptually liquidated—or demolished in a culture’s thoughts—when its members are seen as less than human, as massively confused about the right order of things, and as lost in a hopeless cognitive and spiritual morass . . . . [There are] four steps in the process of the conceptual liquidation of LGBs [lesbians, gays, and bisexuals] by anti-gay campaigns. The first step involves portraying LGB people as a threat. Step two focuses on equating LGB orientation with pathology. The third step is the construction of an explanation for their orientations . . . . [The] final step is the social construction of a cure for the presumed pathology of LGB orientations.

\textit{Id.} at 5.
legal pretext to avoid constructive norm competition with homosexual parents, from whom their straight counterparts could learn much. Second, and more generally, the symbolic and legal over-valuation of reproduction—of which the taste for heterosexuality is a lynchpin—leads many heterosexuals to regret reproduction after-the-fact. Feminist economic methods might do a better job of helping heterosexuals to resist the gravitational pull of compulsory pregnancy. The surface resemblance of this part of the argument to eugenics may raise hackles, so it is important to note that any such resemblance is illusory. Eugenics advocates strategic reproduction based on racialized preferences, which is the furthest thing from my mind.29

Don’t get me wrong: I love straight people and children, and babies less so because they lack irony. It is just that my affinities extend only to those already in being. What alarms me is making—as Morrison and Hernandez do—the normative status of heterosexuality a social engineering project in need of legal subsidies. It is as though this majority orientation would perish but for our efforts on its behalf. It is the patterned unreflectiveness of heterosexual reproduction that concerns me most. Our moral clarity about racism and anti-Semitism may one day extend to marriage discrimination.30 While we wait, read on for a textual contraceptive against the propagation of normative heterosexuality.31

29 Eugenic programs brought together constituencies with widely divergent interests and ideologies. For example, in Switzerland, social reformer Auguste Forel promoted eugenics as part of a movement of “rational sexuality.” Natalia Gerodetti, From Science to Social Technology: Eugenics and Politics in Twentieth-Century Switzerland, 13 SOC. POL.: INT’L STUD. IN GENDER, ST. & SOC’Y 59, 69–72 (2006) (analyzing the impact of Forel’s The Sexual Question on Swiss eugenic policies in the Swiss Criminal and Civil Codes). Gerodetti points out that the success of the eugenics movement in Switzerland lay in its comprehensive appeal to “conservative conceptions of sexuality as well as to social reformist and even feminist conceptions of sexuality.” Id. at 82.

30 See John Boswell, Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century 6 (1980).

As long as the religious beliefs which support a particular prejudice are generally held by a population, it is virtually impossible to separate the two [religious belief and prejudice]; once the beliefs are abandoned, the separation may be so complete that the original connection becomes all but incomprehensible. For example, it is now as much an article of faith in most European countries that Jews should not be oppressed because of their religious beliefs as it was in the fourteenth century that they should be.

Id.

I. HETEROSEXUALITY OFFSPRING PREFERENCE

Given the animus visited on sexual minorities by judges, legislators, clerics, teachers, and, most poignantly, their own families, preferring that one’s child be straight may seem merely paternalistic.32 Let me convince you otherwise. Section A situates the parental taste for heterosexuality in the context of critical legal and feminist scholarship and connects it to natalist policies in law. Moving from parents to courts, Section B analyzes how Morrison and Hernandez reflect the same taste in their legal reasoning.

A. The Parental Taste for Heterosexuality and Its Reproduction

Michele Goodwin has shown how, in the adoption market, the racialized preferences of would-be parents “tier” children available for adoption by pricing them according to pigmentation and other racial features.33 Were the race of one’s own children more contingent, racialized preferences might appear not only in secondary markets for children—like adoption—but also in the primary birth market which is my focus.34 My specific contention is that, were heterosexuals to think it through, many would prefer heterosexuality to homosexuality in a norms and the gay rights movement is too seldom made express. “The real lavender threat, perhaps symbolized by marriage but certainly not subsumed by it, is that gay kinship, gay sexual frontiers, gay intimacies will disrupt heterosexual familialism.” Id.

32 I recognize the difference between heterosexuality and heteronormativity, but until heterosexuals-at-large internalize and sustain this working distinction, it may be more effective to collapse the two, as some do. See Gabilondo, supra note 27, at 29.

33 See Goodwin, supra note 4, at 66–69.

The concept of a free market in children is rejected based on what it symbolizes, including its argued resemblance to slavery or the auction block. Yet, directly and indirectly, market forces or economic considerations influence adoptions in the United States to a greater extent than traditionally acknowledged. . . . Contemporary adoption services, however, resemble free markets where aesthetic profiles of race, hair texture, eye color and other market variables determine the welfare of children or, at least, their likelihood of placement.

Id. at 62–63.

34 The taste for heterosexuality is different from the race discount in that the former occurs routinely within the same racial group (which is not to suggest, of course, that the race discount never appears within the same racial group in the form of a preference for lighter-colored children). Were race more broadly contingent—in the sense that a white couple might be faced with having a black child—one would expect would-be parents to express racialized preferences similar to that for heterosexuality in children.
child.\textsuperscript{35} Indeed, the preference for heterosexual offspring may be so great as to trump the taste for “own children” that Gary Becker’s work on the socioeconomics of the family posits as the “distinguishing characteristic of families.”\textsuperscript{36} Ruthann Robson points out Richard Posner’s casual recognition of parental preferences in existing children and his seeming hope that science will manage to eradicate homosexuality in the future when she quotes him directly:

Maybe we should just be patient; science, which has worked so many wonders, may someday, perhaps someday soon, discover a “cure” for homosexuality . . . . If the hypothetical cure for homosexuality were something that could be administered—costlessly, risklessly, without side effects—before a child had become aware of his homosexual propensity, you can be sure that the child’s parents would administer it to him, believing, probably correctly, that he would be better off, not yet having assumed a homosexual identity.\textsuperscript{37}

\textsuperscript{35} See generally Juan Battle & Michael Bennett, Research on Lesbian and Gay Populations Within the African American Community: What Have We Learned? 6 AFR. AM. RES. PERSP. 35 (2000) (summarizing research examining the extent and dynamic of homophobia in the African-American community). This article invites any would-be parent to consider the role of his or her own preferences on this matter. The justification asserted in polite company for the preference—concern for a future child’s prospects in a straight-preferenced world—assumes and relies upon exactly that which it is intended to substantiate.

\textsuperscript{36} See \textsc{Becker, Family}, supra note 1, at 45 (“One could postulate a ‘taste for own children,’ which is no less (and no more) profound than postulating a taste for good food or for any commodity entering utility functions. Fortunately, the demand for own children, the distinguishing characteristic of families, need not be postulated but can be derived.”). Becker explains this socially-valued narcissism as a savings in information costs from sharing genes—because one knows the “intrinsic characteristics” of one’s own children, they are less risky than alien babies. \textit{Id.} Belief in the value of genetic self-interest may flow as much from socialization as from any “natural” inclination to favor the reproduction of one’s genes, so narratives about genetic affinity deserve the kind of critical analysis underway about evolution. See generally Misia Landau, Narratives of Human Evolution (1991) (applying Vladimir Propp’s theory about the morphology of folk-tales to identify the narrative structure of scientific accounts of evolution); Melanie G. Wiber, Erect Men Undulating Women: The Visual Imagery of Gender, “Race” and Progress in Reconstructive Illustrations of Human Evolution (1997) (analyzing how illustrations about evolution reflect contemporary assumptions about race and gender).

\textsuperscript{37} Ruthann Robson, Sappho Goes to Law School 202 (1998) (quoting Richard A. Posner, Sex and Reason 308 (1992)). Robson draws attention to Posner’s comments as part of her analysis of his economic commentary on lesbians. Pharmaceutical companies might find more lucrative the development of a cure for coercive normativity in heterosexuals, for which there is a much greater need than for a supposed “cure” addressed to stray sexual minority children. \textit{See id.}
Again, my premise is that the preference Posner mentions precedes birth and, indeed, creates demand for reproduction by holding out the promise of social approval and the enhanced status that comes from being a parent. Admittedly, little social science research exists on parents’ prenatal preferences as to the sexual orientation of their offspring.\(^{38}\) That is one reason why the Introduction asked the reader to do some basic research in his or her own social milieu. Another way of testing my hypothesis would be to ask prospective parents some version of the following: “Assume that you are genetically capable of producing only homosexual children. How would such a condition influence your interest in having a baby?”\(^{39}\) In any event, this data gap is predicted by Catharine MacKinnon when she points out that organized social dominance can make some social facts seem so “natural” that they never become the object of methodological inquiry in research or criticism.\(^{40}\) The auction, anecdotal conversations, and the anthropology of everyday life are enough to convince me.

A consensus of other legal scholars on post-natal preferences for heterosexuality also supports my assertion—both directly and by implication. For example, Robson has recognized the harm which post-natal preferences for heterosexuality on the part of heterosexual parents can visit on sexual minority children.\(^{41}\) She notes that “[w]hether conservatives proceed from an essentialist (biological and immutable) basis for sexuality, a constructionist (psychological and environmental) basis for

\(^{38}\) No social science research of which I am aware links a would-be parent’s prenatal demand for children with preferences about the sexual orientation of offspring. The relationship between the two is suggested, though, in two of twenty-five questions included in a survey instrument used to measure homophobia: “I would feel that I had failed as a parent if I learned that my child was gay” and “I would feel disappointed if I learned that my child was homosexual.” Wendell A. Ricketts & Walter W. Hudson, Index of Homophobia, reprinted in Clive M. Davis et al., Handbook of Sexuality-Related Measures 367–68 (1998).

\(^{39}\) The question can also be modified to test for gender preferences by clarifying that all males born would be “sissies” and all females would be “stone butch” tots.

\(^{40}\) See MacKinnon, supra note 21, at 106. The lack of methods to study heterosexuality is another expression of the power of knowledge production that MacKinnon associates with the liberal state:

Method organizes the apprehension of truth. It determines what counts as evidence and defines what is taken as verification. Operatively, it determines what a theory takes to be real. . . . [M]ethod in this broader sense—approaches to searching for and apprehending the real—both produces and proceeds from substantive conclusions on questions like relevance (what questions count? what evidence supports answers?), structure (what is connected with what, and how?), and reliability (when is information worthy of belief?).

Id.

\(^{41}\) See Robson, supra note 5, at 932–48.
sexuality, or some combination of the two, the message is one of exclusion and hostility.” Teemu Ruskola, Karolyn Ann Hicks, Devon Carbado, and Sonia Renee Martin, among others, have also criticized the post-natal manifestations of heterosexual offspring preference. In the same vein, Eve Kosovsky Sedgewick has pointedly addressed the risks to sexual minority children from parental enforcement of heterosexuality. And heterosexual offspring preference is, in the mind of a would-be parent, the prenatal manifestation of the “compulsory heterosexuality” that Adrienne Rich observed.

The prenatal taste for heterosexuality is also an implication of the “straight mind” theorized by Monique Wittig in 1978. So too Michael Warner has noted how normative heterosexuality crowds out all other conceptions of the social and sexual order. Advocates of reparative

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42 Id. at 932 (citation omitted).
43 Devon W. Carbado, Straight Out of the Closet, 15 BERKELEY WOMEN’S L.J. 76, 120 (2000) (“The parents of heterosexuals do not love them “in spite of” their sexual orientation, and parents do not blame themselves for their children’s heterosexuality.” (citation omitted)); Karolyn Ann Hicks, “Reparative” Therapy: Whether Parental Attempts to Change a Child’s Sexual Orientation Can Legally Consti tute Child Abuse, 49 AM. U. L. REV. 505, 534 (1999) (“[A] court ruling or legislative interpretation that “reparative” therapy is a form of child abuse, or more likely a form of neglect, would be constitutional because the child abuse and neglect laws that a court would interpret are passed for the protection of children and society.” (citation omitted))); Sonia Renee Martin, Note, A Child’s Right to Be Gay: Addressing the Emotional Mistreatment of Queer Youth, 48 HASTINGS L.J. 167, 192 (1996) (“The state does not have an interest in protecting parents’ rights to ensure that their children are heterosexual, especially when it is clear that a significant proportion of the children in our society will not grow to be heterosexual adults. In contrast, the state has a great interest in ensuring the emotional, and thereby physical, health and safety of children.”); Teemu Ruskola, Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist, 8 YALE J.L. & FEMINISM 269, 285 (1996) (“The fantasy and wish that gay people not exist imbues every major institution of our culture. Law plays a central, although not independent, role in the construction and regulation of homosexuality.”).
46 See MONIQUE WITTI G, The Straight Mind, in THE STRAIGHT MIND AND OTHER ESSAYS 27 (1992). Addressing the symbolic composition and imposition of hetero, Wittig writes: “In spite of the historic advent of the lesbian, feminist, and gay liberation movements, whose proceedings have already upset the philosophical and political categories of the discourses of the social sciences, [heteronormativity continues to] function like primitive concepts in a conglomerate of all kinds of disciplines, theories, and current ideas that I will call the straight mind.” Id.
47 See Michael Warner, Introduction to Fear of a Queer Planet, at xxi (Michael Warner, ed. 1993). This is a corollary of Michael Warner’s observation that: “Het[erosexual] culture thinks of itself as the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn’t exist.” Id.
therapy for homosexuals, like Dr. Joseph Nicolosi, would no doubt agree, as suggested by his guide for parents on preventing homosexuality in (existing) children. What this article adds to these research clusters is the contention that part of what precipitates these post-natal manifestations begins long before the birth of any child and, relatedly, that the prospect of increasing one’s social approval by producing “more” heterosexuality contributes to demand for children.

No discussion about the normative value of reproduction would be complete without entering the thicket of disagreement between Katherine Franke and Mary Becker on that subject. As I try to do in this article, Katherine Franke has urged feminists to think more critically about “repronormative forces.” Claiming that some forms of feminism have cabined female sexuality through maternalist debates about motherhood and dependency, Franke objects to the way in which “legal feminists have ceded to queer theorists the job of imagining the female body as a site of pleasure, intimacy, and erotic possibility.” Though aligned with much of Franke’s project, I have two objections. First, she defers too quickly to the phantom fear of extinction which is often used to justify natalism. My instinct would be to interrogate even the

48 See generally Joseph Nicolosi & Linda Ames Nicolosi, A Parent’s Guide to Preventing Homosexuality (2002). Dr. Nicolosi notes: “As one prominent psychoanalyst, Dr. Charles Socarides, says, ‘Nowhere do parents say, “It makes no difference to me if my child is homosexual or heterosexual.’” Given a choice, most parents would prefer that their children not find themselves involved in homosexual behavior.” Id. at 12. Dr. Nicolosi is president of the National Association of Research and Therapy of Homosexuality (NARTH) and the author of numerous books on reparative therapy. Homosexuality: Current Trends in Research and Therapy, http://www.narth.com/docs/2003conference.html (last visited Jan. 24, 2008). He also runs the Thomas Aquinas Psychological Clinic in Encino, California, where he advises parents, their children, and adult homosexuals on how to establish and preserve heterosexuality, particularly in males. Id.

49 Katherine M. Franke, Theorizing Yes: An Essay on Feminism, Law, and Desire, 101 Colum. L. Rev. 181, 184 (2001). Correctly, Franke notes that even heterosexuality gets more scrutiny than reproduction: “Why is it that we are willing to acknowledge that heteronormative cultural preferences play a significant role in sexual orientation and selection of sexual partners, while at the same time refusing to treat repronormative forces as warranting similar theoretical attention?” Id. In a somewhat harsher tone, Kerry Quinn concurs with Franke: “In addition to failing on feminists’ own terms, the child idolatry and family values of the debate has productive and destructive effects . . . . [T]heir rhetoric reinforces the normalcy and desirability of the traditional family model.” See Kerry L. Quinn, Mommy Dearest: The Focus on the Family in Legal Feminism, 37 Harv. C.R.-C.L. L. Rev. 447, 465 (2002).

50 See Franke, supra note 49, at 182.

51 See id. at 186. When examining objections to challenges of repronormativity, Franke correctly notes that its proponents tend immediately to assert a collective interest in reproducing the species: “Certainly this must be right, but the conversation-stopping power of this natalist objection should not be overstated. The fact that the future of the species
grounding of such a species interest more skeptically, although that is beyond the scope of this article. Second, I object to her proposal that the conflict between deemphasizing reproduction and preserving society could be mitigated with foreign labor.  

As I do, she notes the regressivity of repronormativity—for example, when she alludes to the “monied womb.”

Her reliance on immigration to serve a national interest in reproduction, however, would seem merely to shift the burden of reproductive labor onto those abroad.

Mary Becker has objected to Franke’s critique, particularly as it relates to the poor. She queries what “Franke [would] do with poor children (who will continue to be born)? Without supports, they will not be able to develop their capabilities to become the productive citizens they could be.” On this point, I urge a sharp distinction between the interests of lives-in-being (including the right to economic support) and those of future people, along the lines of the “minimum birthrights” argument discussed later. The distinction flows from my experience with dependency as the brother of a developmentally-disabled man. Advocating for him, his dignity, and his care is not inconsistent with the philosophical conviction that—all else being equal—it might be better for all concerned to avoid future lives as seriously compromised as that of my brother. Unsentimental? Perhaps, but it is hardly the logic of Sparta. Reproducing dependency is no virtue, but caring for dependents is.

And the issue goes to the heart of how the cases discussed in the next section create dependency in heterosexuals by providing a legal subsidy of social approval for questionable reproductive practices. This question matters because—as I consider in more detail later in the context of how children provide symbolic capital—how we “price” reproduction as a symbol may influence the demand for children.

depends upon ongoing reproduction does not relieve us from devoting critical attention to the manners in which this biological demand becomes culturally organized.”

See id. at 193. Franke is right, of course, in recognizing the substitutability of foreign workers for citizens: “The need to maintain a certain corps of tax-paying workers could be met through manipulation of our immigration laws—as we have done in the past to meet demand in particular sectors of the economy.”


See infra notes 279–280 for a discussion of minimum birthrights.

See infra notes 118–133 and accompanying text.
Franke observes that “repronormativity remains in the closet” while critiques of compulsory heterosexuality have gotten more traction.\(^{59}\) Agreeing, my argument expands on her point that “reproduction of society takes place constantly through countless reiterative practices, many of which are structured as simultaneously productive and consumptive in nature.”\(^{60}\) My specific contention (developed in greater detail in the following Part) is that heterosexuality “makes a market” for reproduction and vice-versa, although these links are not immediately apparent because of the “invisibility” to some of heterosexuality as a norm. By drawing attention to reproduction, I try to combat the unreflectiveness which Devon Carbado has noted about heterosexuals.\(^{61}\) This patterned unawareness is an example of what one Marx scholar has called “reproductive praxis”:

People engaged in reproductive praxis are *born into* certain social relations, modes of existence, which they accept as natural, even inevitable. They fail to question these and, therefore, reproduce the type of consciousness and conditions of social being that are already in existence. *Minor changes* or reforms may be attained, but these are not of a type that challenges or threatens the *fundamental social relations*.\(^{62}\)

Thus does normative heterosexuality come to seem “natural” in the formulation above.\(^{63}\) Should discordant facts appear—like a gay child—some “minor changes” are possible, like the often belated reconciliation of disappointed parents who come to “love” their gay child nonetheless, and the growing but resisted (which resistance becomes more notable with time) recognition that parental opprobrium can contribute to elevated suicide rates among gay teens.\(^{64}\) Merely tweaking

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\(^{60}\) Id. at 189. Franke objects to the “bourgeois framing of an issue that gives the larger public the tab for the marketing-induced ‘needs’ of children.” Id. at 192. I do too.

\(^{61}\) Carbado, *supra* note 43, at 95 (“[R]arely do heterosexuals critically examine their identities as heterosexual, their sexual identity privilege. Indeed, even pro-gay rights heterosexuals conceive of sexual identity as something other(ed) people have, something that disadvantages other(ed) people.”).


\(^{63}\) See id.

\(^{64}\) See Martin, *supra* note 43 at 167–78. Sonia Renee Martin notes several factors that lead parents to repudiate gay and lesbian children and that result, among other things, in elevated suicide levels of gay and lesbian youth. Id. “Family problems contribute heavily to the disproportionate number of gay and lesbian teen suicide attempts and deaths.” Id. at 175 (citing discussion of gay and lesbian youth suicide in Paul Gibson, *Gay Male and Les-
the norm system, though, does nothing to end either the “fundamental social relation” which underlies it or the reproduction of these social relations.\textsuperscript{65}

On this point, Catharine MacKinnon’s early work on links between radical feminism and Marxian thought bears on how the parental taste for heterosexuality comes to be made invisible.\textsuperscript{66} (Indeed, my argument is a corollary of her thesis that heterosexuality founds patriarchy.) In \textit{Toward a Feminist Theory of the State}, Catharine MacKinnon explains the subordination of women by men as part of an “epic theory” about “male power as an ordered yet deranged whole.”\textsuperscript{67} The reproduction of normative heterosexuality—both materially in children and more widely in law and culture—also structures law and social life in an ordered and deranged way. By substituting “heterosexual reproductivist” for “male” in key passages of MacKinnon’s work, one sees the force of the analogy:

In [heterosexual reproductivist] societies, the [heterosexual reproductivist] standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all. . . . The state incorporates these facts of social power in and as law. Two things happen: law becomes legitimate [that is, by following the pattern of social dominance], and social dominance becomes invisible. Liberal legalism is thus a medium for making [heterosexual reproductivist] dominance both invisible and legitimate by adopting the [het-

\textsuperscript{65} See Allman, \textit{supra} note 62, at 203.

\textsuperscript{66} See generally MacKinnon, \textit{supra} note 21.

\textsuperscript{67} Quoting the work of Sheldon Wolin, MacKinnon points out that epic theory does not merely describe the world but explains structural reproduction in the hopes of intervening not only in theory but in the condition of the world itself: “An epic theory identifies basic principles in political life which produce errors and mistakes in social ‘arrangements, decisions, and beliefs’ and which cannot be dismissed as episodic. . . . [E]pic theories provide ‘a symbolic picture of an ordered whole’ that is ‘systematically deranged.’” \textit{See id.} at x.
The auction and judicial tastes for heterosexuality discussed below in the context of *Morrison* and *Hernandez* form only one head of the heterosexual reproductivist hydra in law. Although I will discuss only its link to marriage, let me outline its overall structure. It is formed by several deductive premises—some explicit, others implicit. These premises include the following: (i) existence—whatever the subjective qualities of that experience—is preferable to nonexistence, as reflected in legal decisions about wrongful life, suicide, and in-

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68. *See id.* at 237. Another good passage for substitution that considers the role of law reads: “Through legal mediation, [heterosexual reproductivist] dominance is made to seem a feature of life, not a one-sided construct imposed by force for the advantage of a dominant group. To the degree it succeeds ontologically . . . control over being produces control over consciousness, fusing material conditions with consciousness . . . . Coercion legitimated becomes consent.” *See id.*

69. Consider state courts’ unwillingness to recognize a hedonic interest in nonexistence through wrongful life claims. *See, e.g.,* Kurtis J. Kearl, Note, Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life, 71 CAL. L. REV. 1278, 1287–88 (1983) (rejecting legal arguments about the preferability of nonexistence in the context of a California Supreme Court decision granting special damages for wrongful life to a child born deaf). Only three states recognize any form of wrongful life claim. Deana A. Pollard, Wrongful Analysis in Wrongful Life Jurisprudence, 55 ALA. L. REV. 327, 329 & n.12 (2004) (arguing that state tort law uses incorrect concepts of damage recovery when denying recognition of wrongful life causes of action). However, even those states limit damage recovery to special damages and do not permit recovery for any interest in not having been born at all. *Id.* at 329 & n.12. This is so despite a good proposal for measuring general damages that avoids the conceptual hurdle in recognizing an interest in nonexistence. *See Bonnie Steinbock, The Logical Case for “Wrongful Life,”* HASTINGS CTR. REP., APR. 1986, at 15, 17 (comparing wrongful life damages assessments to those made in wrongful death claims and finding that in both, the jury must make valuations comparing an impaired or healthy life with non-existence).

70. This reflects Immanuel Kant’s sin in “Christianizing” much of Stoic philosophy. Early Stoics took suicide in stride: “Suicide was viewed as a simple alternative when faced with certain situations, and nothing to spend one’s time thinking or worrying about. The early Stoics followed this lead, allowing for and even recommending suicide in certain circumstances, but not giving the topic any inordinate attention.” Michael Seidler, *Kant and the Stoics on Suicide,* 44 J. OF THE HIST. OF IDEAS 429, 430 (1983) (discussing Stoic ideas about suicide). *See generally* Daniel M. Crone, *Historical Attitudes Toward Suicide,* 35 DUQ. L. REV. 7, 16 (1996) (discussing Seneca’s support for suicide and reviewing the praise of Cato’s suicide for “fear of dishonor”). A lifelong student of Stoic philosophy, Kant rejected the Stoic view that suicide was morally acceptable and, at times, morally superior than continuing to live. Seidler, *supra,* at 440–41. Consistent with my thesis that reproductivism forms part of a consolidated mental system, Seidler suggests a potential link in Kant’s writings between non-reproductive sex and suicide. *See id.* at 442 (“Kant’s revulsion against suicide is as intense as his nausea at sexual perversion . . . .” (citation omitted)). I explore this idea later using Lee Edelman’s argument that heterosexuality represents generative life and homosexuality death. *See infra* notes 206–214 and accompanying text.
voluntary sterilization;\textsuperscript{71} (ii) reproduction tends to further self-interest, including through saving for old age in the form of children’s anticipated future support and through the satisfaction of feeling that one has contributed to society;\textsuperscript{72} (iii) without reproduction, society would perish;\textsuperscript{73} and, given the foregoing; (iv) courts must enable parents to inculcate their children with reproductivist values (as well as many others).\textsuperscript{74}

\textsuperscript{71} Similar debates have erupted in the recent revival among state courts of \textit{Buck v. Bell}, a case that affirmed the constitutionality of a state sterilization statute for individuals with hereditary mental illness, 274 U.S. 200, 207 (1927) (“It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” (citation omitted)). In these cases, state courts have upheld the constitutionality of state statutes that require sterilization of profoundly mentally retarded persons. Norman Cantor, \textit{The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Persons}, 13 \textit{Annals Health L.} 37, 53 (2004).

Today, most of the states that had refused in the 1970s to find inherent jurisdiction to authorize sterilization of a mentally disabled person have changed their law; statutes now permit sterilization where a court finds that the surgery will serve the incapacitated person’s best interests. Only one state appears to continue to exclude all surrogate authorization of sterilization.

\textit{Id.} (citation omitted).

\textsuperscript{72} The existence of other income security schemes, like national retirement plans, undermines the savings rationale. T. Paul Schultz, \textit{Demand for Children in Low Income Countries}, in \textit{Handbook of Population and Family Economics, supra} note 1, at 349, 388. As for leaving a legacy through children, one tongue-in-cheek commentator noted the downside: “The import of your existence can be validated by whoever you bring into the world. But this doesn’t always work. In fact, sometimes it makes things worse. . . . [T]here’s now an innocent woman whose one-sentence newspaper bio will forever be, ‘She was Timothy McVeigh’s mother.’” Chuck Klosterman, \textit{Sex, Drugs, and Cocoa Puffs: A Low Culture Manifesto} 194 (2004).

\textsuperscript{73} The court in \textit{Anderson v. King County} explicitly based part of its holding on this rationale. 138 P.3d 963, 969 (Wash. 2006) (“[T]he legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race . . . .”); \textit{see also} Skinner v. State, 316 U.S. at 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”). Non-reproductive dystopia is the premise of the recent film, \textit{The Children of Men} (Universal 2006). \textit{See} \textit{The Children of Men}, http://www.paramountpictures.co.uk/childrenofmen/ (last visited Jan. 24, 2008).

The argument below about *Morrison* and *Hernandez* targets this wider reproductivist system by zeroing in on one of its key aspects: heterosexual coitus. While the analysis may raise more questions than it resolves, my point is to lay more of a theoretical foundation in law for skepticism about reproduction. As a first step, this article examines how these cases privilege the taste for heterosexuality and its reproduction in the way that they attempt to resolve their central contradiction: affirming the superiority of heterosexuality and its reproduction while admitting that heterosexual coitus is fraught with risks to both parents and children alike.

**B. A Judicial Analogue: Morrison and Hernandez**

The parental taste for heterosexuality finds its echo in law too. After briefly reviewing the context for reproduction in the culture wars about marriage, I look at how *Morrison* and *Hernandez* impose the traditional legal disability on homosexuals in marriage with a new twist based on the wages of heterosexual coitus. I conclude this section by situating my argument in some of the conceptual problems faced by legal feminism.

1. Reproduction in the Culture Wars over Marriage

*Morrison* and *Hernandez* arise out of a national culture war about the normative status in law of heterosexuality, part of which involves the link between marriage and reproduction. One of the most salient legal aspects of the culture war over heterosexuality is the differential standards of review which courts apply based on whether plaintiffs are heterosexuals or homosexuals. Consistent with this differential treatment, the only significant constitutional cases striking down laws that targeted homosexuals, *Lawrence v. Texas* and *Romer v. Evans*, involved failures to satisfy low or ambiguous standards of review. And, even

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empirical study of the reproductive decision-making of pregnant teenage females in state requiring parental notification).

75 See infra notes 76–81, 113–115 and accompanying text.

76 Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (“I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack.”); Romer v. Evans, 517 U.S. 620 634–35 (1996) (finding no rational basis in a constitutional amendment barring access to democratic processes in order to secure anti-discrimination provisions against certain sexual minorities). Laurence Tribe notes that it is difficult to characterize the standard of review in *Lawrence v. Texas*: “To search for the magic words proclaiming the right protected in *Lawrence* to be “fundamental,” and to assume that in the absence of those words mere rationality
then, courts have construed the scope of Lawrence and Romer relatively narrowly.\textsuperscript{77}

The same is true when it comes to reproduction. Let me briefly point out how courts generally deploy “heterosexual” and “homosexual” as legal categories with respect to reproduction. The constitutional dimensions of state law on both marriage\textsuperscript{78} and reproduction\textsuperscript{79} remain

\textsuperscript{77} The Romer majority does not foreclose a finding that the right to participate equally in the political process is a fundamental one—for sexual minorities or any one else—or that heightened scrutiny could apply to state action that may violate equal protection of sexual minorities. But most subsequent cases have cited Romer to uphold antigay laws so long as they satisfy mere rationality. See, e.g., Citizens for Equal Protection v. Bruning, 455 F.3d 859, 867 (8th Cir. 2006) (reversing a district court’s finding that the Nebraska’s Defense of Marriage Act failed to meet Romer’s rational review standard); Able v. United States, 155 F.3d 628, 634–35 (2d Cir. 1998) (distinguishing Romer’s inability to find a rational basis for Amendment Two from the military’s “acceptable” rationale for excluding known homosexuals from military service); Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (upholding anti-gay referendum amending Cincinnati’s charter); Smelt v. County of Orange, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (applying rational basis review to California and federal restrictions on marriage by homosexuals despite the “tenuous” rationality of the laws); Bailey v. City of Austin, 972 S.W.2d 180 (Tex. App. 1998) (upholding city initiative barring city from extending employee benefits to same-sex partners). But see Finstuen v. Edmondson, No. CIV-04-1152-C, 2006 U.S. Dist. LEXIS 32122 (W.D. Okla. May 19, 2006, aff’d, 2007 U.S. App. LEXIS 18500, (10th Cir., August 3, 2007) (citing Romer to declare unconstitutional an Oklahoma statute forbidding the recognition of foreign adoptions by same-sex parents); Dep’t of Human Servs. v. Howard, No. 05-814, 2006 Ark. LEXIS 418 (Ark. June 29, 2006) (upholding a lower court decision that cited Romer to overturn Arkansas regulations that kept homosexuals from serving as foster parents).

\textsuperscript{78} As one scholar has noted:

\begin{quote}
[We] know astonishingly little about the constitutional parameters of marriage. We do know that individuals enjoy a right to marry under the “liberty” interest of substantive due process . . . . We do not know how far this liberty to marry extends, what level of scrutiny should be applied in a particular case, or whether laws restricting marriage based on classifications other than race (e.g., sexual orientation) would violate equal protection.
\end{quote}


\textsuperscript{79} Procreative liberty remains in a haze rivaling that of the copulating heterosexuals postulated by Morrison and Hernandez: “Despite recent concerns about population control, the right to procreate remains relatively ambiguous in contrast to the right not to procreate, which in the abortion context is limited by the interest of the fetus.” Elizabeth Scott, Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy, 1986 DUKE L.J. 806, 828 (citation omitted).
largely unsettled. Yet, consistently, patterns of differential judicial review emerge based on the sexual orientation of the plaintiff class. Stricter standards of review are applied to restraints on heterosexual marriage, reproduction, and intimacy.\textsuperscript{80} In contrast, lower standards of review tend to be applied to analogous restraints on homosexuals.\textsuperscript{81} To date, over a dozen judicial challenges have been made to state laws restricting marriage to heterosexuals.\textsuperscript{82} Only in Massachusetts has any of these challenges met with success.\textsuperscript{83} The federal Defense of Marriage Act, however, ensured that these same-sex marriages would be stripped of the big-dollar federal benefits straight marriages receive.\textsuperscript{84} The same discrepancy appears in adoption and custody proceedings.\textsuperscript{85}

\textsuperscript{80} See generally Planned Parenthood v. Casey, 505 U.S. 833 (1992) (affirming Roe v. Wade); Roe v. Wade, 410 U.S. 113 (1973) (applying strict scrutiny to restriction on fundamental right to abortion based on due process); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free [heterosexual] men”); Griswold v. Connecticut, 381 U.S. 479 (1965) (applying increased scrutiny to Connecticut law prohibiting the sale of contraceptives); Skinner v. Oklahoma, 316 U.S. 535, at 541 (1942) (classifying marriage as one of the “basic civil rights of [a heterosexual] man”).

\textsuperscript{81} See Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. 2005); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006). These judges use the word “rational” to refer to levels of review that require less than what would be considered minimally rational in other fora where legal rationality is rehearsed and tested, such as the Law School Admissions Test, law school examinations, and in-class discussions.

\textsuperscript{82} A complete chronological list of thirteen judicial decisions from 1971 to 1995 rejecting homosexual plaintiffs’ assertions of the right to marry may be found in William N. Eskridge & Nan D. Hunter, Sexuality, Gender, and the Law 1065 n.c. (2004). For the most current information on these challenges, see Human Rights Campaign, Marriage & Relationship Recognition, http://www.hrc.org/issues/marriage.asp (last visited Jan. 24, 2008).


\textsuperscript{85} With respect to adoption, courts apply a more deferential standard of review to state action that restricts the right to adopt because the institution of adoption itself flows from statute, not common law. See Lindley v. Sullivan, 889 F.2d 124, 130–31 (7th Cir. 1989) (“The adoption process is entirely a creature of state law, and parental rights and expectations involving adoption have historically been governed by legislative enactment.”) However, courts may go to extravagant lengths to find rationality when the state acts against homosexuals. See, e.g., Lofton v. Sec’y of Dep’t of Children Family Servs., 358 F.3d 804, 825 (11th Cir. 2004) (“Also, we must credit any conceivable rational reason that the legislature might have for choosing not to alter its statutory scheme in response to . . . recent social science research [in support of same-sex parenting].”) A similar pattern emerges in custody proceedings, especially when courts follow the Uniform Marriage and Divorce Act’s distinction between homosexual identity and behavior, such that the latter may be considered against the best interests of the child. See generally Matt Larsen, Note, Lawrence v. Texas and Family Law: Gay Parents’ Constitutional Rights in Child Custody Proceedings, 60 N.Y.U. ANN. Surv. Am. L. 53 (2004).
In state equal protection doctrine, many categorizations of heterosexuals based on reproduction affirm the legally privileged status of heterosexuality without looking closely at heterosexual coitus as a reproductive reality. The concurrence in *Lewis v. Harris* is one example:

The simple fact is that the very existence of marriage does “privilege procreative heterosexual intercourse.” . . . Procreative heterosexual intercourse is and has been historically through all times and cultures an important feature of that privileged status, and that characteristic is a fundamental, originating reason why the State privileges marriage.86

Confirming its centrality in these legal conflicts about marriage, the issue of reproduction helped to produce one of the relatively more favorable precedents for homosexuals in the conflict over marriage, *Baker v. State*.87 The Vermont court affirmed the link between marriage and the state interest in regulating procreation, noting that the state has a “legitimate and long-standing interest in promoting a permanent commitment between couples for the security of their children.”88 Since the Vermont Legislature had already eliminated legal restrictions on adoption and childrearing by homosexuals, the court reasoned that, “to the extent that the state’s purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the [heterosexual marriage] statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives.”89

In other words, once the Legislature has allowed homosexuals to play in the “Ponzi scheme” of reproductivism, all players—even homo-

87 744 A.2d 864 (Vt. 1999). *Baker* involved an appeal by three same-sex couples of a trial court dismissal of their complaint for declaratory judgment that the town clerks’ refusal to issue the plaintiffs marriage licenses violated the Vermont Constitution. *Id.* at 867. The plaintiffs claimed that the trial court had misconstrued Vermont’s marriage statute and asserted, in the alternative, that any statutory exclusion of homosexuals from marriage violated the Common Benefits Clause of the Vermont Constitution. *Id.* at 868, 870. The plaintiffs failed on the statutory claim. *Id.* at 869. The Court held that the Common Benefits Clause required Vermont to extend the substantive protections of marriage to plaintiffs. *Id.* at 886. As remedy, the court directed the legislature to revise statutory marriage to include homosexuals or to fashion a parallel status for homosexuals. *Id.* The legislature chose the latter. *See* 2000 Vt. Acts & Resolves 91 (act relating to civil unions). *See generally* State of Vermont, House of Representatives, Questions and Answers About H.847 as Passed by the General Assembly, http://www.leg.state.vt.us/baker/h-847q&a.htm.
88 Baker, 744 A.2d at 881.
89 *Id.* at 882.
sexuals—must have equal access to the rights incident to marriage. Nevertheless, even this relatively evenhanded approach to marriage access for homosexuals betrays an unreflectiveness about how normative heterosexuality works. Startlingly, the Baker court is unable to find an “intent” in heterosexual-only marriage regimes to discriminate against homosexuals:

It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us.

Nor could such evidence ever be made to appear in the swirling logic of heterosexual marriage, which starts—and ends—by foreclosing the possibility of such evidence without appearing ever to have done so. In post-modernist diction, evidence of this sort is “always already” excluded. Evidence of “intent” to discriminate here would presuppose the existence of “homosexual” as a category. It is, however, only after homosexuals gained some degree of visibility that legislators bothered organizing against sexual minorities as a class—a dynamic reflected in the “defense of marriage” movements. Hernandez draws on a sister

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90 See id.
91 Id. at 880 n.13.
92 See Stanley Fish, There’s No Such Thing as Free Speech . . . and It’s a Good Thing Too 196 (1994). This adverb phrase reveals an effect of a social condition or practice which, although it is a “given,” may not be apparent. For example, Stanley Fish uses it to show how a legal authority that privileges one sensibility over another is as a matter of course linked and, indeed, defined by what is excluded:

A politically earned authority is always already in a relation to the Other it is accused of scorning, and the problem (as some see it) of opening the law’s self-referential procedures to the pressures of the “real world” is no problem at all because that very self-referentiality (autonomy, unity, integrity, etc.) has been constructed (reconstructed) in response to those pressures.

Id.

93 Consider the agility with which Congress and the states have (independently) enacted substantially uniform legislation prohibiting same-sex marriage once the specter of it appeared. At present, forty-five states have either constitutional amendments, statutes, or other laws restricting marriage to heterosexuals. Human Rights Campaign, Statewide Marriage Prohibitions (as of Sept. 19, 2007), available at http://www.hrc.org/documents/marriage_prohibit_20070919.pdf. Twenty-six of those are state constitutional amendments. Id. Twenty-two of these constitutional amendments were enacted in the two years after Massachusetts legalized gay marriage (2004–2006), a rate of almost one state constitutional amendment a month. Id. What is most useful to legal scholars is the rich record of legisla-
tautology: that homosexual marriage is not rooted in tradition or custom.\textsuperscript{94} As the next section shows, these odd and circular forms of argument are the norm when courts look at heterosexuality and homosexuality, especially where reproduction is concerned.

2. Judicial Alchemy: \textit{Morrison} and \textit{Hernandez}

Although judicial rationales based on reproduction have assumed new importance in recent litigation, David Cruz notes that such arguments appear in the earliest cases confirming the exclusion of homosexuals from marriage.\textsuperscript{95} Although they are squarely in this tradition, what is most interesting and original about \textit{Morrison} and \textit{Hernandez} is their candor about what is wrong with reproductive coital intercourse. Despite the blithe assertion of heterosexual privilege in \textit{Lewis v. Harris}, the facts seem less simple to the courts in \textit{Morrison} and \textit{Hernandez}.\textsuperscript{96} This is so despite the standard of review common to both adjudications: mere rationality.\textsuperscript{97}

Let me briefly summarize these cases before turning to their unflattering accounts of heterosexual coitus. \textit{Morrison} involved an appeal from an Indiana trial court’s dismissal of a request for a declaratory judgment that plaintiffs, three same-sex couples, could obtain marriage licenses from the circuit clerks of Hendricks and Marion Counties.\textsuperscript{98} The suit challenged Indiana’s Defense of Marriage Act (DOMA), which provides that “[o]nly a female may marry a male. Only a male may marry a female.”\textsuperscript{99} The three couples had each entered into a civil union in Vermont.\textsuperscript{100} Indiana law also withheld Full Faith and Credit to

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\textsuperscript{94} See \textit{Hernandez}, 855 N.E.2d at 9, 10.

\textsuperscript{95} See David B. Cruz, \textit{Heterosexual Reproductive Imperatives}, 56 EMORY L.J. 1157, 1164 (2007) (“This brings us to the kinder, gentler face of heterosexism today: reproduction.”).

\textsuperscript{96} \textit{Morrison}, 821 N.E.2d at 24; \textit{Lewis}, 875 A.2d at 276; \textit{Hernandez}, 855 N.E.2d at 8.

\textsuperscript{97} \textit{Morrison}, 821 N.E.2d at 24; \textit{Hernandez}, 855 N.E.2d at 8.

\textsuperscript{98} \textit{Morrison}, 821 N.E.2d at 19.

\textsuperscript{99} \textit{IND. CODE. § 31–11–1–1} (a) (1997).

\textsuperscript{100} \textit{Morrison}, 821 N.E.2d at 19.
same-sex marriages legal under the laws of a sister state. The plaintiffs claimed that Indiana’s DOMA violated provisions of the Indiana Constitution. The court failed to recognize any of the plaintiffs’ claims under these provisions.

_Hernandez_ confronted New York’s highest court, the Court of Appeals, with the claim of forty-four same-sex couples that the restriction of marriage to opposite-sex couples violated the due process and equal protection clauses of the state constitution. New York’s marriage statute provided that “the parties must solemnly declare . . . that they take each other as husband and wife.” The plaintiffs sought a declaratory judgment that the statute, to the extent it prevented them from marrying, was unconstitutional. The trial court granted the plaintiffs’ summary judgment motion. On appeal, the Appellate Division rejected the plaintiffs’ arguments and reversed the motion. On final appeal, the Court of Appeals affirmed the reversal.

Had a consistent standard of judicial scrutiny applied to both homosexuals and heterosexuals, the relationship between reproduction and marriage would not have sustained a legally material difference between same-sex and opposite-sex unions. Let me point out some asymmetrical exercises of legal reasoning from the cases. First, consider the “one-drop rule” _Hernandez_ adopts for deciding whether legal curbs on marriage and reproduction by homosexuals pass muster: so long as a potential legislative rationale—however remote—includes even one drop of reason, the court will acquiesce to the restriction. The _Hernandez_ court notes, for instance, that “Plaintiffs have not persuaded us that this long-accepted restriction [of marriage to opposite-sex couples] is a wholly irrational one, based solely on ignorance and prejudice

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102 Morrison, 821 N.E.2d at 19. The provisions in question were Indiana’s Equal Privileges and Immunities Clause, text in Article I about the meaning of a “core value,” and language in Article I guaranteeing effective access to justice. Id. at 21, 31, 34; see Ind. Const. art. 1, §§ 1, 12, 23.
103 Morrison, 821 N.E.2d at 35.
104 Hernandez, 855 N.E.2d at 5.
105 Id. at 6.
106 Id. at 5. New York State’s Due Process Clause provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” N.Y. Const. art. I, § 6. New York State’s Equal Protection Clause provides that “[n]o person shall be denied the equal protection of the laws of this State or any subdivision thereof.” § 11.
107 Hernandez, 855 N.E.2d at 5.
108 Id.
109 Id.
110 See supra notes 78–85 and accompanying text.
111 Hernandez, 855 N.E.2d at 8.
against homosexuals. This is the question on which these cases turn."\textsuperscript{112} While animus may not be the sole reason for marriage discrimination, it—and the social and legal traditions which flow from it—certainly are the primary ones.

Consider also the springing scrutiny in \textit{Hernandez} for any measure that would better link marriage and reproduction at the expense of heterosexuals: "[L]imiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing. A legislature . . . could rationally find that an attempt to exclude childless opposite-sex couples from the institution would be a very bad idea."\textsuperscript{113}

\textit{Morrison} makes a similar move. The court first states unambiguously that, because the Indiana DOMA need pass only the “most basic rational relationship test” to be upheld, the burden of persuasion rests entirely on the plaintiffs to “negative every conceivable basis which might have supported the classification.”\textsuperscript{114} After noting that the plaintiffs do not meet this standard, the court adds that the “key question” is, also, whether same-sex marriage would satisfy “all” of the interests that cross-sex marriage furthers.\textsuperscript{115} So homosexuals in Indiana face a double burden of persuasion—not only must they refute all conceivable legislative rationales for exclusion, but they must also show that letting homosexuals marry would serve all the interests of heterosexual marriage.\textsuperscript{116} In any event, the point is gratuitous, since neither over-inclusivity nor under-inclusivity would threaten the constitutionality of the state DOMA given \textit{Morrison}’s construction of the standard of the review.\textsuperscript{117}

Both courts support their holdings by stipulating to some important advantages for children from same-sex households—an admission against interest which makes their otherwise unqualified legal support for heterosexuality as a norm more paradoxical.\textsuperscript{118} \textit{Morrison} does this in the context of evaluating the plaintiffs’ claim that the Indiana DOMA violates the state’s Equal Privileges and Immunities Clause by privileging heterosexual reproduction above that of others.\textsuperscript{119} The court re-

\textsuperscript{112} Id. (emphasis added).
\textsuperscript{113} See id. at 11–12.
\textsuperscript{114} Morrison, 821 N.E.2d 1, 22 (quoting Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994)).
\textsuperscript{115} Id. at 23.
\textsuperscript{116} See id.
\textsuperscript{117} See id. at 22.
\textsuperscript{118} See id. at 24; Hernandez, 855 N.E.2d at 7–10.
\textsuperscript{119} Morrison, 821 N.E.2d at 21.
responds with a back-handed compliment to reproductive homosexuals, whom it presumes can provide—unaided—the sorts of “stable environments” the state seeks for all children. These homosexual parents are presumed to be “financially and emotionally” invested, committed to childrearing, and, importantly, good at planning and thinking ahead. A recent study does find that the demographics of same-sex households who adopt (and foster) children are different: “Same-sex couples raising adopted children are older, more educated, and have more economic resources than other adoptive parents.” Same-sex couples raising foster children have the highest level of education; their incomes, too, are higher than those of unmarried cross-sex foster parents, though cross-sex married couples have the highest incomes among foster parents. So, the court is on to something.

Because this is an equal protection claim being evaluated at the lowest level of scrutiny, the court also must consider how heterosexuals measure up. They leave something to be desired: heterosexual reproduction can occur “with no foresight or planning” from “one instance of sexual intercourse” between heterosexuals who have shown “little or no contemplation of the consequences that might result.” Logic would expect that such a side-by-side comparison would lead

\[120\] See id. at 24.

\[121\] Id. The Court also notes that

[Homosexuals and others] wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning.

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Members of a same-sex couple who wish to have a child . . . have already demonstrated their commitment to child-rearing, by virtue of the difficulty of obtaining a child through adoption or assisted reproduction, without the State necessarily having to encourage that commitment through the institution of marriage.

\[122\] Gates, et al., supra note 6, at 12, 26–28 (culling statistics on adoption and foster care by gays, lesbians, and heterosexuals using data from the U.S. Census 2000, the National Survey of Family Growth (2002), and the Adoption and Foster Care Analysis and Reporting System (2004)). For example, the mean income for cross-sex married couples who adopt is $81,900, while that of lesbian couples is $102,508 and that of gay male couples is $102,331. Id. at 11. When considering all child-rearing—not just adoption—same-sex couples have lower income and educational levels than do married heterosexual couples. Id. at 12.

\[123\] Id. at 16.

\[124\] Morrison, 821 N.E.2d at 24–25.

\[125\] Id. at 25–26.
these courts to conclude that same-sex marriage would enhance the state’s interest in procreation; instead, a *deus ex machina* in the form of marriage emerges to save heterosexuals from themselves. It is marriage, *Morrison* holds, which can mitigate the problems caused by “time-inconsistency” in casual heterosexual coitus.  

Marriage, says the court, encourages heterosexuals “to procreate within the legitimacy and stability of a state-sanctioned relationship and to [avoid] unplanned, out-of-wedlock births resulting from ‘casual’ intercourse.” How marriage accomplishes this is not clear, given that it is apparently just an afterthought to a coital accident. Nor does the court consider the obvious: if it is barriers to entry, as it were, that make homosexuals undertake reproduction deliberately and properly, then why not consider mechanisms to encourage heterosexuals to be more deliberate about reproduction?

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126 See id. Some behavioral law and economics research finds that people’s preference are much less stable (or “time consistent”) than previously thought, perhaps explaining, as Manuel Utset has proposed, the peskiness of many self-control problems, including those related to sexual decision-making.

First, even small self-control problems due to time-inconsistent preferences can produce large aggregate welfare losses, particularly when decisions are made and actions are taken in an incremental fashion over time—for example the decision each day to smoke another pack of cigarettes or procrastinate enrolling in a retirement account. Second, even when aware of their self-control problems, people tend to mispredict the true magnitude of those problems and thus underappreciate the need to adopt commitment devices in response.


127 *Morrison*, 821 N.E.2d at 24. Neither do the other reasons given by the court address the ex ante risks from impulsive coital intercourse. *Id.* at 24–25.

128 Michael Lee Aday memorialized the time-inconsistency dilemma of heterosexual coitus in his song *Paradise by the Dashboard Lights*. **Meatloaf, Paradise by the Dashboard Lights, on Bat Out of Hell** (Cleveland Int’l Records 1977) (dramatizing conflict between ex ante negotiations about sex and regret ex post).

129 See *Morrison*, 821 N.E.2d at 24. The Court notes:

Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment [that is, one conducive to child rearing], with or without the “protections” of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children *in the first place*.

*Id.* (emphasis added to draw attention to the implications of time-inconsistent behavior).
Hernandez makes the same dodge: noting the recklessness of heterosexual coitus and asserting marriage as a risk mitigant ex post. Hernandez notes that a rational legislature could find that heterosexual relationships are “all too often casual or temporary” and that they “present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples.”

Marriage, the court alleges, can “create more stability and permanence in the relationships that cause children to be born.”

As in Morrison, Hernandez blurs the time-inconsistency problem it identifies (impaired rationality during coitus) and the remedy it extols (marriage ex post). What Wickard v. Filburn did to expand the outer limits of “rationality” in federal legislation based on the Commerce Clause, these cases do for the strained ends-means arguments resorted to by those seeking to keep marriage straight.

One could infer a preference for heterosexuality—like the one discussed in the previous section about the auction—solely on the basis of this asymmetrical analysis. Hernandez, though, makes an express case for it (as do the players in the auction) in its second reason for why a rational legislature could limit marriage to heterosexuals: the notion that children are better off being raised in a cross-sex, heterosexual

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130 Hernandez, 855 N.E.2d at 6–8. Section III of the Hernandez opinion includes the court’s analysis of the rationality of limiting marriage to heterosexuals on account of their often irresponsible reproductive dynamics. Id. The court’s later consideration and rejection of the plaintiffs’ equal protection arguments incorporate Section III’s categorization discussion by implication when observing that the New York legislature could limit marriage to heterosexuals “for the reasons we have explained . . . based on the different characteristics of opposite-sex and same-sex relationships. Our earlier discussion [in Section III] demonstrates that the definition of marriage to include only opposite-sex couples is not irrationally underinclusive.” Id. at 11. Another demonstration of the incoherence of the court’s standard of review is that it justifies the admitted under-inclusivity, an argument which is surplus if the standard of review is mere rationality.

131 Id. at 7.

132 Id.

133 See supra notes 124–129 and accompanying text.

134 See Wickard v. Filburn, 317 U.S. 111 (1942). Wickard involved the constitutionality, under the Commerce Clause, of the Agricultural Adjustment Act of 1938 (“Act”), a piece of New Deal legislation which assessed fines on agricultural production in excess of established quotas. Id. at 113. A farmer who had grown 239 bushels of wheat for use by his family and as cattle feed was fined under the Act for excess production. Id. at 114. He appealed the fine. Id. at 113–14. Finding that even this negligible amount of excess production designed for personal use could exert a “substantial effect” on the federal scheme for regulating interstate commerce, the Supreme Court upheld the Act. Id. at 128–29. It is a strained construction of “substantial effect” on interstate commerce. It seems no more plausible that marriage as a “morning after” device for unintended pregnancy necessarily adds stability to that kind of family unit.
household.\footnote{Hernandez, 855 N.E.2d at 7.} “Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like,” says the court.\footnote{Id.}

It is this move which resolves, for the court at least, the central contradiction faced by the court. Presumably, it is heterosexuality’s inherent superiority which offsets the instability that necessitates accident-induced marriage. Could a minimally rational legislature really favor child-rearing by cross-sex couples as an essentialized class when that same legislature has also recognized that heterosexual marriages may be little more than damage control after impulsive coitus? I do not see how the two thoughts could be held at once: reckless reproduction due to problems of time-inconsistency in regulating sexual impulses, on the one hand, and the inherent superiority of heterosexuality as a model, on the other.\footnote{Over one-third of adoption agencies in one study stated that they would reject a gay or lesbian applicant because of the agency’s religious ideologies or marriage requirements, or the director’s personal enmity against homosexuality. See Gates, et al., supra note 6, at 9.} So I conclude that it must be some kind of visceral taste for heterosexuality that permits the courts to countenance these irregularities in reasoning.

The Hernandez plurality suggests some personal discomfort, on the part of the judges, with the conclusion that is compelled, in their opinion, by the legal doctrine.\footnote{The plurality makes clear that it is their concept of judicial duty which compels their support for keeping marriage heterosexual: We emphasize once again that we are deciding only this constitutional question. It is not for us to say whether same-sex marriage is right or wrong. We have presented some (though not all) of the arguments against same-sex marriage because our duty to defer to the Legislature requires us to do so. We do not imply that there are no persuasive arguments on the other side—and we know, of course, that there are very powerful emotions on both sides of the question. Hernandez, 855 N.E.2d at 12.} Not so Judge Graffeo’s concurrence, which deserves particular consideration as the most primitive in its re-assertion of heterosexual normativity.\footnote{See id. at 13.} Judge Graffeo writes to “elaborate” after the plurality has denied the plaintiffs’ request for a marriage license.\footnote{Id. at 12–13.} The concurrence voices more support for the state’s asserted link between procreation and marriage than does the plurality’s more balanced consideration.\footnote{Id. at 14–17.} First, the concurrence approvingly refer-
ences the portion of a Minnesota Supreme Court opinion that points to the book of Genesis as support for the historic link between procreation and heterosexuality.\textsuperscript{142} Next, it wields \textit{Lawrence} as an animus cap, not as that lever of equality which some giddy jurists have seen in it.\textsuperscript{143} Judge Graffeo gleans from \textit{Lawrence} that its prohibition on criminalizing homosexuality based on moral disapproval does not inhibit civil legal disabilities on homosexuals.\textsuperscript{144} It is a good point.

The capstone of the concurrence is that—and this is where he tips his hand—the statute does not really keep homosexuals from marrying: it is just that they cannot marry other homosexuals.\textsuperscript{145} “[I]ndividuals who seek marriage licenses are not queried concerning their sexual orientation and are not precluded from marrying if they are not heterosexual. Regardless of sexual orientation, any person can marry a person of the opposite sex.”\textsuperscript{146} And here we have spent \textit{all} this wasted time and court costs. It is not the first time that the argument has been made.\textsuperscript{147} It is another example of symbolic violence in law, one so absurd that it could not have been arrived upon through reason.\textsuperscript{148}

\begin{footnotes}
\footnotetext{142}{See id. at 17, n.4 (citing Baker v. Nelson, 191 N.W.2d 185, 186 (1971)).}
\footnotetext{144}{Hernandez, 855 N.E.2d at 18. It is a good example of “death by distinction”:}
\footnotetext{145}{Id. at 20.}
\footnotetext{146}{\textit{Id.}}
\footnotetext{147}{Other cases considering equal protection have put forth similar arguments. See, e.g., Lewis, 875 A.2d at 263 (quoting trial court: “Plaintiffs, like anyone else in the state, may receive a marriage license, provided that they meet the statutory criteria for marriage, including an intended spouse of the opposite gender. . . . The State makes the same benefit, mixed-gender marriage, available to all individuals on the same basis.”).}
\footnotetext{148}{See infra note 235.}
\end{footnotes}
The dissent by Chief Justice Kaye responds well not only to the plurality opinion but to the sharp concurrence too.149 Chief Justice Kaye concludes that the exclusion of homosexuals from marriage is subject to heightened scrutiny for three reasons: homosexuals are a suspect class; their exclusion from marriage flows from a sex-based distinction; and the right in question—marriage—is a fundamental one.150 Nevertheless, applying an evenhanded minimal rationality review for argument's sake, she concludes that the exclusion of homosexuals from marriage serves no legitimate state interest, including the interests typically used to justify such exclusion: fostering reproduction, furthering moral disapproval of homosexuals, keeping with tradition, and maintaining uniformity with the marriage law of sister states.151

With the notable exception of Chief Justice Kaye’s dissent, the judicial reasoning in Morrison and Hernandez has more in common with religious doctrine than with the secular reasoning one expects from these courts.152 These cases do rely on some non-tautological arguments, but they are few and far between.153 As the next section shows, unstable standards of review and incoherent modes of differentiation are the rule where legal categorizations of heterosexual and homosexual are concerned.

149 Hernandez, 855 N.E.2d at 22–34.
150 Id. at 27–30.
151 Id. at 30–34.
152 Indeed, the arguments in Morrison and Hernandez are in line with the shift from reason to religious orthodoxy that Charles Freeman describes in his excellent book on the consolidation of Christian power in the Roman Catholic church beginning in the third century:

The imposition of orthodoxy went in hand with a stifling of any form of independent reasoning. By the fifth century, not only rational thought had been suppressed, but there has been a substitution for it of “mystery, magic, and authority,” a substitution which drew heavily on irrational elements of pagan society that had never been distinguished. Pope Gregory the Great warned those with a rational turn of mind that, by looking for cause and effect in the natural world, they were ignoring the cause of all things, the will of God.


153 See Tamayo, supra note 15, at 64 (“[T]he court’s reliance on the link between heterosexual intercourse and procreation to exclude same-sex partners’ relationships from recognition as state-sanctioned marriages displays stagnant tautology closely mirroring early decisional law.”).
Despite losing, the plaintiffs in *Morrison* and *Hernandez* (and their advocates) have helped to get these courts on the record about legal heterosexuality. The court of history will do its job. By considering the legal doctrine, I was not suggesting that there was much chance that the plaintiffs could prevail. I offered the legal doctrine not for its truth, but only for the *fact* of its utterance in order to examine its meaning.  

For that, let me start with Janet Halley’s analysis of how courts classify heterosexuality in federal equal protection doctrine. She has noted that it is the “*practices of categorization*” rather than the coherence of the categories themselves which matter. She points out the “diacritical” relationship between legal categories for heterosexuality and homosexuality, such that each depends on the other for its identity. Halley also has observed that, while law marked homosexuals in different ways—sodomy being a typical mark because, at the time, *Bowers v. Hardwick* let states criminalize gay sex—heterosexuals were not categorically defined or otherwise legally marked: they were just “nonhomosexuals.” The invisibility of heterosexuals as a “default class” depended on what Halley called the “coercive dynamics of its incoherence” as a class.
When two things are diacritically defined against each other, each one must be distinct enough from the other to sustain the difference. The same principle—in theory, at least—underlies the state equal protection doctrine analyzed here. Equal protection doctrine offers useful side-by-side comparisons of “heterosexual” and “homosexual” because its function is to test the logical quality of legal classification. The diacritical relationship which Halley noted earlier continues in *Morrison* and *Hernandez*, albeit in different terms. There are, however, only so many relevant characteristics which can sustain a legal difference between heterosexuality and homosexuality; now that sex is off the table after *Lawrence*, reproduction does the heavy lifting.

The new methods of jural marking deployed in *Morrison* and *Hernandez* are obvious if one knows what to look for: evidentiary standards for relevance and “intent” that ensure that same-sex plaintiffs are always already precluded from making the necessary showings; the “one drop rule”—deferring to anti-gay state action so long as the animus is not the sole motive; the failure to consider some obvious advantages which same-sex households may provide to children; the unreflective irony of elevating heterosexual reproduction to an end-in-itself immediately after recognizing its frequent recklessness; and, finally, the glib insults which find a safe harbor in legal doctrine.160

These legal categorization practices may have all the self-awareness of a Sasha Baron Cohen character, e.g., Borat, but they embody a distinct moment in the categorization practices used by courts with respect to heterosexuality and homosexuality.161 In *Morrison* and *Hernandez* the legal category of “homosexual” is blurring while that of “heterosexual” category to its members’ own failure to acknowledge its discursive constitution, the coercive dynamics of its incoherence.” *Id.*

160 See *supra* notes 40, 90–94, 111–112, 118–133, 145–148 and accompanying text. 161 Sex, reproduction, and marriage have been de-linked in practice, but remain bound in law:

Contraception and abortion are now readily available. Many married women are financially capable of supporting themselves and their children. The social stigma attached to single parenthood has essentially disappeared. Children are no longer viewed as financial assets but financial burdens, creating a strong incentive toward fewer children. The availability of adoption and artificial reproductive technologies . . . have expanded parental possibilities to single persons and same-sex couples in ways unimaginable only a few decades ago.

*See Foley, supra* note 78, at 76.
is coming into focus, making it easier to examine, challenge, and, eventually, refute.162

The next Part offers one explanation for what causes these categorization practices and the parental taste for heterosexuality. My argument is “structuralist” in that it suggests a system with relatively stable properties which interact with each other in recurrent, predictable ways.163 Because it focuses on consciousness, it is also Marxian, a tradition of explaining “organized social dominance” and its reproduction in human action.164 The argument is an example of what Janet Halley, following Judith Butler, designates the “copula” of structural feminist arguments: it is a rhetorical strategy that links social conditions and

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162 The quickening of reproductive heterosexuality through marriage into a legal category exposes it to rational review, as illustrated by the recent Washington state referendum that would have conditioned ongoing marital status on the production of children. See Washington Defense of Marriage Alliance, Initiative 957, http://www.secstate.wa.gov/elections/initiatives/text/i957.pdf (last visited on Jan. 24, 2008). Gay activists challenged the rationality of reproductive heterosexual marriages in Initiative 957. See id. This state referendum, put forward by the Washington Defense of Marriage Alliance, was meant to better conform state marriage law to its stated legislative intent of furthering procreation. See id. Initiative 957 proposed to do this through several legal requirements intended to improve the enforcement of marriage’s asserted procreative imperative. See id. The proposed bill added the phrase, “who are capable of having children with one another” to the legal definition of marriage; required that couples married in Washington file proof of procreation within three years of the date of marriage; required that couples married out of state file proof of procreation within three years of the date of marriage or have their marriage classed as “unrecognized”; established a process for filing proof of procreation; and made it a criminal act for people in an unrecognized marriage to receive marriage benefits. Id. However this initiative was not enacted and was later withdrawn by its sponsor. Proposed Initiatives to the People–2007, http://www.secstate.wa.gov/elections/initiatives/people.aspx (last visited Jan. 24, 2008).

163 A structural approach describes a formal system of interdependent parts, which behave in predictable and recurrent ways. Levi-Strauss defines the concept clearly (and structurally):

[A] structure consists of a model meeting with several requirements. . . .

First, the structure exhibits the characteristics of a system. It is made up of several elements, none of which can undergo a change without effecting changes in all the other elements.

Second, for any given model there should be a possibility of ordering a series of transformations resulting in a group of models of the same type.

Third, the above properties make it possible to predict how the model will react if one or more of its elements are submitted to certain modifications.


164 See MacKinnon, supra note 21, at ix. “Marxism is the contemporary theoretical tradition that—whatever its limitations—confronts organized social dominance, analyzes it in dynamic rather than static terms, identifies social forces that systematically shape social imperatives, and seeks to explain human freedom both within and against history.” Id.
causes by setting up identities between them that keep elements of the structural model together.\textsuperscript{165}

Let me conclude this Part by anticipating some objections to my approach, particularly from critical communities in which I participate and which are properly suspicious of this sort of argument. For one, my argument rejects post-modernity’s Nicene Creed against essences by using what Janet Halley and Duncan Kennedy have classified as “paranoid structuralism.”\textsuperscript{166} Indeed, the copula is the deep structure of paranoid logic.\textsuperscript{167} Halley notes that the copula may leave its users “energized, emboldened, fortified . . . . indignant and determined.”\textsuperscript{168} She warns, though, that the approach can alienate others: “its hammering insistence, its righteous wrath, will sound to you like scary, even crazy zeal.”\textsuperscript{169} So, while noting their value, Halley rejects the strongest versions of structuralism, including feminism.\textsuperscript{170}

\textsuperscript{165} Janet Halley, Split Decisions: How and Why to Take a Break from Feminism 193 (2006).

\textsuperscript{166} The argument in this article is chargeable with the “paranoid structuralism” that Halley and Kennedy describe. See Duncan Kennedy, A Semiotics of Critique, 22 Cardozo L. Rev. 1147, 1169 (2007) (“The paranoid structuralist asks how unwanted things get reproduced, rather than how the organism sustains itself through time. The answer is paranoid because it emphasizes that “out there” forces or people or structures operate behind our backs . . . .”); see also Halley, supra note 165, at 191 (“[Presupposing] the covert importance of one’s favorite paranoid idea—or claiming to see it precisely [because of] its absence—can have the big downside of being, well, paranoid.”). Halley notes the risk of theoretical paralysis from feminist paranoid structuralism and provides a self-examination to test for paranoid structuralism. Id. at 187–207.

\textsuperscript{167} I set out the copula around conceptual liquidation of sexual minorities most fully in my last article when outlining the structure of conceptual liquidation:

[It includes] overt acts like physical harassment and ridicule, as well as the strategic omissions of straight supremacy: the shameful excitement of early sexual interest, the siege during adolescence, the search for self in literary and historical subtext, parental opprobrium and the resulting splitting of the self, institutionalized religious hostility, hostility from peers, one’s own hostility towards “militant” gays who implicate one’s own internalized repudiation, the risk that a national border will come between one and the object of one’s affection, heightened management of the quite real risks to career, frustrated family formation, deflationary progress narratives, ego conflicts from reconciling self to professional commitments, and, although only anticipated during life, the final insults at death. A complete taxonomy of [conceptual liquidation] is impossible because its genius lies in its ability to turn any social moment into a theater for stigma.

See Gabilondo, supra note 27, at 21–22 & nn.66–79 (citations omitted).

\textsuperscript{168} Halley, supra note 165, at 194.

\textsuperscript{169} Id. at 195.

\textsuperscript{170} Halley notes:
By essentializing, structuralist arguments also risk overlooking the range of constituencies in a legal question. For example, Angela Harris notes that a structural approach may essentialize women of color out of a theory of women.\textsuperscript{171} It is the danger of any single “monolithic” conception of “women’s experience.”\textsuperscript{172} Women of color, says Harris, are likely to be excluded from strategically reductionist accounts of women’s experience.\textsuperscript{173} Bertha Hernandez has noted that critiques of reproductiveism may also conflict with the values of Latina Catholics.\textsuperscript{174}

For example, although neither Morrison nor Hernandez explicitly mention race, their disapproval of casual (and causal) coitus may include a veiled endorsement of the racist reproductive policies denounced by Dorothy Roberts.\textsuperscript{175} Roberts objects to population polices

\begin{quote}
Of course it is no longer acceptable to “be a structuralist” in the strongest sense—that would be hopelessly naïve, almost as bad as being “essentialist”—and almost no one does either any more if he or she can help it. Nevertheless subordination theories across the board, feminist ones being no exception, continue to have persistent recourse to an attitude of paranoid structuralism.
\end{quote}

\textit{Id.} at 189.


\textsuperscript{172} \textit{Id.} at 588 (“The notion that there is a monolithic ‘woman’s experience’ that can be described independent of other facets of experience like race, class, and sexual orientation is one I refer to . . . as ‘gender essentialism.’”).

\textsuperscript{173} \textit{See id.} at 589. Harris states:

\begin{quote}
In my view, however, as long as feminists, like theorists in the dominant culture, continue to search for gender and racial essences, black women will never be anything more than a crossroads between two kinds of domination, or at the bottom of a hierarchy of oppressions; we will always be required to choose pieces of ourselves to present as wholeness.
\end{quote}

\textit{Id.}

\textsuperscript{174} Hernandez explains, “the potential (and unavoidable) conflict that can confront a predominantly Catholic group in being asked to embrace sexual minorities or to accept certain population-control based solutions to hunger and poverty.” Berta Esperanza Hernández-Truyol, \textit{Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex}, 53 \textit{U. Miami L. Rev.} 811, 813–14 (1999) (citation omitted).

\textsuperscript{175} For example, Roberts has shown how racist control over African Americans has—depending on the historical context—favored either more or less reproduction depending on the interests of the dominant white class:

\begin{quote}
Race completely changes the significance of birth control to the story of women’s reproductive freedom . . . . While slave masters forced Black women to bear children for profit, more recent policies have sought to reduce Black women’s fertility. Both share a common theme—that Black women’s childbearing should be regulated [for] social objectives.
\end{quote}

based on race rather than reproductivism, the latter being a value she endorses when arguing that black women have a special claim to the symbolic capital that comes from reproductivism “because they have historically been denied the dignity of their full humanity and identity.”

She does object to the use of “citizens as instruments of the state” but this is not a general rejection of the reproductivism. In this view, reproduction is an exercise in collective self-help in the face of sustained, concerted attacks on dignity.

The charge of essentialism might legitimately be brought against my argument too. Reproduction is over-determined: different heterosexuals may or may not reproduce for any number of reasons. And it means different things to different people. My goal here, though, is only to identify one source of demand for children—demand for symbolic value through heterosexuality. Presumably, other structural elements are also at work, including racialized differences in the taste for heterosexuality, something which I invite other scholars to consider.

Critiquing structuralist approaches, Halley also notes how they have contributed to a “deadlock in feminism” by leading to a form of intellectual paralysis. For example, she analyzes the emergence of

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176 Id. at 302. Roberts sees reproduction as a transcendent human value: “The right to bear children goes to the heart of what it means to be human. The value we place on individuals determines whether we see them as entitled to perpetuate themselves in their children.” Id. at 305.

177 Id. at 306. Her view may leave room to some restraint on procreative liberty in the name of a future child’s welfare but the argument focuses on how racial opprobrium drives the social interpretation given to harm to offspring:

Poor crack addicts and welfare mothers are punished for having babies because they fail to measure up to the state’s ideal of motherhood . . . not penalized simply because they may harm their unborn children or because their childbearing will cost taxpayers money . . . [but rather] because the combination of their poverty, race, and marital status is seen to make them unworthy of procreating.

See id. at 305.

178 Roberts notes the psychic and political value of reproductive self-determination for overcoming the psychic sequellae of slavery: “The process of defining one’s self and declaring one’s personhood defies the denial of self-ownership inherent in slavery. This affirmation of personhood is especially suited for challenging the devaluation of Black motherhood underlying the regulation of Black reproduction.” See id. at 303.

179 Halley, supra note 165, at 192. The crisis Halley describes is familiar to anyone active in critical jurisprudential movements:

Structuralist ambitions figure in these gestures as an ultimate fealty to transcendence, a utopia, or a harmonic convergence that, if we were only smart and good enough, we would be able to produce out of the terrible conflictual material we have to work with.
“governance feminism,” which involves the reception of mediated forms of feminism into the official sector as an example of the porosity of power. She is right to note that “[b]y positing themselves as experts on women, sexuality, motherhood, and so on, feminists walk the halls of power.” The official sector, however, has not digested advocacy for sexual minorities to the same degree. Although structural claims may seem shrill or quaint in the context of women’s experience generally, they may still be relevant for sexual minorities. Being paranoid does not mean that they are not out to get you.

Because of when critiques of heterosexual normativity became institutionalized in the academy, these critiques are sometimes seen as postmodernist. Relegating the analysis of heterosexuality to postmodernism might imply that heterosexual complementarity fits into modernity. In fact, though, pre-modern views can “pass” as modern conceptions, as suggested in a recent Supreme Court case in which one Justice objected to the majority’s “ancient notions about women’s place in the family” when upholding the federal Partial-Birth Abortion Ban Act. I use some post-modern sources to make what is really a conventionally modern argument, albeit one designed to oust pre-modern conceptions of modernity masquerading as the real thing.

So it’s not just that the “race, class . . .” mantra, deployed prescriptively, often obscures rather than illuminates the complexity of power in the social world. The moralized crisis that sustains it is so ritualized—is performed again and again with such Kabuki-like precision—that one could call it a deadlock in feminism. Paralysis again.

Id. See id. at 20–22.

Id. at 21.


See 18 U.S.C. § 1531 (Supp. 2004); Gonzalez v. Carhart, 127 S. Ct. 1610, 1649 (2007) (Ginsburg, J., dissenting). Justice Ginsburg’s dissent uses the word “ancient” rather than “premodern” but the idea is the same. Id. at 1649. She notes that the majority’s decision in Carhart is “ alarming” and “reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.” Id. at 1641, 1649. Admonishing the decision, Ginsberg states, “If there is anything at all redemptive to be said of today’s opinion, it is that the Court is not willing to foreclose entirely a constitutional challenge to the Act.” Id. at 1651. While she acknowledges that Carhart “does not go so far as to discard Roe or Casey,” she recognizes that the Court is “differently composed than it was when we last considered a restrictive abortion regulation, [and] is hardly faithful to our earlier invocations of ‘the rule of law’ and the ‘principles of stare decisis.’” Id. at 1652.
II. Perfecting Observer Status in Heterosexual Reproduction

This Part examines how and why the taste for heterosexuality is reproduced. The social construction of heterosexuality’s value, I assert, creates self-fulfilling demand on the part of parents and courts for the conspicuous reproduction of heterosexuality. Once this happens, the reproduction of (heterosexual) reproduction seems to propel itself. To explain how this comes to be, I use Pierre Bourdieu’s socioeconomic theory of reproduction, as supplemented with feminist and other sources on reproduction and heterosexuality. Read together, these sources let one peer into normative heterosexuality without falling into it.\(^{184}\)

Section A introduces Bourdieu’s framework. Section B considers the mental structure which creates demand for the reproduction of heterosexuality as a practice and as a norm. Section C explains how children provide their parents with capital and how, in a heterosexual economy, parents correctly discount the value of a gay child.

A. Bourdieu: the Individual as Cell of Social Reproduction

As part of his vast sociology on taste, education, and the French academy, Bourdieu examined the reproduction of social institutions and tastes.\(^{185}\) Commentators agree that his work could add “complete-

\(^{184}\) As David Halperin has noted,

[T]he project of shifting the discursive position of homosexuality from that of object to subject does not constitute a mere attempt to reform sexual discourses. . . . The aim, rather, is to treat homosexuality as a position from which one can know, to treat it as a legitimate condition of knowledge.


ness” to legal scholarship, especially on questions of agency and class.\textsuperscript{186} One reason why this is so is because Bourdieu consciously overcame many methodological binaries.\textsuperscript{187} Integrating received oppositions is useful for a relatively new issue like the taste for heterosexuality, which may deserve its own theoretical structure. Bourdieu’s model is “structural” because it connects individual consciousness and action, social structure, and the reproduction of both.\textsuperscript{188} In this it has much in common with a Marxian analysis of “reproductive praxis” mentioned earlier.\textsuperscript{189} Trained first as an ethnographer, however, Bourdieu saw class formation through the lens of the individual, one “thick” with motives and strategies, so, despite his protestations, his approach has some important things in common with the rational actor model.\textsuperscript{190}

Bourdieu saw his work as a form of “genetic structuralism” which examined the origin of both mental and social structures and the joint

\begin{itemize}
\item \textsuperscript{186} See, e.g., Lawrence Lessig, \textit{The Regulation of Social Meaning}, 62 U. Chi. L. Rev. 943, 1020 (1995) (noting the value of Bourdieu’s explanation of formal education as an agent of social construction). Lawrence Lessig has noted the exceptional coherence of Bourdieu’s explanation of formal education as an agent of social construction. See \textit{id.} at 973–74. He also uses Bourdieu’s concept of “social capital,” and praises how Bourdieu’s economic rhetoric contributes more “completeness” than the “materialist” approach of Richard Posner and Tomás Philipson. \textit{Id.} at 1004–05, 1020. Susan Carle points out that American legal theory has only barely begun to consider the implications of Bourdieu’s work on class, and she refers to Bordieu as a “master continental theorist of class.” Susan D. Carle, \textit{Theorizing Agency}, 55 Am. U. L. Rev. 307, 392 (2005). A good place to begin a study of Bourdieu is Richard Terdiman’s translation of Bourdieu’s essay on law as a juridical field, of which the translator’s introduction is exceptionally lucid. Pierre Bourdieu, \textit{The Force of Law: Toward a Sociology of the Juridical Field}, 38 Hastings L.J. 805, 805–13 (Richard Terdiman trans., 1987).
\item \textsuperscript{187} See \textit{Pierre Bourdieu, In Other Words: Essays Towards a Reflexive Sociology} 34 (1990). According to Bourdieu, “Today’s sociology is full of oppositions, which my work often leads me to transcend—even if I don’t set out deliberately to do so.” \textit{Id}.
\item \textsuperscript{188} See generally \textit{Levi-Strauss, supra note 163}, \textit{supra note 62, at 203}.
\item \textsuperscript{189} See \textit{Craig Calhoun, Habitus, Field, and Capital: The Question of Historical Specificity, in Pierre Bourdieu: Critical Perspectives} 55, 70–71 (Craig Calhoun et al., eds. 1993). Calhoun notes the affinity:

\begin{quote}
Bourdieu’s theory does imply dynamism . . . at the level of the strategic actor . . . . That is, the motive force of social life is the pursuit of distinction, profit, power, wealth, and so on . . . . [D]espite his disclaimers, Bourdieu does indeed share a good deal with Gary Becker and other rational choice theorists.
\end{quote}

\textit{Id.} For example, Bourdieu’s view that semi-conscious “dispositions” inform gain-seeking is consistent with the way that the new institutional economics reasons aspire to behavioral assumptions that better approximate how people act in fact, not theory. See, e.g., Oliver Williamson, \textit{The Economic Institutions of Capitalism} 44 (1985) (noting the use of bounded rather than idealized rationality in transaction cost economics because this assumption better reflects “human nature as we know it”).
\end{itemize}
reproduction of each.\textsuperscript{191} I see his work as “Marxian behavioralism” because of its focus on individual action in the patterned reproduction of social structure.\textsuperscript{192} This article examines the relationship between prenatal biases and social and legal structure, so I use his framework because it maps these elements. Bourdieu’s preoccupation with the origin and reproduction of social structures is relevant to this article’s central goal: to demonstrate the existence of a socially-constructed preference (rewarded by law) which privileges heterosexuality and, at the same time, propels personal reproduction, thereby begetting.

Catherine MacKinnon has criticized the way that some feminists have built on “the work of French men” while ignoring the reality of women’s lives.\textsuperscript{193} This may be true of followers of Bourdieu’s contemporaries, but I do not think that this criticism applies to this article. In fact, Bourdieu’s work encourages a critical move “from the model of reality to the reality of the model.”\textsuperscript{194} That said, it is true that he paid less attention to questions of sex and gender—an odd and unfortu-

\textsuperscript{191} See Bourdieu, supra note 186, at 14. Bourdieu described his work this way:

\begin{quote}
I would say that I am trying to develop a genetic structuralism: the analysis of objective structures – those of different fields – is inseparable from the analysis of the genesis, within biological individuals, of the mental structures which are to some extent the product of incorporation of social structures; inseparable, too, from the analysis of the genesis of these social structures themselves.
\end{quote}

\textit{Id.}

\textsuperscript{192} Looking for original ways to span the divide between determinism and constructionism is common to much contemporary scholarship. See, e.g., Judith Butler, Bodies That Matter: On The Discursive Limits of “Sex,” at x (1993) (“Such a willful and instrumental subject, one who decides on its gender, is clearly not its gender from the start and fails to realize that its existence is already decided by gender.”) (clarifying overly constructionist interpretations of her earlier work); Kyriakos Kontopoulos, The Logic of Social Structure \textit{passim} (1993) (proposing theory of structural causation from “macro” levels through “meso” levels in order to reach “micro” behavior at the level of individuals); Carle, supra note 186, at 371–74 (arguing for the value of turn-of-the century classical pragmatist thought as an analytical framework in her comprehensive consideration of agency theory in social constructionist debates).

\textsuperscript{193} Catharine A. MacKinnon, Points Against Postmodernism, 75 Chi.-Kent L. Rev. 687, 702 (2000) (“Postmodern feminists seldom build on or refer to the real lives of real women directly; mostly, they build on the work of French men, if selectively and not very well.”). Indeed, MacKinnon notes how much of postmodernism developed from feminist and Marxian critiques of social dominance: “Postmodernism’s analysis of the social construction of reality is stolen from feminism and the left but gutted of substantive content—producing Marxism without the working class, feminism without women.” \textit{Id.} at 710. The same can be said for feminism’s legacy to postmodern art. See Holland Cotter, \textit{The Art of Feminism As It First Took Shape}, N.Y. Times, Mar. 9, 2007, at E29 (“Much of what we call postmodern art has feminist art at its source.”).

nate oversight considering that physical reproduction is the royal road to social reproduction, including inequality. In general, though, Marxian analysis of the sexual order has been somewhat limited.

A particular virtue of Bourdieu’s approach is that by taking us behind-the-scenes into the middle and upper classes, it avoids the classism of viewing only the reproduction of the poor as a social problem. It is true that reproductivism is regressive, with its costs, like infanticide, falling most heavily on the young, poor, and uninformed. As do others, I emphasize the importance of class when thinking about reproduction. A proper critique of natalism, however, should consider the role

195 However, “this substantive omission should not be taken to mean that Bourdieu’s theoretical apparatus does not necessarily have relevance for feminism,” Lisa Adkins, *Introduction: Feminism, Bourdieu and After*, in *Feminism After Bourdieu* 3, 3 (Lisa Adkins & Beverly Skeggs eds., 2004). This volume is the best source on feminist applications of Bourdieu.


197 The most extended example of this is Bourdieu’s charming examination of the class structure of cultural taste in contemporary French society. *See generally Bourdieu, Distinction*, supra note 185. It classifies and examines taste across social strata but pays special attention to the “petit-bourgeois” and its anguished relationship to the “bourgeoisie.” For example, he notes that “one can contrast a bourgeois ethos of ease, a confident relation to the world and the self, which are thus experienced as necessary . . . with a petit-bourgeois ethos of restriction through pretension, the voluntaristic rigour of the ‘called’ but not yet chosen . . . .” *Id.* at 339 (distinguishing between rising and falling sectors of the petit-bourgeois). Mapping the correspondence between French and U.S. class structure would require a more extended discussion, but I just want to highlight his sustained interest in the sociology of the affluent. *See also Pierre Bourdieu, Masculine Domination 101* (Stanford Univ. Press 2001) (1998) [hereinafter Bourdieu, Masculine Domination] (“The women of the petit-bourgeoisie, who go to extremes in their attention to the care of the body . . . and more generally in their concern for ethical and aesthetic respectability, are the greatest victims of symbolic domination, but also the natural vectors for the relaying of its effects towards the dominated categories.”).

198 *See* Mary Overpeck, *Epidemiology of Infanticide*, in *Infanticide: Psychosocial and Legal Perspectives on Mothers Who Kill* 19, 24–25 (Margaret G. Spinelli ed., 2003) [hereinafter Infanticide]. Two of the most important risk factors for infanticide are the age of the mother and her education. *Id.* Infanticide research suffers from inadequate reporting, but some research has been conducted by state vital statistics agencies. *See id.* at 19–20. One study of 2776 probable infant homicides found that infants at highest risk of infanticide are the second or subsequent children born to mothers under the age of seventeen. *Id.* at 24. Infants of mothers who had not completed high school were eight times more likely to be killed than those of mothers with sixteen years of education, although this correlation also reflects the aforementioned risk factor of age. *Id.* at 25.

199 *See generally* Franke, supra note 49. Dorothy Roberts has also criticized the way that advocacy for reproductive technologies disproportionately consumed by middle and up-
of the reproduction of the affluent.\textsuperscript{200} After all, legal standards about family life may reflect bourgeois styles and interests to the detriment of others.\textsuperscript{201} Because wealth may insulate the rich and the very rich from some forms of status anxiety, it is in the middle and upper-middle classes where the challenge to improve social standing through reproductive competition may emerge more clearly.\textsuperscript{202}

Bourdieu’s model of social reproduction has three moving parts which are central to my argument: the accumulative self (“habitus”); the convertible capitals it seeks; and the exchange markets (“fields”) where it converts these capitals in contests with others.\textsuperscript{203} The following sections examine each of these concepts in the context of the taste for heterosexuality and its role as a crankshaft of heterosexual reproduction.

**B. Heterosexual Time-Inconsistency in the Habitus**

At the heart of Bourdieu’s theory about social reproduction is a notion of a “future-projected, strategizing, accruing, exchange-value

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\textsuperscript{200} Some suggest that heterosexual marriage strategies contribute materially to the reproduction of economic inequality: “Yet sorting on education, income, race, religion, and other characteristics in marriage is probably far more important in transmitting inequality than capital market restrictions on investments in human capital, neighborhood segregation, and the other variables usually emphasized.” \textsc{Gary S. Becker & Kevin M. Murphy}, \textit{Social Economics Market Behavior in a Social Environment} 34 (2000).

\textsuperscript{201} Consider, for example, how concerns about meeting social expectations for dowry in India may encourage female infanticide for families of modest means: “[E]ven today, the birth of a daughter automatically triggers the pressure of saving a suitable dowry. If a family cannot provide a suitable dowry, it risks social ostracism. Among poor rural families, the persistence of female infanticide and sex-selective abortions of healthy female fetuses is attributable to this fear.” \textsc{See Michelle Oberman}, \textit{A Brief History of Infanticide and the Law, in Infanticide}, \textit{supra} note 198, at 3, 5.

\textsuperscript{202} \textit{See supra} note 197. And this class focus also makes the argument more directly relevant to the members of the legal academy.

\textsuperscript{203} \textit{See generally} \textsc{Bourdieu, Masculine Domination, supra} note 197. This “invisible hand” of reproductivism substitutes in part for the concerted strategies noted by Bourdieu:

The work of reproduction was performed, until a recent period, by three main agencies, the family, the church and the educational system, which were objectively orchestrated and had in common the fact that they acted on unconscious structures. The family undoubtedly played the most important part in the reproduction of masculine domination. . . . In fact the whole of learned culture, transmitted by the educational system . . . has never ceased, until a recent period, to convey archaic modes of thought.

\textit{Id.} at 85–86.
self.” The self works through the “habitus,” a reservoir of skills, tastes, and dispositions that reflect prior learning and socialization. The taste for heterosexuality is one of those “dispositions” which comes to reside in the habitus through “learning and socialization.” Though not, as far as I know, framed in such terms, this basic insight is hardly original, as suggested by scholarship about homophobia. My goal here is to suggest how this habital disposition shows up in valuations of potential children.

Humanities scholar Lee Edelman has performed the most detailed analysis of how reproductivism has been “soft-wired” into heterosexual consciousness as a symbol which drives many heterosexuals to organize time through “reproductive futurism.” He posits a conflict in the minds of heterosexuals between two symbols. The dominant symbol is the “Child.” In other words, not a child-in-fact, this is a “when, if, and as-issued” child whose imputed interests reach back from an equally imagined future to call the shots in the present. The Child “marks the fetishistic fixation of heteronormativity: an erotically charged investment in the rigid sameness of identity that is central to the compulsory narrative of reproductive futurism.” (Not an easy sentence, granted, but understanding it is worth the effort.) I have added emphasis to point out that this process involves the collective regulation of libido—that of the parent, the child, and third parties who bear the attendant social costs and benefits—for the sake of reproducing the same social arrangements.

Against the Child, the death drive emerges as a nihilist force associated with the homosexual; it disrupts future-looking reproduction by suggesting that the present may make claims of its own, notwithstanding...

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205 Bourdieu took the habitus from previous theorists and made it “generative”: “I was very close to Chomsky, in whom I found the same concern to give to practice an active, inventive intention . . . . I wanted to insist on the generative capacities of dispositions, it being understood that these are acquired, socially constituted dispositions.” See *Bourdieu*, supra note 187, at 13.

206 See generally *Edelman*, supra note 19.

207 See id. at 3.

208 See id. at 2–4. Edelman capitalizes “child” to emphasize its totemic power.

209 See id.

210 *Id.* at 21 (emphasis added).

211 This symbolic operation involves managing sex energy (hence “erotically” and “fetishistic”). The goal of the operation is to reproduce “sameness,” thus my corollary that the Child—like the heterosexual parent—is straight too.
ing the imaginary future of imaginary children. These symbolic conflicts collapse distinct moments in time (the future of the imaginary Child and everyone else’s present), reflecting a time disjunction similar to the time confusion of heterosexual coitus discussed earlier in connection with *Morrison* and *Hernandez*. It is this ricocheting backward and forward that may keep some heterosexuals permanently locked into a time disorder. This time confusion makes a market for reproduction by keeping heterosexuals from anticipating the forward costs of reproduction. The symbolic capital bribe which cases like *Morrison* and *Hernandez* offer—however illusory it may turn out to be in practice—also keeps some heterosexuals from properly pricing the value of the present and, perhaps, the value of relationships with existing people who do not enter into the reproductive calculus.

It is my contention—extending Edelman’s argument—that this totemic Child is demonstrably heterosexual—at the level of symbol—because that sexual orientation conforms with the overall logic of reproduction—as currently understood—and, therefore, produces the most social approval. This symbolic heterosexual Child would be an example of one of those “internalized categories” which Bourdieu identifies as the building block of social and natural “realities.” Support for the claim that the symbolic Child which Edelman discusses is itself heterosexual comes from the reactions of parents to the early signs that a child may be homosexual. For example, Dr. Nicolosi’s guide

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212 Edelman, supra note 19, at 9. “The drive—more exactly, the death drive—holds a privileged place in this book. . . . [T]he death drive names what the queer, in the order of the social, is called forth to figure: the negativity opposed to every form of social viability.” Id.

213 See supra notes 118–133 and accompanying text.

214 “Politics, then, in opposing itself to the negativity of such a [death] drive, gives us history as the continuous staging of our dream of eventual self-realization by endlessly reconstructing, in the mirror of desire, what we take to be reality itself.” Edelman, supra note 19, at 10.

215 See Bourdieu, *Masculine Domination*, supra note 197, at 121. When explaining how it is that social reform movements accomplish lasting results, Bourdieu emphasizes the need to “subvert” the internalized schema of representation:

To accomplish a durable change in representations, [symbolic subversion] must perform and impose a durable transformation of the internalized categories (schemes of thought) which, through upbringing and education, confer the status of self-evident, necessary, undisputed natural reality, within the scope of their validity, on the social categories that they produce.

Id. Here, preconsciousness or some form of subliminal consciousness in the form of parents’ hopeful but unwarranted expectations about potential children informs the experience of subsequent actual children who come into being. See id.
for parents on preventing homosexuality in (existing) children includes detailed guidelines about what parents can do in the first years of a child’s life to mitigate the risk of incipient homosexuality. Edelman’s main point is about how this mental and social system prejudices sexual minorities; my point is that heterosexuals also suffer in this system.

Habitual heterosexuality involves the reproduction of itself. That is, because it drags learned preferences from the past into the present, the habitus is a structure broker that mediates between former and future states of the world through strategies. It is in this sense that the habitus makes possible the reproduction of reproduction, thereby creating demand for heterosexuality and its symbolic value.

The heterosexualized habitus needs a forum in which to seek gain and, in Bourdieu’s model, these capital production and exchange markets are called “fields.” “Bourdieu understands the social world to

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216 See NICOLOSI & NICOLOSI, supra note 48, at 33–53 (suggesting steps for reparative intervention by parents in the development of what may be a “prehomosexual boy”). The references in these guidelines to the felt experience of these boys of their “genderlessness” are open to other readings. Indeed, perhaps unwittingly, Nicolosi’s idea of a child’s “genderlessness,” the feeling of not being particularly invested in the behaviors and identity ascribed to one’s chromosomal sex status also lends support to the autonomy of gender from sex and sexual orientation, a refreshing perspective given that progressive discourse now uses “gender” when it means “chromosomal sex” (and, in so doing, forecloses the transformative potential of gender). During the last decade or so, “gender” has come to substitute for “sex” on official forms (especially those with progressive aspirations) and in academic and popular discourse. I think this substitution makes people feel “modern” or hip. In fact, though, it is a reactionary move from the point of view of gender politics. Gender starts from the idea that identity and behavior do not correlate with chromosomal sex status. The sex spectrum runs from “male” to “female” while, in parallel fashion, the gender spectrum runs from “butch” to “femme.” By substituting “gender” for “sex” the former loses its power as a reminder of the false correlates between sex and identity. Properly conceived, gender is nothing more than a transitional concept that—correctly—includes the seeds of its own eventual irrelevance. This idea is outside the scope of this article but too important not to mention.

217 See generally EDELMAN, supra note 19.

[O]ur enjoyment of liberty is eclipsed by the lengthening shadow of a Child whose freedom to develop undisturbed by encounters, or even by the threat of potential encounters, with an “otherness” of which its parents, its church, or the state do not approve . . . terroristically holds us all in check and determines that political discourse conform to the logic of a narrative wherein history unfolds as a future envisioned for a Child who must never grow up.

Id. at 21.

218 See BOURDIEU, supra note 187, at 87–88. For legal academics not yet familiar with Bourdieu’s framework, it can be grasped intuitively by thinking about our profession. As teachers, we cultivate particular dispositions in students, such as “thinking like a lawyer” and absorbing specialized course content to produce (seemingly) seamless performances.
comprise differentiated, but overlapping, fields of action, for example, the economic field, the political field, the legal field, and so on.”219 Fields precede and give rise to “games” by setting up the economic interests that animate more targeted competition among relevant actors.220 Embedded in this statement is the idea that games emerge as a

Unceasing calculation is part of the tenure track, where daily strategies are crafted (and concealed, perhaps) in a countdown to one or two important future decisions by senior faculty, a process during which one may have to make a separate peace despite collective interests as faculty.

Reproduction and exchange figure prominently in many more of our customary practices: expounding one’s views through articles, conferences, and media appearances; asking prospective colleagues in their interviews versions of “Why aren’t you me?”; adding to the reputation of one’s home institution; and cultivating ideas, disciplines, and disciplines. Being cited is a key form of reproduction, hence citation markets (and cartels) where faculty provide price support for each other’s work. The promotion and tenure process—and the pageantry of appointments—is a clear site of conflicts over reproductive projects. Just ask anyone who has served on an appointments committee and has noticed a colleague gush at an applicant with a shared distinction: rank, clerkship, or attendance at one of the “thirty schools in the Top Ten.” (The phrase belongs to my College of Law colleague, Tom Baker.) Academic salaries being what they are, economic capital (“financial” is a better word since all forms of capital are economic) matters less in academe than cultural, social, and symbolic capitals, although marginal differences in merit increases, negligible to begin with, can fuel controversy.

Pre-tenure, article placement and scholarship reviews allocate cultural capital, both in one’s home institution (where status may be marked-to-market) and extramurally. Consider academics huddled around a credential, mentor, or prized social network or signaling social standing in an asterisked footnote by thanking a particular reader, regardless of whether or not that reader’s reactions were seriously considered. A law review article is a bid for the symbolic capital of a judge, legislature, or another scholar or critic. Recognition is key to symbolic capital, hence the appeal of titles and chairs and the habit of running serial Lexis searches for one’s own name (guilty). The struggle over the power to name and classify (“the theory effect”) is the bread-and-butter of much academic conflict. Faculty meetings are one forum for these conflicts, with opportunities for serving the self through institutionally-framed discourses and the small, but important, joy of blocking an opponent’s capital strategy. Few things exemplify the symbolic power to create binding status and power through “naming” as does the power of a promotion and tenure committee when considering an application for tenure.

Bourdieu emphasized law as the primary engine of symbolic capital, but nonlegal mechanisms also allocate legitimacy; consider the roles of the Carnegie Foundation and U.S. News and World Report in the faculty habitus. These two institutions make possible our ordinal fixations, including the “trading up” practices involved in maximizing article placement and the sense of knowing one’s place, especially when wearing a nametag at the Marriot Wardman.

219 Lisa Adkins, Reflexivity: Freedom or Habit of Gender, in Feminism After Bourdieu, supra note 195, at 191, 193.

220 It is fields that make possible the emergence of interests, and, hence, games: “The existence of a specialized . . . field is correlative with the existence of specific stakes . . . . [I]nterest is at once a condition of the functioning of a field (a scientific field, the field of haute couture, etc), in so far as it is what ‘gets people moving’, what makes them . . . compete and struggle . . . .” See Bourdieu, supra note 187, at 87–88.
function of field dynamics. Courts make and police fields for games through judicial review, which can empower courts to structure and restructure basic social arrangements (for example, marriage). The main field which this article considers is physical reproduction. Cases like Morrison and Hernandez help promote investment in this field by rewarding acts of coital recklessness with the special rights of marriage.

C. Children as Capital

Faced with one risk and reward scenario after another, “the habitus always works with a perception of future value and accumulation.” What the habitus wants is what Bourdieu classifies as “multiform and convertible” capital, the main types of which are social, cultural, economic, and symbolic capital. Before explaining how a child provides these capitals—and how, in a heterosexual social economy, the return from a straight child might exceed that from a gay one—let me define them.

“Economic capital is wealth either inherited or generated from interactions between the individual and the economy . . . .” Cultural capital takes the form of educational accomplishment, as reflected in credentials. “Social capital is generated through social processes between the family and wider society and is made up of social net-

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221 Here Bourdieu addresses time before the first period of a game:

[T]he inclination to play the economic game, to invest in the economic game which is itself the product of a certain economic game, is at the very basis of the existence of this game. This is something forgotten by every form of economism. Economic production functions only in so far as it first produces a belief in the value of its products . . . and it must also produce a belief in the value of the activity of production itself . . . .

*Id.* at 89.

222 While many law and economics arguments do a good job of explaining how games create incentives for players, these arguments do not always address why or how these games come to be in the first place. Bourdieu offers such an explanation, however, through an argument about interests: “Unlike the natural, ahistorical or generic interest referred to by economists, interest in my view, is an investment in a game, any game, an investment which is the condition of entry into this game and which is simultaneously created and reinforced by the game.” *Id.* at 48.

223 See Skeggs, *supra* note 204, at 85.

224 See Calhoun, *supra* note 190, at 69–70.


226 See Calhoun, *supra* note 190, at 70.
works.” Friendship by the abacus (that is, a quid pro quo calculation) pervades much social life because friendship can involve gain.

Symbolic capital is key to normative heterosexuality because this type of capital includes social approval. “Symbolic power is the power to make things with words” and is essentially unstable. The family is “the guardian of symbolic capital.” Law produces much symbolic capital through official determinations, like those defining the scope of marriage or the extent of parental authorities. These legal determinations confer “upon a [particular] perspective an absolute, universal value, thus snatching it from a relativity that is by definition inherent in every point of view . . . .” For example, Devon Carbado makes a form of symbolic capital argument when noting that opening marriage to

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227 Reay, supra note 225, at 57.
228 Symbolic capital includes social approval in all of its manifestations:

Authority, knowledge, prestige, reputation, academic degrees, debts of gratitude owed by those to whom we have given gifts or favors; all these are forms of symbolic capital. Such symbolic capital can be readily convertible into the more traditional form of economic capital. The exchange value of symbolic capital, while it cannot be stated to the penny, is continuously being estimated and appraised by every individual possessing or coming into contact with it. The relevance of a notion of symbolic capital to the study of an important professional field like the juridical is considerable.

See Bourdieu, supra note 186, at 812.
229 Pierre Bourdieu, Social Space and Symbolic Power, 7 Soc. Theory 14, 23 (1989). Symbolic power turns on classification and naming: “[T]he words, the names which construct social reality as much as they express it, are the stake par excellence of political struggle, which is a struggle to impose the legitimate principle of vision and division, i.e., a struggle over the legitimate exercise of what I call the ‘theory effect.’” Id. at 20–21.
230 See Bourdieu, supra note 187, at 93. Bourdieu notes the “essential instability of symbolic capital which, being based on reputation, opinion and representation . . . can be destroyed by suspicion and criticism, and is particularly difficult to transmit and to objectify.” Id.
231 Id. Bourdieu makes the observation in the context of the family’s relationship to religion and the state when he notes “the constant, explicit support that the family, that guardian of symbolic capital, receives from churches and from law.” See id. The court in Hernandez alludes to this symbolic capital. See 855 N.E.2d at 7 (“Beyond this, [heterosexual couples] receive the symbolic benefit, or moral satisfaction, of seeing their relationships recognized by the State.”).
232 What Bourdieu says about state-granted titles generally is true also about marriage:

Official nomination, that is, the act whereby someone is granted a title, a socially recognized qualification, is one of the most typical expressions of that monopoly over legitimate symbolic violence which belongs to the state or its representatives . . . . As an official definition of an official identity, it frees its holder from the symbolic struggle of all against all by imposing the universally approved perspective.

See Bourdieu, supra note 187, at 135.
233 Id. at 21.
homosexuals would reduce its premium as a symbol. It is the desire to hold on to this symbolic premium which has led defenders of straight supremacy—when their backs are against the wall—to concede the economic substance of marriage to homosexuals (through civil unions) but not the symbolic franchise of marriage. Morrison and Hernandez add symbolic capital to heterosexual reproduction by converting a heterosexual social ill—unintended pregnancy—into a warrant for a special right. And the flip-side of this subsidy is the “symbolic violence” which the opinions perform on homosexuals.

What kind of capital could a child provide to a parent? The answer is obvious in economies in which children provide the promise of wage returns from labor. In other economies, other forms of capital must be considered. Though Gary Becker comes from a different methodological tradition, his work complements Bourdieu’s model of a capital-seeking habitus. Becker notes that reproduction involves a discretionary lifestyle choice by an individual to acquire a “consumption good.” Becker’s model assumes a pair consisting of a female and a male. The all-in cost (or benefit) of having a child, says Becker, is the present value of all anticipated inflows minus the present value of all antici-

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234 See Carbado, supra note 43, at 96. (“[T]o the extent that lesbian and gay marriages are legalized, the “value” of heterosexual marriage—its cultural, political, and social currency—is diminished. Part of the perceived value of marriage as an institution derives from its heterosexual exclusivity. . . . The right to marriage must be heterosexually earned.”)

235 The particular form of insult derived from reading cases like Morrison and Hernandez involves what Pierre Bourdieu considered “symbolic” or “gentle” violence. Bourdieu, Masculine Domination, supra note 197, at 1–2 (“And I have also seen masculine domination . . . as the prime example of this paradoxical submission, an effect of what I call symbolic violence, a gentle violence, imperceptible and invisible even to its victims, exerted for the most part through the purely symbolic channel of communication and cognition . . . or even feeling.”). A glib and callous dissent from a Massachusetts opinion on same-sex marriage provides a typical example. See Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 n.1 (2004) (Sosman, J., dissenting) (“The insignificance of according a different name to the same thing has long been recognized: ‘What’s in a name?/That which we call a rose/By any other name would smell as sweet . . . .’”) (quoting William Shakespeare, Romeo and Juliet, act 2, sc. 2)). I am particularly grateful to Frank Valdés for his advice on negotiating symbolic violence in legal decisions while reading them.

236 See generally Schultz, supra note 72.

237 See Becker, Fertility, supra note 1, at 210. “For most parents, children are a source of psychic income or satisfaction, and, in the economist’s terminology, children would be considered a consumption good. Children may sometimes provide money income and are then a production good as well.” Id.

238 See Becker, Family, supra note 1, at 38 n.3 (referencing “a household with one man and one woman”). The only examples that he provides reflect this configuration.
pated outlays. Here, “income” refers not primarily to money income (although this is so when children act as an income reserve from which aged parents may draw), but to various forms of psychic income too. The costs of reproduction also involve both money and psychic costs, although children can reduce their net cost to the family unit by providing services.

If this present value is a negative number (the costs exceed the income), the child is a consumer durable; if the present value is a positive number (the anticipated income exceeds the cost) the child is a producer durable. This present value also includes a time-discounted “dynastic utility function” that measures the income of future descendants. Unlike most other commodities, however, “[c]hildren are usually not purchased but are self-produced by each family, using market goods and services and the own time of parents, especially of mothers.”

According to Becker, it is “complementarity” in the sex-based differences between the heterosexual male and the heterosexual female that makes cross-sex pairing more efficient than other arrangements. In this view, sex-based division of labor reflects natural efficiencies in gestation and child-rearing. Indeed, he argues for a biological basis for preferring cross-sex households over other types.

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239 See Becker, Fertility, supra note 1, at 213. More technically, the cost of a child “equals the present value of expected outlays plus the imputed value of the parents’ services, minus the present value of the expected money return plus the imputed value of the child’s services.” Id.

240 See id.

241 Id.

242 See Becker, Family, supra note 1, at 156. “By relating the utility of children to their own consumption and to the utility of their children, we obtain a dynastic utility function that depends on the consumption and number of descendants in all generations.” Id. The model assumes that parents are altruistic toward their children. Id. at 155.

243 Id. at 138. Becker explains private demand for children and patterns between the quantity and quality of children (as measured by parental investment in education). Id. He defines demand as “the number of children desired when there are no obstacles to the production or prevention of children.” Id. at 141.

244 Becker, Family, supra note 1, at 39. Becker’s argument makes no moral judgments about arrangements other than a cross-sex pair, but stylized examples like this may confer symbolic value on the model: “Complementarity [between heterosexual men and heterosexual women] implies that households with men and women are more efficient than households with only one sex, but because both sexes are required to produce certain commodities complementarity reduces the sexual division of labor in the allocation of time and investments.” Id.

245 Id. at 37–48.

246 Id. at 39. The argument also reflects the classic use of analogies from nonhuman sexual arrangements, a point explored in greater detail later:
The biological argument rests on analogies to the “naturalness” of sexual reproduction by nonhuman animals.\textsuperscript{247} (There is also some interesting countervailing zoological research that challenges determinism by studying non-reproductive sex in nonhuman animals.)\textsuperscript{248} This is akin to the biological determinism behind some of the legal arguments brought by the state in the cases discussed earlier.\textsuperscript{249} (I am not attributing to Becker’s arguments any explicit normativity.\textsuperscript{250} Versions of the “heterosexual complementarity” arguments, however, are used in \textit{Morrison} and \textit{Hernandez} to justify reserving the special legal rights of marriage as a reward for reckless heterosexual coitus.)\textsuperscript{251}

My contention is that babies and children provide parents with social and symbolic capital by enhancing reputation in important networks. Such gains produce psychic income from individual alignment with widely-held norms. For example, sociologist Viviana Zelizer has pointed out that, while their financial value dropped during the consequently, biological differences in comparative advantage between the sexes explain not only why households typically have both sexes, but also why women have usually spent their time bearing and rearing children and engaging in other household activities, whereas men have spent their time in market activities.

\textit{Id.}\textsuperscript{247} According to Becker, humans reproduce in much the same way as all vertebrates: “Sexual reproduction along these lines is all but universal among vertebrates: not only mammals, but also fish, reptiles, birds, and amphibians reproduce sexually.” \textit{Id.} at 37.\textsuperscript{248} See \textsc{Bruce Bagemihl, Biological Exuberance: Animal Homosexuality and Natural Diversity} 168 (1999) (“What many people fail to realize is that reproduction itself often occupies a peripheral position in animal life—either being a ‘marginal’ activity among apparently heterosexual animals, or else a common activity among seemingly ‘marginal’ animals such as those involved in homosexuality.”).\textsuperscript{249} See, e.g., \textit{Baker}, 744 A.2d 864, 909. For example, the state’s argument in \textit{Baker} uses the concept of biological complementarity between man and woman to show that marriage is essentially heterosexual. “The State contends that (1) marriage unites the rich physical and psychological differences between the sexes; (2) sex differences strengthen and stabilize a marriage; (3) each sex contributes differently to a family unit and to society. \textit{Id.} at 909; see also \textit{Morrison}, 821 N.E.2d at 26 (favorably citing \textit{O’Connor v. O’Connor}, 253 N.E.2d 250, 258 (Ind. 1969) (“Through the institution of marriage, biological drives are directed into channels of socially accepted activity . . . .”)); \textit{Hernandez}, 855 N.E.2d at 15, (J. Graffeo, concurring) (“The binary nature of marriage—its inclusion of one woman and one man—reflects the biological fact that human procreation cannot be accomplished without the genetic contribution of both a male and a female.”).\textsuperscript{250}

To the credit of Becker’s work, it clearly distinguishes between efficiency analysis and other values like social justice. For example, he points out that “an efficient division of labor is perfectly consistent with exploitation of women by husbands and parents—a ‘patrimony’ system—that reduces [women’s] well-being and their command of their lives.” \textsc{Becker, Family, supra} note 1, at 4.\textsuperscript{251} See \textit{Morrison}, 821 N.E.2d at 24; \textit{Hernandez}, 855 N.E.2d at 7.
nineteenth century due to child labor laws, children became “economically ‘worthless’ but emotionally ‘priceless.’”\textsuperscript{252} The type of income which children provided shifted from economic to what Bourdieu would probably consider symbolic.\textsuperscript{253} Social economist Thorsten Veblen coined the concept of “conspicuous consumption” to explain what he saw as the downward drift of taste from the upper to lower classes, who tried to enhance their status by consuming goods associated with the wealthy.\textsuperscript{254} As imagined by Veblen, spending money on the right goods would let a person consume “up” beyond his actual class. In the case of conspicuous reproduction which I suggest, having children does not enhance one’s financial status but, rather, provides social approval, including validation of one’s identity.\textsuperscript{255}

Although the realities of raising a child may involve substantial sacrifice on the part of a parent and symbolic detriment, part of the payoff from having children is the symbolic capital from the social approval


\textsuperscript{253} See id.

\textsuperscript{254} “Conspicuous consumption of valuable goods is a means of reputability to the gentleman of leisure.” \textit{Id.} at 64. The less affluent have fewer resources for leisure but their taste resembles that of the affluent because “the upper class extends its coercive influence with but slight hindrance down through the social structure of the lowest strata.” \textit{Id.} at 70. This is too simple; which is why I prefer Bourdieu’s more nuanced appreciation of the dynamics of taste within the middle classes. See discussion supra note 202. Thorsten Veblen introduced the concept of a status good in 1899. See Thorsten Veblen, \textit{A Theory of the Leisure Class} (New York, MacMillan (1899); Jonathan Barnett, \textit{Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property and the Incentive Thesis}, 91 Va. L. Rev. 1381, 1388–91 (2005) (citing Thorsten Veblen’s concept of status goods). Veblen’s work anticipated much of the current recognition in economics for the impact of peer valuation on individual consumption, as Gary Becker and Kevin Murphy note with surprise: “We were surprised to discover, upon rereading Thorsten Veblen’s influential \textit{Theory of the Leisure Class} (1934), that he anticipated many of our results, although he does not make a systematic analysis . . . . [H]e particularly emphasizes behavior that conveys signals about one’s wealth, that is, ‘conspicuous consumption,’ to use his famous phrase.” See Becker & Murphy, supra note 200, at 5.

\textsuperscript{255} With regard to sex identity, for example, one infertility researcher concludes that infertility leads men and women to revise their own sex self-concept:

Those who do not conceive after an extended effort, however, begin to question images [of their sex role] they find themselves unable to live up to. . . . Everyone [of the several hundred subjects] was asked the question, Has your identity as a woman/man changed as a result of experiencing infertility? All women and most men responded affirmatively . . . .

and enhanced social status which initially and automatically result. Adrienne Rich anticipates the analysis: “A child can be used as a symbolic credential, a sentimental object, a badge of self-righteousness.” As symbol, the decision to reproduce may be read to signal maturity, sexual self-regulation, and social responsibility, all of which are open to other readings. Some may read the “credential” as an expression of maturity and an assumption by the parent of the complex inter-temporal responsibilities produced by something with even more long-term variability than a floating-rate mortgage. Another way to read having a baby is a commitment by the parent to sexual self-regulation, most obviously in the form of compliance with the incest taboo. Such a reading is consistent with Edelman’s analysis of reproductive futurism as a mechanism of responsible sublimation of libido. Interpreting reproduction as suggesting sexual self-regulation seems odd in light of the sexual recklessness addressed by Morrison and Hernandez and the awkward truth about child sexual abuse—that it seems to be mostly a family affair, despite the moral panic about unrelated sexual predators. Equally odd is the interpretation that having a child represents a form of social responsibility, given that having babies tends to shift energy away from the public and onto the brood, whose priorities must come first.

In a social economy where a child can function as a status good, a gay child may be worth less because it impairs the parent’s dynastic utility function. The gay child may cut off the parent’s reproductive am-

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256 Reproduction may also involve symbolic detriment, such as the risk of employment discrimination based on the possibility that a woman will become pregnant.


258 See Edelman, supra note 19, at 4.

259 Although reporting of sexual abuse, particularly of boys, remains incomplete, much—perhaps most—of this abuse occurs in the family. See Mic Hunter, Abused Boys: The Neglected Victims of Sexual Abuse 21 (1990) (suggesting that 75%–95% of child sexual abuse is perpetrated by someone known or related to the child). In this case, the symbolic subsidy given that the family may keep the truth about these practices from emerging. For example, some sexual abuse “treatment professionals claim they do not bring up the subject of incest, because they don’t want to insult the client by implying that he might have come from ‘that kind of family.’” Id. at 29.; see also David Finklehor & Larry Baron, High-Risk Children in David Finkelhor et al., A Sourcebook on Child Sexual Abuse 60, 78–79 (1990) (summarizing prevalence studies of child sexual abuse, including those of the special risks of sexual abuse to girls in families with a stepfather).

260 When modeling how parent-investors react to their children, Becker posits a distinction between perceived “normal” orientations consistent with sex-based “biology” and “deviant” orientations of children who buck statistically-based expectations based on sex. Becker, Family, supra note 1, at 40. He suggests that parental investment in children of the latter sort involves risk: “Investments in ‘deviant’ children, on the other hand, conflict
bitions, “corrupting the blood” or reducing the likelihood of genetic transmission and accumulation through that child. The gay child may produce less social capital in networks where the parent may have some explaining to do, for example, to his or her own parents, who may have their own concerns about dynastic utility.

The way that some parents treat their sexual minority children suggests such discounting. The high suicide rate among sexual minority children may reflect a parent’s “downgrade” of a child from investment to sub-investment grade. And the ordinary instability of heterosexual pairings cited by Morrison and Hernandez may be more pointed against sexual minority children, exposed to targeted neglect from disappointed parent-investors. Modest advances in reducing animus against homosexuals have (quite correctly) sounded the alarm that tolerance will cause the social market value of investments in heterosexuality to drop. Small wonder that some parents mobilize with their biology, and the net outcome for them is not certain.” Id. His use of the word “deviance” suggests no moral judgment, just a statistical one. Id. at 40 n.4. The same logic would also suggest discounted parental investment in homosexual children. Becker notes that “in this analysis parents and society are not irrational, nor do they willingly discriminate against deviants.” Id. at 41. Obviously, the same cannot be said about parents who possess the taste for heterosexuality.

This may be part of what parents “blame” themselves for when a child is gay. Cf., Carbado, supra note 43, at 120 (“The parents of heterosexuals do not love them ‘in spite of’ their sexual orientation, and parents do not blame themselves for their children’s heterosexuality.”).

“Having a gay or lesbian child reflects not only on the child but the entire family. For one thing, it also alters the parents’ social status.” Ruskola, supra note 43, at 321 (noting a straight parent’s complaint that his son’s homosexuality compromised the family’s social standing).

“The legal system’s complacency regarding the emotional abuse of queer youth also results from notions of parents’ rights.” Martin, supra note 43, at 189. The effects of parental abuse in sexual minority children also include suicide, homelessness, substance abuse, sex work, and contraction of HIV. Id. at 174–79.


See, e.g., Hicks, supra note 43 (concluding that reparative “therapy” should be interpreted judicially as child abuse). After the American Psychiatric Association repudiated the notion of homosexuality as a disorder, “gender identity disorder” emerged largely as a diagnostic category to track and treat children with observed tendencies toward homosexual object choice or other sex discordant behavior. See Sedgewick, supra note 44, at 18–19, 20; Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, 83 CAL. L. REV. 1, 84–91 (1995) (parsing the interaction of sex, gender, and sexual orientation as separate categories).

See Michael Janofsky, Gay Rights Battlefields Spread to Public Schools, N.Y. TIMES., June 9, 2005, at A18 (“We’re concerned about the effort to capture youth through indoctrination
against such tolerance to avoid frustration of their anticipated “capital returns” from reproduction. Surely, these parental preferences predated the birth of the child.

Many homosexuals raise children, sometimes their own but often, through adoption and foster care programs, the unwanted children of heterosexuals. Would a homosexual parent also preference hetero-

into the homosexual lifestyle. Students are a captive audience, and they are being targeted by groups with that as an agenda.”) (quoting Mathew D. Staver, president and general counsel of Liberty Counsel, a “conservative group”); see also Nancy J. Knauer, Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts, 29 Hofstra L. Rev. 401, 404, 468–82 (2000) (showing how a contagion model of homosexuality articulated in the 1920s continues to inform parental and other efforts to erase homosexuality from the experience of the young). See generally Nicolosi & Nicolosi, supra note 48.

The constitutional status of religious claims makes them valuable to parents who want to safeguard their investment from the risk of homosexualization. For example, in Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch., No. AW-05–1194, 2005 U.S. Dist. LEXIS 8130, at *34–35 (S.D. Md. 2005), the Court issued a temporary restraining order against an eighth- and ninth-grade curriculum to which religious fundamentalists had objected because it noted that some fundamentalist religions are more likely to have negative attitudes about gays than other religions:

Defendants open up the classroom to the subject of homosexuality, and specifically, the moral rightness of the homosexual lifestyle. However, the Revised Curriculum presents only one view on the subject—that homosexuality is a natural and morally correct lifestyle—to the exclusion of other perspectives. . . . As such, the Court is deeply concerned that the Revised Curriculum violates Plaintiffs’ free speech rights under the First Amendment, and believes that Plaintiffs’ free speech allegations merit future and further investigation.

Id. (emphasis added to draw attention to the judge’s own bias). Such mobilizations against tolerance are common—and encouraged—among religious fundamentalists. See, for example, Southern Baptist Convention, Resolution: On Educating Children (2005), http://www.sbc.net/resolutions/amResolution.asp?ID=1142, a resolution adopted by the Southern Baptist Convention regarding homosexuality in schools:

Whereas, Homosexual activists and their allies are devoting substantial resources and using political power to promote the acceptance among schoolchildren of homosexuality as a morally legitimate lifestyle . . . . Whereas, Parents have access to textbooks, curricula, special programs, teachers, and other school personnel, giving them tremendous power to effect change in schools. . . . Resolved, That we urge parents and churches to exercise their rights to investigate diligently the curricula, textbooks, and programs in our community schools and to demand discontinuation of offensive material and programs . . . .

Id. (emphasis added to stress the similarity between judicial and religious vocabulary); see also Ron Barnett, Baptists’ Fears of Homosexuality in Curriculums Muted Here, Greenville News (S.C.), Sept. 26, 2005, at 15B (noting fundamentalist success in using public schools as mouthpieces for heteronormativity).

268 See Gates, et al., supra note 6, at 8. By one estimate, over sixty-five thousand children under eighteen live in a same-sex household. Id. at 8 (this figure also includes second
sexuality? Homosexuals might also derive social and symbolic value from having straight children. Public displays of heterosexuality pay instant dividends while displays of homosexuality (especially between males) may be met with negative reactions ranging from disapproval and shunning to physical violence and, in the most extreme cases, murder.269 Expanding on sociologist Erving Goffman’s work on identity management by members of stigmatized groups, Kenji Yoshino has noted that homosexuals play down their identity in order to reduce exposure to this type of hostility.270 For a gay or lesbian parent, then, having a child—especially a heterosexual one—may yield “covering value.” And this kind of social and symbolic income may be dearer to the homosexual parent than a straight one who is already awash in that type of social approval and other forms of symbolic capital.

Contra, one might expect homosexual parents to mimic their straight counterparts through projection of the parent’s identity, but this time a homosexual one. One could postulate a lesbian daughter preference, for instance, to mirror the heterosexual parent’s taste for

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269 In 2006, there were nearly fourteen hundred reports of hate crimes against gays, lesbians, and other sexual minorities. Clarence Patton, National Coalition of Anti-Violence Programs, Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2006, at 2 (2007), available at http://www.ncavp.org/common/document_files/Reports/2006NtlHVReportReleaseEdition.pdf. In 2006, fifty-five percent of the sexual minorities reporting hate crimes were male and twenty-eight percent were female. Id. at 10. Another thirteen percent of the victims self-reported as “Transgendered male-to-female.” Id. I understand that category to mean that some if not most of those reporting were biological males, a conclusion supported by official statistics. For example, although the 2006 statistics of the Federal Bureau of Investigation were not yet available, for 2005 these statistics reported more than three times as many anti-gay incidents against male victims as female victims. See Federal Bureau of Investigation, Hate Crimes Statistics 2005, available at http://www.fbi.gov/ucr/hc2005/table1.htm. There is little reported about the specific incidents which trigger these incidents but, to a homophobe, physical expressions of same-sex affection would be more provocative than the mere existence of a gay or lesbian person. Some research has correlated homophobia with personal discomfort with same-sex touching. See, e.g., Neal J. Roese et al., Same-Sex Touching Behavior: The Moderating Role of Homophobic Attitudes, 16 J. of Nonverbal Behav. 249 (1992). In contrast, consider the pleasant surprise felt by this woman who, after decades as a lesbian, began expressing affection in public with a man: “Whenever we [two women] would hold hands in public, I felt . . . fear, waiting for the customary dirty looks or . . . looking-away.’ In place of revulsion, she was now greeted by strangers with approving smiles. ‘I felt suddenly acceptable and accepted and cute, as opposed to queer.’” Guy Trebly, A Kiss Too Far? N.Y. Times, Feb. 18, 2007, § 9, at 1.

270 See Kenji Yoshino, Covering, 111 Yale L.J. 769, 875–924 (2002) (analogizing from the dynamics of gay self-effacement through “covering” to other forms of subordination through assimilation based on sex and race). Gays and lesbians sometimes play down their identity to avoid the discomfort of regulatory attention from enforcers of straight supremacy. See id. at 776, 849–63.
heterosexuality in children, although I have come across no argument for it. Or a homosexual parent might prefer a homosexual child to protect it from normative heterosexuality. However, social science research goes out of its way to show that gay and lesbian parents do not “homosexualize” (my word) their offspring. The supplicant posture of this research is worth noting: it genuflects to the straight supremacist fear that gay and lesbian parents will mimic straight ones in reproducing parental preferences. It implicitly reveals the Catch-22 that gay parents must face: if being raised by gay parents increased the likelihood of a child being gay, this would threaten the dominance of heterosexuality; but if children raised by sexual minorities are no more likely to be gay than those raised by straight ones, then this outcome also challenges heterosexual normativity by refuting the claim that only heterosexual parents can be trusted to reproduce heterosexuality.

III. Implications

“So what?” you might say. It is one thing to know that, chances are, your child will be heterosexual or right-handed. It is another to desire it—with varying degrees of elasticity as suggested by the auction’s price points—and to cathect the outcome with meaning. The implications of this meaning are, of course, contestable; but let me suggest some provisional conclusions about the conceptual problems

271 I first presented this argument at a feminist conference in Finland on the politics of the philosophy of gender. A member of the audience associated with a Finnish political action group that advocated for homosexual parents objected to it on two grounds. First, lesbians could not afford to abort male fetuses because of the prohibitive cost of pregnancy. Second, lesbians benefited from having male babies because (and I hope that this ground involved unstated ambivalence about resting on Freud) it was their primary contact with the penis.

272 See, e.g., Charlotte J. Patterson, Children of Lesbian and Gay Parents, 15 Current Directions Psychol. Sci. 241, 242 (2006). One study did find a statistically significant difference in the reported ability of children of homosexual parents to feel connection with people at school: they report feeling more connected than do their counterparts. Id. This result is particularly remarkable given the finding, corroborated by the hostility that many students who are themselves sexual minorities encounter in elementary and secondary schools, that the children of homosexuals may become targets of “anti-gay” sentiment from other students. Id. at 243. The studies that target sexual orientation, in part to test for a disproportionate prevalence of homosexuality in offspring, have not found a higher incidence of homosexual offspring for homosexual parents. Charlotte J. Patterson et al., Children of Lesbian and Gay Parents: Research, Law, and Policy, in CHILDREN AND THE LAW: SOCIAL SCIENCE AND POLICY 1, 12 (Bette L. Bottoms et al., eds., 2000).

273 Several lines of social science research have considered “whether the development of sexual identity might be compromised” in children raised by homosexual parents. Id. at 11.
raised by the taste for heterosexuality. Section A concludes that it is a
eugenic family preference, nodded to by cases like *Morrison* and *Her-
nandez*. Then, turning to the interests of heterosexuals, Section B
urges more ex ante recognition of heterosexual ambivalence and re-
gret about coital reproduction, which would reduce the pressure be-
hind the taste for heterosexuality.

A. *Lifestyle Competition: Managing Eugenic Disappointment in the Family*

The taste for heterosexuality in offspring is akin to (and similarly
troubling as) the preference, in some cultures, for a son over a daugh-
ter. In this sense, it is one of the “eugenic concerns” which Martha
Ertman sees in reproductive markets. In isolation and as part of an
aggregate, the taste dynamically reproduces the very condition—
conceptual liquidation of sexual minorities—that many would-be par-
ents use as a bootstrap justification for the taste. None of this is
meant to suggest that parents are simple “perpetrators.” They suffer,
too, and dearly. Normative heterosexuality has few winners once all
the cards are on the table.

Michele Goodwin makes some feasible legal recommendations to
mitigate marketized racism in the adoption market. Unlike law’s
formal commitment to ending formal racism, however, the law pro-
motes heterosexuality, including through the regulation of marriage
and childrearing. It would, therefore, be premature for me to rec-
commend reforms to positive law. That said, a legal argument for pro-
tection from the taste could take the form of Bonnie Steinbock and
Ron McClamrock’s argument for a “minimum birthright” for future
children. Arguing that even future people have “interests,” Stein-

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274 See Schultz, *supra* note 72, at 386–87. Economic reasons are cited for this preference
too: “[N]et economic productivity of boys may exceed that of girls . . . . [T]he remittance
rate to parents from the economic productivity of boys and girls may differ such that the
old age insurance value for parents of an investment in boys exceeds that of . . . girls.” *Id.*
at 386.


277 See Goodwin, *supra* note 4, at 75–79 (recommending price caps, taxation, and pub-
licity to correct marketized racism).

278 See *supra* notes 75–94 and accompanying text.

279 See Bonnie Steinbock & Ron McClamrock, *When Is Birth Unfair to the Child? Hast-
an approach to contingency familiar to property law, this stake in minimum birthrights is
modeled after the concept of springing “future interests.” *Id.* The idea of springing inter-
ests protects contingent interests in a quality of life while avoiding a vested interest in com-
ing into existence at all: “The pre-conscious, presentient fetus has no actual interests, and
bock shows that people-in-being must consider the interests of future people. By analogy, future sexual minorities may be entitled to protection from heterosexuality offspring preference in parents-to-be.

In the meantime, it might behoove straight parents to take some cues from their same-sex counterparts. Doing so would contribute to the “symbolic subversion” which Bourdieu identifies as a key objective of the movement to resist the conceptual liquidation of sexual minorities. Correctly, he notes that the “symbolic destruction” of the dominant heterosexual order and the abolition of its underlying “principle of division” are the main objectives of any serious efforts on this issue.

One baby step which heterosexuals could take is some consistency in using the word “lifestyle,” which refers to a principle or taste underlying therefore cannot be harmed (or benefited). But on the assumption that the fetus will be born, we can ascribe to it certain ‘future interests’ which can be . . . defeated by actions done before the potential person becomes an actual person.” See generally Maura Ryan, The Argument for Unlimited Procreative Liberty: A Feminist Critique, Hastings Ctr. Rep., July–Aug. 1990, at 6, 7–9 (objecting to legal recognition of a parent’s property right in children).

See Bonnie Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 37 (1992) (applying an interest view of moral status to conscious individuals, nonconscious individuals, future people, and potential people, such as embryos and fetuses). Steinbock argues that future people have moral status because their interests are foreseeable now:

If people today pollute the atmosphere and drinking water . . . and deplete natural resources, that is likely to have disastrous effects on the lives of those who come later. Their actual future interests will be harmed . . . because of our decisions today . . . . Because they have interests, future people qualify for moral status.

Id.

See Bourdieu, Masculine Domination, supra note 197, at 123. Bourdieu’s analysis of heterosexual power leaves something to be desired, mostly because it is so brief. The only extended discussion I could find about the “symbolic domination” which heterosexual power imposes on sexual minorities is in the Appendix to Masculine Domination. See id.

See id. The irony of Bourdieu’s comment is that he does not account for the gap between the alleged strength of the gay and lesbian movement and the relatively modest progress it has made in symbolic subversion:

[T]he gay and lesbian movement brings together individuals who, although stigmatized, are relatively privileged, especially in terms of cultural capital, which constitutes a considerable asset in their symbolic struggles. The objective of every movement committed to symbolic subversion is to perform a labour of symbolic destruction and construction aimed at imposing new categories of perception and appreciation, so as to construct a group or, more radically, to destroy the very principle of division through which the stigmatizing group and the stigmatized group are produced.

Id. at 123. Halley’s earlier analysis of the legal construction of heterosexuality is a good example of such an effort. See Halley, supra note 165, at 83.
ing a discretionary consumption choice. The word “lifestyle” persists as a somewhat crass (heteronormative) putdown of homosexuals, a good recent example of which is the holding in *Lawrence v. Texas*: “[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who . . . engaged in sexual practices common to a homosexual lifestyle.”

To a homosexual, the word “lifestyle” sounds—or ought to sound—just as “Negro” or “colored” would sound to an African-American. Justice Kennedy’s plainly conciliatory diction serves the important judicial function of projective denial by doing two things at once: first, it suggests that having a sexual orientation—a homosexual one, that is—is akin to choosing between Prada or Hugo Boss; second, it invites us to assume that when heterosexuals have a relationship it involves something other than a lifestyle. As Becker points out, however, having a baby is a lifestyle choice because it involves acquiring a “consumption good.”

As the welcome borrowings by *arriviste* metrosexuals suggest, heterosexuals stand to gain from copying homosexuals, maybe in reproduction too. Sexual minority parents may socialize children differently from their heterosexual counterparts, hopefully by disapproving of the sex-based institutions which have been the bane of homosexual existence. Their own experience with animus, family coercion, and legal insult may give gay and lesbian parents a practical comparative advantage at letting a young child develop organically along a standard based *in fact*—not just in law—on the child’s best interests, rather than the projective interests of the parents, as endorsed by third parties like courts. If feminist Dorothy Dinnerstein was right to blame cross-sex childrearing for patterned heterosexual malaise, then stopping the near-monopoly of these traditional family structures might not be such a bad thing.

Legal doctrine like *Morrison* and *Hernandez*, however, stunts heterosexual self-awareness by providing a pretext for not considering any serious lifestyle competition with gay and lesbian par-

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283 Lawrence v. Texas, 539 U.S. 558, 578 (2003) (emphasis added to reflect value-laden terms that can serve as the textual bases for future cases); see also Franke, *supra* note 143 on the limits of *Lawrence*.

284 See *supra* note 237 and accompanying text.

285 See Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* 10 (1977) (“The gathering impulse to break loose from our existing gender arrangements, to free ourselves from the fixed symbiotic patterns that have so far prevailed between [heterosexual] women and men, is part of the central thrust of our species’ life toward more viable forms.”).
It does this by sanctioning (in the positive, not the negative, sense) heterosexual reproductive practices that deserve more scrutiny and, as the courts admit, mitigation. The effect is to preclude the need to imagine—and put into practice—better reproductive practices, much in the way that MacKinnon notes feminist conceptions of the state have been precluded.

B. The Wages of Coitus: Heterosexual Counterdemand

The more general problem, for the heterosexuals posited in Morrison and Hernandez, is how to escape the social conditions that can lead to a long and dreary cycle of reproductive regret. Were heterosexuals more aware up front of the “total effect” and costs of reproduction, they might better avoid the marriage-inducing accidents considered by Morrison and Hernandez.

Here I offer a strategic essentialization of anti-natalist regret in the aggregate by introducing the idea of “counterdemand” for children. Though one could express a similar idea in terms of the “excess supply” of children, counterdemand appropriately focuses on the holding preference of parents in the aggregate instead of on the supply of children. Rather than conscious decisions that successfully eliminate the risks of pregnancy ex ante—such as contraception, avoidance of reproductive sex, and voluntary sterilization—counterdemand refers to de-

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286 See supra notes 118–133 and accompanying text.
287 See supra notes 118–133, 135–136 and accompanying text.
288 MacKinnon, supra note 21, at 249. MacKinnon notes: “It will be said that feminist law cannot win and will not work. But this is premature. Its possibilities cannot be assessed in the abstract but must engage the world. A feminist theory of the state has barely been imagined; systematically, it has never been tried.” Id.
289 Cf. R.H. Coase, The Problem of Social Cost, 3 J. L. & Econ. 1, 44 (1960) (showing in the context of the law of nuisance that, absent transaction costs, allocating liability between two counterparties to a transaction makes no difference in allocative terms because the parties will negotiate in order to optimize the yield on the transaction). The useful phrase belongs to Coase:

[W]e have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system. In devising and choosing between social arrangements we should have regard for the total effect.

Id. (emphasis added).
290 See generally Van Praag & Warnaar, supra note 1, at 243. Considering the net effects of reproductive decisions is the essence of deliberative rationality on this point: “A child does not only generate household costs but revenues as well. . . . There is a calculus of cost and revenue behind it and in some sense we are only really interested in the balance.” See id.
sire (and attempts) to “back-track” from prior action that might not have been undertaken but for pro-natalist bias.

Counterdemand starts by adding up data that suggests some regret over or repudiation of the fact of pregnancy or birth: abortion, infanticide, post-partum “disorders” in women, pregnancy denial, child abuse, pregnancy-related domestic violence, child abandonment, and the giving up of one’s child for adoption. In one sense, counterdemand would be one measure of time-inconsistency in reproduction. Even this interim measure, however, will understate counterdemand because it overlooks private parental regrets about reproduction which never rise to the level of a reportable incident.

As noted earlier, of each year’s roughly four million births, about 1.3 million (33%) of them may represent unintended pregnancies not terminated. Approximately one million of these four million births involve premature birth, low birth weight, or birth defects (all factors which may impair a real baby’s quality of life), and over 450,000 of the total births are by teenage females arguably too young to appreciate how having a baby at that age impacts one’s life prospects. About 240,000 pregnant women experience domestic abuse, with forty percent of this abuse beginning during the couple’s first pregnancy. Suggesting counterdemand on the part of fathers, pregnant women are at twice the risk of battery (presumably from partners) than non-pregnant women. Many children suffer crimes, neglect, and other

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291 See infra notes 292–310 and accompanying text. The statistics are silent as to whether parents with counterdemand are heterosexual or homosexual, although my intuition is that heterosexual parents are dramatically overrepresented in any measure of counterdemand (that is, the proportion of counterdemand attributable to heterosexuals exceeds the proportion of heterosexuals in the general population). A finding to that effect would vindicate the judicial arguments in Hernandez that opposite-sex couples need incentives to promote the stability which same-sex parents are able to provide through their own self-regulation. See Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006). Nonetheless, as Chief Justice Kaye points out in her dissent, the majority fails to show how excluding homosexuals contributes to heterosexual stability. Id. at 27 (Kaye, J., dissenting) (“Correctly framed, the question before us is not whether the marriage statutes properly benefit those who are not covered by the law.”).

292 See discussion supra note 17. My use of abortion statistics to support my argument does not involve any criticism of women who seek abortion. Quite the contrary: it is remarkable that at least this many women manage to obtain abortions despite the legal and cultural obstacles. A more “abortion-friendly” legal system that provides people—especially the young—more options for managing their reproduction might reduce demand for “morning after” marriages in response to unintended pregnancy.

293 Am. Pregnancy Ass’n, supra note 17.

294 Id.

295 Id.

Counterdemand should take into account some of this suffering by children because it may reflect parental frustration over contact with the realities of child-rearing.

Post-partum mood disorders and pregnancy denial may also involve a form of counterdemand. As a formal matter, postpartum depression refers only to post-natal mood disruptions which are more serious than the common “baby blues.”\footnote{Katherine L. Wisner, et. al., \textit{Postpartum Disorders, in Infanticide}, \textit{supra} note 198, at 35, 41 (“Postpartum depression also must be distinguished from the ‘baby blues,’ which are very common and occur in 50\%–80\% of women. Symptoms, which peak on days 4–5 postpartum, consist of a mild mood disturbance without the pervasive dysphoria characteristic of major depression.”.)} Even at this high threshold, however, it is frequent.\footnote{See \textit{id.} at 36. One study found that fourteen percent of women were experiencing a major mood disorder within three months after terminating or continuing a pregnancy to term; in the first month after birth, a woman is over twenty times more likely to develop psychosis than in the two years prior to the birth. \textit{Id.} Abortion opponents sometimes note that some women who have abortions become depressed after doing so. Symptoms and Frequently Asked Questions About Post Abortion Stress Syndrome, http://afterabortion.com/faq.html (last visited Jan. 24, 2008) (discussing the controversy surrounding Post Abortion Stress Syndrome (PASS)). It is more accurate to note that, for some women, pregnancy—whether or not terminated—leads to depression. See Katherine L. Wisner, et. al., \textit{Postpartum Disorders, in Infanticide}, \textit{supra} note 198, at 35, 41.} Estimates of the frequency of post-partum
depression range from ten to fifteen percent of all live births.\footnote{Postpartum Progress, http://postpartumprogress.typepad.com/weblog/2004/08/by_the_numbers.html (Aug. 4, 2004) (comparing conservative estimate of annual incidence of post-partum depression (400,000)—10\% of 4,000,000 live births—with annual diagnoses of Parkinson’s disease (50,000), Alzheimer’s disease (250,000), multiple sclerosis (104,000), and diabetes (800,000)).}

Postpartum psychosis affects far fewer women—between one in one thousand and one in five hundred—but has consequences much more severe than depression.\footnote{See Nat’l Women’s Health Info. Ctr., U.S. Dept. of Health & Human Servs., Depression During and After Pregnancy: Frequently Asked Questions, 3 (2005), http://www.4woman.gov/faq/postpartum.pdf. For an interesting extrapolation comparing rates of post-partum depression in the United States with those in other countries, see WrongDiagnosis.com, Statistics by Country for Postpartum Psychosis, http://www.wrongdiagnosis.com/p/postpartum_psychosis/stats-country.htm (last visited Jan. 24, 2008).} Pregnancy denial involves the refusal to admit that one is pregnant to oneself (or, perhaps, to one’s forbidding parents).\footnote{Laura J. Miller, Denial of Pregnancy, in INFANTICIDE, supra note 198, at 81, 82–86.} Pregnancy denial often precedes neonicide—the killing of an infant on the day of its birth.\footnote{Id. at 81.} The baseline for pregnancy denial is the absence of “the usual heightened emotional state of the pregnant woman that is associated with the process of early bonding.”\footnote{Id. at 82.} Not surprisingly, then, some feminists argue that law should revise thinking about infanticide by seeing it as involving a form of motherhood-as-suffering.\footnote{Id. at 129.}

Liquidating unwanted children is, of course, the ultimate expression of time-inconsistent regret in reproduction. As noted by Michelle Oberman, infanticide, perhaps contrary to popular belief, has been a constant through history.\footnote{Oberman, supra note 201, at 6–8 (noting that religious and legal efforts fail to eradicate the practice and tracing infanticide in ancient cultures, medieval Judeo-Christian society, Great Britain, and the United States); see also Owen D. Jones, Evolutionary Analysis in Law: An Introduction and Application to Child Abuse, 75 N.C. L. REV. 1117, 1192–1200 (1997) (situating the history and contemporary practice of human infanticide in the context of evolutionary theory).} Deterrence based on legal punishment fails since infanticide tends to be “a spontaneous crime, reflecting a loss of control rather than a cool-headed calculation.”\footnote{See Oberman, supra note 201, at 14.} Indeed, Oberman notes that, given the circumstances in which many of these mothers find themselves, “on some occasions this terrible crime may be all but inevitable.”\footnote{Id. at 16. See generally Lucy Jane Lang, To Love the Babe That Milks Me: Infanticide and Reconceiving the Mother, 14 COLUM. J. GENDER & L. 114 (2005) (arguing that infanticide is a}
inconsistent” and gives only limited recognition to “post-partum psychosis” as a legal defense.\textsuperscript{308} This inconsistency reflects a failure to “recognize the profound similarities that underlie the many contemporary infanticide cases” and address them properly.\textsuperscript{309}

Expressed as a rough ratio of supply (live births) to counterdemand, for every ten live births: three result from an unplanned pregnancy; two involve premature birth, low birth weight, or birth defects; one arises from a teenage pregnancy; one produces post-partum depression; and two abortions occur, exposing women to the health risks of a quite invasive procedure. Even this primitive construction of counterdemand suggests a more complex picture than patterned exuberance about babies-as-ideas.\textsuperscript{310} Indeed, this is a more complete look at the heterosexual coitus than that used by \textit{Morrison} and \textit{Hernandez} as an anchor for their holdings. (And it bears noting that procreative morbidity and mortality abroad, especially in developing countries, are much worse.)\textsuperscript{311}

Because the mental organization of time bears directly on counterdemand, more research about the time dynamics of reproduction would help. Behavioral research suggests that humans suffer from over-optimism, tending to overvalue nearer states in time at the expense of later ones, a phenomenon called “hindsight bias.”\textsuperscript{312} Models for moral reasoning and microeconomics, however, have tended to underestimate the instability of many time preferences, perhaps because accounting

\begin{itemize}
\item \textsuperscript{308} See Oberman, \textit{supra} note 201, at 9.
\item \textsuperscript{309} \textit{Id.} at 14.
\item \textsuperscript{310} Counterdemand would seem to be another aspect of Derek Parfit’s “repugnant conclusion” that, at the heart of reproductivism lies the principle that more unhappy lives are better than fewer happy ones. \textit{See generally Derek Parfit, Reasons and Persons} 381–87 (1984) (showing that total utility for a population can be increased by growing the population into a larger one in which members have a standard of living just marginally above an interest in nonexistence). Russell Jacoby has more recently noted that, for the conservative writers who push reproductivism, “the sanctity of life ends at birth; at least they show little interest in the suffering of the living.” Russell Jacoby, \textit{Excellent Writers, Facile Thinkers, Chron. Higher Educ.} (Wash. D.C.), Feb. 2, 2007, at B13.
\item \textsuperscript{311} Population Resource Ctr., \textit{World Health Day} 2006, http://www.prcdc.org/files/World_Health_Day_2006.pdf (last visited Jan. 24, 2008) (“Death and disability from maternal causes account for nearly twenty percent of the total disease for women of reproductive age in developing countries.”). Women under the age of fifteen are five times more likely to die from childbirth than older women. \textit{Id.}
\item \textsuperscript{312} See Christine Jolls et al., \textit{A Behavioral Approach to Law and Economics}, 50 STAN. L. REV. 1471, 1524–25 (1998) (noting that people underestimate the probability of bad outcomes to themselves compared with others).
\end{itemize}
for time-inconsistency makes economic models more complicated and limits the generalizability of their conclusions.\textsuperscript{313} Manuel Utset and others, however, have shown that many self-control problems actually reflect time-inconsistency.\textsuperscript{314} Reproduction (and sexual decision-making generally) are good candidates for this type of analysis both because sex impulses have great potential to influence behavior and because the multiplier effects over time of reproductive and sexual decisions are unusually significant. Pregnancy and child-rearing require the participants to plot their preferences over a period that may span two decades or longer. (One good legal approach to this reproductive reality is the enactment of states “safe haven” laws which make unwanted children “puttable” by establishing mechanisms to transfer unwanted infants and children.\textsuperscript{315} By reducing the exit costs of holding unwanted children, such laws make children more “liquid.”\textsuperscript{316})

Greater institutionalization of feminist methods in the economic study of reproduction might increase the contestability of dominant ideas about reproduction.\textsuperscript{317} Both a feminist economics and a feminist

\textsuperscript{313} John Rawls’s concept of deliberative rationality assumes time-consistency. “We are to see our life as one whole, the activities of one rational subject spread out in time. Mere temporal position, or distance from the present, is not a reason for favoring one moment over another.” \textit{See John Rawls, A Theory of Justice} 124 (1971). “One who rejects equally the claims of his future self and the interests of others is not only irresponsible with respect to them but in regard to his own person as well. He does not see himself as one enduring individual.” \textit{Id.} at 423.

\textsuperscript{314} \textit{See} Utset, \textit{supra} note 126, at 419–20. As noted earlier, some behavioral law and economics research finds that people’s preferences are much less stable (or “time-consistent”) than previously thought. \textit{Id.} Utset also notes how time-consistency in law imposes marginal but material costs on decision-making about abortion. \textit{See} Manuel A. Utset, \textit{The Temporally Extended Family & Self-Control: An Essay for Lee E. Teitelbaum}, 2006 Utah L. Rev. 107, 132–34 (showing that legal decisions that improperly assume time-consistent behavior on the part of pregnant women may impose marginal costs on ending a pregnancy).

\textsuperscript{315} Carol Sanger, \textit{Infant Safe Haven Laws: Legislating in the Culture of Life}, 106 Colum. L. Rev. 753, 760 (2006) (using “moral panic” analysis to note the “snug and interesting fit between Safe Haven legislation and a culture whose politics are increasingly organized around the protection of unborn life”).

\textsuperscript{316} \textit{See} Becker, \textit{Fertility, supra} note 1, at 227. Becker notes the illiquidity of children in the context of the preference for holding liquid assets (sometimes called a “flight to quality” in the bond world) during cyclical downturns in the economy and periods of economic depression: “[S]ince children cannot be bought and sold they are a less ‘liquid’ asset than ordinary durables, and the economic uncertainty accompanying a depression would increase the community’s preference for liquid assets.” \textit{Id.} He makes this point when considering reasons why the demand for children—as for any consumer durable—may decline during an economic depression. \textit{Id.} at 225–27.

\textsuperscript{317} In 2000, only fifteen percent of faculty in economics departments of Ph.D.-granting institutions were female. Marianne Ferber & Julie Nelson, \textit{Introduction to Feminist Economics Today: Beyond Economic Man} 1, 3 (Marianne A. Ferber & Julie A. Nelson eds., 2003). In 2000, moreover, women made up only seven percent of the tenured economics
law and economics are emerging, much of which sounds in contract. Some of it challenges the bright line distinctions in the rational actor model between open market relations and the economics of the family. Parallel to these developments in feminist methods, behavioral law and economics has been maturing into a discipline, one that insists on more use in theory of inductive detail about real people. One source of such detail is games, including cooperation simulations like the ultimatum game, the stag hunt, and the prisoner’s dilemma, in addition to such exercises as the heterosexuality auction. Because this commitment to inductive detail creates an important opening for feminists, especially economically-minded ones, this article urges a marriage—or at least a civil union—between feminist methods and behavioral law and economics, the progeny of which could make reproductive law and policy better reflect the realities of reproduction for women and others.

faculty. Id. Organizations such as the Committee on the Status of Women in the Economics Profession and the International Association for Feminist Economics have contributed to building professional networks, increasing the prominence of feminist research in professional economics journals, and incorporating feminist pedagogy in the economics classroom. Id. at 2–29 (reviewing the incorporation of women’s and feminist perspectives in the economics profession).


See Paula England, Separate and Soluble Selves: Dichotomous Thinking in Economics, in FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN, supra note 317, at 33–59. Becker’s model assumes radically separate selves. Id. at 45–48. She criticizes this bright-line distinction as tending to underemphasize the range of separate preferences within the family. Id. at 43–50.

See Jolls, supra note 312, at 1473. This research field purports to ask “How do ‘real people’ differ from homo economicus?” Id. at 1475–76. Jolls suggests three methodological premises (bounded rationality, bounded self-control, and bounded self-interest) in order to produce “testable propositions” pending the ultimate resolution of the many philosophical questions involved. Id. at 1477.

Id. at 1489–98.
One example of useful work in this area is Molly Walker Wilson’s writing on surrogacy contracts. She suggests that surrogacy contracts should be voidable at law because would-be surrogates, when they execute these contracts, cannot appreciate how they may feel when it comes time to tender their baby to the counterparty, typically a wealthier couple. She frames the problem of surrogacy contracts in the context of time-inconsistent behavior. She bases her claim on four features of human decision-making which vitiate meaningful consent to a surrogacy contract: the optimism bias, the endowment effect, the problem of market manipulation, and cognitive dissonance over time. Wilson’s work does not support counterdemand but, rather, the more general claim that reproduction is prone to time-inconsistent decision making. The work by Utset and Wilson mines a new vein of insight about parental ambivalence about reproduction, but more is needed.

Conclusion

This article was designed to intervene in some existing legal and socioeconomic conversations about reproduction and heterosexuality, ones in which economic logic mixes with other kinds of values. De-


323 See id. The underlying philosophical issue is whether “the self at Time 1 should be able to commit the self at Time 2 to a binding decision. . . . [W]ho is the real self, the Time 1 self or the Time 2 self; and how much control should one self be able to exert over another?” Id. at 334–35. This question has special relevance for reproduction. As one feminist scholar, Mary O’Brien, has noted, the reproductive process actually involves three different types of time: “cyclical time, unilinear time and irregular episodicity,” MARY O’BRIEN, THE POLITICS OF REPRODUCTION 61 (1981). She identifies ten different pivotal moments in heterosexual reproduction through coitus, each of which has a logic that does not fit easily into the type of discounting assumed by the time-consistent preferences in the rational actor model. See id. at 47.

324 Wilson, supra note 322, at 336–42.

325 Id. at 331. “[W]omen who enter surrogacy contracts can never truly give informed consent because there is no way that they can know before conceiving the child how they will feel about giving up the child once the time comes.” Id. (citation omitted). The dynamic which Wilson identifies is actually the opposite of counterdemand for children; in other words, surrogacy contracts suggest regret over a prior decision to surrender the infant in Period 1 when the mother’s holding preference in Period 2 has changed. Id. at 347 (“Commentators who blithely assert that people only enter into contracts that are in their own best interests ignore evidence that in certain situations individuals make systematic errors in the process of decision making.”). Counterdemand also suggests time-inconsistency in reproduction but in the opposite direction: it is the decision to conceive that gives rise to the ambivalence. See supra note 291 and accompanying text.
spite welcoming their candor about heterosexual malaise, reading *Morrison* and *Hernandez* as a gay man means facing the sorts of “insults” which cultural historian Didier Eribon has studied. On the bright side, outsider status makes possible clinical detachment which is useful for analysis. To echo Halperin’s distinction, homosexuality and its legal aspects are often over-studied and over-theorized as an “object”, rather than as a platform for generative insights. More interesting is the heterosexual as a legal matter. So this article considered heterosexual reproduction and, more specifically, how prenatal tastes for heterosexuality in children may drive demand for children and inform how parents make sense of reproduction (or fail to do so). The issue matters not only to opponents of “gender cleansing” in children but also to those interested in how market mechanisms—like the adoption market Goodwin studied and the “when, if, and as issued” market from the heterosexuality auction—impact the family.

Let me recapitulate before concluding. Conceptual liquidation of homosexuals begins long before birth. The prenatal taste for heterosexuality is inferable from parental reactions to children. Indeed, it may be strong enough to overcome the “taste for own children” which Becker considers the “distinguishing characteristic of families.” Refining and pursuing one’s taste for heterosexuality in children follows from (and reenacts) a social and legal premium on heterosexuality and its reproduction. So the pill Posner imagines to inoculate children against homosexuality (or, for that matter, prenatal diagnosis of homosexual tendencies in time to abort) makes sense as a strategy for turning the conceptual liquidation of sexual minorities into a liquidation-in-fact.

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Thus do gay people live in a world of insults. They are surrounded by a language that hems them in and points them out. The world insults them; it speaks of them and of what is said about them. The words of day-to-day life as well as of psychiatric, political, and juridical discourse assign each of them individually and all of them collectively to an inferior place within the social order. And yet this very language preceded them: the world of insults preexisted them, and it takes hold of them even before they know what they are.

*Id.* at 56.

327 See Halperin, *supra* note 184, at 60.

328 See Becker, *Family*, *supra* note 1, at 45.

I used Bourdieu’s model of socially-constructed self-interest as the engine of social reproduction to suggest how the Ponzi scheme which Edelman describes stays in perpetual motion, in seeming stealth. By subsidizing heterosexual coitus with symbolic capital through marriage, Morrison and Hernandez make a market for the heterosexuality premium and, perhaps, become complicit in a long, dreary, and all too regenerative cycle of reproductive regret for some heterosexuals. To interrupt this form of reproductive praxis in law, sex, and consciousness, I spoke at and about the legal doctrine without speaking from it, as it does not admit of special appearances to challenge its jurisdiction without thereby conceding it.

The structuralist premises underlying my argument would themselves predict that, essentially, it will fall on deaf ears as far as legal institutions are concerned; a contrary reaction would call into question the quality of my argument. Let me close by noting that my goal is not to encourage liberals, progressives, and others opposed to anti-gay animus to “cover” by denying what may be their taste for heterosexuality in children. Quite the contrary—arguments in favor of the taste for heterosexuality should be made and examined. What I do care about is encouraging some to think critically about their role as individuals in ideologies of reproduction through what has been called Bourdieu’s “sociology . . . as a form of therapy.” Doing so might help to cultivate a taste for the new, rather than for sameness. The benefits which Adrienne Rich promised feminists may be available more widely. If more heterosexuals did this kind of mental work, we might get to the point where—as Alexander Portnoy’s analyst tells him at the novel’s end—we can now begin.

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331 See Rich, supra note 45, at 648. The possibilities for friendship which Adrienne Rich points out in the context of women apply more universally:

To take the step of questioning heterosexuality as a “preference” or “choice” for women—and to do the intellectual and emotional work that follows—will call for a special quality of courage in heterosexually identified feminists but I think the rewards will be great: a freeing-up of thinking, the exploring of new paths, the shattering of another great silence, new clarity in personal relationships.

Id.

332 Philip Roth, Portnoy’s Complaint 274 (Vintage 1994) (1967) (illustrating psychic conflicts in integrating sexual impulses and upward mobility against the background of ethnic subordination as a Jew) (“So [said the doctor]. Now vee may perhaps to begin. Yes?”) (original brackets).
Abstract: Courts have generally disfavored evidence from recanting witnesses. This article examines the standards laid out in *Berry v. State* and *Larrison v. United States* that courts use when considering motions for new trials based on new evidence. It next explores some of the reasons courts have disfavored recantations. Recent cases involving DNA exonerations present useful lessons for evaluating recantations and weaken many of the reasons courts have used to reject such evidence. Because DNA evidence is not readily available in most cases, however, the current framework has led to incarceration of innocent defendants. Given these lessons, courts must find new means of assessing the testimony of recanting witnesses. Courts should adopt a modified version of the *Larrison* standard, which would require corroboration rather than proof of truth. Appellate courts should not apply a deferential standard of review to summary denial of motions for new trials based on recantations.

Introduction

On July 9, 1977, police found Cathleen Crowell Webb walking near a Homewood, Illinois park.¹ When the bleeding, crying, and disheveled sixteen-year-old told police she had been kidnapped by three men and raped in their car, they had every reason to believe her.² Her story became even more convincing when she was examined at a local hospital, where doctors found vaginal trauma and carvings on her ab-

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² See Kraft, *supra* note 1.
domen.\textsuperscript{3} After vividly describing the attack to police and looking through hundreds of mug shots, she identified her attacker as Gary Dotson, a high-school dropout with a criminal record.\textsuperscript{4} Although Dotson adamantly protested his innocence, he was convicted in 1979 and sentenced to twenty-five to fifty years in prison.\textsuperscript{5}

Webb ultimately married and moved to New Hampshire, becoming a born-again Christian.\textsuperscript{6} That conversion prompted her to recant her testimony, admitting that she had fabricated the rape story because she feared that she was pregnant.\textsuperscript{7} Dotson immediately requested a new trial and received an evidentiary hearing, but the judge ultimately found that Webb’s trial testimony was more credible than her recantation.\textsuperscript{8} The ensuing drama became the intense focus of the media, with newspapers, magazines and morning television shows profiling the case and engaging in a national debate on the way courts treat recanting testimony.\textsuperscript{9} Dotson ultimately was paroled—although not pardoned—after the Illinois governor personally presided over a televised hearing on Dotson’s clemency request.\textsuperscript{10}

Dotson did not stop trying to prove his innocence, however, and, in 1989, he became the first person in the United States to be exoner-

\textsuperscript{3} Id.
\textsuperscript{4} Id.; see also Kevin Klose, Illinois Governor Questions Dotson, Webb: ‘Extraordinary’ Rape Case Attracts Wide Audience, Wash. Post, May 10, 1985, at A3 (noting Dotson had several encounters with police prior to his arrest for Webb’s rape).
\textsuperscript{5} People v. Dotson, 516 N.E.2d 718, 719 (Ill. App. Ct. 1987); Jim Dwyer et al., Actual Innocence 39–40 (2000); Alan Dershowitz, Our System of Justice Does Make Mistakes, St. Petersburg Times (Florida), Aug. 19, 1989, at 19A.
\textsuperscript{6} Kraft, supra note 1.
\textsuperscript{7} Id.
\textsuperscript{8} See Dotson, 516 N.E.2d at 718–19, 721–22 (affirming trial court’s finding that Webb’s 1979 trial testimony was more credible than her 1985 evidentiary hearing testimony).
\textsuperscript{9} See, e.g., Laurent Belsie, Recanted Testimony: Issue Tests Criminal-Justice Credibility, Christian Sci. Monitor, Apr. 19, 1985, at 5 (discussing the debate among law professors and women’s groups that was provoked by the recantation in the Dotson case); Peter W. Kaplan, NBC, at No. 1, Snaps 10-Year Ratings Decline, N.Y. Times, June 1, 1985, at 46 (explaining that CBS interrupted its live coverage of the Claus von Bülow trial to show the Dotson rape hearings); Kraft, supra note 1 (relaying that Webb apologized to Dotson’s mother on national television and that a Senate subcommittee was holding hearings on the way courts treat recanted testimony); Remnick, supra note 1 (discussing Webb’s public campaign to secure Dotson’s exoneration by appearing on morning shows, in People magazine, and on the Phil Donahue show). The Dotson case was also the focus of legal scholarship; some authors argued, based in part on the Dotson case, that courts should reevaluate the way they treat recanting witnesses. See, e.g., Janice J. Repka, Comment, Rethinking the Standard for New Trial Motions Based upon Recantations as Newly Discovered Evidence, 134 U. Pa. L. Rev. 1433, 1454–58 (1986) (arguing for a more relaxed “reasonable probability approach” for judging the credibility of recantations).
ated based on DNA testing, proving conclusively that Webb’s recantation was true. Since that time, more than 200 innocent prisoners have been exonerated based on DNA testing, and these ever-increasing numbers have sensitized the public and policymakers as never before to the problems in the criminal justice system. These exonerations have conclusively proven that much of the evidence frequently relied upon by courts—such as informant testimony, accomplice testimony, eyewitness testimony, and confessions—are more unreliable than anyone ever realized. Moreover, the study of DNA exonerations has led to tremendous reforms all over the country, such as the improvement of eyewitness identification procedures, the videotaping of police interrogations, crime lab reform, and the creation of “innocence commissions” that recommend reforms in individual states. In addition to reforms that would prevent wrongful convictions, at least forty-two states have laws that allow prisoners to seek post-conviction DNA testing that would help prove their innocence. Indeed, it would not be an exaggeration to say that these exonerations have had a greater impact on criminal justice policy than any other event in recent American history.

As other commentators have observed, however, the reforms that have focused on correcting wrongful convictions have focused almost exclusively on cases involving DNA evidence. Unfortunately, DNA evi-

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11 Dwyer et al., supra note 5, at 39–40.
13 See generally Dwyer et al., supra note 5, (chronicling the stories of wrongly convicted individuals who were eventually exonerated by DNA evidence).
dence is unavailable in the vast majority of cases, either because there was no biological evidence present at the initial crime scene, because evidence initially available has been lost or destroyed, or because evidence that has been saved is no longer viable for testing because it is too degraded.\textsuperscript{17} Moreover, because DNA tests are now more widely available before trial, the pool of cases in which post-conviction DNA testing is available inevitably will shrink.\textsuperscript{18} Thus, it will be increasingly important in the future to provide improved post-conviction mechanisms for prisoners who have newly discovered non-biological evidence of innocence, such as “confessions by the actual perpetrator, statements by previously unknown witnesses, and/or recantations by [key] trial participants.”\textsuperscript{19}

There are significant roadblocks for any defendant with newly discovered non-DNA evidence of innocence. The type of evidence most emphatically disfavored by courts, however, is the kind proven reliable when Gary Dotson was exonerated: the recantation of key witnesses like Webb.\textsuperscript{20} It is fair to say that courts are almost uniformly skeptical of recanting witnesses, and the predominant view still seems to be the one espoused by the Court of Appeals of New York in 1916: “There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character.”\textsuperscript{21} It is undoubtedly true that concerns about recanting witnesses—witnesses who have lied on at least one occa-

\textsuperscript{17} See Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary, 107th Cong. 221 (2002) (statement of Professor Barry Scheck, Co-Director of the Innocence Project and Member of New York State’s Forensic Science Review Board) (estimating that approximately eighty percent of felony cases do not involve biological evidence amenable to DNA testing); Nina Martin, \textit{Innocence Lost}, S.F. Mag., Nov. 2004, at 78, 105 (“only about ten percent of criminal cases have any biological evidence”).

\textsuperscript{18} Medwed, \textit{supra} note 16, at 657.

\textsuperscript{19} See id. at 658.

\textsuperscript{20} See Repka, \textit{supra} note 9, at 1434 (defining a recantation as “a formal, intentional renunciation by a witness of her former testimony”).

\textsuperscript{21} People v. Shilitano, 112 N.E. 733, 736 (N.Y. 1916) (finding witness’ recantation incredible and denying defendant’s motion to grant a new trial); see Sharon Cobb, Comment, \textit{Gary Dotson as Victim: The Legal Response to Recanting Testimony}, 35 \textit{Emory L.J.} 969, 981 (1986). A Lexis search of the phrase “there is no form of proof so unreliable as recanting testimony” found thirty-four hits between the time of Dotson’s release and September 27, 2007. http://www.lexis.com (in MEGA database, type in terms and connectors search: “there is no form of proof so unreliable as recanting testimony,” and restrict date from 8/15/1989 to 9/27/2007).
sion—are valid, and some recantations clearly lack any specificity or 
indicia of reliability. While some of this skepticism is fair, such a
blanket mistrust of recantations seems outdated in the era of DNA
exonerations, when we know that testifying under oath does not al-
ways produce the most reliable information.

This article argues that the longstanding skepticism of the judici-
ary toward recantations deserves reexamination; some DNA exonera-
tions have proven the unreliability of certain forms of testimony and 
the reliability of certain recanting witnesses. Part I of this article ex-
amines the standards used when courts consider recantations as newly 
discovered evidence in a motion for a new trial. Part II examines some 
of the reasons why courts are strongly skeptical of recantations. Part 
III examines the lessons of DNA exonerations and explains why some 
of those lessons undercut most of the reasons why courts have tradi-
tionally disfavored recantations. Part IV proposes a new framework for 
evaluating recantations, which more effectively balances the concerns 
of Part II with the new realities discussed in Part III. The new frame-
work calls on courts to abandon requirements of truthfulness in favor 
of a more relaxed corroboration standard, and proposes that courts 
eliminate deferential standards of review when new trial motions are 
summarily dismissed.

I. Standards for Considering Recantations

People both inside and outside the legal system frequently pre-
sume that the post-conviction and appellate processes in criminal 
cases are well suited to the task of rooting out wrongful convictions. 
This opinion, however, ignores the reality that appellate and post-
conviction procedures are almost exclusively focused on correcting

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22 See Cobb, supra note 21, at 982 (“When a witness substantially recants his or her previous testimony, it is immediately apparent that on one occasion or the other, he or she told something other than the truth.”). In my current capacity, I have seen recantations that are extremely incredible, such as letters saying “I’m sorry I lied about you,” and containing no other indications of why someone might have lied. I, however, also have seen recantations that seem quite credible, such as repeated public statements explaining exactly why a witness lied at trial, for reasons ranging from police pressure to malice toward the defendant. It is easy to see why courts would be reluctant to grant new trials in the former cases, but recantations, as any other type of evidence, can vary considerably in reliability.

23 See, e.g., Dwyer et al., supra note 5, 142–43, 153 (detailing the witness testimonies implicating Ron Williamson for murder and rape and his post-conviction exoneration through DNA evidence). I do not intend to suggest that most testimony elicited at trial is unreliable. Rather, my intention is to indicate that testimony elicited at trial is not always more reliable than a recanting statement, as courts and judges seem to assume.
legal and constitutional errors, not on correcting factual errors.\textsuperscript{24} The presumption of innocence that cloaks criminal defendants no longer exists after a defendant is convicted, and the burden of proving innocence after conviction is therefore tremendous.\textsuperscript{25} In addition, courts are skeptical of newly discovered evidence claims because they are concerned about finality, believe firmly in the jury’s ability to make factual determinations, and have inherent doubts about the validity of evidence that is discovered after trial.\textsuperscript{26}

Despite these obstacles, there are procedures in state courts for prisoners who want to bring forward new evidence of innocence.\textsuperscript{27} The primary vehicle for a defendant with newly discovered evidence of innocence is a motion for a new trial.\textsuperscript{28} In some states, newly discovered evidence also can be brought to a court’s attention through collateral attack proceedings.\textsuperscript{29} This article focuses primarily on motions for a new trial because they are the primary vehicle for litigating newly discovered evidence claims and are conceptually similar to collateral attack proceedings and, therefore, can be treated similarly.\textsuperscript{30} States considering newly discovered innocence claims primarily use or have adopted one of two standards: the Berry standard or the Larrison standard, with some states offering adaptations outside those schemes.\textsuperscript{31}

\textsuperscript{24} See Medwed, \textit{supra} note 16, at 664.

\textsuperscript{25} See Schlup \textit{v.} Delo, 513 U.S. 298, 326 n.42 (1995) (stating that convicted defendants “no longer ha[ve]the benefit of the presumption of innocence” but instead face a strong presumption of guilt).

\textsuperscript{26} Medwed, \textit{supra} note 16, at 664–65.


\textsuperscript{28} See Medwed, \textit{supra} note 16, at 665 (noting that “every state provides for a motion for new trial on the basis of newly discovered evidence”).

\textsuperscript{29} See Wilkes, \textit{supra} note 27, §§ 1-3 to 1-5, at 13–30.


\textsuperscript{31} Larrison \textit{v.} United States, 24 F.2d 82 (7th Cir. 1928); Berry \textit{v.} State, 10 Ga. 511 (1851); Tim A. Thomas, Annotation, \textit{Standard for Granting or Denying New Trial in State Criminal Case on Basis of Recanted Testimony—Modern Cases}, 77 A.L.R. 4th 1031, 1037–50 (1990 & Supp. 2007). As is the case with any statement making a generalization about the fifty states, the tests they employ vary widely. See Thomas, \textit{supra}, at 1037–50. That being said, most of them use \textit{Berry, Larrison}, or some adaptation of the two. \textit{Id.} A few jurisdic-
Most state courts considering a motion for a new trial based on newly discovered evidence use the standard articulated by the Georgia Supreme Court in *Berry v. State.* Under *Berry*, a new trial based on newly discovered evidence should only be granted if the defendant proves that: (1) the evidence has come to his knowledge since the trial, (2) the failure to discover the evidence was not because of a lack of diligence, (3) the evidence is so material that it would probably produce a different verdict if a new trial were granted, (4) the evidence is not merely cumulative, and (5) the evidence does not simply impeach a witness’ credibility. The test was not developed in the context of recantations and therefore is applied to other types of newly discovered evidence.

Unlike the *Berry* standard, the other predominant standard for courts considering new recantation evidence specifically considers the issue of granting new trials based on witness recantations. In *Larrison v. United States*, the court found that a new trial should be granted [based on a recanting witness] when, (a) The court is reasonably well satisfied that the testimony given by a material witness is false. (b) That without it the jury might have reached a different conclusion. (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

The *Larrison* test initially was perceived as being more lenient than the *Berry* test because it has a lower standard of materiality, but commentators have argued that these differences are largely illusory. The primary difference between the two tests is that a defendant using the *Larrison* test is only required to prove that the new evidence might result in a different verdict, whereas a defendant using...
the Berry test must prove that it probably would result in a different verdict. The more lenient materiality requirement of the Larrison test, however, is mitigated by requiring that the judge be persuaded of the recantation’s truthfulness. Thus, in practice, which test is applied makes very little difference in the outcome of the case.

II. REASONS WHY COURTS DISFAVOR RECAPTATIONS

As discussed above, whether a court uses the Berry or Larrison standard makes very little practical difference in the outcome of a case, in part because the standards are not as different as they appear. The more significant reason there is so little difference, however, is the inherent skepticism most courts have toward recaptations. Courts usually approach recaptations with a presumption that they are incredible, which means that any defendant pursuing a new trial based on a recantation is facing an uphill battle. Indeed, this reasoning often reflects legitimate trepidation about pieces of evidence whose credibility is extremely difficult to assess. Thus, it is important to understand and consider these reasons in any attempt to fashion a new standard for evaluating recaptations.

This section explores some of the reasons—both stated and unstated—for this inherent mistrust of recaptations, and isolates seven reasons why courts often find recaptations to be unreliable: (1) the perception that any witness who recants is untrustworthy, (2) determinations about the demeanor of the witness during an evidentiary hearing, (3) findings that the other evidence in the case supports the initial guilty verdict, (4) fears that the witness has recanted under duress or because of coercion, (5) close relationships between defendants and witnesses, (6) a desire for finality and concerns about judicial economy, and (7) the desire to prevent the manipulation of courts.

37 Larrison, 24 F.2d at 88–89; Berry, 10 Ga. at 527; Cobb, supra note 21, at 976.
38 Larrison, 24 F.2d at 88–89; Cobb, supra note 21, at 978.
39 Cobb, supra note 21, at 978.
40 See Christopher J. Sinnott, Note, When a Defendant Becomes the Victim: A Child’s Recantation as Newly Discovered Evidence, 41 CLEV. ST. L. REV. 569, 574–75 (1993) (“Judicial skepticism toward recaptations “has become so universal that it appears to have given rise to an inference that recantation evidence is not trustworthy and should be treated as such absent the movant’s ability to persuade otherwise.”).
41 See Repka, supra note 9, at 1442 (“Although courts are not required to presume the untrustworthiness of recantation testimony, the long-standing rule that such testimony is suspect and inherently unreliable ultimately produces the same effect.”).
A. General Mistrust of Recanting Witnesses

The first reason why courts are reluctant to grant new trials in recantation cases is simply that they mistrust recanting witnesses. Any defendant seeking a new trial based on the testimony of a recanting witness has one immediate and significant hurdle: the defendant is hanging his or her hat on a witness who has either lied under oath or who is wasting a court’s time by lying after trial. As a result, judges have significant problems deciding which version of a story to believe. Thus, courts often interpret recantations as evidence of the unreliability of the witness, not the accuracy of the new testimony. Under Berry, such testimony could be classified as immaterial, and under Larrison, many courts would find that challenging credibility does not prove the falsity of the trial testimony. Thus immediate distrust of recanting witnesses—before even hearing their testimony—can make it impossible to satisfy either test.

B. Specific Judgments About Witness Demeanor

The second reason courts disfavor recanting witnesses is because judges frequently find a witness’ demeanor at evidentiary hearings to be characteristic of someone who is lying. In most claims involving new evidence, the initial trial court holds the evidentiary hearing in the case. Thus, the trial court is able to compare the demeanor of the witness when he or she testified at trial to the demeanor of the witness.

42 See Cobb, supra note 21, at 982 (“When a witness substantially recants his or her previous testimony, it is immediately apparent that on one occasion or the other, he or she told something other than the truth.”).

43 See, e.g., Carpitcher v. Commonwealth, 641 S.E.2d 486, 489–90 (Va. 2007) (noting that the trial court was unable to determine which version of the witness’ testimony was true, because the witness had “testified inconsistently on the same issues on three separate occasions”).

44 See, e.g., People v. Canter, 496 N.W.2d 336, 341–42 (Mich. Ct. App. 1992) (per curiam) (“Contrary to defendant’s contentions, neither the veracity of [the witness’] recanting testimony nor the falsity of her trial testimony has clearly been established.”); State v. Perry, 758 P.2d 268, 275 (Mont. 1988) (stating that “recanted testimony demonstrates the unreliability of a witness”); Carpitcher, 641 S.E.2d at 489–90.

45 See Carpitcher, 641 S.E.2d at 493 (holding that recantation was not material to the issue of actual innocence because defendant could not prove the recantation was true). See generally Larrison v. United States, 24 F.2d 82 (7th Cir. 1928); Berry v. State, 10 Ga. 511, 527 (1851).

46 Medwed, supra note 16, at 699.
same witness at an evidentiary hearing. In many cases, the trial court simply determines that the witness’ testimony at trial was simply more convincing than the testimony at the hearing because of the witness’ demeanor. For example, in State v. Berry, the trial court found that the recanting witness was unbelievable because he “had been ‘somewhat spirited’ at trial” but had a “completely flat” affect at the evidentiary hearing. In People v. Dotson, the trial court found “[the victim’s] demeanor was consistent with a person making a sincere claim of rape,” and found that her memory lapses about certain details at the evidentiary hearing made her seem less credible. Thus, courts often find the evidentiary hearing testimony to be less credible than the original trial testimony because they are influenced by observations regarding witness demeanor.

C. Evaluations of the Other Evidence in the Case

The third reason judges tend to dismiss motions for new trials based on recantation evidence is that they often find the recantation to be outweighed by other evidence introduced at the trial. Under both the Berry and Larrison standards, the judge must pay varying degrees of attention to the chances of a different jury verdict in the event of a retrial. It therefore makes sense that judges would evaluate the recantation in the context of the other evidence produced at trial, and that frequently is the basis for dismissing the credibility of recantations. For example, in State v. Perry, the court found that the recanting witness’ testimony was implausible in part because it contradicted the testimony of other witnesses who testified at trial. Thus, when a court evaluates a recantation in context, it often may

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48 See, e.g., Dotson, 516 N.E.2d at 721; State v. Berry, 2003 WL 735088, at *3.
49 2003 WL 735088, at *3.
50 516 N.E.2d at 721.
51 See Larrison, 24 F.2d at 87–88; Berry, 10 Ga. at 527.
52 See, e.g., Perry, 758 P.2d at 275 (finding witness’ recantation did not “conform to the testimony of the other witnesses, the evidence presented at trial, the [defendant’s] prior statements; nor [did] it account for [the defendant’s] whereabouts at the time of the murder”).
53 Id. at 273; see also Ashcraft v. State, 918 S.W.2d 648, 654 (Tex. Crim. App. 1996) (finding that medical testimony at trial supported the recanting witness’ trial testimony, not her recantation); State v. Cason, No. 01-0809, 2002 WL 109545, at *4 (Wis. Ct. App. Mar. 19, 2002) (per curiam) (finding that the recantation contradicted the physical evidence admitted at trial).
find that the recanting testimony simply is not supported by the other evidence that was introduced at trial.

D. Fears of Duress or Coercion

The fourth reason for judicial mistrust is the fear that such recantations are the product of duress or coercion.\footnote{Cobb, \textit{supra} note 21, at 983–85.} Some of this apprehension has its roots in an unfortunate—and highly publicized—reality of our judicial system, that witnesses often are threatened or coerced before trials, particularly in gang and domestic violence cases.\footnote{See Nora V. Demleitner, \textit{Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?}, 46 Am. J. Comp. L. Supp. 641, 644–45 (1998) (discussing the increasing publicity given to witness intimidation in domestic abuse and gang-related cases); Kelly Rutan, Comment, \textit{Procuring the Right to an Unfair Trial: Federal Rule of Evidence 804(B)(6) and the Due Process Implications of the Rule’s Failure to Require Standards of Reliability for Admissible Evidence}, 56 Am. U. L. Rev. 177, 186 (2006) (discussing a 1995 Department of Justice study that revealed an increase in witness intimidation in the 1980s and 1990s).} This coercion can come from defendants, their families, or their friends, so judges often assume coercion even when a defendant is incarcerated.\footnote{See \textit{supra} note 21, at 983–86, 987–89.} This significant problem undoubtedly has created a system in which judges are hyper-aware of the possibility for duress and coercion, something that almost certainly carries over to situations in which witnesses recant after trial.\footnote{See, \textit{e.g.}, State v. Elkins, No. 21380, 2003 Ohio App. LEXIS 4037, at *9–14 (Ohio Ct. App. Aug. 27, 2003) (affirming trial court’s finding that child-victim’s recantation was “the result of influence from her family and others who have an interest in the success of [defendant’s] petition”).} Moreover, prosecutors who sponsored witnesses at trial often respond to recantations by looking for evidence of coercion, not necessarily because they are looking to thwart justice but because they believed in the initial testimony of the witnesses and have had similar experiences with duress and coercion.\footnote{See, \textit{e.g.}, Shannon Selden, \textit{The Practice of Domestic Violence}, 12 UCLA Women’s L.J. 1, 37–38 (2001) (discussing the tendency of domestic violence victims to recant their stories because of duress, coercion, and fear of retaliation).} Thus, any recantation may be met with the assumption that it was the product of duress or coercion because judges are aware of such tactics and are trained to look for it.

E. Close Relationships Between Defendants and Witnesses

A fifth factor that leads to judges’ skepticism toward recantations is the relationships that often exist between defendants and witnesses. Defendants often have preexisting relationships with the witnesses who
testify against them in criminal trials, whether those witnesses are victims, co-defendants, or friends who are informants. Testifying against a friend or a relative undoubtedly is a difficult proposition, and unless there is a motive to lie, taking such a risk will be seen as an indicator of witness credibility. The flip side of that equation is also true: a witness who recants his or her testimony against a friend or loved one generally will be perceived as doing so because they want to help the defendant. Thus, recantations in such cases often will be presumed incredible because there is a significant motive to help the defendant.

F. Finality and Judicial Economy

The sixth reason why judges are reluctant to grant new trials in recantation cases is a general concern about finality and judicial economy; these concerns are common in all cases where defendants are seeking new trials. The judicial system understandably is apprehensive about the need to keep cases from continuing for years after an initial trial, both because of anxiety about victims and because a system in which criminal cases perpetuate for years is impractical. In addition, a judiciary that is consistently overburdened and underfunded is worried about granting new trials in too many cases, because of fears that they simply would not be able to handle the onslaught.

G. Desire to Prevent Manipulation of Courts

The seventh reason why judges are skeptical of recanting witnesses is their desire to prevent manipulation of the courts. As the Virginia Supreme Court observed in Carpitcher, “recantation evidence is generally questionable in character and is widely viewed by courts with suspicion because of the obvious opportunities and temptations


60 See, e.g., Lewis v. State, 111 P.3d 636, 651 (Kan. Ct. App. 2003) (per curiam). For example, in Lewis v. State, the child victim recanted her trial testimony against her paternal uncle, the defendant. Id. at 640, 651. At the time of trial, the victim lived with her mother, but at the time of the recantation, she lived with her paternal grandmother (the defendant’s mother). Id. at 650–51. There, the court found ample evidence that the victim’s loyalty to the defendant’s mother may have motivated her recantation. Id. at 651.

61 Cobb, supra note 21, at 991.

62 See Cynthia E. Jones, Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes, 42 AM. CRIM. L. REV. 1239, 1265–67 (2005) (explaining that government’s interest in finality of judgments stems from a desire to punish the guilty, and therefore to serve a deterrent function, and to provide closure to victims).
for fraud.” Like the other concerns of courts, these worries are not entirely misplaced. In one case, the court found the recanting witness was motivated to change his trial testimony because the defendant’s family paid him $300. Thus, courts frequently encounter situations in which defendants and their associates may legitimately be trying to manipulate the courts to obtain a favorable outcome.

III. LESSONS OF DNA EXONERATIONS

Despite all of these legitimate or understandable reasons for disfavoring recantations, the 200-plus DNA exonerations have provided sound bases to reevaluate the current treatment of recanting witnesses. Before the advent of DNA evidence, the debate surrounding wrongful convictions often focused on whether wrongful convictions occurred in significant numbers, not on the causes producing such a systemic failure in the criminal justice system. Today, however, a plethora of scholars, non-profit organizations, and state commissions have focused extensively on how the criminal justice system can break down to produce a wrongful conviction. We therefore have greater insight than ever before into the types of evidence that are the least trustwor-

63 641 S.E.2d at 492; see also State v. Soto, No. 03-3446, 2005 WL 524874, at *3 (Wis. Ct. App. Mar. 8, 2005) (quoting the trial court’s statement that a co-defendant’s recantation should be viewed with suspicion because “[c]o-defendants should not be able to pool their post-conviction resources and decide which one of them ought to get a new trial”).


65 See Innocence Project, About Us: Mission Statement, supra note 12 (indicating 207 people have been exonerated through DNA testing).

66 See, e.g., Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 23–24 (1987) (highlighting 350 erroneous convictions in “capital or potentially capital” cases in the twentieth century); Stephen J. Markman & Paul G. Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121, 121–22 (1988) (criticizing the methodology and conclusions of Bedau and Radelet’s study and claiming the actual number of wrongful convictions was much lower); see also Hugo Adam Bedau & Michael L. Radelet, The Myth of Infallibility: A Reply to Markman & Cassell, 41 Stan. L. Rev. 161 (1988) (replying to Markman and Cassell’s critique). The debate about the frequency and nature of wrongful convictions still exists today, but the focus of most wrongful convictions scholarship has shifted to addressing solutions to the problem, not whether a problem exists. See, e.g., Andrew M. Siegel, Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy, 42 Am. Crim. L. Rev. 1219, 1220 (2005) (noting wrongful convictions scholarship has more recently focused on “identify[ing] and publiciz[ing] the factors that lead to flawed evidence and faulty convictions”).

thy and the ways in which that evidence and the criminal justice system can be made more trustworthy.

These lessons can be applied to the universe of recanting witnesses as well. As discussed above, judges are likely to presume the unreliability of recanting witnesses, who most often are co-defendants, informants, or victims. They do this for some legitimate reasons, but even the legitimate ones are undercut when we apply what we have learned from the DNA exonerations. Those exonerations are rife with examples of witnesses who we now know lied at trial. Thus, the circumstances of those cases and the underlying motivations for some of those lies can provide valuable insight into the ways in which judges can and should evaluate such recantations.

This section examines four of those lessons: (1) all participants in the justice system, including judges, are subject to cognitive biases that call into question their ability to impartially analyze new evidence of innocence; (2) incentivizing witnesses creates strong motives to lie at trial; (3) defendants are not the only parties in the criminal justice system who coerce false testimony out of witnesses; and (4) fact finders are not always the most accurate judges of witness credibility. Each of these lessons calls into question the general judicial mistrust of recanting witnesses, as well as the instinct to avoid granting new trials because of finality and judicial economy.

Examined individually, these factors

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68 See supra notes 45–70 and accompanying text. In very rare circumstances, eyewitnesses have recanted their testimony when presented with pictures of the real perpetrator or when confronted with problems in their testimony. See Mid-Atlantic Innocence Project, Mistaken Eyewitness Identifications, http://www.exonerate.org/facts/causes-of-wrongful-convictions/mistaken-eyewitness-identifications/ (last visited Jan. 2, 2008). Such recantations are rare, however, because the vast majority of eyewitnesses are people who genuinely believe in the truth of their testimony. See id. This distinguishes them from the subset of recanting witnesses considered in this article, who have knowingly lied at trial. The same preconceptions are not as likely to apply to the testimony of eyewitnesses, because they are presented to the court as having made a mistake, not as someone who has lied at some point in their testimony.

69 See generally Dwyer et al., supra note 5.

70 See Cobb, supra note 21, at 991. The notions of finality and judicial economy are based at least in part on the premise that the panoply of protections provided to criminal defendants at trial adds sufficient guarantees of reliability to verdicts in criminal trials. See Jones, supra note at 62, at 1266 (highlighting the dual assumptions underlying the principle of finality of judgment: that the original trial resulted in a reliable verdict and that post-conviction litigation will be unlikely to change the outcome because the constitutional protections given to the accused drastically reduce the likelihood of an erroneous conviction). DNA exonerations, however, call into question those notions, because they indicate that the system is not functioning as well as previously was believed. See Dwyer et al., supra note 5, at 248–49 (citing a National Commission on the Future of DNA Evidence Task
also call into question each of the other rationales judges rely upon when they explain their mistrust of recantations.

A. Cognitive Biases Affect Judicial Decisions

In Gary Dotson’s case, the trial judge who presided over both Dotson’s trial and post-judgment relief hearing found that the victim’s recantation was implausible because her demeanor at trial was consistent with someone who had been raped and because there was independent evidence corroborating her trial testimony. The judge noted that the victim’s memory at the 1985 evidentiary hearing was not as sharp as her memory at the 1979 trial, which he interpreted as selective memory. The court did not find a conceivable motive—such as duress or a relationship with the defendant—for the victim to make up the recantation, but instead relied on her trial testimony and on the testimony of investigating officers and her guardians, who believed her initial story of the attack. In making this determination, the judge ignored significant inconsistencies between the victim’s initial statement and the evidence adduced at trial, deeming them inconsequential. Of course, DNA evidence ultimately proved that the victim’s recantation, and not her trial testimony, was the truth. The relatively weak justifications the trial judge used in his ruling make clear that he did not want to believe the victim’s recantation was true. He was too invested in the initial verdict to make an objective decision about the new evidence of innocence.

One of the most significant lessons that Dotson’s case and other DNA exonerations have taught us is that tunnel vision contributes
significantly to the problem of wrongful convictions.\textsuperscript{77} Tunnel vision is a natural human tendency that causes judges (and other actors in the criminal justice system) “to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion.”\textsuperscript{78} In his examination of cognitive biases among judges, Daniel Medwed ultimately concluded that post-conviction petitions and motions for new trials should not be directed to trial judges, in part because of the cognitive biases that infect their decision-making.\textsuperscript{79} While this article does not directly tackle the problem of cognitive bias, Medwed’s arguments go a long way toward explaining why judges are likely to discount recantations (and other new evidence of innocence) without fully considering the import of that evidence.

Medwed identified two significant cognitive biases that are relevant in cases where new evidence of innocence is being offered.\textsuperscript{80} First, the prospect of a wrongful conviction is anathema to most judges, who see themselves as fair and competent individuals.\textsuperscript{81} As a result, they do not believe that their decisions could have allowed such an injustice to take place and are reluctant to find credible any evidence that would suggest otherwise.\textsuperscript{82} Second, the problem of “status quo bias” means that “people often have difficulty deviating from a prior decision because that decision has become the reference point to which they compare and contrast newfound information.”\textsuperscript{83} Thus judges revisiting a case in which they already have presided are likely to require a defendant to prove much more about his or her innocence than would be required if the judge were examining a new case.\textsuperscript{84} The net result of both cognitive biases is that judges are likely to find grounds to discount new evidence of innocence because that evidence does not fit with their notions of themselves or of the case at hand.\textsuperscript{85}

This problem is particularly acute when it is examined in the context of recantations. As demonstrated in Part II, there are several significant and understandable reasons why judges often disfavor recanta-

\textsuperscript{78} Id. at 292.
\textsuperscript{79} See Medwed, supra note 16, at 700–08.
\textsuperscript{80} Id.
\textsuperscript{81} See id. at 701 (discussing the problem of egocentric bias in which individuals develop a positive and often over-inflated image of their own abilities).
\textsuperscript{82} See id.
\textsuperscript{83} Id. at 701–02.
\textsuperscript{84} Medwed, supra note 16, at 701–02.
\textsuperscript{85} See id.
tions.\textsuperscript{86} Unfortunately, several of them allow judges to make subjective judgments about statements, evidence, and credibility, as the judge did in the \textit{Dotson} case.\textsuperscript{87} While this is well within the rights of a judge ruling on a motion for a new trial, the authority to employ subjective, rather than objective, factors will make it easier for judges who are experiencing tunnel vision to rationalize their decisions. Thus, any decision on a recantation that hinges almost exclusively on witness demeanor, speculative allegations of duress or coercion, speculations about relationships, or misstatements of the evidence should raise alarm bells. The problem of tunnel vision does not necessarily undercut the legitimacy of those reasons, but it should raise a red flag in those cases where a court seems to be relying only on subjective judgments or speculations.

B. \textit{Incentivizing Witnesses Creates Strong Motivations to Lie}

In 1985, Jerry Watkins was convicted by an Indiana jury of the murder of an eleven year-old girl based on circumstantial evidence and the testimony of a jailhouse informant.\textsuperscript{88} Among the witnesses to testify against Watkins was Dennis Ackaret, who had a long history as an informant in Florida and Indiana, testifying in exchange for both cash and lighter sentences in many cases.\textsuperscript{89} Ackaret said at trial that Watkins had confessed to him when they were briefly in a holding cell together.\textsuperscript{90} In 1987, however, Ackaret swore in a court filing in his own case that he had learned details of the crime not from Watkins, but from investigators, who showed him pictures of the murder victim and took him to the crime scene.\textsuperscript{91} In 1988, Watkins produced witnesses who testified that Ackaret had admitted his lies to them.\textsuperscript{92} The Indiana Court of Appeals found that there was substantial evidence against Ackaret and that the witnesses he had produced were cumulative of other evidence produced at trial.\textsuperscript{93}

In 2000, in the wake of exonerating DNA evidence, the United States District Court for the Southern District of Indiana remanded Watkins’ case for a new trial.\textsuperscript{94} Notably, in the wake of the DNA exonera-

\textsuperscript{86} See supra notes 42–64 and accompanying text.
\textsuperscript{87} 516 N.E.2d at 720–22.
\textsuperscript{88} Watkins v. State, 528 N.E.2d 456, 457, 460 (Ind. 1988).
\textsuperscript{89} Watkins v. Miller, 92 F. Supp. 2d 824, 834 (S.D. Ind. 2000).
\textsuperscript{90} Id. at 828.
\textsuperscript{91} Id. at 830.
\textsuperscript{92} Watkins v. State, 528 N.E.2d at 458.
\textsuperscript{93} See Watkins v. Miller, 92 F. Supp. 2d at 827.
\textsuperscript{94} Id. at 857.
tion, even the remanding court found that “there is ample reason to be skeptical about Ackeret’s motion that effectively recants his trial testimony” because the motion “reflects his selfish motives to lie against the police and prosecution.”

Watkins ultimately was released from prison in 2000, thirteen years after Ackaret’s recantation. Without the DNA evidence in this case, the courts would have continued to believe in the truth of Ackaret’s trial testimony and in the falsity of his recantation.

Watkins’ case and a host of other DNA cases have proven that jailhouse informants, accomplices, and others who testify in exchange for reduced sentences are particularly untrustworthy. Indeed, such testimony was involved in 45.9% of the first 111 death row exonerations since 1970. The causes of such unreliability are not hard to fathom: simply put, “when the criminal justice system offers witnesses incentives to lie, they will.” The incentives for providing false testimony are powerful, whether the informant is either already in jail, a co-defendant, or an acquaintance of a defendant with pending charges. Anyone in that situation knows that providing information about a defendant can result in a much-reduced sentence or dropped charges. Even worse, the most famous informant of all, Leslie Vernon White, explained that providing false testimony as an informant is not difficult—he provided...

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95 Id. at 854.
96 Terry Horne, 14 Years Later, DNA Results Aid Inmate’s Release, INDIANAPOLIS STAR, July 22, 2000, at A1.
98 Warden, supra note 97, at 3. Incentivized testimony is the number one cause of wrongful convictions in capital cases, most of which do not involve DNA evidence. Id. at 3, 14. This dearth of DNA evidence exists because “the typical crime in this country is not a rape murder, but a murder in the course of robbery or burglary, or for insurance or hire, and these offenses are only infrequently characterized by biological evidence left by the offender.” James S. Liebman, The New Death Penalty Debate: What’s DNA Got to Do with It?, 33 COLUM. HUM. RTS. L. REV. 527, 541–42 (2002). Typical capital crime cases are less likely to involve eyewitnesses than rape cases, and the exoneration of the perpetrator are more likely to involve a confession by the real perpetrator, a recantation, defects in other forensic evidence, or proof of an ironclad alibi. Id. at 542.
99 Warden, supra note 97, at 2.
100 Dwyer et al., supra note 5, at 128–29 (detailing how snitches concocted false confessions in return for jail release or extra privileges in jail); Alexandra Natapoff, Beyond Unreliable: How Snitches Contribute to Wrongful Constructions, 37 GOLDEN GATE U. L. REV. 107, 108 (2006) (“Informants lie primarily in exchange for lenience for their own crimes, although sometimes they lie for money.”).
101 See Dwyer et al., supra note 5, at 128–29; Natapoff, supra note 100, at 108.
false information in three murder cases in a thirty-six day period and even demonstrated for police that he could use a phone to obtain enough false information to testify against someone in a twenty-minute period.\textsuperscript{102}

In recent years, the practice of rewarding informants has become more pronounced and more entrenched in the justice system.\textsuperscript{103} Alexandra Natapoff traces this rise to three factors: (1) the U. S. Sentencing Guidelines, which make cooperation with authorities the main way to receive leniency; (2) mandatory minimum sentences, in which only cooperation allows courts to depart from high sentencing requirements; and (3) the growth of drug crime enforcement efforts, in which officers need informants to solve their cases.\textsuperscript{104} As a result, the justice system has become increasingly dependent on such implausible incredible testimony, with police and prosecutors coming to rely very heavily on informants as their only evidence in some cases.\textsuperscript{105} Even though informant testimony is often the only evidence in a case, police and prosecutors cannot always and do not always rigorously check statements provided by their informants.\textsuperscript{106} Thus, as Natapoff writes, “[t]his gives rise to a disturbing marriage of convenience: both snitches and the government benefit from inculpatory information while neither has a strong incentive to challenge it.”\textsuperscript{107}

For the most part, the reaction to this problem has been to suggest reforms that would mitigate the problem of false informant testimony.\textsuperscript{108} This is as it should be. Yet the problem of informant testimony also has important implications in cases involving recantations. The reforms suggested to eradicate the problems associated with in-

\begin{footnotesize}
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\item \textsuperscript{102} See Dwyer et al., supra note 5, at 127.
\item \textsuperscript{103} Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 U. Cin. L. Rev. 645, 655 (2004) (explaining that “informant use is on the rise” because the criminal “justice system has become increasingly dependent on criminal informants over the past twenty years”). About twenty percent of federal offenders and thirty percent of drug defendants receive credit for cooperation with authorities, but not all defendants who cooperate receive leniency. \textit{Id.} at 657; see also N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001) (“Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else’s expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.”).
\item \textsuperscript{104} Natapoff, supra note 103, at 655.
\item \textsuperscript{105} Natapoff, supra note 100, at 108; Natapoff, supra note 103, at 655.
\item \textsuperscript{106} Natapoff, supra note 100, at 108.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} See, e.g., id. at 112–29 (proposing establishment of pre-trial reliability hearings for snitch testimonies).
\end{enumerate}
\end{footnotesize}
formant testimony before trial do not address these implications. Recantations by incentivized witnesses are quite common, but as Watkins illustrates, courts that rely frequently on the testimony of informants are reluctant to believe those same witnesses when they recant.109 Courts in these cases are particularly leery of recanting informants trying to manipulate the courts, an understandable fear.110 That fear, however, needs to be balanced with the inherent problems posed by incentivized testimony. DNA exonerations have proven how unreliable incentivized testimony can be, so courts should begin to balance that with their concerns about manipulation.

C. Witness Coercion Is Not Limited to Defendants

In 1978, a young man and his fiancée were abducted from the Homewood, Illinois, gas station at which he was employed.111 They were taken to an abandoned apartment in East Chicago Heights, Illinois, where she was raped and killed; the man was taken to a nearby field where he was shot to death.112 Police quickly focused their attention on the Ford Heights Four—Kenneth Adams, Verneal Jimerson, Willie Rainge, and Dennis Williams, four young men who lived near the crime scene.113 Shortly after the crime and the first arrests, police interviewed Paula Gray, a mentally retarded seventeen-year-old with a ninth grade education.114 Gray told police she had gone to the murder scene, where she saw the four men perpetrating the crime.115 She said they would not let her leave the scene, gave her a lighter to hold for them, and raped the female victim while she watched.116 Gray then observed the men kill the male victim.117 Gray testified to this effect before the grand jury but recanted her testimony at a preliminary hearing in the case, which forced the state to drop charges against one of the men and led them to charge her with perjury.118

109 See 92 F. Supp. 2d at 854.
112 Id.
113 Id. at 587–88, 590.
114 People v. Williams, 588 N.E.2d 983, 993 (Ill. 1991); Gray, 721 F.2d at 587–88.
115 Williams, 588 N.E.2d at 993.
116 Id.
117 Id.
118 Gray, 721 F.2d at 590–92.
Gray’s perjury case ultimately was reversed, because her attorney was found to have a conflict of interest.\footnote{119} When her case was remanded, she changed her story again, agreeing to testify against the men in exchange for time served.\footnote{120} When defense investigators interviewed Gray, she told them her statement had been coerced by police.\footnote{121} Her recantation was proven true when DNA testing exonerated all of the men.\footnote{122}

Although it seems counterintuitive, Gray’s case is not an anomaly. One of the most surprising revelations of the DNA revolution has been the number of wrongfully convicted defendants who falsely confessed to committing crimes.\footnote{123} Most of those defendants have only implicated themselves, but there have been multiple co-defendants who have falsely confessed by implicating themselves and their co-defendants.\footnote{124} While this might sound like incentivized testimony, the testimony detailed in this section is more commonly thought to be obtained as a result of coercive interrogation tactics than by a calculated desire to receive a lower sentence.\footnote{125} A host of psychological factors can cause individuals to confess to crimes they did not commit, because interro-

\footnote{119} Id. at 597–98.
\footnote{121} Douglas Holt & Steve Mills, *Ford Heights 4 Figure Pardoned*, Chi. Trib., Nov. 15, 2002, § 2, at 1.
\footnote{124} See, e.g., Laylan Copelin & David Hafetz, *Police Conduct Facing Review*, Austin Am.-Statesman, Dec. 22, 2000, at A1. Aside from the Ford Heights Four case, another example of a false confession implicating co-defendants took place when a man, Chris Ochoa, falsely confessed to a rape and murder and implicated another man, Richard Danziger, in the process. Id. In another case, two men falsely confessed to murdering a graduate student in Chicago, implicating two other co-defendants in the process. Maurice Possley & Steve Mills, *Governor Pardons Roscetti 4*, Chi. Trib., Oct. 17, 2002, § 1, at 1. In each of these cases, DNA testing ultimately exonerated the defendants. Copelin & Hafetz, supra; Possley & Mills, supra.
\footnote{125} Drizin & Leo, supra note 123, at 911 (explaining that “[t]he purpose of interrogation is not to determine whether a suspect is guilty,” but to “break the anticipated resistance of an individual who is presumed guilty”). Police officers interrogate reluctant witnesses the same way they do suspects. Jim Trainum, Detective, Metro. Police Dep’t, Presentation to Wrongful Convictions Class at American University’s Washington College of Law (June 17, 2007). Thus, given that seventeen percent of all wrongful convictions involve “other” false testimony by witnesses, it is safe to assume that some of that false testimony is the product of these interrogation techniques. Id.
These interrogation methods are capable of eliciting confessions from the innocent, particularly from young, mentally impaired defendants, but also from defendants with no impairments at all.\textsuperscript{127}

This phenomenon calls into question several of the reasons enumerated by courts for their failure to find credible the recantations of witnesses. First, not all recanting co-defendants are simply trying to manipulate the system.\textsuperscript{128} Some of them, like Gray, have genuinely been coerced and have attacks of conscience.\textsuperscript{129} Second, and perhaps more significantly, defendants are not the only parties in the criminal justice system who coerce statements out of witnesses.\textsuperscript{130} Courts tend to presume that witnesses recant because they are coerced, but they neglect to consider the possibility, and even dismiss the possibility, that police or prosecutors also use improper tactics to elicit witness statements.\textsuperscript{131} Thus, recantations that allege such tactics frequently are deemed unbelievable, oftentimes \textit{because} they allege such tactics.\textsuperscript{132} Although there certainly are frivolous allegations of improper police tactics, the problem of false confessions and documented use of improper interrogation techniques in dozens of cases should change the calculus of courts as they examine recantations that are coupled with allegations of coercion.\textsuperscript{133} Taking those claims seriously, rather than

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\item[126] Drizin & Leo, \textit{supra} note 123, at 913 (“[T]he interrogator’s goal is to persuade the suspect that the act of admission is in his self-interest and therefore the most rational course of action, just as the act of continued denial is against his self-interest and therefore the least rational course of action.”).
\item[127] See Boaz Sangero, \textit{Miranda is Not Enough: A New Justification for Demanding “Strong Corroboration” to a Confession}, \textit{28 Cardozo L. Rev.} 2791, 2793–94 (2007) (“In a considerable number of [DNA exoneration] cases . . . convictions were based solely on the false confessions of defendants, which had been extracted by police interrogators.”).
\item[128] See \textit{supra} notes 111–127 and accompanying text.
\item[129] See \textit{supra} notes 111–127 and accompanying text.
\item[130] See \textit{supra} notes 111–127 and accompanying text.
\item[131] See, \textit{e.g.}, \textit{Watkins v. Miller}, 92 F. Supp. 2d at 854 (finding incredible the recanting informant’s assertion that investigators took him to the crime scene and fed him details about the crime); \textit{Lewis v. State}, 111 P.3d 636, 651 (Kan. Ct. App. 2003) (per curiam) (affirming the trial court’s finding that victim’s recantation did not merit a new trial, despite her assertion that the prosecutor told her to lie).
\item[132] See \textit{Gray}, 721 F.2d at 592–94; \textit{Watkins v. Miller}, 92 F. Supp. 2d at 854; \textit{Lewis}, 111 P.3d at 650–51. In Paula Gray’s case, the trial court and appellate court both found incredible her assertion that her confession had been coerced. \textit{Gray}, 721 F.2d at 592–94.
\end{itemize}
discounting them outright, will lead to a more balanced examination of witness recantations.

D. Observations About Witness Demeanor Are Not Always Accurate

In 1999, Clarence Elkins was convicted of murdering his mother-in-law and raping his six-year-old niece. The niece unhesitatingly identified him at trial, pointing him out in the courtroom. A few years later, the child admitted to her mother that she thought the assailant and Elkins had different eyes. In 2002, the child recanted her testimony to a defense investigator and Elkins filed a motion for a new trial. The court was presented with a videotaped deposition of the child recanting her testimony, but the judge found that the recantation lacked credibility. Specifically, he found that she recanted under significant pressure from her family and that “during the deposition [in which she recanted on video], the child was hesitant and seemed unsure of her answers.” He contrasted this to her confident testimony at trial. In short, he found that her demeanor at trial was much more consistent with a witness telling the truth than her demeanor in the video deposition. Unfortunately for Elkins, the victim’s recantation actually was the truth, which was proven when DNA testing exonerated Elkins in 2005.

The Elkins case, as well as the Dotson case, demonstrates that trial judges are not always adept at judging the demeanor of recanting witnesses, even though they frequently find that recanting witnesses are incredible based on assessments of demeanor. This is not surprising. In his article on evaluating witness credibility, Steven I. Friedland explains that laypersons rarely are able to assess accurately witness

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136 Bischoff & McCarty, supra note 134.
137 Id.
139 Id. at *10–14.
140 Id. at *10, 12.
141 See id. at *12.
142 See id. at *13–14.
143 See Bischoff & McCarty, supra note 134.
credibility. Instead, psychological studies have found that “[g]iven the complexity and subtlety of . . . nonverbal cues, an untrained observer, such as a juror, has ‘probably . . . no better than chance’ to assess accurately sincerity from nonverbal action.”

Friedland primarily addresses the inability of jurors to assess the sincerity of witnesses, arguing that defendants should be permitted to introduce expert testimony on the credibility of witnesses, whether those witnesses are eyewitnesses or sexual assault victims. However, his argument is applicable to judges; like jurors, judges can lack the expertise of psychologists to assess accurately witness credibility. Indeed, the Elkins and Dotson cases are proof that in some cases, judges can be wrong in their assessments of witness demeanor. Those cases are proof that the oft-cited problem of witness demeanor may not always be a persuasive reason to dismiss the credibility of a recantation.

IV. A New Standard for Evaluating Recantations

The DNA revolution has called into question the factors relied upon by judges to dispute the reliability of nearly all recantations. The current standards used by courts to determine whether a defendant is entitled to a new trial, coupled with those outdated notions of witness unreliability, allow judges to dismiss requests for new trials with very little scrutiny in nearly every case. An effective solution to this problem will not simply call on courts to grant new trials in every case in which there is a recantation. That remedy would swing the pendulum too far and would not be a palatable result for most courts. Rather, the solution needs to balance the legitimate concerns about recantations with the lessons learned from DNA exonerations.

This article proposes two changes—that will more effectively balance the interests of defendants with the interests of the courts. First, courts should adopt a modified version of the Larrison standard that requires corroboration rather than proof of truth. As styled by the Wisconsin Supreme Court, corroboration would be a much more relaxed requirement

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146 Id. at 185.
147 See id. at 222–24.
149 See Larrison v. United States, 24 F.2d 82, 88–89 (7th Cir. 1928).
than currently exists in most state courts. Second, appellate courts should not apply a deferential standard of review to summary denial of motions for new trials based on recantations.

Neither of these changes would radically alter the formulations used by most courts, and their adoption by other state supreme courts makes clear that the burdens they impose would not be particularly onerous. Thus, they offer practical solutions to a problem that will only grow more pronounced as the number of DNA exonerations continues to prove that wrongful convictions happen on a more consistent basis than anyone ever believed.

A. Adoption of a Modified Larrison Standard

The first element of this new framework would be courts adopting a modified version of the Larrison test, one that abandons the truthfulness requirement. As an initial matter, the materiality standard of the Larrison test is preferable, largely because the strong materiality requirement of the Berry test invites courts to look at truth as an element. Thus, a wholesale abandonment of the truthfulness requirement requires courts to adopt the Larrison standard rather than the Berry standard.

The genesis of the truthfulness requirement makes some sense—granting new trials in cases with obviously false recantations would be unwise for many reasons. However, as evidenced in the Dotson, Watkins, Elkins, and Ford Heights Four cases, the recanting witnesses were testifying about events or conversations in which only the witness and the defendant knew the truth. In those scenarios, proving the absolute truth of the recantation or absolute falsity of the trial testimony was virtually impossible until each defendant could use DNA evidence. The simple explanation for this is that when only the witness knows the real

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150 See State v. McCallum, 561 N.W.2d 707, 711–12 (Wis. 1997) (requiring recantations be corroborated by new evidence rather than meet a truthfulness requirement).
151 See id.
152 See Berry v. State, 10 Ga. 511, 527 (1851); In re Carpitcher, 624 S.E.2d 700, 707 (Va. Ct. App. 2006) (holding that the defendant must prove the truth of the recantation or the falsity of the trial testimony to satisfy the materiality requirement).
153 See supra notes 1–11, 88–96, 111–122, 134–143 and accompanying text.
154 See Steven B. Duke et al., A Picture’s Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions, 44 Am. Crim. L. Rev. 1, 11–12 (2007) (“If the witness had contact with the defendant (or a plausible claim to the same) and no other witnesses were present, the witness’ word can rarely be disproven. The witness’ motives for testifying can be explored, but this hardly demonstrates that the witness’ recollection of the conversation is erroneous.”).
truth, the courts essentially are forced to guess based on credibility judgments and other subjective factors. Thus, a new formulation of this standard is necessary to balance the interests in judicial economy with the reality that discerning truth based on witness demeanor is incredibly difficult.

Advocates for the wrongfully convicted are not the only people to have noticed the problems inherent in a truth requirement. Instead of requiring the defendant to prove the truth of the allegation, the Wisconsin Supreme Court requires the defendant to corroborate the recantation with other newly discovered evidence of innocence.\(^{155}\) A corroboration requirement could be a wolf in sheep’s clothing, a truth requirement that simply is called by a different name. However, the Wisconsin Supreme Court has recognized that “requiring a defendant to redress a false allegation with significant independent corroboration of the falsity would place an impossible burden upon any wrongly accused defendant.”\(^{156}\) Thus, the court has found that “a feasible motive for the initial false statement” and “circumstantial guarantees of the trustworthiness of the recantation” meet the corroboration requirement.\(^{157}\) Adopting such a requirement would enable defendants trying to prove the truth of a recantation in difficult circumstances to argue that various indicia of reliability make the recantation more credible.

The first element of Wisconsin’s relaxed corroboration requirement is evidence of a feasible motive for providing false testimony at trial.\(^{158}\) In McCallum, the court found that a feasible motive to falsify allegations existed.\(^{159}\) The child victim “wanted her divorcing parents to reconcile,” “resented [the defendant] McCallum for attempting to take the place of her father,” and “was angry at McCallum for disciplining her.”\(^{160}\) In contrast, the Virginia courts discounted evidence of motive in the Carpitcher case, in part because Virginia has a truth re-

\(^{155}\) See McCallum, 561 N.W.2d at 711–12. The Wisconsin court adopted the corroboration requirement because it found recantations to be inherently unreliable. Id. at 712. This means that the courts continue to be somewhat dismissive of recantations, particularly in cases involving informants or co-defendants. See, e.g., State v. Soto, No. 03-3446, 2005 WL 524874, at *3 (Wis. Ct. App. Mar. 8, 2005) (quoting the trial court’s statement that a co-defendant’s recantation should be viewed with suspicion because “[c]o-defendants should not be able to pool their post-conviction resources and decide which one of them ought to get a new trial”).

\(^{156}\) McCallum, 561 N.W.2d at 712.

\(^{157}\) Id.

\(^{158}\) Id.

\(^{159}\) Id.

\(^{160}\) Id.
quirement. Under the formulation recommended in this article, either the desire to receive a more favorable sentence or coercion by police also would constitute a feasible motive to testify falsely at trial. This modification could change the way courts treat recantations in situations like the Watkins case and the Ford Heights Four case, thus leveling the playing field for defendants attempting to win new trials based on recantation evidence.

The second element of Wisconsin’s corroboration requirement is circumstantial guarantees of trustworthiness. The Wisconsin courts have found that:

Assurances of trustworthiness can include the spontaneity of the statement, whether the statement is corroborated by other evidence in the case, the extent to which the statement is self-incriminatory and against the penal interest of the declarant, and the declarant’s availability to testify under oath and subject to cross-examination.

The determination of credibility is not limited to those factors, leaving the door open for considering other indicia of reliability not listed by the court. Thus, under the formulation recommended in this article, courts also should consider whether the type of evidence (such as incentivized testimony) has been proven to be untrustworthy in other contexts, whether the witness might be someone who could be subject to coercion, and whether the law enforcement personnel involved have coerced statements in the past. The DNA exonerations have proven that each of these factors could be present in a given case and may indicate the reliability of a recanting statement. If courts begin to objectively consider reliability both in the traditional context articulated by the Wisconsin courts and in the context of what we now know about the fallibility of the justice system, the decisions they

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161 See In re Carpitcher, 624 S.E.2d at 709 (“Although [the witness] had an alleged motive to commit perjury . . . the existence of a motive to lie does not establish, by clear and convincing evidence, that the witness did, in fact, perjure herself during the criminal trial.”).
162 See supra notes 88–96, 111–122 and accompanying text.
163 McCallum, 561 N.W.2d at 712.
164 State v. Kivioja, 592 N.W.2d 220, 232 (Wis. 1999) (citing State v. Brown, 291 N.W.2d 528 (Wis. 1980)).
165 Id. at 232–33. The court recommends considering allegations of duress or coercion at the same time as these other factors, viewing evidence of such problems as cutting against reliability. Id.
reach are likely to be fairer and to balance more appropriately the interests of defendants with interests of finality.

B. *Deferential Review of Summary Denials Should Be Abandoned*

The other reform that is necessary to ensure fair consideration of recantation testimony is that courts should adopt a less deferential standard of review for summary denials of new trial motions based on recantation testimony.\(^{166}\) In most cases, appellate courts reviewing denials of new trial motions use an “abuse of discretion” standard, which is extremely deferential and gives trial judges wide latitude to deny motions without the fear of reversal.\(^{167}\) As Medwed argues, this system “offers few incentives—and arguably provides a disincentive—for trial judges to do so much as hold an evidentiary hearing.”\(^{168}\) Thus, evidentiary hearings in new trial motions are rare, particularly in recantation cases.

At least one state has correctly observed that determining the veracity of a recantation is a difficult task without holding an evidentiary hearing.\(^{169}\) In *McLin v. State*, one of the defendant’s alleged co-conspirators, who had testified against McLin in a pretrial deposition, signed an affidavit stating that McLin did not participate in the crime and that another man did.\(^{170}\) The trial court summarily denied McLin’s motion alleging newly discovered evidence, finding, without holding an evidentiary hearing, that the affidavit probably was untruthful.\(^{171}\) The appellate court said that a trial court summarily denying a motion for post-conviction relief based on newly discovered evidence must prove that the claim is “facially invalid” or “conclusively refuted by the record.”\(^{172}\) Moreover, “where no evidentiary hearing is held below, [the appellate court] must accept the defendant’s factual allegations to the extent they are not refuted by the record.”\(^{173}\) This standard of review is

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\(^{166}\) See Medwed, *supra* note 16, at 714–15 (arguing “de novo review should apply to summary dismissals of state new trial motions and post-conviction petitions grounded on newly discovered evidence”). Because of its limited scope, this article does not address the propriety of this recommendation with respect to other types of evidence. Daniel Medwed provides a fuller discussion of this idea in the context of other new evidence cases. *See id.*

\(^{167}\) *Id.* at 708–09, 710.

\(^{168}\) *Id.* at 709.

\(^{169}\) *See* 827 So. 2d 948, 955 (Fla. 2002) (quoting Robinson v. State, 736 So. 2d 93, 93 (Fla. Dist. Ct. App. 1999)).

\(^{170}\) *Id.* at 951.

\(^{171}\) *Id.* at 952–53.

\(^{172}\) *Id.* at 954.

\(^{173}\) *Id.*
much less deferential than the standard of review in cases where the trial court holds an evidentiary hearing.\textsuperscript{174} The court also recognized that in recantation cases, evidentiary hearings are usually required to determine whether the defendant meets the standard for a new trial.\textsuperscript{175}

As Medwed observes, the rationale of the \textit{McLin} court is quite sensible.\textsuperscript{176} The justification for deferential review of trial court decisions is usually that trial courts—which have heard the evidence presented—have a superior grasp of the facts that cannot be matched by an appellate court making determinations based on a paper record.\textsuperscript{177} When a trial court does not have that advantage because it has not held an evidentiary hearing, the purpose of deferential review is less pronounced.\textsuperscript{178} Medwed’s suggestion and the solution adopted by the \textit{McLin} court strike an appropriate balance, ensuring fairness to defendants who have not had their claims heard while addressing concerns about judicial economy in cases where courts have held evidentiary hearings.\textsuperscript{179} Finally, non-deferential review also will force trial courts to justify their decisions more thoroughly in those cases where they summarily deny new evidence motions based on recantations.

Adopting a non-deferential standard of review in these cases will begin to mitigate the problem of tunnel vision in recantation cases. Apprehension about tunnel vision should be even greater in recantation cases where judges refuse to hold evidentiary hearings, since a court that refuses even to listen to new evidence of innocence may be falling victim to the cognitive biases that infect so many participants in the justice system. Non-deferential review by an appellate court will ensure that a new set of eyes, one that is somewhat more objective, will be critically examining the recantation to determine whether it seems credible enough to warrant an evidentiary hearing or a new trial.

\textsuperscript{174} \textit{McLin}, 827 So. 2d at 954 n.4 (noting that in cases where the trial court has held an evidentiary hearing, the appellate court does not substitute its judgment for the judgment of the trial court, “[a]s long as the trial court’s findings are supported by competent substantial evidence”) (quoting Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)).
\textsuperscript{175} See \textit{id.} at 955 (quoting \textit{Robinson}, 736 So. 2d at 93).
\textsuperscript{176} See Medwed, supra note 16, at 714.
\textsuperscript{177} \textit{Id.} at 713.
\textsuperscript{178} See \textit{id.} at 714–15.
\textsuperscript{179} See \textit{McLin}, 827 So. 2d at 955–57 (declining to apply a deferential standard of review where the trial court dismissed a newly discovered evidence claim without an evidentiary hearing); Medwed \textit{supra} note 16, at 715–16.
Conclusion

The sagas of Gary Dotson, the Ford Heights Four, Jerry Watkins, and Clarence Elkins are tragic stories of a criminal justice system that has made mistakes far more often than most people ever believed. In each of those cases, the defendants spent years in prison, even after recantation evidence seriously undermined the credibility of the government’s case against them. The unfortunate reality is that those defendants are among the lucky ones, because DNA evidence ultimately became available in their cases and conclusively proved their innocence.

In the vast majority of recantation cases, DNA evidence never will be available to conclusively prove the defendant’s innocence. Under the current system, the Gary Dotsons of the world will remain in prison, even after cases like Dotson’s have proven that the standards used by courts to judge recantations often fail to assess credibility accurately. It therefore is imperative that courts act to change this scheme. While the reluctance of courts to grant new trials based on recantations is understandable, the reasons for that reluctance need to be balanced with what we now know about the fallibility of the criminal justice system. Changing the standards is possible without overburdening courts, and such change is necessary to address the injustices suffered by innocent defendants who have no other way to prove their innocence.
BEYOND MONETARY COMPENSATION:  
THE NEED FOR COMPREHENSIVE  
SERVICES FOR THE WRONGFULLY  
CONVICTED

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Abstract: Twenty-two states, the District of Columbia, and the Federal  
Government currently have statutory mechanisms in place to provide  
compensation for wrongfully convicted individuals. Most of these statutes  
focus on the need for monetary compensation for individuals who have  
spent years in prison for crimes they did not commit. Only three of these  
statutes also provide meaningful post-release services. This is despite the  
fact that these programs are critical to address the unique reentry obsta-
cles that face wrongfully convicted individuals and to ensure successful re-
integration into society. This article examines the need for all states to  
provide meaningful post-release services to wrongfully convicted indi-
viduals. Focusing on the Massachusetts statute—the first compensation  
statute to include a meaningful services provision—the authors also assert  
that non-monetary “compensation” should include reentry services im-
mediately upon release that are at least comparable to those received by  
parolees, but yet are tailored to the distinct needs of wrongfully convicted  
individuals.

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pro bono basis by Goodwin Procter. NEIP provides pro bono legal services to inmates who  
are challenging their wrongful convictions, and is committed to supporting legal reform  
that will hasten the identification and release of innocent prisoners and ensure that  
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INTRODUCTION

Over the past several years, there has been a considerable increase in the number of individuals who have been exonerated of the crimes for which they were wrongfully convicted. This has included over 200 individuals since 1983 who have had their actual innocence demonstrated through DNA testing. Despite the fact that individual states have played at least a substantial contributing role in each of these wrongful convictions, currently fewer than half of the states in this country have any mechanism to provide compensation to these exonerates for the years they were wrongfully incarcerated. Other authors

1 Samuel R. Gross et al., Exonerations in the United States 1989 Through 2003, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005) ("The rate of exonerations has increased sharply over the fifteen-year period of this study, from an average of twelve a year from 1989 through 1994, to an average of forty-two a year since 2000.").

2 Innocence Project, News and Information: Fact Sheets, http://www.innocenceproject.org/Content/351.php# (last visited Jan. 28, 2008). To date, there have been 212 exonerations in the United States based on DNA testing. Id.

3 As used in this article, the term “wrongful conviction” refers to the conviction of individuals who have either pled guilty to, or have been tried and found guilty of, criminal charges, who are in fact innocent. As used herein, the term does not refer to individuals who have committed crimes, but were convicted under constitutionally defective procedures. The authors also refer to “wrongfully convicted” individuals who have been released and “exonerees” interchangeably, although readers should note that in practice there may be legal distinctions between these two terms.

have conducted comprehensive examinations of the obligation—if not legal, then at the very least moral—of every state to provide a statutory mechanism for the compensation of wrongfully convicted individuals.\(^5\) As early as 1914, legal scholars in this country argued that just as all members of our society share a common interest in “maintaining the public peace by the prosecution of crime . . . the loss should be borne by the community as a whole and not by the injured individual alone.”\(^6\) Scholars have also documented why state compensation statutes are necessary in light of the inadequacy of the other legal alternatives that are available for individuals who have been wrongfully convicted and later exonerated.\(^7\) The two other primary legal avenues—bringing a lawsuit either in tort or under civil rights statutes, or drafting a private bill and attempting to have it introduced into the state legislature—are much more challenging, time-consuming, and expensive, and more often than not are unsuccessful.\(^8\)

Even in the minority of states that do have compensation statutes, these mechanisms are excessively restrictive in identifying who will be compensated, and cap the amount of recovery at artificially low levels.\(^9\)

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\(^7\) See, e.g., Bernhard, *Justice Still Fails*, supra note 5, at 732–34 (documenting the legal hurdles a wrongfully convicted individual faced).

\(^8\) See id.

\(^9\) See, e.g., 705 Ill. Comp. Stat. 505/8(c) (2004). For instance, the Illinois compensation statute for unjust imprisonment requires that the imprisoned person receive a pardon from the Governor on the grounds of innocence, and the awards are capped at $15,000 for five years or less, $30,000 for imprisonment of five to fourteen years, and no more than $35,000 for more than fourteen years imprisonment. Id. Under the New Hampshire statute, if a majority of the Board of Claims finds that the claimant is “innocent of the crime for which he was convicted” and that “the payment to a claimant is justified,” the claimant
Moreover, these statutes generally have not addressed the need for post-release services for exonerees, who encounter a host of unique and complicated long-term, non-monetary problems as a result of their wrongful incarceration, but are generally simply set free after years of imprisonment without any systemic assistance.\(^{10}\)

In 2004, Massachusetts became the first state to create a compensation statute that provides a mechanism for post-incarceration services (through the state or otherwise) in addition to monetary compensation for wrongfully convicted individuals upon release.\(^{11}\) The Massachusetts statute not only provides for monetary compensation up to $500,000, but it also allows courts to grant, in their discretion, “state services that are reasonable and necessary to address any deficiencies in the individual’s physical and emotional condition” as a result of his or her erroneous “conviction and resulting incarceration.”\(^{12}\) Exonerees are also entitled to a fifty percent tuition reduction at any state community college or university.\(^{13}\)

This article will focus on the need for all states to provide meaningful services to wrongfully convicted individuals, both to compensate them for the non-monetary injuries they have suffered as a result of their incarceration, and to assist their successful reintegration into society. It will argue that monetary compensation is not enough, and will suggest why all states should embrace the spirit of the Massachusetts, Louisiana, and Vermont compensation statutes by also providing com-

\(^{10}\) See, e.g., 705 ILL. COMP. STAT. 505/8(c) (2004) (failing to provide exonerees with post-release services).

\(^{11}\) See MASS. GEN. LAWS ch. 258D, § 5(A) (2004). In 2005, Louisiana enacted a compensation statute that provides services such as job skills training for a year, medical and counseling services for three years, and state educational aid for five years. LA. REV. STAT. ANN. § 15:572.8 (2005). In addition, in 2007 Vermont passed a compensation statute that provides up to ten years of eligibility for the Vermont Health Access Plan using state-only funds, and compensation “for any reasonable reintegrative services and mental and physical health care costs incurred” between “the release from mistaken incarceration and the date of the award.” VT. STAT. ANN. tit. 13, § 5574 (2007). Like the Massachusetts statute, Louisiana and Vermont provide services to exonerees in addition to capped amounts of monetary compensation. See LA. REV. STAT. ANN. § 15:572.8 (2005); MASS. GEN. LAWS ch. 258D, § 5(A) (2004); VT. STAT. ANN. tit. 13, § 5574 (2007). In contrast, Montana provides post-release services, allowing for ten years of educational aid, but does not award any money to the exoneree. MONT. CODE ANN. § 53-1-214 (2003).

\(^{12}\) MASS. GEN. LAWS ch. 258D, § 5(A) (2004).

\(^{13}\) Id.
pensation in the form of services. In addition, it will explain why states have an obligation to provide reentry services for wrongfully convicted individuals immediately upon release. Like other prisoners, for whom the most critical time periods for the transition to life outside of prison are the “moment of release” and the time period immediately following release, an exoneree’s experience in the very first days, weeks, and months following release will strongly influence whether he or she is able to successfully reenter and reintegrate into society. Yet, ironically, these individuals generally are not even provided with the equivalent social services that are currently provided to individuals who were guilty of the crimes for which they were incarcerated. Because wrongfully convicted individuals generally are not “qualified” or appropriate for the post-release systems that are in place for parolees, exonerees likely will not receive any transitional services upon release at all. In addition, because of the time it takes to pursue their legal compensation claims, exonerees generally will not receive any monetary compensation until months or years after release. Given this, even if exonerees knew how to access necessary services upon release, they would lack the financial means to do so. Moreover, even if pre-release reentry planning assistance were available to exonerees (generally it is not), as a practical matter, exonerees generally have insufficient advance notice of their release to take advantage of these programs.

Part I of this article will address the reentry plight of wrongfully convicted individuals. As compared with the extensive analysis that has been conducted regarding the reentry issues of guilty prisoners upon release, the data that has been compiled regarding the effects of prison on the reintegration experiences of wrongfully convicted individuals is largely anecdotal. We know from these powerful accounts, however, that the impact of prison life on inmates who are in fact innocent of the crimes for which they have been convicted and imprisoned is, in at least some respects, even more detrimental. This article will provide examples of how the impact of prison in the most basic areas—psychological health, job opportunities, housing, and physical health—is further

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compounded by the lack of appropriate pre- and post-release services for exonerees, as compared with other prisoners.

Part II of this article will examine the particularities of the Massachusetts compensation statute and discuss experience to date with its provisions, most specifically, the services component. The Massachusetts statute’s services provision is a meaningful step towards providing wrongfully convicted individuals with the services and support that are necessary to give these individuals a true chance at successful reentry into society, and should set the bar for other state compensation statutes. In addition, however, states should recognize their responsibility to assist in a more comprehensive fashion with the reintegration of wrongfully convicted individuals, to provide reentry services immediately upon release, and to address reintegration issues in a manner that is specifically geared towards the distinctive obstacles that face wrongfully convicted individuals.

I. Reentry Plight of the Wrongfully Convicted

In addition to financial problems they face after being released from prison, wrongfully convicted individuals also encounter a host of unique and complicated non-monetary obstacles upon their release. To date, these issues have gone largely unaddressed by existing compensation mechanisms. This is despite the fact that the impact of prison life on inmates who are actually innocent is even more detrimental than for other prisoners. While incarcerated individuals who are guilty face well-documented obstacles to successful reentry, wrongfully convicted individuals endure even more onerous circumstances

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18 See King, supra note 6, at 1097 (noting that persons recently released from prison have trouble finding employment).

19 See Bernhard, Justice Still Fails, supra note 5, at 704–06.
upon release.\textsuperscript{20} This part provides an overview of some of the detrimental impacts of incarceration on an individual’s psychological health, job opportunities, housing, and physical health. It also identifies certain factors which suggest that the post-release experiences of exonerees in each of these areas are worse than that of other former prisoners.

In general, there are no state or federal systems in place to support the reentry of exonerees immediately upon release, and, ironically, most wrongfully convicted individuals are not even entitled to the social services that are provided to released convicts who were guilty.\textsuperscript{21} In any event, the state systems that are in place for probationers or parolees are entirely inappropriate for wrongfully convicted individuals. Traditional reentry programs are premised on the notion that the participants committed crimes for which they were properly convicted and served their time.\textsuperscript{22} In addition, these programs are focused on successful reintegration as a means of, among other things, curbing recidivism rates.\textsuperscript{23} For exonerees, on the other hand, post-release services should be provided both as a means of ensuring successful reintegration and as part of an effort to “make whole” exonerees who have been injured by errors in the administration of the criminal justice system that led to their wrongful conviction. While the categories of problems that face wrongfully convicted individuals upon release—such as mental health problems, lack of education and job training, lack of suitable housing, and physical health problems—may be the same as those that face other former prisoners, the nature of the issues faced by wrongfully convicted individuals upon release are distinct and must be addressed in a way that is sensitive to their specific needs.

Moreover, although most wrongfully convicted individuals would likely qualify for public assistance, including access to housing, food

\textsuperscript{20} “Reentry,” defined as “leaving prison and returning to society,” carries with it a host of obstacles, both physical and mental, societal and personal. \textit{Travis et al., supra} note 15, at 1.

\textsuperscript{21} \textit{See generally} Shawn Armbrust, \textit{When Money Isn’t Enough: The Case for Holistic Compensation of the Wrongfully Convicted}, 41 AM. CRIM. L. REV. 157, 175–76 (2004) (recounting the experience of David Shepard, an exoneree who served eleven years in prison for a rape he did not commit and who was turned away from four agencies that served ex-offenders because of his innocence).

\textsuperscript{22} \textit{See Travis et al., supra} note 15, at 14 (stating that parole boards have traditionally released prisoners who have rehabilitated themselves).

\textsuperscript{23} \textit{Id.} at 6–8.
stamps, and possibly job and vocational training, immediately upon release, most exonerees are unaware of these programs or their entitlement to such services, do not have the skills necessary to navigate these systems on their own, and may be too embarrassed to ask for help. While properly convicted individuals generally receive state-provided assistance in accessing appropriate public services and setting up reentry plans prior to their release, most wrongfully convicted individuals are simply, and often suddenly, set free.24

A. Psychological Impact of Incarceration

What has he suffered? . . . He is psychologically scarred for life. He will always suffer from the core symptoms of post-traumatic stress disorder. As well, he will always suffer from paranoia, depression and the obsessive desire to clear his name. His reputation as a murderer has affected him in every aspect of his life, from work to family relations. . . . His reputation as a murderer will follow him wherever he goes.25

1. Prison Experience

Studies of the prison environment and its effects on those living within it demonstrate that, although each individual will react differently to incarceration, incarcerated persons generally suffer long-term consequences from having been subjected to pain, deprivation, and extremely atypical patterns and norms of living and interacting with others.26 “Institutionalization” (also referred to as “prisonization”) is the process that occurs throughout the adjustment to life in prison, and is often used as shorthand for the negative psychological effects of imprisonment.27 Through this process, prisoners develop a dependence

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24 See Interview with Lawyer Johnson, in Boston, Mass. (June 29, 2007) (on file with authors). Lawyer Johnson was initially sentenced to death and spent ten years in prison for a murder he did not commit in Massachusetts, before he was released in 1982. Id. He analogizes the release process to the experience of a freed slave. Id. “It is like setting a slave free without the means to be free: a mule, food, shelter or the means to build shelter, no means to remain free and survive.” Id.


27 Id. at 80.
on institutional structures as a result of the very strict rules and limitations imposed in a prison environment. The consequences of this process are often difficult to reverse after release from prison, particularly for those who have been incarcerated for long periods of time or since a young age.

Prisons also have an informal inmate code to which prisoners must conform. This culture typically discourages meaningful emotional expressions and any signs of vulnerability or weakness. This “code” may promote a culture of hypermasculinity in male prisons “in which force and domination are glorified as essential components of personal identity.” As a result, prisoners often develop “hypervigilance,” becoming distrustful of fellow inmates and causing some individuals to develop aggressive strategies to avoid victimization. Due to the constant threat, actual and perceived, from other inmates and prison guards, prisoners also develop emotional control strategies.

The prisonization process may cause some prisoners to withdraw socially, exhibiting behavior closely resembling that of people suffering from clinical depression. Developing a flat affect and withdrawn behavior may help prisoners cope with prison life. Prisoners describe a diminished sense of self-worth after living in a prison environment. The deprivation of privacy rights, feelings of infantilization, and degradation may cause prisoners to internalize the stigma and “compromised social status” resulting from incarceration.

Finally, the experience of incarceration may manifest as a form of post-traumatic stress in some prisoners. According to the Diagnostic and Statistical Manual of Mental Disorders, symptoms of post-traumatic
stress may include difficulty sleeping due to recurrent nightmares, hypervigilance, irritability or anger, and difficulty concentrating.40

For exonerees, the psychological impact of imprisonment is further compounded by the fact of having been incarcerated for crimes that they did not commit.41 In 1984, Dennis Maher, who was then a sergeant in the U.S. Army, was wrongfully convicted of two rapes (one in Lowell, Massachusetts, and one in Ayer, Massachusetts) and one assault with intent to rape (in Lowell), based on mistaken victim identifications, and sentenced to life in prison.42 Maher was exonerated in 2003 through DNA testing, after spending nineteen years in prison.43 Maher recounts countless nights in which he has been tormented by nightmares of prison.44 Beyond the memories of prison, Maher has the added fear of being wrongfully convicted again.45

Maher also identifies institutionalization as one of the most serious psychological effects of prison he experienced and observed during his wrongful incarceration.46 According to Maher, inmates—even those who are innocent of the crimes for which they were convicted—who enter prison young or without a well-formed identity are most susceptible to the effects of institutionalization.47 Maher credits the regimented life he led before conviction as an army sergeant, his strong familial relationships, and the job he held in the staff grill at the Treatment Center of the Old Colony Correctional Center in Bridgewater, Massachusetts, where he was incarcerated, with minimizing some of the effects of institutionalization.48 Because of his job as a cook and the hours it required, Maher was not “locked into every count” and, thus maintained a schedule and responsibilities similar to those of people on the outside.49

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40 Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders, 309.81 (4th ed. 1994).
41 See Interview with Dennis Maher, in Boston, Mass. (June 26, 2007) (on file with authors).
42 Id.
43 Id.
44 Id.
45 Id.
46 Interview with Dennis Maher, supra note 41.
47 Id.
48 Id.
49 Id.
2. Upon Release

Release from prison is not always a joyous occasion, as it is often accompanied by feelings of anxiety about such things as family, employment, and finances.\(^{50}\) Studies of prisoner reentry have concluded that the “moment of release,” and the hours and days immediately following release, are critical to the transition to life outside of prison.\(^{51}\) It has been suggested that policy reforms addressing the anxieties attendant to release from prison for properly convicted individuals could “reduce the risk of recidivism . . . and improve the odds of successful reintegration after release.”\(^{52}\) Adjusting to life outside of prison is made even more difficult when former prisoners are stigmatized and ostracized by their communities.\(^{53}\)

The abruptness with which exonerees are released only compounds the trauma that comes along with the drastic change of reentering society.\(^{54}\) While parolees and inmates who have served out their sentences expect release and are provided with reentry services in advance to prepare for it, exonerees are often released suddenly upon a judicial decision in their favor.\(^{55}\) According to exoneree Lawyer Johnson, who was wrongfully convicted of murder, after fighting for years to prove his innocence and secure his release, living outside of prison was at times so difficult that he would commit minor offenses, like shoplifting, in order to spend the night in prison when he was feeling particularly overwhelmed with life on the outside.\(^{56}\)

During his years in prison, Johnson had developed a strategy of isolation as a coping mechanism—what Johnson calls his “wall.”\(^{57}\) Learning to depend on himself alone was a way to survive and to shield himself from the violence of prison and anger of being wrongfully convicted.\(^{58}\) Release was akin to being thrown from one extreme to another—from a strictly enforced structure and complete lack of freedom

\(^{50}\) Travis et al., supra note 15, at 18.
\(^{51}\) Id.
\(^{52}\) Id. at 19.
\(^{54}\) See Interview with Lawyer Johnson, supra note 24.
\(^{55}\) See id.
\(^{56}\) Id.
\(^{57}\) Id.
\(^{58}\) Id.
and privacy in prison, to no structure, total freedom, and true isolation on the outside.\textsuperscript{59} When released, Johnson “took the wall” with him—this wall of distrust and of fear that the horror of wrongful conviction could happen again.\textsuperscript{60}

Once out of prison, without the proper support, Johnson remembered prison as an environment in which he knew how to function, a place to “reboot”—despite the horrors that came along with it.\textsuperscript{61} Tragically, Johnson had developed a serious drug habit while in prison, a habit that he did not have before his wrongful conviction.\textsuperscript{62} Thus, petty crime after his release both helped to support his drug addiction and provided him with the occasional reprieve from the unstructured world he had grown to distrust and fear.\textsuperscript{63}

Johnson is not alone in his post-exoneration experience. For example, Neil Miller was convicted in 1990 in Boston, Massachusetts for aggravated rape, based almost entirely on the eyewitness testimony of the victim.\textsuperscript{64} He was exonerated in 2000 through DNA testing.\textsuperscript{65} Miller tells a similar story, not only about the pressure and shock of release, but of the anger attendant to having served nine-and-a-half years for a crime he did not commit:

There are days that I am so angry and get so nervous being on the train around a bunch of people that I wish I could go upstairs to my cell, close my door, and lock in. That is what I used to do whenever things got too hectic and did not make me feel right. I was so used to being able to close the cell door.\textsuperscript{66}

**B. Employment**

Prisoners, as a group, have lower levels of education and literacy than the rest of the population. For instance, according to a 2003 Bureau of Justice Statistics report, only thirteen percent of the prison and jail population had any post-secondary education, as compared to forty-

\textsuperscript{59} Interview with Lawyer Johnson, supra note 24.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Neil Miller, Reflections of the Wrongly Convicted, 35 New Eng. L. Rev. 615, 619 (2001).
\textsuperscript{65} Id. at 615.
\textsuperscript{66} Id. at 620.
eight percent of the general population.\textsuperscript{67} Such educational deficiencies, particularly when combined with minimal or no prior or recent work experience that results from long periods of incarceration, make attaining meaningful employment particularly difficult for prisoners upon release.\textsuperscript{68} Compounding these factors is the fact that employers are hesitant to hire employees with criminal records.\textsuperscript{69}

Many states offer work-release programs to help prepare prisoners for the transition to work upon release.\textsuperscript{70} In Massachusetts, for instance, inmates become eligible for a work-release program up to eighteen

\begin{itemize}
  \item \textsuperscript{67} Caroline Wolf Harlow, Bureau of Justice Statistics, Education and Correctional Populations \textsuperscript{1} (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf.
  \item \textsuperscript{68} Harry J. Holzer et al., Employment Barriers Facing Ex-Offenders \textsuperscript{7} (2003), available at http://www.urban.org/UploadedPDF/410855_holzer.pdf.
  \item \textsuperscript{69} \textit{Id.} at 8.
  \item \textsuperscript{70} States vary in their commitment to transition, and due to the large number of prisoners being released each year, some states have begun to experiment with different programs to assist in the release process. In fact, during the 2004 State of the Union address, President George W. Bush recommended committing $300 million over four years for funding of programs focusing on reentry issues—an initiative that received bipartisan support and seems to have inspired action by state legislatures, as well. See Michael Pinard, \textit{An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals}, \textit{86 B.U. L. Rev.} \textit{623}, 649 (2006) (citing President George W. Bush, \textit{State of the Union Address} (Jan. 20, 2004), available at http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html).
  
  The pre-release center in Montgomery County, Maryland, organizes meetings between inmates and parole and probation officers during incarceration so that plans can be developed before the critical moments of release. Marta Nelson & Jennifer Trone, \textit{Why Planning for Release Matters} \textsuperscript{2} (2000), available at http://vera.org/publication_pdf/_for_release.pdf. The center offers many other services, including family counseling, to prepare inmates for release. \textit{Id.} A secure transitional facility was created in 1996 by the Maryland Department of Correction to which some prisoners may move eighteen months before release. \textit{Id.} The facility provides vocational training, domestic relations classes, sessions with victims to discuss the impact of crime, job readiness training, and psychological counseling. \textit{Id.}

  Similarly, Texas developed a state program called the Serious and Violent Offender Reentry Initiative Program “designed to reduce recidivism by better preparing and assisting offenders . . . to successfully reenter their communities.” Tex. Dep’t of Criminal Justice, Serious and Violent Offender Reentry Initiative Program, http://www.tdcj.state.tx.us/pgm&svcs/pgms&svcs-serious-offender-pgm.htm (last visited Jan. 2, 2008). The program consists of two phases: phase I involves in-cell training with programming provided on a computer six to seven months before release covering anger management, substance abuse, employment, and more; phase II starts upon release into supervision and continues the care. \textit{Id.} In order to be eligible, inmates must have, among other things, a minimum of ten months before release. \textit{Id.}
months before scheduled release.71 The inmate will work full-time during this period.72 After certain deductions, the earned income is placed into the inmate’s account and turned over to him or her upon release.73 In addition to state services, there are non-profit organizations in Massachusetts that have contracts with state government agencies to provide work preparation assistance to ex-offenders.74 For example, Span, Inc., in conjunction with the Massachusetts Department of Correction, Parole Board, and the Board of Probation, offers work readiness classes and reintegration counseling to former inmates.75

Exonerees, however, may not have the benefit of preparation for release while in prison, and so are unlikely to have the opportunity to participate in work-release or other programs geared towards reentry. For them, the process is often unpredictable and the release experience abrupt. As a result, the wrongfully convicted are generally left without even the benefits provided by the states to the properly convicted who have served out their sentences. Even after exoneration and release, most exonerees’ criminal records are not automatically expunged and, thus, continue to reflect the wrongful conviction and remain visible to potential employers.76 Ironically, then, exonerees do not receive the work preparation assistance provided to ex-offenders or the advantage of having a clean criminal record. Even where a state compensation statute does provide for the expungement or sealing of records, there will still be a significant gap in the exoneree’s employment history that will require explanation.77

Dennis Maher expresses frustration at the lack of support for exonerees at the critical moment of release.78 When first exonerated,

72 Id.
73 Id.
74 See id. (listing several non-profit agencies that prepare ex-offenders to work).
77 See, e.g., MASS. GEN. LAWS ch. 258D § 5(A) (2004) (providing, after a separate hearing, that persons exonerated in Massachusetts may have records of their erroneous conviction expunged or sealed).
78 Interview with Dennis Maher, supra note 41.
Maher recalls, he did not receive many of the services provided to parolees. However, Maher had one advantage that many exonerees do not—he had received vocational training during high school and then worked as a mechanic in the military. Upon release, he was able to get a job as a mechanic with a reputable company that took him in, understood his story, and has since embraced his cause. Unfortunately, this story is rare among exonerees, many of whom leave prison with little or seriously interrupted work history and without marketable job skills.

C. Housing

Like finding employment, finding housing frequently presents challenges for the recently released. For recently released prisoners who have the option to live with relatives, the effort to find housing can be delayed. However, returning to a family home, in the same neighborhood with the same connections that one had before entering prison, may not be the optimal situation for a successful reentry. Generally, prisoners without post-release housing plans receive assistance from the State as a component of their reentry planning program. For instance, in Massachusetts, inmates without plans for post-release housing are referred to housing specialists at the Reentry Services Division of the Massachusetts Department of Correction six months before scheduled release. Specialists will conduct initial assessments and then develop housing plans for the inmates, considering housing preferences and potential barriers to housing, as well as the community-based services that may be needed by the individuals. Former inmates move into their housing immediately upon release and are guided by housing specialists for up to six-months during the stabilization period. During this time, specialists will conduct home visits and mediate the landlord-tenant relationships when necessary.

79 Id.
80 Id.
81 Id.
83 Id.
84 Id.
85 Id.
Securing long-term housing is often even more challenging for exonerees. Without advance notice of upcoming release, exonerees generally do not receive the benefits of services like the ones provided by the Reentry Services Division of the Massachusetts Department of Correction. Moreover, because their criminal records are not automatically expunged upon exoneration, they will most likely be unable to secure affordable housing on their own. Immediately upon release, exonerees who do not have family or friends to stay with are forced to seek housing at a homeless shelter.

D. Physical Health

1. Prison Effects

Serious, life-threatening diseases are significantly more prevalent among the prison population than among the general population in the United States. According to the Department of Justice, as of the end of 2004, the rate of confirmed AIDS diagnoses in prison (both federal and state) was more than three times that of the general population. The statistics are similar for tuberculosis (TB) and hepatitis C. Approximately two percent of the American population is infected with hepatitis C, a viral disease that attacks the liver and is spread through infected blood. In stark contrast to that statistic, it is estimated that approximately thirty percent of the residents of correctional institutions are infected with the disease. Though only 0.7% of the United States population was incarcerated in prisons and jails in 2003, 3.2% of

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86 See id. (summarizing the services the Executive Office of Public Safety provides to incarcerated individuals who are able to anticipate and plan for their release).
87 See Caterina Gouvis Roman & Jeremy Travis, Where Will I Sleep Tomorrow? Housing, Homelessness and the Returning Prisoner, 17 Housing Pol’y Debate 389, 397 (2006). Released prisoners may not be eligible for subsidized housing because of laws prohibiting persons convicted of certain crimes from receiving subsidized housing. Id.
89 Id.
the nation’s TB cases occurred in prisoners. The close living quarters and overcrowding of correctional facilities contribute to the risk of transmission of TB.

2. Upon Release

Prisoners generally receive assistance from the State in determining whether they are eligible for public medical assistance upon release and in applying for these benefits, as part of a comprehensive reentry plan. For instance, in Massachusetts, inmates are provided with assistance applying for health insurance within sixty days of their scheduled release through the Department of Correction’s MassHealth Initiative. “The goal of the Department of Correction is to have everyone who is eligible to have a MassHealth card in their hand upon release.” A correctional program officer will work with an inmate to fill out a MassHealth application and, after it is screened for accuracy, will ensure that it is sent to the MassHealth Central Processing Unit. The Reentry Services Division tracks and monitors the application from start to finish.

Despite the fact that many exonerees are released with significant medical issues as a result of having been incarcerated, and without any means of obtaining health care, these reentry services are not routinely provided to exonerees. Instead, it is incumbent upon each exoneree to navigate the system and determine how to apply for and receive public assistance benefits on his or her own. Without this assistance, exonerees

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93 Id.
97 Id.
without significant support from friends, relatives, or attorneys are unlikely to access the medical care needed upon release from prison.

II. STATUTORY COMPENSATION IN MASSACHUSETTS

A. Overview

To date, most of the compensation mechanisms for wrongfully convicted individuals, as well as the debates regarding justification for compensating exonerees, have focused on their entitlement to financial compensation. Existing state compensation statutes vary widely with respect to their mechanisms for recovery, the amount of compensation they provide, and the legal standard that must be applied to determine whether an individual is entitled to recovery, as well as who has authority over the claims.\textsuperscript{98} For the most part, state compensation statutes provide for either an administrative or judicial remedy. Massachusetts was the first state with a statutory mechanism entitling exonerees to meaningful services as a component of their compensation award, \textit{in addition to} the statutorily mandated maximum monetary compensation.\textsuperscript{99}

According to local practitioners who have represented several of the individuals who have received awards under the Massachusetts statute, the most significant shortcoming relates to the practical implications of contemplating post-release services as part of a judicial judgment.\textsuperscript{100} While the need for reentry services for exonerees—like the

\textsuperscript{98} For instance, the New Hampshire statute caps an exoneree’s potential recovery at $20,000, \textit{see} N.H. REV. STAT. ANN. § 541-B:14 (2003), the Tennessee statute authorizes an award up to $1,000,000, \textit{see} TENN. CODE. ANN. § 9-8-307 (2004), while the New York statute does not put a dollar limit on damages, stating only that if the claimant is successful the court will award an amount of damages it “determines will fairly and reasonably compensate” the claimant. N.Y. CT. CL. ACT § 8-b (McKinney 2007).

\textsuperscript{99} \textit{See} MASS. GEN. LAWS ch. 258D, § 5(A) (2004).

\textsuperscript{100} Interview with Robert Feldman, Partner, Birnbaum & Godkin, LLP, Boston, Mass. (June 27, 2007) (on file with authors); Interview with Howard Friedman, Attorney, The Offices of Howard Friedman, P.C., in Boston, Mass. (June 8, 2007) (on file with authors). As of August, 2007, nine exonerees had received awards under the Massachusetts compensation statute: Stephen Cowsans, Donnell Johnson, Lawyer Johnson, Dennis Maher, Neil Miller, Marvin Mitchell, Marlon Pasley, Eric Sarsfield, and Eduardo Velazquez. E-mail from Peter Sacks, Massachusetts Deputy Chief Attorney General, to Anna Froneberger, NEIP Paralegal (Aug. 10, 2007, 11:57:00 EST); E-mail from Peter Sacks, Massachusetts Deputy Chief Attorney General, to Anna Froneberger, NEIP Paralegal & Jennifer Chunias, Partner, Goodwin Proctor LLP (Aug. 10, 2007, 15:04:00 EST). At least twenty-two claims have been filed since the statute was enacted, and many are still pending. \textit{Id.} Of the nine exonerees who have received awards to date, approximately three have received services
need for reentry services for other prisoners—is immediate, it may take many months or years to file and adjudicate a claimant’s entitlement to compensation. Other cited problems include the fact that any services awarded under the statute are to be provided exclusively by the State, and are limited to services that are currently provided by the State. As a result, the unique psychological and other needs of exonerees are likely to be unmet.

B. The Massachusetts Compensation Statute

Pursuant to chapter 258D of the Massachusetts General Laws, a claimant may bring an action against the Commonwealth for an “erroneous” felony conviction, provided that the claimant has (1) received a full written pardon on the basis of innocence, or (2) been granted certain specified judicial relief (set forth below), and provided that, at the time of filing the compensation action, no criminal proceeding is pending or can be brought against the individual for any act associated with the felony conviction. The specified judicial relief that would qualify a claimant to seek relief is either (a) the judgment of the conviction is vacated, reversed, and the indictment or complaint was dismissed, or (b) at a new trial the claimant was found not guilty or not retried or the case against the claimant was abandoned (nolle prosequi) with the accusatory instrument dismissed. If the claimant meets these requirements, he is entitled to bring an action against the State in the superior courts.

At trial, the claimant has the burden of proving by “clear and convincing evidence” that he qualifies as an erroneously convicted person as set forth above. The claimant is required to attach certified copies of the mittimus that shows his or her sentence to incarceration, and the pardon or certified copies of the records from the judicial action relating to his release.

pursuant to the statute. *Id.* Some of the other six exonerees who have not yet followed up their initial request for services, but whose cases are still open, may also ultimately receive services through their statutory compensation award. *Id.*

102 *Id.*
103 *Id.; see also* § 3 (requiring claimants to bring their claims in the county where they were convicted or in Suffolk County).
104 § 1(C) (i).
105 § 1(B).
Also, the claimant must not have pled guilty to the felony for which he was convicted, must not have been serving any concurrent time for another crime, and must prove that he did not commit the felony charged (or any other felony arising out of or reasonably connected) or any lesser included offenses. The claimant has the right to prove all these facts at a jury trial with relaxed standards of evidence relating to issues such as any difference of proof caused by passage of time, death, or unavailability of witnesses. Should the Governor revoke the pardon, the case is immediately dismissed. Service of process must be made on the Attorney General’s office; the Attorney General then decides whether to oppose the claim. The Attorney General is also granted authority to arbitrate or settle the claim, but any settlement greater than $80,000 needs approval by the Secretary of Administration and Finance. However, settlement precludes other claims against the Commonwealth.

If the claimant wins a verdict by meeting the burden of proof for the various elements, the claimant is entitled to compensation. The court or jury can consider any factors “deemed appropriate under the circumstances in order to fairly and reasonably compensate the claimant,” including but not limited to the income he would have earned, the particular circumstances of his trial and other proceedings and the length and conditions under which he was incarcerated, with a limit of $500,000 and no punitive damages.

In addition to monetary damages, the court may also require the Commonwealth to provide services to the claimant that are “reasonable and necessary to address any deficiencies in the individual’s physical and emotional condition that are shown to be directly related to the individual erroneous felony conviction.” To receive these services,
the claimant must specifically plead the nature of the services required and the agencies in the Commonwealth that will provide them in the original complaint and prove the need for them at trial.^{117} An exoneree’s psychological or physiological issues relating to the individual’s experience while in prison (generally set forth in a separate affidavit that counsel may then seek to have impounded) may be considered in relation to damages and to necessary services.^{118}

The court may also include a fifty percent tuition reduction at any state community college or university in the Commonwealth in the judgment.^{119} It is unclear whether the court can order the individual admitted to an educational institution, or whether the statute is intended to provide only for tuition assistance once the individual has been admitted.^{120} The Massachusetts statute also provides, after a separate hearing on the matter, for the expungement or sealing of records directly pertaining to the erroneous conviction.^{121}

C. Experiences With the Massachusetts Statute

Through the inclusion of a services component in its compensation statute, Massachusetts has implicitly recognized that the “loss [that] . . . should be borne by the community as a whole and not by the injured individual alone” is not limited solely to monetary damages.^{122} Rather, it is the obligation of the states to attempt to make exonerees “whole” by also providing access to meaningful services to address the negative impacts of wrongful imprisonment on every aspect of their lives. In this regard, the Massachusetts statute should serve as a model for other states.^{123}

^{117} Id.
^{118} See id. (giving the court or jury broad discretion to consider any factors they deem relevant in awarding damages and services).
^{120} See id.
^{121} Id. As previously noted, the wrongfully convicted still face the problem of having to explain significant gaps of time in their employment and life histories. Exonerees who have already been compensated under the state compensation statute also report that their records will not be expunged as long as they have a federal civil rights case relating to their wrongful conviction pending. Interview with Lawyer Johnson, supra note 24; Interview with Dennis Maher, supra note 41. It is often the case that exonerees will pursue recovery in both forums.
^{122} See § 5(A); Borchard, supra note 6, at 110.
^{123} See § 5(A).
That being said, according to local attorneys who have represented several of the individuals who have received awards under the Massachusetts statute, there are still some shortcomings relating to the services component that need to be addressed. The most significant inadequacy relates to the practical implications of addressing the need for post-release services solely as a component of a judicial judgment or award.\textsuperscript{124} Attorney Howard Friedman, a civil rights attorney who has represented several of the exonerees who have received compensation under the Massachusetts statute, suggests that it is critical that exonerees also receive assistance from the State immediately upon release.\textsuperscript{125}

As with other prisoners, it is this initial reentry period that is most likely to determine whether an individual is going to be able to successfully reintegrate into society.\textsuperscript{126} But practically speaking, it may take months or years for an exoneree’s statutory compensation claim (including a claim for services to address specifically pleaded physical or emotional deficiencies) to make its way through the legal system to resolution.\textsuperscript{127} In the meantime, exonerees generally do not receive the benefit of state-sponsored reentry services that, for parolees, may begin before release and continue after reentry into society.\textsuperscript{128} Exoneree services should include job and vocational training, mental health counseling, substance abuse programs, and assistance in obtaining housing and food stamps.\textsuperscript{129}

\textsuperscript{124} Interview with Howard Friedman, \textit{supra} note 100.

\textsuperscript{125} \textit{Id.} Mr. Friedman, of the Offices of Howard Friedman, P.C. in Boston, Massachusetts, has been a civil rights attorney for over thirty years, focusing much of his practice on police misconduct cases. \textit{Id.} He has represented several of the exonerees who have received awards under the Massachusetts statute in connection with their state compensation cases, and also represents exonerees in connection with federal civil rights lawsuits relating to their wrongful convictions. \textit{Id.}

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} The Massachusetts Department of Correction, in collaboration with the Massachusetts Parole Board, has established a Regional Reentry Initiative. “The goal is to provide links to the community especially in the areas of housing, mental health counseling, substance abuse counseling, and employment.” Mass. Executive Office of Pub. Safety, Regional Reentry Center Initiative, http://www.mass.gov/?pageID=eopshomepage&L=1&L0=Home&sid=Eeops (follow “Prisons” hyperlink under “Law Enforcement & Criminal Justice”; then follow “Reentry & Reintegration” hyperlink; then follow “Regional Reentry Centers” hyperlink; then follow “Regional Reentry Center Initiative” hyperlink) (last visited Jan. 2, 2008).

\textsuperscript{129} Although not technically a “service,” reentry assistance for exonerees should also include a monetary stipend adequate enough to tide them over for the first few months after their release.
Unfortunately, simply making the reentry services that are already in place for parolees available for exonerees is not a viable solution. Prisoner reentry programs are largely inappropriate for individuals who are actually innocent of the crimes for which they were imprisoned, because the programs are generally premised on the notion that participants were guilty of the crimes for which they were imprisoned. These programs are also often reminiscent of prison in their structured rules and strict curfews, which are presumably intended to increase the likelihood that parolees will not recidivate. Programs that are reminiscent of a prison environment are not appropriate for exonerees who were not properly incarcerated in the first place. Rather than being thrown back into an environment akin to prison, exonerees need a support system to assist them in developing the skills and trust necessary to lead fulfilled lives.

In addition, although exonerees experience many of the same symptoms of “institutionalization” and other detrimental impacts of prison as other inmates, many of an exoneree’s needs and issues are completely distinct. Hence, so as not to inflict further injury upon the wrongfully convicted by forcing them into programs that are inappropriate and only serve to remind them of the strictures of prison life, reentry services for exonerees must be sensitive to the particular reintegration issues and obstacles that face this population.

A related problem is the fact that the Massachusetts statute requires that any services that are “awarded” to a claimant must be provided by the State.\(^\text{130}\) Likewise, the Commonwealth’s obligation to provide services to exonerees is limited to services that are already currently available, regardless of whether that leaves an exoneree’s particular needs unmet.\(^\text{131}\)

Attorney Friedman also suggests that many of the services that will ultimately be “awarded” to exonerees through the compensation statute may be services that they are already entitled to through state public assistance programs unrelated to incarceration.\(^\text{132}\) But without satisfactory reentry services from the State, most exonerees do not know how to access this assistance upon release.\(^\text{133}\)

\(^{131}\) See id.
\(^{132}\) Interview with Howard Friedman, supra note 100.
\(^{133}\) Id. For instance, although Dennis Maher and Lawyer Johnson were without income, health insurance, or housing of their own upon release, neither of them had any idea what
Attorney Friedman and Attorney Robert Feldman, another local attorney who has represented several of the individuals who have received or are seeking compensation under the Massachusetts statute, agree that currently there are not appropriate structures in place to facilitate the provision of appropriate reentry services.\textsuperscript{134} One solution would be for the Commonwealth to designate an exoneree case worker who would work directly with each exoneree from the moment of release, conduct a detailed intake interview, and locate appropriate services for each exoneree. This person could be someone who is employed by the Massachusetts Department of Public Health or some other agency, and should be someone who is familiar with and could navigate the available systems and deal with exonerees’ needs on a case-by-case basis.

\textbf{Conclusion}

Wrongfully convicted individuals can never fully recover for the years they spent behind bars for crimes they did not commit. They should, nonetheless, be provided with reasonable monetary \textit{and} non-monetary compensation by the State that was responsible for the administration of the criminal justice system that wrongfully imprisoned them. Non-monetary “compensation” should include reentry planning services immediately prior to and upon release that are at least comparable to those received by other prisoners upon release, but yet are sensitive and tailored to the distinct needs of exonerees. States should also provide wrongfully convicted individuals with long-term physiological, psychological, and other services necessary to address the detrimental impacts of imprisonment. These services are required to address the unique obstacles that wrongfully convicted individuals face upon reentry to life outside of prison, and to give them the tools they need to enable them to successfully reintegrate into society.

\textsuperscript{134} Interview with Robert Feldman, \textit{supra} note 100; Interview with Howard Friedman, \textit{supra} note 100. Attorney Robert Feldman is a partner at Birnbaum & Godkin, LLP in Boston, Massachusetts. He has represented several of the exonerees who have received awards under the Massachusetts statute in connection with their state compensation cases, and also represents exonerees in connection with federal civil rights lawsuits relating to their wrongful convictions.
SHEDDING THE BURDEN OF SISYPHUS: INTERNATIONAL LAW AND WRONGFUL CONVICTION IN THE UNITED STATES

ROBERT SCHEHR*

Abstract: Efforts to address the scourge of wrongful conviction in the United States would benefit from a theoretical framework for applying international law. Mythology has long been acknowledged as perhaps the most effective way to propagate values within a culture and to the external world. A new sort of mythology—one that can seamlessly accommodate local cultural variations—should be mobilized to enforce transcultural values and norms. This conception of mythology calls for the primacy of justice, the abrogation of sovereignty to the extent it precludes justice, and cultural variation within the parameters of human rights. Although the United States was founded on the law of nations and the U.S. Supreme Court has long extended comity to international law, in recent years American jurisprudence—particularly in the Supreme Court—has assumed an isolationist approach. This regrettable development is largely responsible for the systemic failures in the criminal justice system that have allowed wrongful conviction to become the pervasive problem that it is today.

Brotherhood and otherhood must always exist side by side.¹

INTRODUCTION

Sisyphus is notable in Greek mythology for being compelled to live out eternity unceasingly pushing a boulder the size of a Volkswagen Beetle up a hill, only to have the boulder roll back down again and again. The figure of Sisyphus is a suitable metaphor to describe innocence activists confronting the significant structural changes necessary to avoid and remedy wrongful convictions. The entrenched procedural and cultural obstacles to change in the subcultures of law enforcement officers, state police forensics labs, prosecutors, defense attorneys, and

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¹ Jeffrey C. Alexander, The Civil Sphere 22 (2006).

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the judiciary pose a challenge tantamount to a Sisyphean struggle. Is it possible that our Sisyphus, painstakingly making some progress (as with the Justice For All Act, and some state legislation)—often only to see it roll back over time—will someday be able realize affirmative change in wrongful convictions? In my view, so long as courts in the United States continue to rely solely on domestic case law and retributive statutes designed to strip the accused of the due process protections, innocence activists will continue to toil with Sisyphus along the same worn path, bearing the same insurmountable weight.

I begin with the premise that, in order for the United States to make the criminal procedure changes necessary to avoid wrongful convictions, innocence activists must adopt a counter-hegemonic narrative based on insights emerging in international law, in particular human rights law and the criminal procedures of transnational bodies. Doing so will require legal practitioners and the judiciary to forego U.S. exceptionalism (and its concomitant claims of threats to sovereignty) and demonstrate a willingness to learn from and, where appropriate, adopt insights culled from transnational jurisprudence and policies. Such a commitment would signify maturation of our legislative and judicial processes. However, when it comes to consideration of international law and human rights, contemporary U.S. courts continue to be shaped by both a deep-seated political, economic, and cultural commitment to exceptionalism and the United States’ contemporary status as the world’s dominant superpower. In addition to the United States’ stubborn aversion to the adoption of key international human rights agreements, some of its Supreme Court justices have shown overt hostility toward consideration of foreign innovations that would advance domestic human rights.

Part I makes the case that international law should be viewed as a global mythology necessary to organize an increasingly interconnected world. Part II advocates the efficacy of international law within the context of transnational civil society. Part III presents a final theoretical

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3 “U.S. exceptionalism” refers to the belief that the United States is, in some measure, beyond reproach on account of its national origins and unique political institutions. See David P. Forsythe, The United States and International Criminal Justice, 24 HUM. RTS. Q. 974, 975 (2002); Johan D. van der Vyver, American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness, 50 EMORY L.J. 775, 777 (2001).


5 See Forsythe, supra note 3, at 980.
consideration necessary to domestic adoption of international human rights criteria (and other transnational criminal procedure innovations) by introducing the concept of cosmopolitan democracy. The concluding Parts argue that, by adopting the most salient features of international criminal law, the United States will realize the Kantian notion of the Federalism of Free Nations and will come to recognize the common transnational thread that connects all people everywhere: the right to liberty and justice. It is here that the subject of wrongful conviction comes into the scope of our discussion, albeit only in a rudimentary way.6

To approach contemporary jurisprudential concerns in the United States from a transnational perspective is not unique. Indeed, for centuries legal scholars have contended that U.S. jurisprudence has much to learn from transnational innovations.7 My approach is unique, however, in that it suggests that transnational comity is inevitable due to its role as a new global mythology, located within the sociological understanding of civil society and couched in terms of cosmopolitan democracy. The goal is to establish a theoretical framework for applying international law (and the innovations of a transnational body of case law and statutes) to the vexatious problem of wrongful convictions in the United States.

I. INTERNATIONAL HUMAN RIGHTS AS MYTHOLOGY

International human rights law signifies a grand mythology. Increasing transnational interactions regarding commerce, the environment, and the media will cause a new mythology to emerge and guide international relations. Myths serve the purpose of providing common understanding. They are deep structures that provide a common narrative and speak to a prevailing desire among human beings for ways to

6 A more substantive application of international law and practice to the subject of domestic wrongful conviction is forthcoming. My purpose, in this piece, is to establish the theoretical context for the substantive claims to follow in future work.

understand themselves in broader and more diverse temporal and spatial contexts. According to Joseph Campbell, myths serve the purpose of “explain[ing] the maturation of the individual from dependency through adulthood, through maturity, and then to exit.”\(^8\) Since myths are typically generated within a specific culture, the idea of applying the language of myth to a cross-cultural context is novel. But given increasing transnational associations and an ever-present liquidity in regard to how subjects come to experience temporal and spatial relationships, it seems appropriate—and, in fact, imperative—that we apply insights generated from mythology to an ever more diverse set of transnational social relationships and geopolitical situations.\(^9\)

I am not making the claim that the law itself is mythology. Rather, the role expectations, rituals, and authority that comprise the law are mythological in orientation. In this context, international human rights law is a manifestation of deeply rooted desires among human beings to generate archetypal modes of proper transnational interaction. International human rights discourse signifies the human desire to navigate temporal and spatial relations in a world where previous, archetypal modes of interaction are increasingly penetrated by a host of transnational practices. In this way, international human rights law allows global actors to interact in a manner conducive to peaceful cohabitation. Because this is a monumental task given the nature and diversity of existing cultures, a grand myth has emerged once again to serve the purpose that culturally specific mythology has always served.

To help clarify the distinction I am attempting to make between parochial mythology and the grander transnational mythology animating human rights jurisprudence, consider U.S. Supreme Court Justice Antonin Scalia’s aversion to domestic adoption of insights generated through international court opinions—whether they be from the International Court of Justice (ICJ), an international human rights organization, or any individual state or combination of states (for example, the European Union). In his dissenting opinions in \textit{Atkins v. Virginia, Lawrence v. Texas,} and \textit{Roper v. Simmons,} Justice Scalia argues that domestic jurisprudence should be guided by constitutionalism and fidelity to the


\(^{9}\) \textit{See generally Zygmunt Bauman, Liquid Modernity} (2000). Bauman’s explication of “liquidity” is used as a metaphor to describe contemporary modernity. \textit{Id.} at 2. Most salient for our purposes is Bauman’s suggestion that traditional, more stable institutions, reference groups, patterns, and codes have given way to the “epoch of universal comparison.” \textit{Id.} at 7. The result is a clash of patterns and configurations that challenges traditional coercive powers. \textit{See generally id.}
That is, only human rights enumerated in the U.S. Constitution, together with those that have arisen from U.S. case law, should be germane when considering how to decide domestic cases. Stated in the context of mythology, what Justice Scalia articulates is a narrow, culturally-bounded interpretation of myth. For example, Justice Scalia’s dissent in *Lawrence v. Texas*, the case in which the Court declared anti-sodomy laws unconstitutional, chides the majority for its reference to changing international opinions regarding homosexual sodomy laws. As Justice Scalia would remind the Court, *Bowers v. Hardwick*—the decision overruled by *Lawrence*—had “never relied on ‘values we share with a wider civilization,’” but was, instead, based upon the supposed deeply held values and traditions of U.S. citizens. Likewise, in *Atkins v. Virginia*, a case in which the Court ruled against the constitutionality of executing the mentally ill, Justice Scalia penned a dissent challenging the majority’s suggestion that international opinion—including international human rights treaties regarding execution in general and execution of the mentally ill specifically—may be used to inform U.S. judicial opinions.

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10. See *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting). As normative practice, the American interpretation of constitutionalism can be traced to a letter from the Massachusetts General Court in 1768. Herman Belz, *Constitutionalism*, in *The Oxford Companion to the Supreme Court of the United States* 190, 191 (Kermitt L. Hall et al. eds., 1992). In that letter, the General Court emphasized that, “In all free States the Constitution is fixed; & as the supreme Legislative derives its Power & Authority from the Constitution, it cannot overlap the Bounds of it, without destroying its own foundation.” *Id.* Thus, the Constitution served “as the permanent, binding, and paramount political law of the polity.” *Id.* at 190. Beginning with Chief Justice John Marshall’s ruling in the landmark *Marbury v. Madison* case, Constitutionalism came to refer to the enhancement and near-monopoly of judicial authority over constitutional questions and disputes. *Id.* at 192; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall’s interpretation of the judiciary as the primary vehicle for redressing constitutional injuries dominated until the 1930s, when political uprisings calling for increased social justice ushered in a far greater role for the legislative branch of government. See Belz, *supra*, at 192. According to Belz, the U.S. Supreme Court attempted a return to its previous emphasis on Constitutionalism in the 1980s by once again enhancing the role of the judiciary over matters of public policy. See generally *id.* (explaining constitutionalism).


12. *Id.*


justice are (thankfully) not always those of our people.” Justice Scalia returns to a myopic constitutionalism when he argues that:

We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.

Justice Scalia reserves his most spirited invective for his dissent in *Roper v. Simmons*, the case which effectively banned the execution of juveniles. He begins with an indictment of the majority’s subordination of the “original meaning of the Eighth Amendment” to “evolving standards of decency.” Criticizing the majority for acting as the “sole arbiter of our Nation’s moral standards,” Scalia continues by decrying the Court’s references to “the views of foreign courts and legislatures.”

Justice Scalia’s remarks in *Lawrence*, *Atkins*, and *Roper* are certainly not unique among Supreme Court justices, but they do serve as contemporary examples of a strong emphasis on originalism and its concomitant aversion to the ideas, opinions, and jurisprudential influences of people living beyond U.S. borders. The tendency for some Supreme Court justices to dismiss international court opinions as “irrelevant” to

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15 *Id.* I agree with Justice Scalia that international variation regarding our “notions of justice” is an important aspect of our cultural identity and should be respected. He errs, however, in his thorough dismissal of insights arising from international law and practice. When he exclaims, “Equally irrelevant are the practices of the ‘world community,’” Justice Scalia adopts a parochial, intellectually dishonest, and, in my view, ideological position. *Id.* The practices of the world community have been of interest to the political, economic, and legal communities in the United States since its founding, a point that I will address in greater detail. What Justice Scalia either fails to recognize, or cannot allow himself to recognize out of concern for ideological consistency, is that it is neither necessary nor desirable for U.S. judges and politicians to adopt the practices of the international community entirely and indiscriminately. Rather, what benefits all nations is a recognition of international norms of justice and human rights that simultaneously preserves cultural uniqueness. This idea will be more fully explored in the body of the text as part of my discussion of cosmopolitanism.


17 See *Roper*, 543 U.S. at 616 (Scalia, J., dissenting).

18 *Id.* at 608 (quoting Thompson, 487 U.S. at 561).

19 *Id.* He concludes his opening salvo by writing: “Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.” *Id.*
deliberations over domestic disputes can be viewed as a manifestation of a time-honored dualism intended to marginalize outsiders. As far back as 1948–49, when the United Nations first adopted its Declaration of Human Rights, country-specific narratives seeking to define “democracy” differently than the master narratives generated by Western democratic states (Great Britain, France, and the United States) were discounted, marginalized, and delegitimated.20 Desperate to understand how to implement the newly created Declaration of Human Rights, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Committee of Experts, in May 1949, distributed an international survey to philosophers and social scientists soliciting their understanding of “democracy” and its relation to international human rights discourse. What the Committee soon came to realize was that the manipulation of “value-loaded words with unstable cognitive connotations is a powerful tool of attitude influencing and control.”21 The Committee found that the concept of “democracy” was prone to manipulation by powerful nations often having it as their “deceitful motive” to advance a certain political agenda.22

In a related way, Daniel Levin contends that originalist positions offer the possibility of an immediate and authentic encounter with the past tied to a critique of modernism as both antidemocratic and inauthentic. Originalism portrays the federal period as a special moment of civic unity, whose virtues have been preserved by the larger public, but have been eroded among elites by modernity.23

So it is that Justice Scalia attempts—through binary juxtaposition of his own originalist interpretation of the Constitution with others’ “inferior” contemporary transnational claims to human rights—to marginalize and delegitimate doctrinal developments from abroad.

22 Id. at 464. According to Henri Lefebvre, a French respondent to the survey, “middle-class politicians mislead the people by trying to let their bourgeois democracy pass for the ideal democracy—be it from unconscious prejudice or from a deliberate, cynical determination to bamboozle.” Id. at 464–65.
Certainly one could contend that, because the colonies (and later the federation of states) constituted a relatively homogenous grouping, a more insular and exceptionalist conception of myth may have seized the imagination of the framers. But, neither the framers nor the early Supreme Court held such a myopic view of the principles that informed the drafting and initial interpretation of the Constitution. Both the framers and the early Supreme Court made frequent references to international law and human rights, and thus in no way did either intend for the Constitution to be strictly interpreted as an intractable and essentialistic charter incapable of responding to changing times and circumstances. Neither did they ignore the “evolving standards of decency” articulated in numerous foreign court opinions throughout the eighteenth and nineteenth centuries. Indeed, such standards were cited by the Supreme Court when it was found useful to do so.

Transnational social relationships and the procurement of peaceful cohabitation of diverse peoples require a new mythology that transcends localized or national culture. While this new mythology will still be infused with cultural variations in the character and flavor of its stories, it also—as a matter of necessity, reason, and sound policy—will slowly incorporate narratives that speak to transnational matters of significance. The reason for situating a discussion of international human rights law and its applicability to domestic wrongful conviction within this context is to generate understanding of the significance of international human rights discourse for the continued evolution of criminal law and criminal procedure in the United States. By recourse to mythology, I can more effectively contend that positions taken in opposition to adherence to international law by U.S. courts—at least when made on grounds of constitutionalism and “original intent”—are seriously flawed. No longer can any country blamelessly exempt itself from participation in the grander human rights discourse that began to emerge in the middle of the twentieth century. Domestic attempts to do so promote a parochialism that will position Americans at the opposite pole of a growing transnational mythology that promotes universal peace and well-being.

When I teach students about federalism, I make a point to emphasize that any physical lines of demarcation existing between the states

24 See Trop v. Dulles, 356 U.S. 86, 101 (1958) (stating that courts should interpret the Eighth Amendment in accordance with “evolving standards of decency that mark the progress of a maturing society”).

25 See infra text accompanying notes 134–167.

26 A movement that, notably, was initiated in part by the United States.
are artificial. To make this point, I explain to them how I felt the first time I flew in an airplane and noticed that, when I peered through my window to the earth thousands of miles below me, the cartographical lines with which I was so familiar were not really there. Of course, my students laugh at how simplistic the example is. But, insofar as it pertains to how humans come to know their place in the world, the point is far more complex. This same analogy can be drawn when considering transnational geopolitical distinctions. Beautiful, almost spiritual, satellite images of Earth depict stunningly clear oceans, clouds, and terra firma constituted by flatlands and mountains. There are no lines to demarcate nation-state boundaries. Those boundaries, thought to be so important to our sense of national pride, are but artificial products of conquest and political negotiation. In contrast to the striated space constituting geographic boundaries, there is only smooth and continuous space. Recognizing this physically unfettered multidimensionality radically alters one’s sense of the neatly demarcated, but seriously flawed, parochialism that pervades contemporary domestic jurisprudence.

Nothing makes this point more salient than the ubiquitous power of the Internet and satellite telecommunications. With media of this sort, information scatters in endless multi-directional bursts without obstruction, not needing to stop at border checkpoints. A person no longer need be living in the Middle East to receive news, reported in Arabic, from places like Iraq, Iran, or Pakistan—one need only tune in to Al Jazeera. Fans of European, Asian, or Latin American football need not be located in any of these places to watch the games, but rather can view them on television, often live and beamed from satellites hovering far above the Earth. Furthermore, consider decisions made by governments or corporations that, despite initially appearing to have only domestic impact, produce effects that reach far beyond national borders. Take, for example, how decisions made by corporations to emit air and water pollution can affect the quality of the air and drinking water in communities thousands of miles away. Monetary decisions made by a small group of brokers and financiers living in the United States, China, or Japan can stimulate reverberations, both positive and

negative, in countries around the globe. Although these decisions are made by actors working within national boundaries, the effects of their decisions are felt globally. The point is that myths and ideas are no longer strictly bounded, as they once were, by geographical demarcations. In short, we no longer live lives of geographic separation and we must, therefore, construct a new global mythology capable of generating broad understanding of transnational actors, their actions, and the effect on our global community. To more fully address the evolution of shared political, economic, and cultural experiences, I now move to a discussion of transnational civil society.

II. TRANSNATIONAL CIVIL SOCIETY

Like mythology, articulation of the concept “civil society” is typically geographically bounded. Conceptually nestled between the realm of politics and economics, civil society is the location of voluntary associations, social movements, and public groupings organized around lifeworld issues. Once organized, actors coalescing in civil society can have a significant influence on institutions in the “international, national, regional, local, and subcultural arenas.” Proposing the idea of a transnational civil society—or a “world civil society,” as Gordon Christenson would have it—requires both a dramatic reconceptualization of civil society and a willingness to blur the artificial boundaries of sovereignty. As with civil society as it is normally conceived, transnational civil society involves combinations of actors in voluntary associations. But transnational civil society sheds cultural parochialism and exceptionalism, and suggests that transnational actors should disregard traditional state boundaries when necessary to confront matters of transnational public concern. Still, even transnational actors must rely on their own national legal systems to protect basic rights.

29 See id. at 99.
33 See Christenson, supra note 32, at 412 (introducing the concept of “world civil society”).
34 See id. at 414.
voluntary transactions or investments can thrive in world civil society without credible and legitimate international and national legal systems.\textsuperscript{35} Thus there is a recursive relationship between national and international legal institutions, on the one hand, and on the other, transnational actors in civil society invested in the work of advancing human rights.

In his recent work, Jeffrey Alexander attempts to clarify and reclaim the long debated and oft-misunderstood concept of civil society in order to accentuate its relevance to the promotion and realization of justice:\textsuperscript{36}

> Justice depends on solidarity, on the feeling of being connected to others, of being part of something larger than ourselves, a whole that imposes obligations and allows us to share convictions, feelings and cognitions, gives us a chance for meaningful participation, and respects our individual personalities even while giving us the feeling that we are all in the same boat.\textsuperscript{37}

Through his emphasis on the necessity of acknowledging certain universalisms while simultaneously valuing local uniqueness, Alexander engages his reader in a balancing act that generates justice by defining an Archimedean vantage point from which to consider both the universal and the unique.\textsuperscript{38} Through the analysis of civil society, Alexander seeks to accentuate “the we-ness of a national, regional, or international community, the feeling of connectedness to ‘every member’ of that community, that transcends particular commitments, narrow loyalties, and sectional interests.”\textsuperscript{39} In this view, Alexander is joined by Kwame Anthony Appiah, who recently cited a similar position held by Adam Smith, the eighteenth-century philosopher of capitalism.\textsuperscript{40} Smith, according to Appiah, while struggling to understand why human beings can be moved to action in the service of strangers, concluded that this impulse has little to do with vague notions of benevolence.\textsuperscript{41}

\textsuperscript{35} Id.
\textsuperscript{36} See generally \textsc{alexander, supra} note 1.
\textsuperscript{37} \textit{id.} at 13.
\textsuperscript{38} See generally \textit{id.}
\textsuperscript{39} \textit{id.} at 43.
\textsuperscript{40} See \textsc{kwame anthony appiah, cosmopolitanism: ethics in a world of strangers} 156–57 (2006).
\textsuperscript{41} See \textit{id.} (citing \textsc{adam smith, the theory of moral sentiments} 157 (Knud Haakonsen ed., Cambridge University Press 2002) (1759)). Smith instead intuited that: “It is a stronger power, a more forcible motive, which exerts itself upon such occasions. It is
But, as Alexander admits, while the notion of justice is ubiquitous in philosophy and social science (and jurisprudence, too, of course), it nonetheless remains a terribly difficult concept to define and, perhaps, an even more difficult one to realize. Alexander argues that “[m]odernity is fundamentally multiple and ambiguous.”\textsuperscript{42} Here, he joins the likes of Zygmunt Bauman, who stresses the liquidity of modern political, economic, and cultural relations.\textsuperscript{43} What this conveys is the perennial confluence of the fixed and the chaotic—or, as Alexander suggests, the transcendent and the particular—as each affects our local, regional, national, and international relations. At the local level, where cultural capital combines with ever-changing external stimuli, people rely on their storehouse of mëtis, “a wide array of practical skills and acquired intelligence in responding to a constantly changing natural and human environment.”\textsuperscript{44} 

In the context of the synergistic relationship between the “transcendent and the particular,” the concepts of mëtis and techne provide a useful way to relate the influence of international human rights law to the domestic adoption of it. While a body of agreed-upon human rights principles has emerged, it has done so only through wrenching negotiation among United Nations member-states over the meaning of concepts like democracy, justice, and equality. In applying these principles, the member-states have, alarmingly, misplaced emphasis on mëtis. It is techne which “‘came into being when from many notions gained from experience’” and represents “a universal judgment about a group of similar things . . . .”\textsuperscript{45} And although techne is defined as a set of universal rules and principles, it is precisely that universality which may expose it to numerous local variations.\textsuperscript{46} Consequently, when the United States—or any other country—adopts international human rights standards, these standards are always interpreted within the context of a mëtis specific to the United States.

The implementation of a global human rights discourse requires both mëtis and techne. In place of the artificial distinctions that all

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reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct.’” Id. at 157 (quoting Smith, supra, at 157).
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\textsuperscript{42} Alexander, supra note 1, at 22.
\textsuperscript{43} See generally Bauman, supra note 9.
\textsuperscript{44} James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed 313 (1998). Mëtis is in constant interplay with techne, the tightly structured and rule-bounded principles and propositions that characterize universal order. Id. at 319–20.
\textsuperscript{45} Id. at 320 (citation omitted).
\textsuperscript{46} See id.
cultures make on the basis of such things as race, ethnicity, class, religion, and national origin, justice requires the global privileging of "reason, principle," and "conscience" through realization of morality in the application of law.\textsuperscript{47} This is not to say, however, that the implementation of a human rights discourse should only appeal to reason. In recognition of the thickness of culture, it is necessary for advocates of a universal human rights discourse to recognize the role of emotion in the effective transnational administration of justice.\textsuperscript{48} Catherine Lane West-Newman challenges the conventional Occidental reduction of human rights to pure reason by exploring the heterogeneous transnational manifestations of justice based on complicated and culturally bounded expressions of emotion. Specifically, West-Newman argues for a culturally specific analysis of the ways in which "emotions connect with law."\textsuperscript{49} The challenge is to effectively administer a transnational human rights discourse that privileges cultural capital (métis) but simultaneously imposes an agreed upon body of law necessary to protect human dignity (techne).

Theoretical articulations of transnational civil society emphasize a universal commitment to a notion of justice that constructs a narrative that encourages a political culture "more tolerant of individual differences and more compatible with the pluralization of interests."\textsuperscript{50} The idea is to promote a common narrative that enhances one's understanding of transnational norms and cultural codes, thereby enabling a fuller understanding of otherness. Readers of my earlier work may cringe at my acknowledgment of the existence of universals in any shape or form, but it is clear that, while they may be mediated, negotiated, and exhibit local flavor, universal codes of behavior do exist.\textsuperscript{51} This is largely because human beings have been interacting in meaningful ways through trade, cohabitation, and cross-cultural communication for millenia. When people communicate across cultural bounda-

\textsuperscript{47} Appiah, supra note 40, at 157 (quoting Smith, supra note 42, at 157).
\textsuperscript{49} Id. at 306.
\textsuperscript{50} Alexander, supra note 1, at 46.
ries they do so by discussing those issues that matter most to them.\textsuperscript{52} Thus, while those of us in the United States may not have much interest in or knowledge about the ritualistic habits displayed in African tribal ceremonies, both U.S. citizens and Africans care deeply about justice, fairness, and respect.

Unfortunately, claiming residence in a community, region, or nation by definition requires making clear in-group and out-group distinctions.\textsuperscript{53} These distinctions are often based on parochial notions of exceptionalism, local superiority, and consequent exclusion of the other. But is it necessary for members of any nation to marginalize and delegitimate the other in order to retain their sense of cultural identity? It is not. When people learn to see the other not as an abstract and disembodied signifier, but instead as a real human being with shared interests in a quality of life not dissimilar from their own, it is possible to generate the meaningful associations that enable us to understand and learn from others.

I do not claim that all cultural and biological predispositions to suspicion of the other will vanish. To make such a claim would require the utopian presumption that there can be both universal clarity of understanding and a shared motivation for understanding that, while praiseworthy, is, for political, economic, and cultural reasons, largely impossible. There are good reasons—culturally and even biologically grounded ones—for remaining suspicious of those with whom we are unfamiliar. Suspicion of what is potentially dangerous is a vital element of species survival. In his book about the origins of non-normative and harmful behavior, naturalist Lyall Watson writes that species have one desire—to survive.\textsuperscript{54} Genes in all species survive by a simple set of three commands: “be nasty to outsiders, be nice to insiders[,] and cheat where possible.”\textsuperscript{55} According to Watson, the further we are removed from our direct biological descendants, the less involvement we desire to have with “the other,” especially in important matters of life and death.\textsuperscript{56} Stated crudely, ‘I’ll risk further propagation of my bloodline

\textsuperscript{52} See APPILAH, supra note 40, at 96–97. For example, people across the globe share a common interest in “music, poetry, dance, marriage, funerals; values resembling courtesy, hospitality, sexual modesty, generosity, reciprocity, the resolution of social conflict; concepts such as good and evil and right and wrong, past, present, and future.” Id.

\textsuperscript{53} See generally GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL (Kurt H. Wolff ed. & trans., 1950).

\textsuperscript{54} See generally LYALL WATSON, DARK NATURE: A NATURAL HISTORY OF EVIL (1997).

\textsuperscript{55} Id. at 54, 56, 65.

\textsuperscript{56} See id. at 52–53 (calculating the genetic benefits of the chimpanzee’s apparently altruistic behavior).
only for those who already share my DNA.’ For example, mothers or fathers will, without thinking, place themselves in harm’s way to protect their children. Children will do the same for each other, and for their parents. But as we move further away from shared DNA to the next level of association, as between a spouse or a lifelong friend, say, it becomes less probable that one would jeopardize his or her own life or genetic reproduction without first pausing a moment to consider it. Hesitation to extend intimacy to strangers, who may pose danger to oneself or one’s family, arises in part from a biological predisposition to protect those most like oneself. But, for Watson, relationships are both biologically and culturally determined.

Considering what we know about cultural filtering mechanisms used to protect indigenous practices, there is a strong argument in favor of thoughtful skepticism regarding those whom we do not know or understand.

Reservations against approaching the transcultural other can be explained on both biological and cultural grounds and are perfectly consistent, in both the short and long term, with protecting oneself, one’s family, and one’s culture. So how can this skepticism be overcome so that human beings can reposition themselves in ways that enrich their shared humanity? From the perspective of hermeneutics, deep understanding of the other means overcoming misunderstanding.

To the extent that we are able to be understood, and our will is adopted as the prevailing view, we do not experience the “eddies of misunderstanding.” On the other hand, when confronted with in-

57 See id. at 257–59 (noting culture’s effect on animal behaviors).

58 The study of hermeneutics commenced in the eighteenth-century with the work of Friedrich Ast (1778–1841). Consequent to the rise of Modernism, Ast’s primary concern was about ways to gain deep understanding of art, poetry, literature, and scholarship (verständnis versus missverständnis, or understanding versus misunderstanding). Later, Schleiermacher argued that understanding could only come from knowledge of the universal human experience; specifically, knowledge of daily living and lived experience. Most important, the purpose of hermeneutics was to move us to a place of cross-cultural understanding. Other founding voices of hermeneutics include Hans-Georg Gadamer and Martin Heidegger. See generally HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS (David E. Linge ed. & trans., 1976) and MARTIN HEIDEGGER, BEING AND TIME (John Macquarrie & Edward Robinson trans., 1962). For a thoughtful and concise overview of the contributions to the study of hermeneutics see ZYGMUNT BAUMAN, HERMENEUTICS AND SOCIAL SCIENCE (1978).

59 BAUMAN, supra note 58, at 17. Consider Schopenhauer’s explication of pain and happiness:

Just as a brook forms no eddy so long as it meets no obstructions, so human nature, as well as animal, is such that we do not really notice and perceive all that goes on in accordance with our will. If we were to notice it, then the reason for this would inevitably be that it did not go according to our will, but
comprehension, we are forced to consider the problem of understanding. For Bauman, “[i]ncomprehension is a state which calls for an effort to make the uncertain certain, the unpredictable predictable, the opaque transparent.”

To fully understand is to embrace the autonomy of the other and, whether enthusiastically or not, to endow the subject “with authority in the negotiation which follows.”

Humility, as one encounters misunderstanding arising from incomprehension, is of the utmost importance because it is likely that such misunderstanding is due to the partiality of the intellect.

Our warehouse of stored knowledge about the world around us provides us with the context necessary to gain understanding and to effectively interact with it. But our past is also a limitation, in that we are constituted by a limited array of interactions which sometimes can function to exaggerate differences and thereby construct obstacles (eddies) to our ability of fully knowing the other. Meaning can only come from experiencing the world firsthand through meaningful interactions with the other. But how is that to be accomplished? The answer is through dialogue.

In the context of this essay, the urgency of dialogical interactions speaks to the need for juridic actors in the United States to engage in dialogical relations as a way to come to a

must have met with some obstacle. On the other hand, everything that obstructs, crosses, or opposes our will, and thus everything unpleasant and painful, is felt by us immediately at once and very plainly. . . . On this rests the negative nature of well-being and happiness, as opposed to the positive nature of pain . . . .

*Id.* at 194 (citation omitted).

60 *Id.* at 195.

61 *Id.* at 203.

62 *See id.* at 225. As Bauman explains:

> It is neither the complexity of the universe, nor its notorious amenability to contradictory interpretations, which in this case defies the power of intellect. It is the partiality of intellect itself, its tendency to see some of the things rather than others . . . . Any intellect, however powerful, sets about its work loaded with its own past; this past is simultaneously its liability and its asset.

*Id.* (citation omitted).

63 In this context I am speaking of dialogue to mean “a willingness to enter conversation about ideas, taking a position in openness that can still be altered given additional information; a commitment to keep relationships affirming, even as disagreements over theory occur; and a willingness to ask value questions about information application.” *See Ronald C. Arnett, “Dialogic Education* 10–11 (1992) (summarizing Rob Anderson’s explication of presence, unanticipated consequences, otherness, vulnerability, mutual implication, temporal flow, and authenticity). In short, dialogical interaction means “reaching out to the other in an authentic fashion, willing to try to meet and follow the unpredictable consequences of exchange.” *Id.* at 11.
more comprehensive understanding of who we are, while enhancing our understanding of those from different cultures. Dialogue includes thoughtful engagement with both human beings and texts. As it is relevant to our interests here, that engagement means sincere interaction with transnational legal practitioners and legislators, as well as critical deconstruction and analysis of juridic texts. Probing the meaning of foreign statutes and case law is consistent with Sidorkin’s First and Second Discourses. The First Discourse signifies the authority of the text, a master narrative that establishes common ground upon which dialogue can function to generate a common perception of the text. The Second Discourse provides for “speaking out” about the text. This is an organic process that opens up the Master Narrative for deconstruction and reinterpretation and that will never generate a singular truth. Rather, through the process of engaging the text, a transmogrified form consistent with local interests, a new interpretation befitting local needs, will be achieved. For our purposes, a shared introduction to transnational jurisprudence gives way to dialogical deconstruction of the merits of that jurisprudence.

Dialogical intercourse is necessary for human beings to realize their humanity. To be truly human is to acknowledge the essence of the other. Without that acknowledgement, “I” cannot exist. Said differently, “failure to affirm the being of the other brings myself into non-being.” For Martin Buber, “all real living is meeting.” When communication breaks down we are prone to view the other with distrust and misunderstanding. We overly value our own opinions, and devalue those held by our adversaries. Polarization of discourse generates

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64 See generally Alexander M. Sidorkin, Beyond Discourse: Education, the Self, and Dialogue (1999).

65 See id.

66 See id.

67 Id. at 12.

68 Id. at 11 (citation omitted).

69 See Ronald C. Arnett, Communication and Community: Implications of Martin Buber’s Dialogue 15 (1986). Consider Martin Buber’s remarks:

Man is more than ever inclined to see his own principle in its original purity and the opposing one in its present deterioration, especially if the forces of propaganda confirm his instincts in order to make better use of them. . . . He is convinced that his side is in order, the other side fundamentally out of order, that he is concerned with the recognition and realization of the right, his opponent with the masking of his selfish interest. Expressed in modern terminology, he believes that he has ideas, his opponent only ideologies. This obsession feeds the mistrust that incites the two camps.

Id.
misunderstanding. Alternatively, a discourse that is relationship-centered moves us closer to dialogical communication, and requires a commitment on all sides to empathize with the other to come nearer to understanding. One way to accomplish this is to attain a healthy interest in the folkways and mores of those different from us, and to ask questions of them. By asking questions in the spirit of a dialogical community we come closer to understanding, and we demonstrate a sincere commitment to enhanced awareness. In the space that exists between questioner and listener, and interpretation of foundational texts, emerges the dialogical moment. Through our ability to open up to others we begin to know ourselves more fully. Through meaningful discursively a process of true awakening unfolds for each interlocutor because each plays the role of questioner and listener. This dialogical process is what moves us nearer to our shared humanity. 

A true dialogic community would be a place where “partners must cooperate to establish a mutual world in which they may or may not agree. What is important is how partners must coordinate to establish meaning between themselves.” Guilar suggests that Gadamer’s hermeneutic community is similar to Dewey’s “organic community”—like Dewey, who emphasized praxis as the way to true knowledge, Gadamer contends that “dialogic conversations about concrete actions and reflections upon them [take] place within a context of historic truths also open to inquiry.” Most important for Gadamer is the idea that inter-

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70 The notion that we cannot know ourselves without interaction with the other has a long history in philosophy and sociology that gained prominence in the 1930s. See, e.g., generally Charles Horton Cooley, Human Nature and Social Order (1922); John Dewey, Democracy and Education: An Introduction to the Philosophy of Education (1944); Erving Goffman, The Presentation of Self in Everyday Life (1959); George Herbert Mead, The Mind, Self, and Society: From the Standpoint of a Social Behaviorist (Charles W. Morris ed., 1967); W.I. Thomas, W.I. Thomas on Social Organization and Social Personality: Selected Papers (Morris Janowitz ed., 1966). Dewey’s pragmatism emphasized the importance of interaction with the objective world to gain true knowledge. See generally Dewey, supra. For Mead, there can be no self without the other to interact with. See generally Mead, supra. Without someone to respond to our public self (what Mead referred to as “Me”) we can have no sense of the “I”—whether we are smart, funny, sad, supportive, or anything else. Id. In short, we have no feedback with which to determine who we are. The primary emphasis for all symbolic interactionists is that human beings are perpetually engaged in a process of interaction with the external world of objects and people, and that through this interaction—and our processing of and reaction to it—we evolve our sense of who we are.

71 Joshua D. Guilar, Intersubjectivity and Dialogic Instruction, in Radical Pedagogy (2006), http://radicalpedagogy.icaap.org/content/issue8_1/guilar.html (citation omitted).

72 Id.
pretation of dialogical moments is open-ended.\textsuperscript{73} There is no attempt to establish truth once and for all.\textsuperscript{74}

The most important lesson for us to draw from the body of literature addressing hermeneutics and dialogue is the potential for transnational understanding. Despite our differences, which will always be present, a process exists to allow for real discovery and growth. Through our earnest engagement with the other as listeners and questioners, we humanize the other in a way that validates them and ourselves. We learn from them, and they from us. From a dialectical perspective, dismissing the jurisprudential practices and decisions emanating from international courts of law only limits our own ability to grow, just as our refusal to engage in dialogue with transnational courts limits their ability to grow. Absent dialogue, we remain enshrouded in polarizing discourse. The result is a far too parochial and, thus, stunted jurisprudence.

As we continue to interact in increasingly transcultural contexts, we must generate myths necessary to open ourselves to “the other” in meaningful ways.\textsuperscript{75} In short, what I am calling for are those “human sunrises” that Alice Walker recognizes to signify the common thread of human striving for justice, equity, value, and joy. We are not disembodied signifiers, but rather human beings with shared interests in a certain quality of life.

But, the skeptic may ask, if we are open to being influenced in significant and thoughtful ways through reasoned consideration of alternate modes of living, and if we then become too cosmopolitan in our open engagement with other cultures, does it not become possible that we will risk losing aspects of our own culture that we value? Probably


\textsuperscript{74} See generally \textit{Gadamer}, supra note, 58.

\textsuperscript{75} In a recent commencement address delivered to Naropa University, Alice Walker offered a fair summation of the point I am attempting to make here:

When it is all too much, when the news is so bad mediation itself feels useless, and a single life feels too small a stone to offer on the altar of peace, find a human sunrise. Find those people who are committed to changing our scary reality. Human sunrises are happening all over the earth, at every moment. People gathering, people working to change the intolerable, people coming in their robes and sandals or in their rags and bare feet, and they are singing, or not, and they are chanting, or not. But they are working to bring peace, light, compassion to the infinitely frightening downhill slide of human life.

not. Countless historical examples demonstrate how cultures have been able to absorb, embrace, and thrive amidst an influx of transcultural influences. To adopt a universal human rights discourse and the procedures necessary to document abuses would signify a commitment to a certain standard of dignity agreed to by people across the planet. But it would not mean that all international human rights agreements must be adopted by each participating state in the same ways. Consider, for example, the attempt of Islamic women in Palestine to reinterpret Islam consistent with international human rights campaigns against gender discrimination. According to Sally Engle Merry, who attended the conference on women in Gaza, “[Islamic women] did not ask for gender equality nor did they reject Islam.” Instead, these women sought specific protections that would afford them greater choice and public safety. They attempted to graft international human rights protections upon pre-existing cultural practices.

The United States itself is perhaps the paramount example. Consider the numerous and familiar ways in which the United States continues to thrive with a strong national identity, all the while its people and institutions appropriate transnational ideas and products. American culture signifies a confluence of multi-cultural influences that includes contributions from peoples migrating from all points on the globe, not to mention those who were present prior to colonization. The very fact that we are a federation of states makes this point clearly. During the months preceding the Constitutional Convention in 1787, the framers were beset by disagreements among colonial representatives over ways to preserve jurisdictional uniqueness. And despite the homogenization of laws across the United States brought about by passage of the Fourteenth Amendment, one cannot deny the nation’s history and continued championing of spirited efforts to retain local autonomy.


77 *Id.* at 944–45.

78 *Id.* at 944.


81 The Fourteenth Amendment, ratified in 1868, requires that: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due proc-
Leonard Levy recounts the extraordinary balancing act maintained by James Madison, the author of the Bill of Rights, up to its passage in 1791. Amendments to the U.S. Constitution were necessary to maintain the fragile accord between the Federalists and the Anti-federalists, the latter of which feared the creation of a strong centralized government. But where did the rights sought to be protected from a strong national authority originate? Many of the rights articulated in the Bill of Rights can be traced back to English common law and the Magna Carta. According to Levy, the “Magna Carta had come to mean indictment by grand jury, trial by jury, and a cluster of related rights of the criminally accused . . . .” Consider as well the importance of habeas corpus, a storied writ that appears to predate even the Magna Carta. The rights of the accused flowing from the Magna Carta and the writ of habeas corpus were adopted by the colonists and then reinterpreted and expanded to complement the other freedoms articulated in the U.S. Bill of Rights. Thus, from the founding of the United States, its judges and legislators have freely borrowed from the laws and procedures of foreign nations—especially England—and have modified them to suit the perceived needs of a newly democratic state. This process is a clear example of fluidity as it is realized through métis.

More contemporary examples can be found in the identity movement of the 1980s, which demonstrated that Americans are strident protectors of (and effusive participants in) their real or imagined ethnic heritage. Irish-Americans, German-Americans, Mexican-Americans, Chinese-Americans—the list goes on and on—lay claim to a portion of the composite identity of American people as a whole. We happily, of-
ten greedily, receive into our own culture foreign art, literature, film, music, sports, food, automobiles, motorcycles, and clothing, to name just a few popular imports. Our universities flourish with international scholars who provide our students and communities a limited but invaluable insight into life elsewhere.

That said, do we alter our sense of what it means to be American by consuming these cultural imports? Or, does this consumption enhance our sense of identity by making us better able to discern the meaning of these imported influences by way of juxtaposition to our American-ness? I suggest that the answer to each question is affirmative. By making our cultural filters more porous and permitting the influences of other cultures to penetrate our consciousness, we cause ourselves to change, if ever so slightly, in a way that opens us up to new experiences and new ways to appreciate difference. I perceive this to be a good thing—a cosmopolitan thing—and a clear manifestation of liquid modernity. Similarly, by being open to new ideas and ways of being, the definition of American-ness itself changes to include a more cosmopolitan sensibility. It becomes normal for us to accept without a second thought that international food, music, literature, cars, ideas, and the like are simply a part of the pastiche that constitutes American-ness. It is in this way that we in the United States can skate freely on smooth space without ever relinquishing our sense of being Americans.

Whatever one considers a unique U.S. identity to be, it has—as with other strong national identities tied to claimed cultural capital—proven to be extraordinarily resilient to dramatic alteration. No matter what international influences are consumed by nation-states with a strong sense of national identity, people are generally going to prefer home-grown versions when they are available.90 The French, for example, may enthusiastically embrace American television programming, but are more likely to enjoy French programming, when it exists, because it is their own.91 The point is that people around the globe tend to be especially critical consumers of transnational imports. They are not, as some would have us believe, empty vessels easily swayed by transcultural influences. Instead, as generations of spectator studies have confirmed, complex interactions and filtering processes take place between consumers and images and ideas.92 Our socialization as part of local, regional, and national associations provides context for critical

90 See Appiah, supra note 40, at 108.
91 Id.
consideration of non-native ideas and behaviors. To presume, as Justice Scalia appears to, that there is some entrenched, essentialistic American-ness that serves as a nodal point for determination of jurisprudential decisions belies both U.S. history and a reasoned understanding of the perpetual interplay of transcultural artifacts with U.S. political, economic, and cultural experiences.

III. Cosmopolitan Democracy

To further contextualize the location and privileging of international human rights law as a necessary consideration in domestic wrongful conviction jurisprudence, it is important that we understand the principles of cosmopolitan democracy and, more specifically, the way in which cosmopolitan democracy has emerged over the course of the last century to confront more conventional articulations of the nation-state centered on theories of democracy.

Cosmopolitan democracy refers to the application of democratic principles across nation-state boundaries in an effort to impart people everywhere with greater participation in and real authority regarding the decisions that directly affect their lives. Following Held, “The term cosmopolitan is used to indicate a model of political organization which citizens, wherever they are located in the world, have a voice, input and political representation in international affairs, in parallel with and independently of their own governments.”

Historically, the primary author associated with the idea of cosmopolitan democracy is Immanuel Kant. Kant’s essay, “Perpetual Peace: A Philosophical Essay,” originally published in 1795, lays the foundation for a “Federation of Free States.” His aspiration, in this essay, was to further global peace through the avoidance of war. According to Kant, a perpetual state of war-making could only be averted through the adoption of laws respecting republicanism (liberty) across interna-

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94 See generally Immanuel Kant, **Perpetual Peace: A Philosophical Essay** (M. Campbell Smith trans., 1917) (1795), available at http://oll.libertyfund.org/files/357/0075_Bk.pdf. This position is most forcefully presented in the “Second Definitive Article of Perpetual Peace”: “The law of nations shall be founded on a federation of free states.” See id. at 128.

95 See id. Kant’s work should be re-read as a contemporary moral lesson for those advocating imperialism. One of his more prescient insights, restated in the United States by President Dwight D. Eisenhower (and more recently by former Nixon Asianist Chalmers Johnson) was that it is not only war-making that threatens democratic states with dissolution, but also the perpetual preparation for war (The Perpetual Peace). See generally Chalmers Johnson, **Nemesis: The Last Days of the American Republic** (2006).
tional borders, from which an “federation of nations” would arise.\textsuperscript{96} The logic of Kant’s theory speaks to the heart of republicanism: namely, that there can be no actual global democracy until all states adhere to reasoned participation in \textit{foedus pacificum} (covenant of peace).\textsuperscript{97} This federation would not be ruled by a centralized world government, but would instead operate through the principles of liberty and the application of public laws.\textsuperscript{98} Once a group of people organized as a state commits to the rule of a form of law predicated on a pure republican commitment to liberty, other nation-states will be inspired to attach themselves to that beginning state, thereby creating an ever-expanding democratic nexus.\textsuperscript{99}

Kant’s notion of a Federalism of Free States is evocative, to me, of a Mandelbrot Set. Mandelbrot Sets, named for mathematician Benoit Mandelbrot, are generated using fractal geometry.\textsuperscript{100} An infinite set of related quadratic equations defines which numbers belong to a given Mandelbrot Set.\textsuperscript{101} If one solves these iterative equations and plots the result each time, the image that begins to emerge has self-similar subcomponents that nonetheless exhibit unique local variations.\textsuperscript{102} To illustrate this point, a shaded plot depicting part of a Mandelbrot Set is reproduced below. The image portrays a center, or nodal point, with an endless array of associated or linked approximations of that nodal point affixed to it. The possibility of visualizing Kant’s theory of a Federalism of Free States through the lens of Mandelbrot Sets appears in the primacy of the core (which represents, by analogy, the establishment of a republican ethic of liberty) and the endless array of near-copies (representing sympathetic nation-states), each one created by the same fundamental values that make up the core, but with local (fractal) variations.

\textsuperscript{96} See \textsc{Kant}, supra note 94, at 128–29, 134.
\textsuperscript{97} See \textit{id} at 134.
\textsuperscript{98} See \textit{id}.
\textsuperscript{99} See \textit{id} at 134–35.
\textsuperscript{100} See David Dewey, Introduction to the Mandelbrot Set (Sept. 4, 2002), http://www.ddewey.net/mandelbrot.
\textsuperscript{101} \textit{Id}.
\textsuperscript{102} \textit{Id}.
Thus, when one views a Mandelbrot Set from afar, one tends to see what appears to be an integrated whole. But, upon closer examination, one begins to notice considerable variation at the periphery.

When nation-states begin to attach themselves to each other through their shared commitment to liberty, they establish a de facto union premised on the law of nations. It was Kant’s belief that this process of fractal reconstitution could, in theory, be never-ending so long as the nation-states remained committed to replicating the values of liberty. In practice, this meant that any traveler visiting any nation-state should expect to be afforded a certain set of “rights” necessary for interpersonal peace. This does not mean that the traveler should necessarily be granted the same rights as citizens of the state. Rather, the traveler would have a right to a kind of “hospitality” (which would include, most fundamentally, the right of “entering into social intercourse”), the exact parameters of which could be codified in public law. Over time, application of this public law to non-citizens would generate what Kant referred to as a “cosmopolitical constitution.” It is here, in his “Third Definitive Article,” that Kant appears to have

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103 See id.
104 See Dewey, supra note 100.
105 KANT, supra note 94, at 137–39.
106 Id. at 139.
107 Id.
brought the idea of cosmopolitan democracy.\textsuperscript{108} Through references to the social intercourse of peoples across the globe—from the East Indies to the Americas, from China to Japan—Kant comes to the contemporary realization that the globe is far smaller than it once was, and is in desperate need of a new system of generating common discourse to preserve peaceful relations.\textsuperscript{109}

Kant’s vision of a global proliferation of republican states, infused with a body of international public law to serve the discursive interests of global peace and well-being, constitutes the foundation of contemporary cosmopolitan theory and suggests a framework for global implementation of human rights law and procedures.\textsuperscript{110} Kant’s influence can clearly be read in S. James Anaya’s definition of international law: “International law is a universe of authoritative norms and procedures—today linked to international institutions—that are in some measure controlling across jurisdictional boundaries.”\textsuperscript{111} For Supreme Court Justice Sandra Day O’Connor, the federalism inspired by Kant describes

the proper relationship between domestic courts and transnational tribunals . . . “the federalism of free nations,” to use a phrase of the philosopher Immanuel Kant. Just as our domestic laws develop through a free exchange of ideas among state and federal courts, so too should international law evolve through a dialogue between national courts and transnational tribunals and through the interdependent effect of their judgments.\textsuperscript{112}

Philosopher John Rawls establishes a similar mechanism for the defense of human rights through his articulation of “justice as fairness”

\textsuperscript{108} Id. at 137, 139.
\textsuperscript{109} See id. at 140–41. Kant explains:

The intercourse, more or less close, which has been everywhere steadily increasing between the nations of the earth, has now extended so enormously that a violation of right in one part of the world is felt all over it. Hence the idea of a cosmopolitan right is no fantastical, high-flown notion of right, but a complement of the unwritten code of law—constitutional as well as international law—necessary for the public rights of mankind in general and thus for the realisation of perpetual peace.

\textit{Id.} at 142.
\textsuperscript{110} See generally Kant, \textit{supra} note 94.
\textsuperscript{111} S. James Anaya, \textit{Indigenous Peoples in International Law} 4 (2nd ed. 2004).
\textsuperscript{112} Sandra Day O’Connor, \textit{Federalism of Free Nations, in International Law Decisions in National Courts} 13, 17–18 (Thomas M. Franck & Gregory H. Fox eds., 1996); \textit{see also} Christenson, \textit{supra} note 32, at 423.
and his derivation of the “law of peoples.” Rawls’s “law of peoples” encompasses all people everywhere and provides the foundation necessary to promote fairness. The basic principles constituting the law of peoples are justice, the normative “right,” and the common good. These principles establish the ideal against which both interstate and intrastate activity is to be assessed. The law of peoples differs from international law, however, in that the latter is a formal (not theoretical) system of positive law, albeit one largely bereft of enforcement mechanisms.

As it relates to Kant’s notion of a federalism of free states, Rawls makes it clear that the law of peoples, if enacted, would challenge conventional notions of sovereignty because nation-states would become compelled to adhere to basic human rights principles. Challenging conventional notions of state sovereignty is consistent with cosmopolitan democracy, and Rawls emphatically contends that a state does not have the “right to do as it likes with people within its own borders.” Conceptually, a law of peoples—a law that protects all people everywhere from intrastate and interstate transgressions—delegitimates conventional thinking about the authority of governments and the distribution of control within nation-state boundaries. According to Rawls, “[w]e must reformulate the powers of sovereignty in light of a reasonable law of peoples and get rid of the right to war and the right to internal autonomy . . . .” To be perfectly clear, Rawls’s interest is making certain that all people have “basic rights and liberties and opportunities; fundamental freedoms and claims of the general good; and measures assuring for all citizens adequate all-purpose means to make effective use of their freedoms.”

What I find most compelling in Rawls’s account of a law of peoples is his clear condemnation of states that violate the human rights of its own people. Rawls makes a strong case for adherence to rulings of the World Court regarding human rights violations taking place in the United States or elsewhere, and provides a strong rationale for the U.S.

114 See id. at 82.
115 See id. at 69.
116 See id. at 48.
117 Id. at 49.
118 Rawls, supra note 113, at 51.
119 See id. at 56. In fact, Rawls emphasizes this point by stating, “nor can a people protest their condemnation by the world society when their domestic institutions violate the human rights of certain minorities living among them.” Id.
Supreme Court to consider international human rights law when deciding domestic cases involving clear human rights components. And, while Rawls’s enumerated list of human rights largely mirrors those protected by the U.S. Constitution and its Amendments, his emphasis is on these rights as components of the law of peoples. Like constitutional rights, rights arising from the law of peoples establish the limits of sovereign authority. These two kinds of rights are distinct, however, in that the former, by their very nature, must apply universally and without regard to one’s location or citizenship status.

So what should be done when states refuse to acknowledge the law of peoples? Rawls refers to such states as non-compliant, “outlaw regimes.” There are numerous examples of non-compliant regimes that have historically been characterized as evil, and which would in no way yield to conscience or international pressure to adopt human rights principles. But what about countries like the United States, England, France, or Spain? These are democratic states that spurn and resent any suggestion of being associated with non-compliant or outlaw status. But—despite both their aversion to being so designated and their rhetorical commitment to the fundamental principles of law and human rights—these states signify “outlaw” regimes, in Rawls’s calculus, because they have historically engaged in imperial global missions seeking to dominate geopolitical relations. An international institution like the United Nations, argues Rawls, is necessary to keep outlaw nations in check, and to promote the law of peoples.

Echoing Rawls’s emphasis on the power of international law to direct rogue state violators of human rights into patterns of behavior more consistent with international opinion are S. James Anaya and Sally Engle Merry. Anaya’s work focuses on ways international human rights law can be used to embarrass, marginalize, and otherwise shame a non-compliant state into more humane treatment of its people. Thus, for Anaya, state sovereignty is not absolute. In the indigenous rights arena, states infamously ignore treaties, statutes, and case law designed to protect indigenous people and their resources. International law and procedures designed to promote human rights

120 Id. at 72.
121 See generally Agnes Heller, The Limits to Natural Law and the Paradox of Evil, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, supra note 113, at 149, 155 (labeling the Nazi regime as evil).
122 See generally Anaya, supra note 111; Engle Merry, supra note 76, at 941.
123 See Anaya, supra note 111, at 217–19.
124 See id. at 52.
serve as a counterweight to domestic obstacles to recognition of indigenous sovereignty claims. Once established by international oversight bodies, complaint procedures designed to amplify violations of human rights serve to shame governments into compliance with international norms. This is an effective check of state power, argues Anaya, because states want to avoid being viewed as “violators of human rights in the eyes of the world community.” It is Anaya’s belief that international law, despite once serving as an instrument of colonization, may now be seen as an avenue to support the demands of indigenous people.

Engle Merry argues, consistent with West-Newman’s concern for careful understanding of culturally significant interpretations of justice and emotion, that advances in international human rights must “build[] on national and local cultural practices and religious beliefs . . . .” Culture must be viewed as liquid, not static, in the sense that it is perennially changing in response to internal and external stimuli. And, like Anaya, Engle Merry views the adoption of international human rights procedures and the subsequent documentation of rights violations as vital mechanisms for the expression of desirable behavior. These mechanisms are effective, argues Engle Merry, because they exert moral pressure on recalcitrant countries. . . . These policy statements have the legitimacy of international procedures [because] they define problems and frame social issues in the language of human rights and freedom from discrimination and gender equality, [and] they provide a language of argument that resonates with the values of a secular global modernity.

So, while there is no enforcement mechanism that can compel “outlaw” states to behave in accordance with international human rights standards, condemnation of a state by the international community, and legitimization of standards of conduct through published documents,

125 See id. at 152.
126 See id. at 248.
127 Id. at 153.
128 See generally Anaya, supra note 111 (explaining how international law should increase the political representation of indigenous people).
129 Engle Merry, supra note 76, at 947.
130 See id. at 968.
131 Id.
incline outlaw states toward behaving in accordance with the expectations of the global community.

Finally, written in the spirit of cosmopolitan democracy, and consistent with Rawls’s conceptualization of a law of peoples, Steven Lukes characterizes contemporary struggles between nation-states as a political, economic, and cultural battle among utilitarians, communitarians, proletarians, egalitarians, and libertarians. 132 Recognizing the diversity existing across the globe with regard to the philosophical and ideological underpinnings of nation-states, Lukes argues for agreement over human rights as a way to establish an “egalitarian plateau.” 133 This egalitarian plateau constitutes a short list of human rights protections that includes “basic civil and political rights, the rule of law, freedom of expression and association, equality of opportunity, and the right to some basic level of material well-being.” 134 It is these rights that will provide the foundation for settling transnational disputes, because by adopting the discourse of human rights conceived as an egalitarian plateau each nation-state will be compelled to filter domestic and international behavior through a human rights lens. In short, it is through acknowledgement of cosmopolitan democracy that Lukes proposes establishing a master narrative capable of administering transnational justice.

IV. CAN WE CITE TO INTERNATIONAL LAW?

The framers of the U.S. Constitution extended comity to international law. In the Declaration of Independence, Thomas Jefferson emphasizes the need to maintain a “decent respect to the Opinions of Mankind.” 135 Federalist Paper 63 makes specific reference to our need to be open to insights gleaned from other nations:

An attention to the judgment of other nations is important to every government. . . . [I]ndependently of the merits of any particular . . . measure, it is desirable . . . that it should appear to other nations as the offspring of a wise and honorable policy . . . [and] in doubtful cases, particularly where the national councils may be warped by . . . passion or momentary interest,

132 See generally Steven Lukes, Five Fables About Human Rights, in On Human Rights: The Oxford Amnesty Lectures 1993, supra note 113, at 19. Of course, this same struggle could take place between each of these represented positions within the same state.

133 See id. at 39.

134 See id.

135 The Declaration of Independence para. 2 (U.S. 1776).
the presumed or known opinion of the impartial world may be the best guide that can be followed.\footnote{136}

The Supremacy Clause makes it clear that every state must abide by the terms of treaties entered into by the federal government.\footnote{137}

Louis Henkin posits two possible sources of domestic law.\footnote{138} First, he argues that the law of nations became “our law” in 1776, appearing as part of English common law.\footnote{139} Next, he suggests the origins of domestic law and reference to a law of nations was a simple matter of becoming a sovereign state.\footnote{140} Once established, the United States was forced into recognition of the law of nations, particularly with regard to treaties, and the Supremacy Clause established the requirement that these laws be followed by the states.\footnote{141} Recognition of the new status of the United States appeared in the case of \textit{Chisholm v. Georgia} (1793), where Chief Justice Jay argued that “the United States had, by taking a place among the nations of the earth, become amenable to the law of nations . . . .”\footnote{142} As far back as the sixteenth and seventeenth centuries, there was no distinction drawn between international law and domestic law. International law, such as it was, was considered binding on all people.\footnote{143} Over time, and with the ascent of Britain as an empire, inter-

\footnote{136} Vicki Jackson, \textit{Yes Please, I’d Love to Talk with You}, LEGAL AFF., July–Aug. 2004, at 43, 44 (quoting \textit{The Federalist} No. 63 (James Madison)).

\footnote{137} \textit{See} U.S. Const. art. VI, cl. 2. The Supremacy Clause reads:

\textit{This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.}

\textit{Id.} (emphasis added).


\footnote{139} \textit{Id.} at 1555–56.

\footnote{140} \textit{See id.} at 1556.

\footnote{141} \textit{See id.}

\footnote{142} 2 U.S. (2 Dall.) 419, 473 (1793); \textit{see Harry A. Blackmun, The Supreme Court and the Law of Nations}, 104 Yale L.J. 39, 39 (1994).

\footnote{143} Harold Hongju Koh, \textit{Paying “Decent Respect” to World Opinion on the Death Penalty}, 35 U.C. Davis L. Rev. 1085, 1088 (2002). According to Koh, Blackstone “described the law of nations as ‘a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.’” \textit{Id.} (quoting \textit{William Blackstone, 4 Commentaries} *66). Of course, Blackstone’s reference to the law of nations being limited to the “civilized inhabitants of the world” framed the law of nations in such a
national law became consolidated into English common law and in that manner was adopted by the American colonies. Until 1789, then, most “state” or colonial law was international law. Thus, while there is no expressly stated requirement of domestic adherence to the law of nations in either the Constitution or Bill of Rights, international law was nonetheless established through the auspices of the common law.

But it may be that the most significant influence on U.S. courts with regard to the law of nations are the longstanding internationally agreed-upon principles of *jus cogens* ("compelling law") and *jus gentium* ("law of nations"). Both *jus cogens* and *jus gentium* provide for the acknowledgement of a mandatory corpus of international law. Customary international law refers to another conception of the law of nations, this time as a body of law generated from the international community of states and based on past practices. Selected “customs are accepted as legal requirements or obligatory rules of conduct; practices that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.” While not a treaty, and thus not binding via the Supremacy Clause, customary international law can be used by the courts as a reservoir of legal opinion grounded in the community of nations. T. Alexander Aleinikoff supports his proposal for a * tertium quid* founded on customary international law by pointing to the Supreme Court’s reference to the law of nations in *The Paquete Habana* case. There, the Court states that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” Aleinikoff contends that because domestic law was based on common law, and therefore indirectly on conventional transnational norms, the states were intended to be bound by certain well-established principles reflected in international law. Here, Aleinoff is joined by Harold Koh, who argues that in the realm
of cross-cultural public law litigation, litigants often blend domestic and international law to create a *tertium quid* based on “transnational law.” Litigants invoking transnational law often argue that some transnational norm has been violated. This is a useful strategy, even when there can be no internationally enforced judgment against a defendant, because rulings in favor of litigants in transnational cases provide powerful political leverage for application in other arenas.

The Supreme Court has found guiding principles in the “law of nations” even when deciding conflicts that have emerged in wholly domestic contexts. Court references to international law were often driven by the emphasis on “evolving standards of decency” in Eighth Amendment jurisprudence. In *Trop v. Dulles* (1958), the Court considered whether the death penalty violated the Eighth Amendment’s prohibition of cruel and unusual punishment by reference to international norms of “‘dignity, civilized standards, humanity and decency.’” Similarly, in *Enmund v. Florida* (1982), the Court cited the abolition of the felony-murder rule in England and India, its restriction in Canada, and its absence from continental Europe. Justice Blackmun argued that “international law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishment.”

Numerous decisions emerging from the Supreme Court early in the nineteenth century make this point. In *Marbury v. Madison* (1803), Chief Justice John Marshall established the Supreme Court as the ultimate authority where interpretation of federal law is concerned. Significantly, however, Justice Marshall never suggested that the judiciary should consider only domestic law. The Supreme Court rulings in a number of cases while not always reaching the correct result, demonstrated the Court’s avowed commitment to comity with inter-

153 See generally Koh, supra note 143. For the purposes of this paper, I will join Professor Koh in citing Judge Phillip Jessup’s definition of “transnational law.” According to Jessup, transnational law is “all law which regulates actions or events that transcend national frontiers,” including “both public and private international law . . . [plus] other rules which do not wholly fit into such standard categories.” See id. at 1088, n.9 (quoting PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956)).
155 Koh, supra note 143, at 1096; see 458 U.S. 782 (1982).
156 Blackmun, supra note 142, at 45.
157 See 5 U.S. (1 Cranch) 137 (1803).
158 See id.
national law.\textsuperscript{159} In \textit{Murray v. The Charming Betsy}, Chief Justice Marshall wrote that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”\textsuperscript{160} \textit{Charming Betsy} thus famously establishes the presumption “that courts, in interpreting statutes, should assume that Congress sought to adopt legislation consistent with international law.”\textsuperscript{161} In \textit{Schooner Exchange v. McFaddon}, the Court declined to accept jurisdiction over a ship belonging to the nation of France, notwithstanding that it was docked in U.S. territory.\textsuperscript{162} In \textit{Thirty Hogsheads of Sugar v. Boyle}, the Court stated that “[t]he decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.”\textsuperscript{163} The Court consulted international law in \textit{Worcester v. Georgia} to discern the limits of Indian tribal authority.\textsuperscript{164} In \textit{Prigg v. Pennsylvania}, where the Court invalidated a Pennsylvania statute making it a crime for a master to apprehend one of his slaves within that State, the Court acknowledged that, while international law itself would not compel return of fugitive slaves against the policy of a sovereign state, the Constitution had abrogated that particular tenet of the law of nations as to the states.\textsuperscript{165} Both sides of the Court in the infamous \textit{Dred Scott} case cited international law when deciding the question of whether blacks were to be considered “citizens” of the United States.\textsuperscript{166} Finally, in \textit{Fong Yue Ting v. United States}, the Court invoked international law in support of its conclusion that a nation may attach conditions to the admission of foreigners into its territories.\textsuperscript{167} In each of these cases, the Supreme Court pointed to trends in international law to support its ruling.\textsuperscript{168}


\textsuperscript{160} 6 U.S. (2 Cranch) at 81.

\textsuperscript{161} Aleinikoff, \textit{supra} note 4, at 99; \textit{see} 6 U.S. (2 Cranch) at 81.

\textsuperscript{162} \textit{See} 11 U.S. (7 Cranch) 116.

\textsuperscript{163} 13 U.S. (9 Cranch) at 198.

\textsuperscript{164} \textit{See} 31 U.S. (6 Pet.) at 515.

\textsuperscript{165} \textit{See} 41 U.S. (16 Pet.) at 611.


\textsuperscript{167} \textit{See} 149 U.S. at 705.

V. Wrongful Conviction in the United States

On April 23, 2007, Jerry Miller became the two-hundredth DNA exoneree in the United States. Miller spent twenty-five years in an Illinois prison after being convicted of a crime he did not commit. And while, for innocence activists at least, each exoneration in the United States generates a momentary pause of satisfaction, the magnitude of the problem of wrongful conviction dominates our professional thoughts and actions. There is no way to know how many wrongfully convicted people there are in the United States, but we do know that the more we scratch, the more we find. But why?

In many respects, the United States has taken the lead with regard to scholarship examining the primary causes of wrongful convictions. This is perhaps due to the fact that, among Occidental nations, the United States has the largest prison population and is, therefore, more likely to generate errors leading to unsound verdicts. Certainly there can be little doubt that the increased frequency of crimes for which convicted felons face prison time or the death penalty has caused an increase in the number of wrongful convictions. Wrongful convictions have far more to do, however, with the way crimes are investigated and processed through the criminal justice system.

Largely through post mortem review in cases where exonerations have been confirmed through DNA testing, legal and social science scholars have identified six leading causes of wrongful conviction: (1) police and prosecutorial misconduct; (2) false eyewitness identification; (3) false confessions; (4) junk science; (5) jailhouse informants; and (6) indigent defense. To that list can be added a host of additional

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170 Id.

171 See U.S. Dep’t of Justice, Bureau of Justice Statistics Prison Statistics (Sept. 27, 2007), http://www.ojp.usdoj.gov/bjs/prisons.htm. According to the U.S. Bureau of Justice’s Prison Statistics Summary, by June of 2005 there were 2,186,230 individuals held in federal and state prisons and jails, or 488 prison inmates per 100,000 population. This presented an increase of 2.6% from 2004. Id.

structural- and process-related causes. These include: (1) police interrogation tactics (not necessarily misconduct, but police training in Reid School tactics designed to generate confessions); (2) plea bargaining; (3) pretrial discovery; (4) jury perceptions of defendant guilt based on the fact that they are defendants in a trial; (5) the Direct Connection Doctrine (making it difficult for defendants to introduce evidence of a third party suspect); (6) admissibility of eyewitness identification; (7) factual guilt determinations on appeal; (8) “harmless” error; and (9) the expansive application of the felony murder rule. In short, we now have considerable evidence to support arguments that the causes of wrongful convictions appear at specific points during crime scene investigation and the legal processes that follow.

In response to a growing body of scholarship addressing the causes and potential remedies for wrongful conviction, legal and social science scholars have put forth an impressive set of recommendations to minimize the likelihood of errors occurring during case investigations, at trial, and on appeal. Federal recognition of the need to improve each aspect of case processing occurred with passage of the Justice For All Act in 2004. In addition, many states have enacted measures to either review case processing standards or institute changes in case processing. Still, the actual implementation of proposed changes has been slow in coming. The reasons for reluctance to implement changes to both structure and process include lack of political will; entrenched practices in institutional cultures; self-interested career preservation; racial, ethnic, and class prejudice; ignorance; and flagrant disregard of the ethical commitments sworn officers and those who work under them have to the presumption of innocence and the preservation of constitutionally guaranteed civil liberties.

If innocence scholars and activists adopt a counter-hegemonic narrative based on international human rights, and incorporate the best practices culled from transnational experience, external pressure may be brought to bear on those criminal justice institutions in dire need of reform. Juxtaposition with the transnational experience, that is to say, may serve to shame and humiliate those who have been derelict.

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in their responsibilities to ensure safe convictions, and may thereby generate a far more critical analysis of U.S. institutions and procedures.

Conclusion

In this essay I have endeavored to establish the theoretical foundation for U.S. adoption of international human rights standards and transnational insights pertaining to criminal law and criminal procedure. I have argued that a new global mythology based on human rights and capable of explaining the increasingly complex interrelatedness of human beings across the planet is necessary to promote human dignity. I have also argued that this process can only be understood by carefully acknowledging the perennial interplay of métis and techne within global civil society, and by adopting a theoretical commitment to cosmopolitan democracy. By doing so, we become positioned to realize Kant’s Federation of Free Nations.

I have argued throughout that the obstacles to eradication of the primary causes of wrongful conviction are entrenched in professional subcultures, and procedural bars established by case law and statute. I also argued that, in order for innocence activists to shed their Sisyphian load, we must generate a counter-hegemonic narrative based on insights drawn from international law.

The practical result of this research is its application to domestic jurisprudence regarding the prevention and remedying of wrongful convictions. Such a project includes a detailed analysis of transnational criminal procedure. In this way, I am able to provide both the theoretical and empirical impetus for meaningful alteration of our domestic jurisprudence, each in the Kantian and Rawlsian spirit of a law of peoples.
SUSPICIOUS CLOSETS: STRENGTHENING THE CLAIM TO SUSPECT CLASSIFICATION AND SAME-SEX MARRIAGE RIGHTS

MARGARET BICHLER*

Abstract: Ever since gay marriage was legalized in Massachusetts in 2003, the gay marriage debate has consumed much of the American political conscience. While many important questions concerning equal protection, the institution of marriage, and modern conceptions of family have been asked, few have stopped to question what (aside from Judeo-Christian moral issues) makes homosexuals so wrong—so undeserving of the right to marry and have a family. The process of deviant identity construction and the optional “closet” must be comprehended in order for the gay claim to equal protection and suspect classification to be fully considered and appropriately evaluated. Once gays are properly regarded as a suspect class, laws prohibiting gay marriage will, in all likelihood, fail strict scrutiny analysis.

Introduction

Recent polls indicate that Americans might soon be willing to accept civil unions between homosexual couples.1 However, the same polls reaffirm both American society’s refusal to accept gay marriage and a general disdain for homosexual individuals.2 As the debate centers on the pros and cons of gay marriage, little or no discussion focuses on what exactly makes any debate over gay rights so heated.3

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1 Gary Langer, Most Oppose Gay Marriage; Fewer Back an Amendment, ABCnews.com, June 5, 2006, http://abcnews.go.com/US/Politics/story?id=2041689&page=1 (last visited Jan. 15, 2008). The poll results indicated that 58% of Americans believe gay marriage should be illegal, and 45% think civil unions giving equal rights to gay couples should be legal. Id. When 1002 adult Americans were asked whether they believed homosexuality should be considered an acceptable alternative lifestyle, 41% replied that it should not. Gallup Poll, May 8–11, 2006, pollingreport.com, http://www.pollingreport.com/civil.htm (last visited Jan. 15, 2008).

2 See Langer, supra note 1; Gallup Poll, supra note 1.

The debate is fueled by the frequently unacknowledged historical process by which the homosexual identity was labeled perverse by those in the fields of science, medicine, psychology, and media over the last century.\textsuperscript{4} This process and the resulting gay identity of deviance explain, to some extent, the general scorn for homosexual individuals and their pursuit of equality.\textsuperscript{5} Because of this attitude of aversion, gays exist in a structure commonly referred to as the “closet”—effectively giving gay individuals the option of “coming out” and being discriminated against or remaining closeted and being treated equally to heterosexual individuals.\textsuperscript{6} Moreover, laws prohibiting gay marriage reinforce and maintain the notion that homosexuality is inherently wrong.\textsuperscript{7} Statutes that criminalize sodomy (whether limited to homosexual sodomy or not) deny gays equal rights and imply a moral and social inferiority to gay relationships and homosexuals themselves.\textsuperscript{8} The process by which homosexuals have been labeled deviant, the resulting closet, and the precarious legal status of gay individuals are highly suspect.\textsuperscript{9} Only when this background becomes an integral part of the gay marriage debate, and every debate concerning gay rights, can the legal claims of gay individuals be properly weighed and evaluated.\textsuperscript{10} This backdrop can and should serve to

\textsuperscript{4} See MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION, 42–43, 97–101, 105–06 (1990). Foucault explains the process by which the homosexual identity was constructed as deviant. \textit{Id.} at 101.

\textsuperscript{5} \textit{Id.} at 100–01.


\textsuperscript{7} Goodridge v. Dep’t of Public Health, 798 N.E.2d 941, 968 (Mass. 2003) (explaining that laws prohibiting gay marriage are based on prejudice against gays).

\textsuperscript{8} TEX PENAL CODE ANN. § 21.06 (1993); GA. CODE ANN. § 16–6–2 (1984); see Lawrence v. Texas, 539 U.S. 558, 582, (2003) (O’Connor, J., concurring) (explaining that a Texas law prohibiting homosexual sodomy legally sanctioned discrimination against homosexuals in the areas of employment, family issues, and housing); Bowers v. Hardwick, 478 U.S. 186, 199 (1982) (Blackmun, J., dissenting) (stating that the Georgia statute prohibiting all acts of sodomy denied “individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity”).

\textsuperscript{9} See FOUCAULT, supra note 4, at 101; SEDGWICK, supra note 6, at 68–70, 86.

\textsuperscript{10} See FOUCAULT, supra note 4, at 101, 104–05; SEDGWICK, supra note 6, at 18–20, 69–71. The construction of the deviant identity and closet structure are what make the homosexual population a suspect class; the requirement of denying one’s identity in order to achieve social and legal equality is the very type of evil targeted by the Equal Protection Clause and suspect classification. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 163 (1980); FOUCAULT, supra note 4, at 43, 101; SEDGWICK, supra note 6, at 69–71.
strengthen the gay claim to suspect classification within equal protection doctrine.\textsuperscript{11}

The Equal Protection Clause of the Fourteenth Amendment declares that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{12} This clause was ratified to stop southern states from enacting discriminatory statutes that attempted to maintain the social and political inferiority blacks had suffered as slaves.\textsuperscript{13} Since its ratification, the purpose of the clause has been expanded to protect the interests of other socially and politically unpopular groups from a potentially ill-motivated legislature.\textsuperscript{14} For the most part, the very process of democracy ensures that people’s interests are pursued by the legislature in its lawmaking—people vote for legislators whose interests align with their own and the need for reelection maintains that alignment.\textsuperscript{15} But history has demonstrated that the democratic process can malfunction; a legislature representative of the majority can and will pass laws to the specific disadvantage of minority groups.\textsuperscript{16} The Equal Protection Clause works to correct such malfunction by prohibiting state legislation that denies persons equal protection under the laws or, in other words, that discriminates between similarly situated individuals.\textsuperscript{17} The clause, “by its explicit concern with equality among the persons within a state’s jurisdiction,” is the Constitution’s clearest recognition that a voice and a vote will not always guarantee good-faith representation of everyone.\textsuperscript{18}

Equal protection doctrine distinguishes between classifications,\textsuperscript{19} and explains that a suspect classification is one which serves to disadvantage members of a group that has been historically discriminated against, denied political power, and is discrete and insular.\textsuperscript{20} Such a

\begin{itemize}
\item \textsuperscript{12} U.S. Const. amend. XIV, § 1.
\item \textsuperscript{13} Erwin Chemerinsky, Constitutional Law 652 (2d ed. 2005).
\item \textsuperscript{14} Id. at 617–19.
\item \textsuperscript{15} Ely, supra note 10, at 82.
\item \textsuperscript{16} Id. at 103.
\item \textsuperscript{17} Id. at 98.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Chemerinsky, supra note 13, at 619–20. In addressing equal protection claims, courts apply one of three tests depending on the individual or group making the claim: rational basis, heightened scrutiny, or strict scrutiny. Id.
\item \textsuperscript{20} Bakke, 438 U.S. at 357; Carolene Prods., 304 U.S. at 152–53 n.4. For the purposes of this paper, “discrete” refers to one’s ability to identify an insular gay community or individual, and not the idea that one can or should sensor their personal expression of the gay identity.
\end{itemize}
classification is treated by the court as inherently suspicious, or sus-
pect; accordingly, it will only be upheld if it can withstand strict scru-
tiny analysis, which requires that the law be narrowly tailored to
achieving a compelling government interest.21 Racial classifications
have consistently been regarded as suspect because racial minorities
have historically been disenfranchised from the political process and
have a signifying trait (skin color) that is immutable and readily visi-
ble.22 John Hart Ely, a prominent constitutional law scholar, examines
equal protection doctrine in his book Democracy and Distrust.23 Perhaps
the most compelling aspect of Ely’s consideration of suspect classifica-
tion is his analysis of its purpose—namely, to identify the cases in
which the democratic process has failed an unpopular minority leav-
ing them vulnerable to mistreatment by the majority.24

Despite the rigid criteria for suspect classification, the doctrine’s
purpose of detecting and stopping efforts by the majority to subjugate a
socially unpopular group reveals that the gay population is one such
population deserving of its protection.25 Homosexuals have thus far
been denied suspect classification because they do not fit neatly within
the parameters drawn by the Court.26 However, the history of con-
structed deviance and the unique situation of closeted existence, cou-
pled with Ely’s analysis of the aims of suspect classification, will reveal a
population more suspiciously situated than any this country has ever
seen.27

This note seeks to provide a comprehensive understanding of the
process by which homosexuals came to be assigned a deviant and per-
verse identity and then to use this understanding to strengthen their
claim to suspect classification and to marriage rights. Part I will situate
the reader within the landmark court decisions that have punctuated
the battle for gay rights in the United States and the discourse that has
defined the gay marriage debate ever since that battle achieved minor
success with the legalization of gay marriage in Massachusetts in 2003.
Part II will summarize the process by which medical, scientific, and

21 See Bakke, 438 U.S. at 357; Carolene Prods., 304 U.S. at 152–53 n.4.
22 See Chemerinsky, supra note 13, at 653.
24 See id. at 152–53, 161.
25 See id. at 145–46, 163.
26 Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004) (stating that the Supreme
Court has never determined homosexuals to be a suspect class).
27 See Ely, supra note 10, at 155–58 (explaining that more and more scholars are sug-
gest that legislation rooted in stereotype should be regarded as suspicious); Foucault,
supra note 4, at 43, 101; Sedgwick, supra note 6, at 71.
popular discourse created and maintained a perverse implantation and the resulting closet. Part III will examine the purpose of the Equal Protection Clause and suspect classification, the complexities of the gay claim to suspect classification given the optional closet, and will then use this peculiar situation to strengthen that claim. Finally, Part IV will argue that if the laws banning gay marriage were subjected to strict scrutiny review they would be ruled unconstitutional.  

I. DISCOURSE OF DEVIANCY: THE LEGAL AND SOCIAL UNDERSTANDING OF THE GAY MARRIAGE DEBATE

Meaningful discourse on gay rights has been exchanged on both the legal and social fronts, but what has frequently made this exchange caustic is the underlying assumption of a deviant and perverse homosexual identity.  

This typically unacknowledged assumption is crucial to understanding the unique social and legal circumstance of being gay. Most importantly, only when the process of perverse identity construction is understood and accounted for can the claim by gay men and women to equal marriage rights, and equality in general, be properly evaluated within the framework of suspect classification.

A. From Bowers to Lawrence: The Process of Progress

The current legal battle for gay rights began in 1986 with the landmark case of *Bowers v. Hardwick*, in which a Georgia citizen challenged a state statute prohibiting all acts of sodomy after he was arrested and charged with its violation.  

Hardwick’s defense argued that engaging in consensual sodomy was a private and intimate act protected from state prohibition by the guarantee of privacy under the Ninth Amendment of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment. Accordingly, the Supreme Court phrased the issue as “whether the Federal Constitution confers a

28 Though the same process which has labeled gays deviant and perverse has also worked to craft the perceived deviance of transgendered and bisexual individuals, this note will focus specifically on the gay population and its claim to equal marriage rights because, to date, this is where the debate and its surrounding discourse has focused.

29 See *Foucault*, *supra* note 4, at 43, 101, 104–05.

30 See *id.*, at 43, 101; *Sedgwick*, *supra* note 6, at 67–68, 71.

31 See *Ely*, *supra* note 10, at 155–58, 163; *Foucault*, *supra* note 4, at 43, 101; *Sedgwick*, *supra* note 6, at 69–71.

32 478 U.S. 186, 188 (1986). Hardwick was never prosecuted but challenged the constitutionality of the statute in a civil suit. *Id.*

33 *Id.* at 189.
fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal . . . .”34 The Court ultimately held that the Constitution does not confer such a right, nor does the fundamental right to privacy extend to protect homosexual sodomy.35 Justice Blackmun dissented, arguing that if the fundamental right to privacy “means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an ‘abominable crime not fit to be named among Christians.’”36 The Bowers decision provided a serious setback in the fight for gay rights as statutes prohibiting gays from physical intimacy stood as good law across the nation.37

Justice Blackmun’s argument that the right to privacy protected individuals’ right to control “the nature of their intimate associations with others” finally found support in the 2003 decision of Lawrence v. Texas.38 In Texas, this time, a citizen was prosecuted for violation of a state statute specifically prohibiting homosexual sodomy.39 Because this statute prohibited only homosexual sodomy, the Court evaluated the issues of privacy and due process present in Bowers, and the additional issue of whether a statute such as this violated one’s right to equal protection of the laws.40 Justice Kennedy, writing for the majority, opined:

The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

34 Id. at 190.
35 Id. at 192, 195.
36 Id. at 199–200 (Blackmun, J., dissenting) (citing Herring v. State, 119 Ga. 709, 721 (1904)).
37 See Bowers, 478 U.S. at 196.
38 See Lawrence v. Texas, 539 U.S. 558, 567 (2003); Bowers, 478 U.S. at 200 (Blackmun, J., dissenting).
39 Lawrence, 539 U.S. at 564. This case was thus distinguished from Bowers because the Georgia statute had prohibited all acts of sodomy. Id. at 566.
40 Id. at 564.
When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.\textsuperscript{41}

The majority held that the right to privacy and the guarantee of liberty in the Due Process Clause did, in fact, protect individuals from criminal prosecution for engaging in intimate acts.\textsuperscript{42} The \textit{Lawrence} Court thus overruled \textit{Bowers} and effectively invalidated any state laws prohibiting sodomy.\textsuperscript{43}

Notably, the \textit{Lawrence} court based its decision and the overruling of \textit{Bowers} primarily on the right to privacy and the fundamental liberties guaranteed by the Due Process Clause of the Fourteenth Amendment; the majority declined to decide the issue on equal protection grounds.\textsuperscript{44} The majority explained that the equal protection challenge was “tenable” but that a decision on equal protection grounds would leave the \textit{Bowers} holding intact—a holding recognized by the \textit{Lawrence} Court as demeaning to the homosexual population.\textsuperscript{45} Even though the Court hinted that an equal protection claim would have been successful, it said nothing to suggest what level of scrutiny it would have applied.\textsuperscript{46} Justice O’Connor concurred and evaluated the law under the rational basis test, ignoring all possibility that the gay population is a suspect class.\textsuperscript{47} She determined that the Texas statute failed even ra-

\textsuperscript{41} \textit{Id.} at 567 (emphasis added).
\textsuperscript{42} \textit{Id.} at 578.
\textsuperscript{43} \textit{See id.}
\textsuperscript{44} \textit{Lawrence}, 539 U.S. at 574–75.
\textsuperscript{45} \textit{Id.} This very point brought Justice O’Connor to write a concurring opinion in which she explained that \textit{Bowers} should not have been overturned by \textit{Lawrence}; \textit{Lawrence} should have been decided on equal protection grounds alone because the statute at issue prohibited only homosexual sodomy. \textit{Id.} at 579–80 (O’Connor, J., concurring).
\textsuperscript{46} \textit{See id.} at 574–75 (majority opinion).
\textsuperscript{47} \textit{See id.} at 579–80 (O’Connor, J., concurring).

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.” Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy.\ldots And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.

\textit{Id.} at 583.
tional basis review, the lowest level of scrutiny, because it was not ra-

tional basis review, the lowest level of scrutiny, because it was not ra-
nionally related to a legitimate government purpose.48

Despite the Lawrence Court’s refusal to analyze the equal protec-
tion claim, Justice O’Connor’s declaration that moral disapproval of a
group was not a legitimate state interest was quickly drawn upon by
the Massachusetts Supreme Judicial Court.49 In the case of Goodridge v.
Department of Public Health, the court legalized gay marriage within the
state.50 Here, seven gay couples applied for marriage licenses within
the state and were denied on the ground that Massachusetts did not
recognize same-sex marriage.51 The couples brought suit against the
Department of Public Health, the state agency that had denied the
applications.52 The court evaluated the statute under rational basis,
and, citing specifically to Justice O’Connor’s concurrence in Lawrence,
held that the denial of the right to enter into a civil marriage failed;
the majority reasoned that:

The marriage ban works a deep and scarring hardship on a
very real segment of the community for no rational reason.
The absence of any reasonable relationship between, on the
one hand, an absolute disqualification of same-sex couples
who wish to enter into a civil marriage and, on the other,
protection of public health, safety or general welfare, sug-
gests that the marriage restriction is rooted in persistent
prejudices against persons who are (or who are believed to
be) homosexual . . . . Limiting the protections, benefits, and
obligations of civil marriage to opposite-sex couples violates
the basic premises of individual liberty and equality under
law protected by the Massachusetts Constitution.53

After decades of refusal by the courts to acknowledge gay relationships,
the Lawrence Court ended the criminalization of such relationships and
the Goodridge decision took a dramatic step in declaring them both le-
gitimate and legally equal to heterosexual relationships.54 With the le-

48 Id.
49 See Lawrence, 539 U.S. at 579–80 (O’Connor, J., concurring) (2003); Goodridge v.
50 798 N.E.2d. at 968, 973.
51 Id. at 313–15.
52 Id. at 316.
53 Id. at 341–42, 344.
54 Lawrence, 539 U.S. at 578; Goodridge, 798 N.E.2d. at 969–70.
galization of gay marriage, even in a single state, came a national de-
bate over marriage, sexuality, and the role of the courts.  

B. America up in Arms: A Violent Reaction to Goodridge

The proclamation in Goodridge that there was no rational basis for the same-sex marriage ban met with much social resistance. President Bush did not hesitate to confront the country with his moral disdain regarding the decision. On February 24, 2004, the President informed America that “[t]he union of a man and woman is the most enduring human institution . . . honored and encouraged in all cultures and by every religious faith.” President Bush proceeded to call upon Congress to support an amendment to the U.S. Constitution that would forever define and protect marriage as “a union of man and woman as husband and wife . . . .” Even when the proposed amendment was finally defeated in 2006, its supporters vowed not to give up until marriage was codified in the Constitution as the union of a man and a woman. A similar determination has driven forty-five states to adopt statutes and constitutional amendments defining traditional marriage and banning gay marriage.

The will of the people, echoed in their support of state legislation banning gay marriage, is undoubtedly informed by the scholarly, religious, and popular discourse dissecting the issues inherent in gay mar-

56 Goodridge, 798 N.E.2d. at 973; Stolberg, supra note 55.
58 Id.
59 Id. The proposed Federal Marriage Amendment was defeated in the Senate in June 2006, but even with its defeat, Republican Senators vowed eventual success. Shailagh Murray, Same-Sex Marriage Ban Is Defeated, WASH. POST, June 8, 2006, at 1. Senator Sam Brownback of Kansas promised not to give up: “We’re making progress, and we’re not going to stop until marriage between a man and a woman is protected . . . in the courts, protected in the Constitution, but most of all, protected for the people and for the future of our children in this society.” Id.
60 Murray, supra note 59. An ABC News poll, released in June 2006, reported that forty-two percent of Americans supported the Federal Marriage Amendment. Id.
61 Id. Polls taken during the 2006 elections showed that support for legislation banning gay marriage in many states was wavering. Kirk Johnson, Gay Marriage Losing Punch as Ballot Issue, N.Y. TIMES, Oct. 14, 2006, at A1. This trend is attributable to increased support of gay marriage at the polls as many gay activist groups have worked diligently to increase voter turnout. See id.
Christian scholars, including Pope John Paul II, have declared that gay marriage must be illegal because it is a moral abomination. But the U.S. Supreme Court swiftly addressed this morality-based justification for laws that disadvantage gay people when it explained in Lawrence that moral disapproval of a group does not qualify as a legitimate government interest.

Moral arguments thus discounted, scholars have focused largely on history and sociology in an attempt to articulate a legitimate, if not a compelling, government interest. These formulations attempt to provide a legally sound defense of traditional marriage and, in turn, a legally sound argument for the prohibition of gay marriage. The arguments have centered primarily on: (1) the importance of heterosexual marriage and family to the proper upbringing of children, and (2) the

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62 See Foucault, supra note 4, at 43, 97–102.
63 Rebecca Allison, Pope Calls for Halt to ‘Evil Gay Marriages’, GUARDIAN (London), Aug. 1, 2003, at 1. Pope John Paul II issued a papal note in which he informed all Catholic legislators of a moral duty to oppose all measures aimed at legalizing gay marriage:

There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family. Marriage is holy, while homosexual acts go against the natural moral law.

Legal recognition of homosexual unions or placing them on the same level as marriage would mean not only the approval of deviant behaviour ... but would also obscure basic values which belong to the common inheritance of humanity.


In an even more radical tone, Dr. James Dobson, a Christian radio show host, foretold the downfall of the traditional and biblical family unit and the suffering of children raised by gay parents. James Dobson, Ten Arguments Against Gay Marriage, available at http://www.nogaymarriage.com/tenarguments.asp (last visited Jan. 15, 2008). For Dobson, the allowance of gay marriage would inevitably compromise the moral nature of public schools, force foster parents to “affirm homosexuality in children and teens,” and allow every homosexual to leach expensive health insurance benefits from his or her now legally-recognized spouse. Id.

64 See Lawrence, 539 U.S. at 583.
65 See George Dent, Traditional Marriage: Still Worth Defending, 18 BYU J. PUB. L. 419, 420, 428–29 (2004); Dwight Duncan, The Federal Marriage Amendment and Rule by Judges, 27 HARV. J.L. & PUB. POL’Y 543, 552 (2004) (arguing that gay marriage should be illegal for the sake of children’s upbringing). Dent describes the benefits children reap when raised by heterosexual married parents and argues that the traditional meaning of marriage should not be altered because it has historically provided incentive to heterosexual couples by recognizing their union and providing them with a sense of honor. Dent, supra, at 428–29.

66 See Dent, supra note 65, at 420, 429; Duncan, supra note 65, at 552.
historical, cultural, and social meaning of marriage that cannot and
should not be reconceptualized.67

Those who oppose gay marriage and assert the well-being of
children as a legitimate or compelling interest explain that children
can only come about through heterosexual union, and so common
sense dictates that children are better raised by a mother and a fa-
ther.68 Furthermore, the argument goes, children raised by married
biological parents fare better by every measure—physical and mental
health, academic performance, social adjustment, and obedience to
the law.69 Finally, gay marriage opponents argue that gay parents will
not have the same devotion to the responsibility of raising children
that heterosexual parents have, because biological parents are respon-
sible for the very creation of the children.70

Supporters of gay marriage are equally concerned with the well-
being of children.71 They point to studies that not only debunk social
myths and stigmas traditionally attached to the “gay lifestyle” but also
demonstrate that homosexual and heterosexual lifestyles are remarka-
ibly similar, especially when it comes to parenting skills.72 In fact, the
American Psychological Association (APA) has stated that not a single
study has found that children raised by gay parents are in any way dis-
advantaged compared to those raised by heterosexual parents.73 More-
over, the APA has cited research that actually suggests lesbian and gay
parents are better parents than heterosexual couples; same-sex couples
are less likely to use physical punishment, are more likely to use reason-
ing in admonishing their children, and are more in-tune with their
children’s feelings.74 In short, extensive studies deflate the arguments

67 See Dent, supra note 65, at 420, 429; Duncan, supra note 65, at 552.
68 Duncan, supra note 65, at 552.
69 Dent, supra note 65, at 428–29. Notably, the study Dent uses to support his argument
was explained in a New York Times article that never explicitly compares heterosexual and
homosexual parents, but instead explains that social scientists have reached a consensus
concerning single-parent families. See id. at 429 n.43. The study views the single-parent
family as the reason for “decades of child poverty, delinquency, and crime” and states that
a growing body of social research concludes that the most supportive household contains
two biological parents in a low-conflict marriage. Id.
70 Id. at 432.
71 See Adrienne Butcher, Selective Constitutional Analysis in Lawrence v. Texas, 41 Hous.
72 Butcher, supra note 71, at 1425.
74 Id. at 8.
that heterosexual, biological, married parents are more fit to raise children.\textsuperscript{75}

Opponents of gay marriage also cite the importance of maintaining the historical, cultural and social meaning of marriage.\textsuperscript{76} They argue that the meaning of marriage should not be compromised because it has historically acted as a source of honor for heterosexual couples.\textsuperscript{77} Further, there is a “consensus offered by history—spanning time and space and cultural and religious differences—that marriage is uniquely a relationship between the sexes, naturally related to procreation and the upbringing of children . . . .”\textsuperscript{78} Because society has an interest in future generations, the argument goes, and because the conjugal acts between men and women create these future generations, society has an interest in promoting and protecting laws that reserve marriage for the union of one man to one woman.\textsuperscript{79}

Advocates of gay marriage counter that marriage has meant many different things historically and that the term still varies in meaning depending on cultural and social values.\textsuperscript{80} For much of history, most cultures have endorsed and practiced polygamy—one man marrying several women.\textsuperscript{81} Moreover, marriages were generally arranged by parents whose decisions as to who would be a good spouse for their child were often not informed by said child’s love interests, but instead by a desire to achieve social goals or to obtain social goods.\textsuperscript{82} In this way, marriage was “largely a matter of business: cementing family ties, forging social and economic alliances, providing social status for men and economic security for women, conferring dowries, and so on.”\textsuperscript{83} If nothing else, history clearly indicates that procreation along with successful child-rearing was never the single purpose and reason for the institution of marriage, much less that there was one single reason for marriage at all.\textsuperscript{84} The supposed deeply embedded historical, social, and

\textsuperscript{75} See id.
\textsuperscript{76} See Dent, supra note 65, at 420; Duncan, supra note 65, at 550.
\textsuperscript{77} Dent, supra note 65, at 421.
\textsuperscript{78} Duncan, supra note 65, at 551.
\textsuperscript{80} Jonathan Rauch, Gay Marriage: Why It Is Good For Gays, Good For Straights, and Good For America 13–17 (2004).
\textsuperscript{81} Id. at 15.
\textsuperscript{82} Id. at 16.
\textsuperscript{83} Id.
\textsuperscript{84} See id. at 13–17.
cultural meaning of marriage appears to be more of a mutable relationship between two or more parties.\(^{85}\)

Though the arguments on both sides of the gay marriage debate have encouraged and even demanded careful contemplation by the American public, they have also left many important questions unasked.\(^{86}\) The courts, the legislatures, and the American public need to be well-informed of the politics and the history involved in the creation of the deviant homosexual identity that has ignited the debate; only then can the gay claim to suspect classification and marriage rights be properly evaluated.\(^{87}\)

II. Queer Construction: Identity Politics and the Making of Gay Perversion

*The ideal King reigns over everything as far as the eye can see. His eye. What he cannot see is not royal, not real. He sees what is proper to him. To be real is to be visible to the King.*\(^{88}\)

Meaningful engagement in the gay marriage debate requires both an informed understanding of legal precedent and reasoning, and a critical consciousness of the process by which gay identities have been labeled perverse.\(^{89}\) Acquiring such consciousness, in turn, requires a basic knowledge of the process by which these identities have been historically constructed through the production and dissemination of scientific and legal discourse.\(^{90}\) Michel Foucault explains this process in theoretical terms, and provides a real-life example through a review of the past one-hundred years of scientific and medical discourse focused on the homosexual deviant.\(^{91}\) Throughout, Marilyn

\(^{85}\) See Rauch, *supra* note 80, at 13–17.


\(^{87}\) See Foucault, *supra* note 4, at 37–40, 101–02, 103–04.

\(^{88}\) Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory* 3 (1983). Frye summarizes the process by which homosexuals have been defined out of the King’s reality when she explains that dictionaries generally agree that “sex” or “sexual intercourse” involves the genital union of a male and a female. See id. at 4. At the same time, a “homosexual” is defined as a person who has sex with another of the same gender. See id. Therefore, semantics have effectively rid the King’s reality of homosexuals as, according to these strictly contradictory definitions, they are both logically and naturally impossible. Id. at 6.

\(^{89}\) See Foucault, *supra* note 4, at 37–40, 101; Frye, *supra* note 88, at 6; Sedgwick, *supra* note 6, at 4–6, 75.


\(^{91}\) See id.
Frye’s metaphor of “the King” is useful to understanding the ultimate reality of identity politics: discourse dominantly produced by a heterosexual white male majority (the King) has served throughout history to define many minority populations out of reality by creating ideas of their inferiority, depravity, and ineptitude.92 Most recently, this process has focused on the gay minority and laws attempting to ban its meaningful existence are only some of the more serious manifestations of identity politics.93

A. Power-Knowledge and the Docile Body

Foucault begins by defining the power-knowledge dichotomy, or the idea that power is knowledge and knowledge is power.94 For Foucault, the ability and opportunity to participate in the discursive realm is a crucial form and generator of power.95 Discourse, according to Foucault, serves two very powerful purposes within society: (1) informing, and indeed, forming individual identities; and (2) generating widespread notions about normalcy which ultimately create social norms enforced by the general population.96 Discourse is the very means by which individuals inform their own identities and their perceptions of the identities of others.97 One who creates knowledge thus exercises power by generating conceptions that will be spread among the masses, absorbed, duplicated, and ultimately imposed on or internalized by another individual in creating her identity.98 For example, a young girl will learn from the time she is a toddler what are acceptable feminine activities and attributes.99 While early instruction will come from her parents, as a young adult, she will be influenced by countless books, magazine articles, clothing ads, and the like as she is exposed to

92 See Frye, supra note 88; Sedgwick supra note 6, at 4–5.
94 See Foucault, supra note 4, at 100.
95 See id.
96 See id. at 38–39, 97–101.
97 See id. at 97–101.
98 See id.
99 See Foucault, supra note 4, at 98–99, 120–21.
the popular discourse of femininity.\textsuperscript{100} Foucault theorizes that this process is effective because bodies are docile, capable of being “subjected, used, transformed, and improved” by such internalization and imposition.\textsuperscript{101} At the same time, the discourse becomes even more effective when accepted by a majority that inherently creates widespread ideas and judgments about what is “normal.”\textsuperscript{102} This transition results in a social norm, internalized by individuals, which will further discipline or control them by demanding conformance lest they be labeled outcasts.\textsuperscript{103} Thus, the power of knowledge creation and dissemination does not depend solely on one individual’s internalization of its message, but instead is buttressed with the acceptance by a majority who will enforce its message regardless of the individual.\textsuperscript{104}

These theories of power-knowledge and the docile body are evident in Foucault’s \textit{History of Sexuality}, in which he explains that sexual identities have not always existed.\textsuperscript{105} In fact, we only came to attach identities to sexual acts during the eighteenth century when the fields of medicine, psychiatry, and education produced discourse of sexual identity and the self.\textsuperscript{106} Prior to this attachment, homosexual acts were

\begin{itemize}
\item \textsuperscript{100} See id.
\item \textsuperscript{101} Michel Foucault, \textit{Discipline and Punish: The Birth of the Prison} 136 (1995).
\item \textsuperscript{102} \textit{Id.} at 184.
\item \textsuperscript{103} See Judith Butler, \textit{The Psychic Life of Power} 1–3 (1997); Foucault, \textit{supra} note 101, at 184. Foucault explains that school, factory, barrack, and prison designs evolved as the powerful came to understand the watchful gaze as an effective disciplinary tool. \textit{Foucault}, \textit{supra} note 101, at 172–74. The power of the social norm was similarly recognized and implemented as a society-wide application of what had been so effective in disciplining the criminal few. \textit{Id.} at 184.
\item \textsuperscript{104} See Butler, \textit{supra} note 103, at 1–3. Butler expands on Foucault’s theory, and explains that docile bodies and malleable blank identities are vulnerable to the power, the discourse, and the social norms created and disseminated by the powerful, and enforced by the watchful gaze:
\begin{quote}
As a form of power, subjection is paradoxical. To be dominated by a power external to oneself is a familiar and agonizing form power takes. To find, however, that what “one” is, one’s very formation as a subject, is in some sense dependent upon that very power is quite another . . . . \[P\]ower is not simply what we oppose but also, in a strong sense, what we depend on for our existence and what we harbor and preserve in the beings that we are . . . . \[P\]ower that at first appears external, pressed upon the subject, pressing the subject into subordination, assumes a psychic form that constitutes the subject’s self-identity.
\end{quote}
\textit{Id.}
\item \textsuperscript{105} Foucault, \textit{supra} note 4, at 37–39, 103–05.
\item \textsuperscript{106} \textit{Id.} at 37–39, 103–05.
\end{itemize}
performed without the individual ever being labeled as a certain type, let alone a certain type of pervert.\footnote{Foucault explains:}{107} Foucault explains:

[Sexuality] is the name that can be given to a historical construct: not a furtive reality that is difficult to grasp, but a great surface network in which stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one another, in a few major strategies of knowledge and power.\footnote{See id. at 105–06.}{108}

Notably, even once sexual acts were attached to sexual identities by discourse, homosexual identities were not immediately named deviant, or at least homosexuality was not understood as more deviant than heterosexuality.\footnote{Id. at 105.}{109} As late as the early 1900s, medical journals were defining heterosexuality as the “abnormal or perverted appetite toward the opposite sex.”\footnote{Jonathan Ned Katz, Homosexual and Heterosexual Questioning in Terms, in Queer World 177, 178 (Martin Duberman ed., 1997).}{110} Homosexual and heterosexual thus refer to historically specific identities and practices contingent on ideas of masculinity, femininity, and lust.\footnote{Id.}{111} In other words, sexual identities are not permanent or fixed realities, but are defined by ever-changing medical discourse; only within the last 100 years has the homosexual been defined as perverse and abnormal and the heterosexual defined as normal.\footnote{See id.}{112}

\section*{B. Perverse Implantation: The Process of Constructing Gay Deviance}

Prior to the nineteenth century, there was no specific identity attached to those individuals who engaged in acts that are now considered homosexual.\footnote{See Sedgwick, supra note 6, at 2; Jennifer Terry, Anxious Slippages Between “Us” and “Them”: A Brief History of the Scientific Search for Homosexual Bodies, in Deviant Bodies 129, 131 (Jennifer Terry & Jacqueline Urla eds., 1995). Sedgwick explains that, as of the turn of the nineteenth century, there was a “world-mapping by which every given person, just as he or she was necessarily assignable to a male or female gender, was now considered necessarily assignable as well to a homo- or hetero-sexuality.” Sedgwick, supra note 6, at 2. Even the Lawrence Court noted this historical appearance of the homosexual identity and further explained that American laws targeting same-sex couples did not exist until the late 1900s. See Lawrence v. Texas, 539 U.S. 558, 570 (2003).}{113} The homosexual, as a person, did not exist.\footnote{Terry, supra note 113, at 129, 131.}{114} Be-
ginning in the late 1800s, homosexuality was defined as deviant and was understood as representing an individual’s tendency toward perverse acts, "as evidence of innate moral inferiority as well as biological deficiency." Homosexuality came to be conceptualized as the adaptive result of cultural advancement; the homosexual population consisted of those bodies that had lost their adaptive ability, and so as culture progressed, their nervous systems were broken down by stress, and their primitive instincts ran free. Beginning in the early 1900s, experts developed the theory of sexual inversion, explaining that the gay population embodied physical and behavioral characteristics of the opposite sex. Some experts even asserted that gays comprised a third biological sex.

During the first half of the twentieth century, popular scientific discourse focused less on what caused homosexuality and more on how to identify members of the gay population. Historically, this was a period in which the threat of a declining white race was at the forefront of the political and social consciousness in America as inter-racial relations and perverse sexual behavior (homosexuality, prostitution, and overpopulation of the poor) were viewed as a threatening deterioration of all social hygiene standards. In the 1930s and 40s, the Sex Variant Study was conducted by various scientists in New York City in order to determine the signifying physical characteristics of sex variants from the complexion of skin to the shape and size of genitals. Detecting the signs of homosexuality was intricately connected to the larger socially eugenic campaign to foster marriage and reproduction among the fit. The Sex Variant Study is an obvious example of the process by which discourse created by scientific experts and

115 Id.
116 Id. at 132.
117 Id. at 135.
118 Id. Terry explains that during this same period, Freud believed that many who displayed homosexual tendencies contributed a great deal to society and were of high moral and intellectual standing. Id. at 136. In fact, according to Terry, Freud’s work on homosexuality forced other scientists to question their own stances as he argued that homosexuals could not be placed in one strict typology as their sexual preferences, in many ways, were not much different than those of their heterosexual counterparts. Id. at 137.
119 See Terry, supra note 113, at 138.
120 Id. at 139. To be sure, the phenomenon was not limited to the Americas; gays were some of the first individuals sent to concentration camps in Nazi Germany. Harry Oosterhuis, Medicine, Male Bonding and Homosexuality in Nazi Germany, 32 J. CONTEMP. HIST. 187, 187 (1997).
121 Terry, supra note 113, at 138.
122 Id.
applied to docile bodies has historically rendered gay bodies deviant others.\textsuperscript{123} Scholar Jennifer Terry observed that the study was “as much an effort to construct and maintain hygienic heterosexuality as it was to investigate homosexuality.”\textsuperscript{124}

More recent scientific and medical research has focused, once again, on what causes homosexuality.\textsuperscript{125} Genetic studies have focused on heritability by attempting to determine whether there is a higher occurrence of homosexuality in genetically identical pairs of twins as opposed to non-genetically identical pairs.\textsuperscript{126} Experts involved in psychoendocrine studies have examined the correlation between prenatal hormone levels and adult homosexuality.\textsuperscript{127} These scientists search for a cause of homosexuality by attempting to locate and scrutinize abnormal amounts of, or insensitivity to, androgens in the uterus that can, hypothetically, later result in sexual ambiguity or abnormal sexual tendencies toward members of the same sex.\textsuperscript{128} Neuroanatomic studies of late have been most concerned with the hypothalamus; some have found a correlation between an enlarged hypothalamus and homosexuality while others have found a correlation between a shrunken hypothalamus and homosexuality.\textsuperscript{129} Finally, geneticists claim to have

\footnotesize{\textsuperscript{123} See Foucault, supra note 4, at 101; Terry, supra note 113, at 153.}
\footnotesize{\textsuperscript{124} Terry, supra note 113, at 153. Not all experts were in agreement that there was something inherently wrong with homosexuals. Id. at 154. Dr. Alfred Kinsey noted that the analysis of the data in the Sex Variant Study was based on an assumption that homosexuality and heterosexuality are mutually exclusive traits inherent in fundamentally different kinds of individuals. Id. According to Kinsey’s own research, between a quarter and a third of all males in any mixed-aged group had some homosexual experience. Id. at 155. Homosexuality was not a rare phenomenon but a type of behavior that could potentially involve up to half of the entire male population. Id.}
\footnotesize{\textsuperscript{125} Heino Meyer-Bahlberg, Psychobiologic Research on Homosexuality, in Queer World, supra note 109, at 285, 286.}
\footnotesize{\textsuperscript{126} See id. Journalist Neil Swidey summarizes the most recent advancements in this area of research and explains that instances in which one identical twin identifies with the opposite sex and the other identifies as his own biological sex have scientists questioning whether the cause of homosexuality is entirely attributable to either nature or nurture. Neil Swidey, What Makes People Gay, BOSTON GLOBE, Aug. 14, 2005, at 2. After all, as identical twins, the boys began as genetic clones and have been raised in the same environment by the same set of parents. Id.}
\footnotesize{\textsuperscript{127} Meyer-Bahlberg, supra note 125, at 289.}
\footnotesize{\textsuperscript{128} Id. These studies are limited by a general dearth of data comparing the prenatal hormonal makeup of homosexuals and heterosexuals. Id. at 290.}
\footnotesize{\textsuperscript{129} Id. at 292–93. Scientists Swaab and Hoffman found that the volume of the suprachiasmatic nucleus in a sample of homosexual men was 1.7 times as large as that in heterosexual men. Id. The fundamental problem with this assertion has to do with the fact that the specific nucleus has no known role for determining sexual orientation so abnormalities in its size cannot be concluded to influence homosexual orientation. Id.}
located the biological cause of homosexuality in genes located on the X chromosome. Whether the cause of homosexuality is located in the hypothalamus or on the X chromosome, the source of its supposed deviance can be located in the search itself.

The very persistence of current attempts to find the cause of homosexuality and the resulting discourse bespeak continuing disdain for the gay population. But even if homosexuality is proven to be a biological phenomenon, as long as mainstream discourse maintains the perverse implantation—the process of creating perverse gay identities via discourse—there will be no social acceptance of the gay population.


Lindee & Nelkin, *supra* note 129, at 312. At publication, scientists were continuing to search for a genetic cause of homosexuality. Swidey, *supra* note 126. A five-year genetic study of 1000 gay brother pairs was underway in North America, funded by the National Institutes of Health. *Id.*

See *Katz*, *supra* note 109, at 178.

Some gay advocates claim that locating a cause of homosexuality in biological factors would result in wider social acceptance and less tolerance of discrimination against gays. Swidey, *supra* note 126.

See *Foucault*, *supra* note 4, at 97–101. Luckily, for the sake of equal rights in America (which theoretically involves the realities of all persons, not just the King), power-knowledge is not exclusively a tool of the scientific and legal actors so influenced by the politics of the majority. See generally Annamarie Jagose, *Queer Theory: An Introduction* (1997) (discussing the ways in which members of the gay community have come to theorize their own identities in a body of discourse known as “Queer Theory”). Having had their own bodies fall victim to the wars of identity politics, the gay population has produced its own theory of identity: queer theory. *See id.* at 1–2. Much of the discourse emanating from gay subcultures centers on the term queer, rather than gay or homosexual. *Id.* at 3. Queer is a term defined according to the collective ideologies and worldviews of the gay population. *See id.* at 3. Perhaps the most important characteristic of queer is its resistance to definition and its inherent indeterminacy as this quality allows for flexibility and political efficacy. *See id.*

Queer theory locates and exploits the incoherencies within the dominant heterosexist culture and demonstrates the impossibility of any “natural” sexuality while expanding its borders to include the issues of many different sexualities; the focus of queer theory is not just on homosexuality but stretches from cross-dressing to hermaphroditism to gender ambiguity. *Id.* at 3. Within this framework of queer theory and inclusive instead of exclusive identity politics, one finds that the queer population is more than cognizant of the process by which it has been made deviant and, wary of this construction, has sought to reimagine a process that the individual can be involved in. *See id.*
C. Suspicious Motivation to Maintain the “Other”

Perhaps even more important than understanding the different ways in which experts have tried to explain homosexuality, then, is understanding why such experts have been so dedicated, so persistent, so determined to do so. Marilyn Frye astutely points out: “Where there is manipulation, there is motivation . . . the meaning of this erasure (from the King’s reality) and of the totality and conclusiveness of it, has more to do, I think, with the maintenance of phallocratic reality as a whole.” Other scholars have echoed this theory, suggesting that the creation of homosexuality as a “third sex” leaves assumptions about heterosexuality and gender polarity in place by placing the variants in a category of other. Patriarchal heterosexist society depends in large part on static gender roles and a norm of heterosexual relationships in which women succumb to male dominance; where men and women defy this norm, the foundation of male dominance fails.

The perverse implantation, or the process by which homosexuals were labeled deviant, is not the first use of power-knowledge to disadvantage an entire class of persons in order to maintain a powerful white heterosexist majority: blacks and women have suffered similar stigmatization. Not surprisingly, here again, stereotypes were used

Queer theorists explain that identity in every form and embodiment can no longer afford to be seen as a stable and unchanging thing; instead identity should be conceptualized more as a performance, a process, and a myth. The performance of one’s identity is not innate, but is a process of learning, perfecting, and discovering.

But queer theory inevitably arises from the margins, and is thus largely inconsequential to the persistent efforts of mainstream discourse to create homosexual deviance. See Foucault, supra note 4, at 98; Biddy Martin, Sexual Practice and Changing Lesbian Identities in Destabilizing Theory: Contemporary Feminist Debates 93, 95–97 (Michelle Barrett & Anne Phillips eds., 1992); Sedgwick, supra note 5, at 4–5. Biddy Martin, a lesbian feminist explains: “We are not always confronted with direct, coercive efforts to control what we do in bed, but we are constantly threatened with erasure from discursive fields where the naturalization of sexual and gender norms works to obliterate actual pluralities.” Martin, supra, at 95. The creation of queer theory is in itself a threat to “the King” as it challenges the “epistemological and political terms in which” homosexuality and other perverse behaviors have been closeted—effectively erased—for the benefit of the powerful heterosexual population. See id.

See Frye, supra note 88, at 8.

Id.

Martin, supra note 133, at 97.

See id.

to support legal and social discrimination.\textsuperscript{139} Largely scientific and anthropological discourse worked to create a lesser, more primitive, deviant black population that was then exposed to slavery, social inequality, and blatant discrimination.\textsuperscript{140} The process began with colonial powers and slave-owning countries intent on justifying the dehumanizing torture of black individuals.\textsuperscript{141} Historian Sven Lindqvist examines the work of French scientist George Cuvier, who, during the 1800s, ranked humans into racial categories and explained that the facial features of “negroid” races indicated their evolutionary proximity to the primates.\textsuperscript{142} Early American schools of polygeny supported the view that blacks were another form of life, a separate biological species—one not capable of participating in the “equality of man”—scientists continuously studied the brains and bodies of blacks in order to substantiate these claims with scientific evidence.\textsuperscript{143} As recently as the early 1990s, scientists Richard Herrnstein and Charles Murray published \textit{The Bell Curve}, a text that summarized several studies providing scientific evidence that claims to prove an inherent inferiority in blacks based on IQ test scores.\textsuperscript{144}

Historically, the same structures of power-knowledge that worked to create an inferior class of black citizens rendered the female identity one of fragility, lesser intelligence, hysterical sexuality, and emotional instability.\textsuperscript{145} Medical literature documenting the hysterical and unstable mental condition of women has appeared throughout history.\textsuperscript{146} During the late eighteenth and early nineteenth centuries, scientists and doctors explained the female orgasm as the only means by which the female body and mind could be stabilized.\textsuperscript{147} Men, informed by the popular discourse, routinely took their wives to medical

\textsuperscript{139} See \textit{id.}
\textsuperscript{140} \textit{Id.} at 56.
\textsuperscript{141} See Sven Lindqvist, \textit{Exterminate All the Brutes} iv, 99 (Joan Tate trans., 1997).
\textsuperscript{142} See \textit{id.}
\textsuperscript{145} Foucault, supra note 4, at 54, 97–99; Rachel P. Maines, \textit{The Technology of Orgasm} 8 (1999).
\textsuperscript{146} Foucault, supra note 4, at 104; Maines, supra note 145, at 21–24. Maines documents over 2500 years of discourse regarding the hysteria of femininity. Maines, supra note 145, at 21–24. In fact, the very word “hysteria” is derived from a Greek word meaning “that which proceeds from the uterus.” \textit{Id.} at 21.
\textsuperscript{147} Maines, supra note 145, at 32–36.
doctors who would bring the woman to orgasm so to purge her body of fluids believed to cause hystericism and insanity.\footnote{148} Exaggerated stereotyping, buttressed by the belief that women were inherently unstable individuals, held that women were unsuited to the work of the world and should remain in the home.\footnote{149} Such an understanding has long driven all-male societal power structures, and continues to be informed by scientific studies today.\footnote{150}

When blacks and women acted to challenge laws that disadvantaged them because of such stereotypes, they often met with little success as the courts adopted the constructed inferiority as reason to uphold the laws.\footnote{151} For example, in the case of \textit{Scott v. Sandford}, in which Dred Scott, a slave, sued for his freedom, the Supreme Court explained that from the time the American Government was founded, African-Americans had been considered “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations . . . .”\footnote{152} Similarly, in \textit{Bradwell v. Illinois}, in which the plaintiff filed suit after having been denied admission to a local bar because she was a married woman, the Court stated:

\begin{quote}
Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belong to the domain and functions of womanhood.\footnote{153}
\end{quote}

America is thus well-acquainted with the process of constructing lesser identities for the purpose of maintaining the superiority of white heterosexual males.\footnote{154} Commonly held stereotypes of the ineptitude of blacks and women alike have been carefully crafted by scientific realms

\footnotesize
\begin{itemize}
  \item \footnote{148} \textit{Id.} at 8–9.
  \item \footnote{149} Ely, supra note 10, at 164.
  \item \footnote{150} See id.; Ben Clerkin & Fiona Macrae, \textit{Men Are More Intelligent Than Women, Claims New Study}. \textit{Daily Mail}, Sept. 14, 2006, http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=405056&in_page_id=1770. Most recently, scientists have claimed that lower IQ scores have shown that women are of inferior intelligence when compared to men. \textit{Id.}
  \item \footnote{151} See \textit{Bradwell v. Illinois}, 83 U.S. 130, 141 (1908); \textit{Scott v. Sandford}, 60 U.S. 393, 407 (1857).
  \item \footnote{152} \textit{Scott}, 60 U.S. at 407.
  \item \footnote{153} \textit{Bradwell}, 83 U.S. at 141.
  \item \footnote{154} See supra notes 138–141 and accompanying text.
\end{itemize}
dominated by white heterosexual males basically seeking to maintain superiority by deeming all others inferior.\footnote{See Frye, supra note 88, at 8.} The construction of gay deviance is, in this way, strikingly similar to that of blacks and women.\footnote{See id.}

III. Stay In or Face the Consequences: The Peculiarities of the Gay Claim to Suspect Classification

What separates the construction of gay deviance from the construction of black and female inferiority is the social structure commonly known as the closet that provides homosexuals with the option of concealment.\footnote{See Sedgwick, supra note 6, at 67–68, 75.} The closet has been defined by some as the defining structure for gay oppression in modern times.\footnote{Id. at 71.} Because of the closet, gays, unlike blacks or women, have the option of hiding their homosexual identity and being treated equally or “coming out” and suffering both legal and social discrimination.\footnote{See id. at 67–71, 75. In an attempt to define queer existence into reality in their own terms, the process and significance of “coming out” were defined and embraced by the homophile movements of the 1970s; homosexuality was celebrated and those who claimed this identity demanded that it be “avowed publicly until it is no longer a shameful secret but a legitimately recognized way of being in the world.” Jagose, supra note 133, at 38.} Arguably, laws that discriminate against gays are the most effective means by which the appeal of the closet is maintained; for only through full-time closeting and denial of one’s homosexual desire can a gay individual fully participate in society as an equal, get married, have a family, and obtain other social goods.\footnote{See Sedgwick, supra note 6, at 5–6, 18–21.} The possibility of the closet differentiates the classification of gay people from that of blacks and women, thus complicating the gay claim to suspect classification.\footnote{See id. at 67–71, 75.} This complication should not preclude, but inform, the gay claim to suspect classification.\footnote{See Ely, supra note 10, at 163; Sedgwick, supra note 6, at 67–71, 75.} The purpose and policy that buttress current equal protection doctrine, taken together with the suspicious circumstance of the optional closet, solidify the gay claim to suspect classification.\footnote{See Ely, supra note 10, at 103, 135–41; Sedgwick, supra note 6, at 67–71, 75.}

In order to expand on existing doctrine and fairly examine the gay claim to equal protection, the purpose and the ideals inherent in the Equal Protection Clause must be first fully understood.\footnote{See U.S. Const. amend. XIV, § 1; see Ely, supra note 10, at 81–82.} An ex-
amination of the criteria for suspect classification illuminates the ways in which the gay circumstance does not fall neatly within the bounds of existing equal protection doctrine.\textsuperscript{165} Despite apparent imperfections, once the gay claim to suspect classification is evaluated against the backdrop of constructed deviance that has resulted in an optional closet, the gay population’s situation appears even more suspicious than that of historically suspect classes.\textsuperscript{166}

A. Official Motivation Matters: Equal Protection as a Check on the Majority

The Equal Protection Clause does not require that every law treat everyone equally; laws are often written specifically for the purpose of sorting people out for differential treatment.\textsuperscript{167} Because of the necessity of distinction, three levels of scrutiny are applied within equal protection doctrine to determine whether a law distinguishes in a way indicative of democratic malfunction and thus violates the clause: strict scrutiny, intermediate scrutiny, and rational basis.\textsuperscript{168} Strict scrutiny is reserved for those laws that affect a suspect class, or a discrete and insular minority that has faced a history of purposefully unfair treatment and political powerlessness.\textsuperscript{169} To survive, the law must be narrowly tailored to achieve a compelling government interest.\textsuperscript{170} Intermediate scrutiny is applied to laws that affect a quasi-suspect class, or a group that historically has been disadvantaged but does not meet the requirements of suspect classification; the law will be held valid only if it is substantially related to an important government purpose.\textsuperscript{171} Rational basis is the default level of scrutiny applied to all laws that do not affect a suspect or quasi-suspect class; the law will pass muster as long as it is rationally related to a legitimate government interest.\textsuperscript{172}

\textsuperscript{165} See Ely, supra note 10, at 163–64.
\textsuperscript{166} See id. at 103, 135–41; Sedgwick, supra note 6, at 67–68, 75.
\textsuperscript{167} Ely, supra note 10, at 135. For example, laws that set age requirements for drinking, driving and smoking treat people differently. See id. Thus, the constitutionality of most laws cannot be determined simply by looking at the results of the law, but rather, should be approached by reviewing the process by which the law was passed and the reasons for legislative approval. Id. at 136.
\textsuperscript{168} See Chemerinsky, supra note 13, at 618–20; Ely, supra note 10, at 103. Democratic malfunction exists where a legislature representative of the majority passes legislation to disadvantage a minority group. Ely, supra note 10, at 103.
\textsuperscript{169} Chemerinsky, supra note 13, at 619.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 619–20.
1. Traditional Suspect Classification Criteria and Analysis

The level of scrutiny applied thus depends on who is being singled out for differential treatment by the law.\textsuperscript{173} The doctrine subjects laws singling out quasi-suspect or suspect classes to a form of heightened scrutiny because when a group of individuals possess the characteristics that define a suspect class, the courts will assume that the legislature is attempting to subjugate them or is making judgments based on stereotypes.\textsuperscript{174} A class that has historically been subjected to unfair treatment, has little or no political power by which they may change their situation, and is comprised of members who are easily identifiable and isolated from most of society, is in a socially and politically peculiar situation.\textsuperscript{175} Legislation that not only disregards the class’s situation but singles it out for differential treatment is closely scrutinized.\textsuperscript{176}

In applying intermediate or strict scrutiny, the courts seek the true purpose of the law and to determine whether that purpose is constitutional.\textsuperscript{177} Locating the true purpose necessarily involves examining the often unspoken motivation of the legislature, which is important because “it is inconsistent with constitutional norms to select people for unusual deprivation on the basis of race, religion, or politics, or even because the official doing the choosing doesn’t like them.”\textsuperscript{178} The historical process by which gays have been defined as a deviant and perverse class has informed stereotypes regarding the fitness of gays to be married, have children, serve in the military, and the like; such stereotypes have inevitably influenced Congress and state legislatures alike which have passed laws that reinforce the deviant identity and solidify the stereotypes.\textsuperscript{179} At first glance, there is something peculiar about the social and political situation of gays and about the closet itself—the option of claiming one’s identity and being discriminated against or denying it and being treated equally is no option at all.\textsuperscript{180} Legislation that imposes this option should be subjected to heightened review.\textsuperscript{181}

\textsuperscript{173} Id.
\textsuperscript{174} See Chemerinsky, supra note 13, at 619–20; Ely, supra note 10, at 103.
\textsuperscript{175} See Chemerinsky, supra note 13, at 619–20; Ely, supra note 10, at 151.
\textsuperscript{176} See Chemerinsky, supra note 13, at 619–20; Ely, supra note 10, at 103, 151–53.
\textsuperscript{177} See Ely, supra note 10, at 137–38.
\textsuperscript{178} Id. at 137.
\textsuperscript{179} See 10 U.S.C. § 654 (2000) (popularly known as the “Don’t Ask, Don’t Tell” policy, this federal statute effectively prohibits gays from engaging in homosexual acts or claiming their sexual identity while in the military); supra notes 114–133 and accompanying text.
\textsuperscript{180} See Sedgwick, supra note 6, at 48–49.
\textsuperscript{181} See id.
2. An Alternative Criterion for Suspect Classification

The strictly defined standards of suspect classification may not always be sufficient to determine whether or not a group should be considered suspect.\footnote{182 See Ely, supra note 10, at 149.} As Ely points out, the discrete and insular requirement could potentially fail the black population, the one group everyone seems to agree should be suspect: though blacks are still discrete, many argue they are no longer insular as they participate in the larger society and are no longer legally segregated.\footnote{183 Id. at 155.} Further, the requirement of political powerlessness is complicated: both women and blacks have, at some historical point, been denied the right to vote as a group, but both have since been afforded that right and have now been able to vote for decades.\footnote{184 See id. at 135.} Additionally, a voice and a vote are not always enough to ensure adequate political participation and representation.\footnote{185 Id.}

Because of these complexities, scholars have come to suggest that classifications rooted in stereotype should be regarded as suspicious.\footnote{186 Id. at 155.} Ely explains: “Legislation on the basis of ‘stereotype’ is thus legislation by generalization, the use of a classification believed in statistical terms to be generally valid without leaving room for proof of individual deviation. That, however, is the way legislation ordinarily proceeds, as in most cases, it must.”\footnote{187 Id., supra note 10, at 158.}

In order to decide if a legislature had an unconstitutional motive in passing an act, the generalizations and stereotypes underlying the act must be understood.\footnote{188 Id.} Key factors in deciding whether a stereotype is acceptable for government use include its origin, who created it, and whether the stereotype serves the interests of those affected by it.\footnote{189 Id.} Where the legislators of those they represent stand to gain socially or legally from the generalizations behind the questioned law, certain dangers inherent in any balancing process become intensified and may result in “an undervaluation of the interest in individual fairness.”\footnote{190 See id.} In other words, legislators are likely to accept and promote those stereotypes flattering to themselves even if the promotion of such beliefs comes at a social and legal cost to others; cost itself is likely to be underestimated, therefore undervaluing the individual fairness that is key to representative democracy.\footnote{191 See id.}
If classifications based on stereotype were treated as suspect, gays would probably constitute a suspect class given the long and well-documented history of discourse that ultimately resulted in a stereotyped perverse identity and a closet in which to conceal that identity.\footnote{See supra notes 112–133 and accompanying text.} That the stereotypes have an origin in medical and scientific discourse created primarily by the powerful white heterosexual male majority and that the maintenance of the stereotypes benefits the same majority would confirm the notion that there is something ill-motivated about legislation that capitalizes on the deviant identity and disadvantages those who claim it.\footnote{See supra note 10, at 158 (explaining that even where legislators do not reap tangible rewards from contested legislation, there are “psychic rewards in self-flattering generalizations”); \textit{Frye}, supra note 88, at 8; Donna Haraway, \textit{Simians, Cyborgs and Women: The Reinvention of Nature} 149, 150 (1991); Martin, supra note 133, at 97; Kari Karsjens & Joanna Johnson, \textit{White Normativity and Subsequent Critical Race Deconstruction of Bioethics}, 3 Am. J. Bioethics 22, 22–23.} Within this analytical scheme, the resemblance between the classifications of blacks and women and that of gays is striking: all have been based on stereotypes constructed by the power structures of medicine and science and codified by legislatures determined to maintain social and political superiority.\footnote{See supra notes 122–134 and accompanying text.} Blacks have been a suspect class since the inception of equal protection doctrine and women were once considered a suspect class.\footnote{Chemerinsky, supra note 13, at 652, 755. The Supreme Court regarded women as a suspect class for a period of time. \textit{Id.}, at 755. Eventually, however, the Court determined that, because there were real physiological differences between men and women, laws distinguishing between the sexes would be upheld as long as the laws could withstand intermediate scrutiny. \textit{Id.} Thus, women are currently treated as a quasi-suspect class. \textit{Id.}} The gay population, it would follow, having been subject to the same social and political disenfranchisement \textit{because} of stereotype and its codification, should be regarded as a suspect class.\footnote{See \textit{id.}; supra notes 122–134 and accompanying text.} As such, laws that single them out for mistreatment should be subject to strict scrutiny.\footnote{Chemerinsky, supra note 13, at 618–20.}

Of course, analyzing suspect classification as classification based on stereotype is, to date, a purely academic exercise because courts have not strayed meaningfully from their three-tier system of analyzing equal protection claims.\footnote{See \textit{id.}} Nevertheless, the Supreme Court has noted the unacceptability of legislation based on prejudice toward a specific group—namely, that laws based on stereotypes cannot even survive rational basis review because maintaining stereotypes can never serve
even a legitimate state interest. In keeping with any court’s likely analysis, however, the remaining examination of the gay claim to suspect classification will focus on traditional suspect classification criteria.

B. Analyzing the Gay Claim to Suspect Classification

Though the social and political situation of gay individuals is different from that of other suspect classes, it is equally if not more peculiar. A legislature that acts to reinforce that situation should be required to offer compelling justification. Suspect classification requires that the group be a discrete and insular minority which has suffered a history of purposefully unfair treatment and political powerlessness. Only when an individual is decided to be part of a suspect group will one’s legal claims of discrimination be examined under strict scrutiny. The gay claim to suspect classification is complicated because the closet provides each individual the option of concealing the very trait that is discriminated against—a choice not afforded any other suspect class to date. This peculiarity both skews and strengthens the analysis of the gay claim to suspect classification: (1) only those who have come out and claimed their gay identity are discrete, insular, and discriminated against, and (2) the very fact that coming out is optional renders the class, as a whole, politically disjointed and powerless.

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198 See, eg., Romer v. Evans 517 U.S. 620, 632 (1996) (holding that a Colorado state amendment failed rational basis review because its only justification was general hostility and animus toward gay people); City of Cleburne, Tex. v. Cleburne Living Ctr. 473 U.S. 432, 432–33 (1985) (declaring a law unconstitutional because it served no legitimate purpose and was instead based on irrational prejudice toward and fear of the mentally retarded); U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (“[B]are congressional desire to harm a politically unpopular group cannot serve as a legitimate government interest.”).


200 See id.; Ely, supra note 10, at 163; Sedgwick, supra note 6, at 68–72, 75.

201 See Chemerinsky, supra note 13, at 618–20; Ely, supra note 10, at 163; Sedgwick, supra note 6, at 68–72, 75.


203 Id.


205 See Ely, supra note 10, at 163; Sedgwick, supra note 6, at 18, 69–71; Segrest, supra note 204, at 48; Kenneth Sherrill, The Political Power of Lesbians, Gays and Bisexuals, 29 Pol. Sci. & Pol. 469, 469–72 (1996).
out and face the consequences is itself incredibly suspicious.\textsuperscript{206} Legislation that solidifies the ultimatum should be subject to strict scrutiny.\textsuperscript{207}

1. Discrete and Insular Minority

Requiring that a group be a discrete and insular minority before it can be considered a suspect class ensures that suspect classification is reserved for groups that are “race-like” in that their members are an easily identifiable minority generally isolated from the majority.\textsuperscript{208} This situation lends itself to discrimination by the majority because members of the suspect group are easily identified for purposeful mistreatment and, as part of a socially isolated minority, are less capable of bringing about change in their situation via the political process.\textsuperscript{209}

The gay population is clearly a minority: studies estimate that gays comprise only three to thirteen percent of the population.\textsuperscript{210} But they are discrete only once they refuse the security of the closet, and even then they are insular in a way that is unique among suspect classes.\textsuperscript{211} Whereas blacks generally do not have the option of not being discrete, gays do because they can closet the trait being discriminated against.\textsuperscript{212} Mab Segrest, a feminist scholar, explains that incentives exist to pass as white “under a regime of white supremacy” just as they exist to pass as a heterosexual “under heterosexist regimes.”\textsuperscript{213} In other words, had their identity been concealable behind closet doors, the black plight for equal protection and suspect classification would have been of a similar nature to that of homosexuals.\textsuperscript{214}

\textsuperscript{206} See Ely, supra note 10, at 163; Segrest, supra note 204, at 48.

\textsuperscript{207} See Ely, supra note 10, at 163; Segrest, supra note 204, at 48.

\textsuperscript{208} See Ely, supra note 10, at 151–55. Ely argues that being “race-like” does not depend solely on being recognizable and isolated from the rest of society. Id. There was more to the severe social disadvantages suffered by African Americans before the Civil Rights movement than physical visibility and segregation—there was a colonial culture in which scientists and anthropologists alike created discourse defining African Americans and other black populations as an inferior race. See id; supra notes 122–134 and accompanying text. Given the similar process by which gays have been defined as deviant and perverse, they are “race-like” and deserving of suspect classification. See Ely, supra note 10, at 155; supra notes 122–134 and accompanying text.


\textsuperscript{210} Sherrill, supra note 205, at 469.

\textsuperscript{211} See Sedgwick, supra note 6, at 48–49.

\textsuperscript{212} See id. at 71; Segrest, supra note 204, at 48.

\textsuperscript{213} Segrest, supra note 204, at 48.

\textsuperscript{214} See id.
For the gay individual, insularity is intricately tied to discreteness: many of those who choose to come out also choose to remain discrete by isolating themselves from the rest of society and residing in gay-majority communities.\textsuperscript{215} Those who succumb to the social and legal pressure to remain closeted generally refuse to associate with the gay-majority communities.\textsuperscript{216} As a result, many gay individuals are not insular in the sense anticipated by the Supreme Court because they live dispersed among the heterosexual population.\textsuperscript{217} This dispersion results in their political isolation and inability to change their situation via the democratic process.\textsuperscript{218} Ultimately, when gay individuals naturally opt for social and legal equality by remaining in the closet, they compromise the discreteness and insularity of gays as a class and thus their claim for suspect classification.\textsuperscript{219}

As if the social discrimination were not powerful enough, the laws that discriminate against gays consistently discourage gay individuals from being discrete or insular lest they be denied certain rights like marriage and adoption.\textsuperscript{220} Thus, the stereotype of the homosexual pervert and the closet will be maintained if the current standards of suspect classifications are strictly applied because gays, in an attempt to avoid discrimination, choose to be neither discrete nor insular.\textsuperscript{221} In order to fulfill the purpose of the Equal Protection Clause, the courts must recognize the profoundly unique and suspicious position of the gay population.\textsuperscript{222}

2. History of Purposeful Unfair Treatment

The option of closeted existence is not only embraced by many gay individuals as a means to avoid discreteness and insularity but also as a means to avoid unfair treatment.\textsuperscript{223} Homosexuals who have come

\textsuperscript{215} Sherrill, supra note 205, at 469.
\textsuperscript{216} See id.
\textsuperscript{217} See Carolene Prods., 304 U.S. at 152; Sherrill, supra note 205, at 469.
\textsuperscript{218} See Carolene Prods., 304 U.S. at 152–53 n.4; Sherrill, supra note 205, at 469.
\textsuperscript{219} See Carolene Prods., 304 U.S. at 152–53 n.4: Sedgwick, supra note 6, at 48–49; Segrest, supra note 204, at 48; Sherrill, supra note 205, at 469.
\textsuperscript{220} See Sedgwick, supra note 6, at 48–49; Sherrill, supra note 205, at 469.
\textsuperscript{221} See Sedgwick, supra note 6, at 48–49; Sherrill, supra note 205, at 469.
\textsuperscript{222} See Carolene Prods., 304 U.S. at 152–53 n.4: Sedgwick, supra note 6, at 48–49; Segrest, supra note 204, at 48; Sherrill, supra note 205, at 469.
\textsuperscript{223} See Sedgwick, supra note 6, at 48–49; Segrest, supra note 204, at 48; Sherrill, supra note 205, at 469.
out are denied many social goods and opportunities. For example, gay marriage is prohibited by all states but Massachusetts, and Florida denies all adoption rights to gay individuals. Those who admit that they are gay during a job interview are less likely to be hired, and even if they are hired, workplace harassment of gay employees is rampant. Gay people who claim their identity risk losing even the basic ability to exist in public without falling victim to a hate crime.

While all of the consequences of “coming out” undoubtedly encourage the gay population to remain closeted, a particularly egregious example of purposeful unfair treatment suffered by the gay population is the commission of hate crimes. In early 2006, an eighteen-year-old male went to a gay bar in Massachusetts where he attacked two patrons with a hatchet, shot them both in the head, and then shot a third patron in the abdomen. This horrific instance is just one of many striking examples of hate crimes targeting the gay

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224 See Sedwick, supra note 6, at 45 (explaining that gay individuals out of the closet are frequently denied jobs and housing); Ramone Johnson, Where Is Gay Adoption Legal? http://gaylife.about.com/od/gayparentingadoption/a/gaycoupleadopt.htm (last visited Jan. 15, 2008) (explaining that Florida prohibits all gay adoption and many states prohibit adoption by a gay couple); National Conference of State Legislatures, Same Sex Marriage, http://www.ncsl.org/programs/cyf/samesex.htm (last visited Jan. 15, 2008) [hereinafter NCLS, Same Sex Marriage] (stating that, to date, only Massachusetts issues marriage licenses to gay couples, three states allow gay couples to enter into civil unions, and three states provide some rights to gay couples); Press Release, Federal Bureau of Investigation, FBI Releases Its 2005 Statistics on Hate Crime (Oct. 16, 2006) [hereinafter 2005 Hate Crime Statistics], available at http://www.fbi.gov/ucr/hc2005/pressrelease.htm (stating that hate crimes against gay individuals comprised 14.2% of all hate crimes in 2005).

225 Johnson, supra note 224; NCLS, Same Sex Marriage, supra note 224.

226 Sedwick, supra note 6, at 45; Harriet Schwartz, Work Can Really Be Hell—Discrimination Against Gays, Advocate, June 10, 1997, available at http://findarticles.com/p/articles/mi_m1589/is_n735/ai_20164883. Schwartz describes several instances of discrimination against gays in the workplace. Id. One employee recounts how his co-workers cut out a picture of his head and pasted it on the body of a man in a picture of a gay threesome and then posted it on the bulletin board for all to see. See id. The same employee was later humiliated when co-workers painted his car with slanderous comments about his sexual orientation, videotaped it, and then showed it to a group of trainees; the employee ultimately quit and filed suit. Id.

227 See Sherrill, supra note 205, at 469; 2005 Hate Crime Statistics, supra note 224. Gays were the target of fourteen percent of all hate crimes committed in 2005, which is striking considering that gays comprise as little as three percent of the population according to some estimates. See Sherrill, supra note 205, at 469; 2005 Hate Crime Statistics, supra note 224.

228 See Sherrill, supra note 205, at 471; 2005 Hate Crime Statistics, supra note 224.

population; of all hate crimes committed in 2005, those directed at gay individuals comprised the third largest category.\textsuperscript{230}

Here again, the purposeful unfair treatment is only suffered by those who refuse to closet their identities, and so the threat of suffering social and legal turmoil works to maintain the appeal of the closet and, in turn, to prevent the gay class as a whole from coming out and suffering unfair treatment.\textsuperscript{231} Given the threat of social and legal disadvantage as well as outright violence, it is understandable why many gay individuals welcome the option of the closet.\textsuperscript{232} But such an unfortunate option must not compromise their claim to suspect classification; instead, the choice and the awful consequences that make the closet so appealing must be considered suspicious.\textsuperscript{233}

3. History of Political Powerlessness

Because the threat of social and legal injustice maintains the appeal of the closet so efficiently, the gay class, as a whole, is unable to unify politically.\textsuperscript{234} Professor Kenneth Sherrill points out:

The relative political powerlessness of gay people stands in a contradistinction to their depiction by advocates of ‘traditional values’ as a powerful movement advancing a ‘gay agenda’ in American politics. . . . [T]he attention paid to the occasional electoral victories of openly lesbian and gay candidates distorts the reality that fewer than one tenth of 1 percent of all elected officials in the United States are openly lesbian, gay, or bisexual.\textsuperscript{235}

Rare local victories, according to Sherrill, are not indicative of the national political power of the group.\textsuperscript{236}

Not only are gays a small minority (three to thirteen percent of the population), unlike other minorities that are typically grouped together geographically, gays are rarely found in gay-majority

\textsuperscript{230} See 2005 Hate Crime Statistics, supra note 224.
\textsuperscript{231} See Schwartz, supra note 226; Sedgwick, supra note 6, at 45, 48; 2005 Hate Crime Statistics, supra note 227.
\textsuperscript{232} See Sedgwick, supra note 6, at 45–48.
\textsuperscript{233} See Carolene Prods., 304 U.S. at 152–53 n.4; Ely, supra note 10, at 163; Sedgwick, supra note 6, at 48–49; Segrest, supra note 204, at 48; Sherrill, supra note 205, at 469.
\textsuperscript{234} Sherrill, supra note 205, at 469.
\textsuperscript{235} Id.
\textsuperscript{236} See id.
neighborhoods where their political power could be maximized.\textsuperscript{237} As a result, in a representative democracy, gay voters must depend on the support of heterosexuals if they are to make advancements on the political front.\textsuperscript{238} But this support does not come easily because candidates who want to win are unlikely to create a platform that supports the rights of an unpopular minority group like gays.\textsuperscript{239} Potential heterosexual advocates are further deterred by the fear that they might be perceived (and mistreated) as a homosexual if they pursue the gay agenda.\textsuperscript{240} Finally, because a vast majority of gay individuals are born into heterosexual homes, they are raised to accept heterosexual norms and are expected to act as if they are heterosexual.\textsuperscript{241} Thus, upon entering into adulthood and considering political beliefs, a gay individual is likely to struggle with what a gay political agenda would entail.\textsuperscript{242} The individual struggle translates into a class-wide deficiency in political unification and collective identity.\textsuperscript{243}

Ultimately, the precarious political situation of the gay class is only worsened by the ever-beckoning closet which promises safety from mistreatment but simultaneously prevents the gay population from engaging in meaningful political organization.\textsuperscript{244} So, though the gay population may not be considered politically powerless in the traditional sense of having been denied the right to vote, the mechanics of the closet and the fear of social and legal reprisal work to render the gay class unable to unify, unable to form alliances with the powerful, and largely unable to determine what gay political consciousness would even look like.\textsuperscript{245}

\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} Sherrill, supra note 205, at 470. Not only are gays drastically outnumbered, they are severely unpopular among American political groups. Id. Studies estimate that the gay population is the object of severe distaste—only illegal aliens, who are neither citizens nor voters, are disliked more. Id.
\textsuperscript{240} Id. at 471.
\textsuperscript{241} Id. at 469–72.
\textsuperscript{242} Id. at 469, 472.
\textsuperscript{243} Id. at 472. Sherrill explains: “The formation of political consciousness requires discussion and the development of a shared sense of conditions and grievances, as well as the development of proposed remedies for the grievances and of appropriate courses of action to bring about those remedies.” Id.
\textsuperscript{244} See Sherrill, supra note 205, at 469–71.
\textsuperscript{245} Id.
IV. STATUTES BANNING GAY MARRIAGE LIKELY FAIL STRICT SCRUTINY REVIEW

If the courts recognize the peculiar circumstance of the gay population and the ways in which the closet defines and strengthens their claim to suspect classification, laws discriminating against gay individuals will be subject to strict scrutiny review. In order for laws banning gay marriage to survive, the government must demonstrate that they are narrowly tailored to achieve a compelling government interest.

Of the arguments offered by opponents of gay marriage, for example, that heterosexual parents are best-suited to raise children and that the historical meaning of marriage must be preserved, it is likely that only the promotion of the well-being of children could be considered a compelling government interest. First, it can be shown that marriage does not have one historical meaning but is instead a socially and culturally specific construct that has evolved from the union of many to the union of two. Second, compelling government interests are generally limited to the promotion of health, safety, and welfare, none of which seem to include the preservation of socially-constructed ideals of marriage.

Though the promotion of the well-being of children could be accepted as a compelling government interest, a state that bans gay marriage but allows individual gay adoption will probably be unsuccessful in arguing that its marriage laws are narrowly tailored to achieve the interest. A state government defending a law that denies gay marriage rights cannot justify the legislation as a measure to

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246 See Chemerinsky, supra note 13, at 618–20; Sedgwick, supra note 6, at 48.
248 See Lawrence v. Texas, 539 U.S. 558, 601–02 (2003) (Scalia J., dissenting) (explaining that because the Court refused to accept that promotion of morality was a legitimate interest justifying the Texas anti-sodomy law, preservation of traditional marriage would probably fail to justify marriage laws banning gay marriage, because it was merely a kinder way of describing a State’s moral disapproval of same-sex couples); New York v. Ferber, 458 U.S. 747, 756–57 (1982) (stating that, beyond doubt, a state has a compelling interest in promoting the physical and psychological well-being of minor children); Dent, supra note 65, at 420, 429; Duncan, supra note 65, at 552.
249 Rauch, supra note 80, 13–17.
250 See Chemerinsky, supra note 13, at 619–20; Rauch, supra note 80, at 13–17.
251 See Chemerinsky, supra note 13, at 619–20; Johnson, supra note 224. Many states allow gay individuals to adopt children and deny adoption rights to gay couples. Johnson, supra note 224. The Supreme Court has concerned itself with policy inconsistencies in applying equal protection analysis. See Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982) (explaining that where a state university proposed the promotion of women’s educational success as justification for its policy of accepting only women but allowed men to fully participate as auditors, the policy was not narrowly tailored).
promote the proper upbringing of children when it legally allows gay individuals to adopt and raise children.\footnote{See Hogan, 458 U.S. at 730.}

Laws banning all gay marriage for the purpose of promoting the proper upbringing of children fail strict scrutiny analysis in another regard: such laws are, at once, both too narrow and too broad.\footnote{See Romer v. Evans, 517 U.S. 620, 622 (1996) (explaining that a Colorado amendment that prohibited gay anti-discrimination legislation from being passed was at once too narrow and too broad to even pass rational basis muster).} A statute prohibiting gay marriage in order to promote the best interests of children is too narrow in that it fails to prevent unfit, heterosexual individuals from becoming parents.\footnote{See Elizabeth Bartholet, Nobody’s Children: Abuse and Neglect, Foster Drift and the Adoption Alternative 7–8 (1999).} If the state interferes with an unfit parent’s rights at all, for example by removing the child from the home, it is only after the individual parent has demonstrated a willingness and ability to harm the child.\footnote{See id. (arguing that the state is too deferential to parents’ rights and too hesitant to remove a child from the home when she is known to have been abused).} At the same time, the statute is too broad; by prohibiting all gay marriage it prohibits some couples who have no interest in having children from attaining the benefits of marriage and inevitably prevents those gay couples who would be excellent parents from having and raising children as a married couple.\footnote{Am. Psychological Ass’n, supra note 73, at 8. Some studies have even found that having married parents matters most to the successful upbringing of children; such studies could support an argument that banning gay marriage is counter to the best interest of children because gay individuals can adopt children in many states but cannot provide them the benefit of married parents. See Dent, supra note 65, at 447 n.43.} Marriage laws that deny gays equal rights thus violate the constitutional guarantee of equal protection, but such violation only becomes clear only once gays are considered a suspect class.

**Conclusion**

Though the gay marriage debate has forced significant reflection about the importance of marriage and family, it has also involved a heated exchange regarding the assumed deviance and perversion of gay individuals. This discussion is problematic in that it consistently disregards the process by which the gay identity was constructed as inferior to the heterosexual identity—the same process created the black identity inferior to the white and the female identity lesser to the male. The optional closet was constructed alongside the perverse implantation distinguishing the gay situation from that of blacks and
women: gays can conceal their supposed perversion by refusing to “come out” whereas blacks and women never had such an option. The closet and the option of concealment give gay individuals the option of either denying their sexual identity or expressing it and being discriminated against. If the gay claim to constitutional equal protection is ever to be fairly evaluated, the nuances of the closet and the ways in which it informs their claim to suspect classification must be fully understood by courts and legislatures alike.

In order to be considered a suspect class, a group must be a discrete and insular minority population that has suffered a history of purposefully unfair treatment and political powerlessness. Social and legal discrimination continuously encourage gay people to remain in the closet, which potentially compromises their claim to suspect classification. Only gays who are discrete, who come out, are discriminated against in employment and housing opportunities, fall victim to hate crimes, are denied marriage and adoption rights, and the like. The court must acknowledge the ultimatum of “stay in or face the consequences” as suspicious in itself, thus recognizing gays as a suspect class and subjecting laws that discriminate against them to strict scrutiny review. Once subjected to more searching review, laws banning gay marriage will likely be held unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.
JUSTICE FOR THE FORGOTTEN: SAVING THE WOMEN OF DARFUR

Rebecca A. Corcoran*

Abstract: Since 2003, Darfur has lost nearly half of its six million inhabitants. As many as 500,000 people have been slaughtered, 2.2 million have been displaced, and an untold number have been savagely raped—all victims of a brutal five-year genocide orchestrated by the Sudanese government. The women of Darfur have borne the brunt of the violence: constantly targeted for rape, left physically and emotionally broken. The use of rape as a weapon of war should have shocked the conscience of the world, but we have failed to act, and instead have allowed the women of Darfur to be victimized repeatedly. This note argues that the international community must take two steps to save the women of Darfur: (1) continue criminal prosecutions of those responsible for the genocide in the International Criminal Court and (2) immediately undertake humanitarian solutions in Darfur, including aid disbursement, reparations, military intervention, and political pressure. It is only by combining legal and restorative solutions that the forgotten women of Darfur will truly receive justice.

Introduction

Man’s inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good.

—Martin Luther King, Jr.1

Halima Abdelkarim is twenty-one years old.2 She lives in Chad, just over the border from Darfur, Sudan, and is married with a baby daughter.3 She is also a member of the Dajo, a black African tribe,

* Managing Editor, Boston College Third World Law Journal (2007–2008). With thanks to my mom, for teaching me the importance of social justice and the rewards of hard work.


2 Nicholas D. Kristof, The Face of Genocide, N.Y. Times, Nov. 19, 2006, at D13. Halima was twenty years old at the time of Kristof’s writing, which would make her at least twenty-one years old now. See id.

3 Id.
which makes her a target of the Janjaweed—the Arab militias who, bankrolled by the Sudanese government, are on a five-year genocidal quest to control the region by systematically exterminating the Africans who live on the land. In March 2006, the Janjaweed spilled over from Sudan to Chad and attacked Halima’s village, killing many of the men and kidnapping ten women and girls, among them Halima, who was four months pregnant at the time, and her ten-year-old sister, Sadia. Over the next two days, three men wearing Sudanese military uniforms gang raped Halima, beat her with sticks, and taunted her with racial epithets. The Janjaweed eventually released the women, but not before demanding Sadia’s donkey, and then shooting and killing Sadia when she refused to give it to them. After escaping, Halima and the other survivors settled in a makeshift camp some distance away from their village, which the Janjaweed had destroyed. Although they lived fearfully in deplorable conditions, Halima was able to deliver a healthy baby girl.

4 Id.; see Amnesty Int’l, Sudan, Darfur, Rape as a Weapon of War 3 (2004), available at http://web.amnesty.org/library/pdf/AFR540762004ENGLISH/$File/AFR5407604.pdf; Justin Wagner, Note, The Systematic Use of Rape as a Tool of War in Darfur: A Blueprint for International War Crimes Prosecutions, 37 Geo. J. Int’l L. 193, 195 (2005). “Janjaweed” is an Arabic word meaning “a man (a devil) on a horse,” and was originally used to describe bandits who attack rural areas. Wagner, supra, at 198. The Janjaweed in today’s Darfur is a massive, loosely-united militia made up of nomadic Arabs. Id. The Janjaweed was formed by and is controlled by the Sudanese government, which uses the militia to attack the African tribes living in Darfur. Id.; see also Rosanna Lipscomb, Note, Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan, 106 Colum. L. Rev. 182, 189–90 (2006) (stating that human rights groups, international news agencies, the United Nations (U.N.), and the U.S. State Department have gathered intelligence that clearly demonstrates that the Sudanese government is responsible for the atrocities committed by the Janjaweed).

5 Kristof, The Face of Genocide, supra note 2.

6 Id. Unlike most conflicts in Arab nations, the Darfur conflict has nothing to do with religion, as the Janjaweed, the government, and the black African tribes are all Muslim. See Wagner, supra note 4, at 197. Rather, although the Arab tribes and the African tribes look very similar to outsiders, the conflict is at least partially based on race. See id. When carrying out attacks, particularly rapes, the Janjaweed often vocalize their hatred of the black African tribes (the Fur, the Barni, the Tama, the Jebel, the Aranaga, and the Masaalit, among others), shouting that militias are allowed to rape and take land because the victims are black. See Wagner, supra note 4, at 193, 197, 204; see also Stephanie N. Sackellares, From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict, 20 Wis. Women’s L.J. 137, 138 (2005).

7 Kristof, The Face of Genocide, supra note 2.

8 Id.

9 See id. Although Halima managed to escape the Janjaweed, the attacks destroyed her family. Id. Because rape victims face an extraordinary stigma in Sudanese culture, often finding themselves ostracized by their husbands and parents, shamed by their communities, and blamed for the attack, Halima did not tell her husband of the attack. Id.; see also Wagner, supra note 4, at 205. He deduced what happened, however, from her two-day dis-
Then, in October 2006, the Janjaweed found Halima again; this time the militia preyed upon a group of women as they gathered firewood. The Janjaweed ripped Halima’s infant daughter from her arms, and called her a “monkey” and “not human” while gang raping her, beating her, and stealing her clothes. This time, however, the fault for Halima’s brutalization does not lie solely with the Janjaweed and the Sudanese government. This note argues that fault also lies with the entire international community, with all of the countries and organizations and people who have spent four years either ignoring the worsening genocide in Darfur or doing shockingly little to stop it. If the international community had intervened, as stories of atrocity after atrocity continued to surface over the past four years, Halima may not have had to endure a second nightmarish attack at appearance, and soon after left her to grow crops. Kristof, The Face of Genocide, supra note 2. The area to which he traveled was later attacked by the Janjaweed, and he had not been heard from as of November 2006. Id.

10 Kristof, The Face of Genocide, supra note 2. The culture and habits of the black African tribes in Darfur have, ironically, helped facilitate the attacks on women. See Wagner, supra note 4, at 203. Men are rarely in the villages; they traditionally work outside the villages for long stretches of time, leaving women to assume many of the daily tasks necessary for survival. Eileen Meier, Prosecuting Sexual Violence Crimes During War and Conflict: New Possibilities for Progress, 10 INT’L LEGAL THEORY 83, 119 (2004); Kristof, The Face of Genocide, supra note 2. Since the attacks by the Janjaweed began in 2003, this role has become much more precarious for women. Meier, supra, at 119; Wagner, supra note 4, at 206; Kristof, The Face of Genocide, supra note 2. Many of their duties, such as gathering firewood, make them vulnerable to attack by the Janjaweed. Meier, supra, at 119; Wagner, supra note 4, at 206; Kristof, The Face of Genocide, supra note 2. The majority of women who have reported their rapes stated that they were engaged in their normal daily activities when they were attacked. Wagner, supra note 4, at 206. Furthermore, men often flee when villages are attacked by the Janjaweed, knowing that they will be killed if caught. Meier, supra, at 119; Wagner, supra note 4, at 203. This leaves women, who are much less mobile because of their responsibilities caring for children and the elderly, in the villages, without any protection from the Janjaweed. Wagner, supra note 4, at 203; Kristof, The Face of Genocide, supra note 2. The prevailing thought in Darfur is that since the Janjaweed kill men but “only” rape women, it is better to put the women at risk. Kristof, The Face of Genocide, supra note 2.


the hands of the Janjaweed. But the international community did not intervene, and our complacency in the face of genocide has become as horrific as the attacks themselves. As Halima and the Dajo women and all the women of Darfur struggle to survive, the rest of the world has closed its eyes. We refuse to see that women continue to bear the brunt of the violence in Darfur, that women are being violently raped in public, beaten like animals, and left with horrific and permanent injuries. We choose to ignore that women are being targeted for attack because of their gender, and then, after enduring physical brutalization, are being abandoned and ostracized by their families, forced to relive their trauma alone every day. As the first genocide of the twenty-first century ravages Darfur, the world has turned its collective head.

This note argues that the international community must immediately respond to the ongoing genocide in Darfur with decisive criminal prosecutions and holistic reparations, to both repay the women of Darfur for years of international ignorance of their suffering and to protect

them from future harms. Part I explores the use of rape in the Darfurian genocide and details the physical, emotional, social, and economic consequences that widespread and systematic rape has had on the women of Darfur. Part II examines the history of international criminal prosecutions for rape, the establishment of the International Criminal Court (ICC), and the ICC’s ongoing investigation in Darfur, which resulted in the court’s first indictments of Sudanese war criminals in February 2007. Part II details potential obstacles faced by the ICC in the prosecutions of these defendants and concludes that while ICC prosecutions are necessary and will be effective in the long run, they present a problem of delayed justice for the women of Darfur. Finally, Part III argues that the women of Darfur deserve more immediate and holistic forms of justice beyond the legal justice offered by the ICC. Part III suggests that the international community must repay the women of Darfur for years of keeping our eyes closed to their plight and for our inability to bring them immediate justice through international courts. This note proposes that as an apology for our willful ignorance, the international community must assist the women of Darfur through immediate humanitarian aid, financial reparations, and political and military solutions.

I. THE DESTRUCTION OF DARFUR

*It is . . . rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through the community, to shatter a society, to destroy a people. It is rape as genocide.*

—Catherine A. MacKinnon

A. A Conflict Defined By Sexual Violence

Sudan’s recent history is scarred with political instability and internal religion-based strife. For much of the past two decades, a civil war raged between the Sudan People’s Liberation Army, an armed group of black African tribes in the predominantly Christian southern part of the country, and the country’s Islamic central government in

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21 Wagner, supra note 4, at 195.
Khartoum.\textsuperscript{22} Then, in the 1990s, disagreements over land use in Darfur emerged between the black Muslim African tribes who farm there and the nomadic Arab groups who wanted the land for grazing.\textsuperscript{23} This strife coincided with the arrival of a hard-line, racist Islamic government—led by President Omar Hassan al-Bashir, who took power in a military coup in 1989—that supported Arabic supremacy over the African tribes and granted disproportionate power to the Arab groups in Darfur.\textsuperscript{24} Eventually, in 2003, two rebel groups—the Sudan Liberation Movement and the Justice and Equality Movement, both composed mostly of members of black African tribes—took up arms against government targets in Darfur, demanding more rights for the settled African population.\textsuperscript{25} The government responded with overwhelming and brutal

\textsuperscript{22} See Amnesty Int’l, supra note 4, at 6; Wagner, supra note 4, at 195; see also Jamal Jafari, “Never Again,” Again: Darfur, the Genocide Convention, and the Duty to Prevent Genocide, \textit{Hum. RTS. BRIEF}, Fall 2004, at 8, 8. This civil war came to a tenuous end with the signing of the Comprehensive Peace Agreement in January 2005, although there have been delays in the implementation of this agreement. U.S. Dep’t of State, Bureau of African Affairs, Background Note: Sudan, http://www.state.gov/r/pa/ei/bgn/5424.htm [hereinafter U.S. Dep’t of State, Background Note].

\textsuperscript{23} See International Commission of Inquiry on Darfur, Report to the United Nations Secretary-General, ¶ 60–62, U.N. Doc S/2005/60 (Jan. 25, 2005), available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf [hereinafter Commission of Inquiry Report]; Jafari, supra note 22, at 8; Wagner, supra note 4, at 197. Darfur is a predominantly desert region in far west Sudan, bordered by Chad and the Central African Republic. U.S. Dep’t of State, Background Note, supra note 22. Some experts note that the strife has roots in Darfur’s long-running environmental crises, including droughts and resulting famines in the 1980s that brought about increasing competition for resources between the black African farmers and the Arab herders. See Lydia Polgreen, A Godsend for Darfur, or a Curse?, \textit{N.Y. TIMES}, July 22, 2007, at D1. In July 2007, researchers at Boston University discovered a huge underground lake beneath the barren land of northern Darfur. \textit{Id}. While some experts, including U.N. Secretary-General Ban Ki-moon, believe that this discovery could help bring an end to the violence in the region by reducing competition for resources, others suggest that the lake will likely become an additional source of conflict. \textit{Id}.


\textsuperscript{25} See Commission of Inquiry Report, supra note 23, ¶ 62; Amnesty Int’l, supra note 4, at 6; see also Alexander, supra note 12, at 36 (the rebel groups blame the central government for the region’s problems and claim they are being marginalized). The turning point occurred in early 2003 when the rebel groups ambushed the Sudanese Air Force at a base in northern Darfur, embarrassing the Sudanese government and giving way to more brutal attacks. See Commission of Inquiry Report, supra note 23, ¶¶ 63, 64; see also Human Rights Watch, Q & A: Crisis in Darfur, http://hrw.org/english/docs/2004/05/05/darfur8536_txt.htm (last updated Sept. 18, 2007) [hereinafter Human Rights Watch, Q & A].
military force that did not target the rebels but rather purposely attacked all Darfurians. The government directed Sudanese military personnel to carry out these attacks, and in a deliberate attempt to exploit the long-simmering tension between the Arab and African groups, also recruited nomadic Arabs to form the armed militias that came to be known as the Janjaweed.

Together, the Janjaweed and the Sudanese government have spent the past five years destroying the black African population in the Darfur region. The government has orchestrated widespread attacks on civilians, ordering the Janjaweed to bomb villages, murder men, rape and torture women, abduct children, burn homes, and loot crops and cattle. These attacks, which are obviously blatant and massive human rights violations, are committed in a systematic manner, often in coordination with Sudanese soldiers and the Sudanese Air Force.

26 See Human Rights Watch, Darfur Destroyed, supra note 13, at 7; Alexander, supra note 12, at 36; Wagner, supra note 4, at 198–99. There are reports that the African rebel forces are also responsible for separate attacks on civilians, but there is no definitive evidence on this point. Commission of Inquiry Report, supra note 23, ¶ 190.

27 Human Rights Watch, Darfur Destroyed, supra note 13, at 7–8; see Wagner, supra note 4, at 198. The link between the Janjaweed and the Sudanese government is well-documented. See Wagner, supra note 4, at 198; see also Lipscomb, supra note 4, at 189. Human Rights Watch has obtained numerous documents showing the government’s high-level involvement in recruiting and arming the Janjaweed. Wagner, supra note 4, at 198–99. See generally Human Rights Watch, Darfur Documents Confirm Government Policy of Militia Support 6 (2004), available at http://hrw.org/backgrounder/africa/072004darfur.pdf (discussing numerous Sudanese government documents and interviews with eyewitnesses and victims, all of which describe the “hand-in-glove” manner in which the government and the Janjaweed have operated). The Sudanese government denies this connection, and has repeatedly claimed that the Janjaweed are simply independent, uncontrollable militias acting on the traditional tensions in the region. See Elizabeth Rubin, If Not Peace, Then Justice, N.Y. Times, Apr. 2, 2006, § 6 (Magazine), at 46.

28 Commission of Inquiry Report, supra note 23, ¶ 72; Amnesty Int’l, supra note 4, at 4; Jafari, supra note 22, at 8. The violence halted temporarily in May 2006 with the signing of a cease-fire agreement between the central government and a faction of the Sudan Liberation Movement—known as the Darfur Peace Agreement—but the deadlines of the deal were never met and the agreement, now called “flawed,” ended up making the violence worse. See Nicholas D. Kristof, How Do You Solve a Crisis Like Darfur?, N.Y. Times, March 13, 2007, at A19; Nicholas D. Kristof, When Genocide Worsens, N.Y. Times, July 9, 2006, at D13; Human Rights Watch, Q & A, supra note 25.


government’s “divide and rule” tactics have destabilized the social structure of communities and have allowed the government to control the civilians of Darfur through fear, while denying any responsibility for any of the atrocities.\(^{31}\) In total, as of the fall of 2007, the Sudanese government and the Janjaweed have killed as many as 500,000 people and displaced at least 2.2 million others.\(^{32}\)

What these numbers do not reveal, however, are the women, like Halima, whose lives will never be the same.\(^{33}\) The use of rape as a deliberate military tactic and weapon of war has destroyed Darfur in a way that no other crime could.\(^{34}\) There is no way to know how many women have been victims of sexual violence at the hands of the Janjaweed, and how many women continue to suffer because of physical injuries, economic losses, and the loneliness of ostracization.\(^{35}\) The

\(^{31}\) See Amnesty Int’l, \textit{supra} note 4, at 8. In addition to providing military and logistical support to the Janjaweed, the Sudanese government has also squelched any resistance from black Africans in the region, including human rights workers, lawyers, and village leaders, through arbitrary arrests, forced detentions, unfair trials, cruel punishments, and torture. \textit{See id.} at 4.

\(^{32}\) Karen Hirschfeld, Sudan Coordinator for Physicians for Human Rights, Public Address at Massachusetts Institute of Technology, The Genocide in Darfur: Roots of the Conflict and the Current Stalemate (Mar. 1, 2007); Human Rights Watch, \textit{Q & A, supra} note 25. The number of dead ranges from 200,000 to 500,000; the higher number includes deaths at the hands of the Janjaweed as well as deaths from disease and malnutrition brought on by the genocide. Hirschfeld, \textit{supra}. Some experts estimate that the death toll could reach one million if the genocide continues. Nicholas D. Kristof, \textit{Why Genocide Matters}, N.Y. Times, Sept. 10, 2006, at D13. However, this conflict is about more than just the body count. \textit{Id.} At least two million people have become internally displaced persons (IDPs), forced to move to other towns or villages in Darfur, and at least 232,000 are refugees across the border in Chad. Human Rights Watch, \textit{Q & A, supra} note 25. All refugees and displaced persons remain vulnerable to more attacks by the Janjaweed. \textit{Id.; see also Physicians for Human Rights, supra} note 24, at 5; M. Rafiqul Islam, \textit{The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable}, 18 \textit{Int’l J. Refugee L.} 354, 356–57 (2006). The Chadian refugee camps are dangerously understaffed and provide only spotty access to humanitarian aid. \textit{See Lisa Avery, The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of IntentionalVictimization of Women and Children in War, 51 LOY. L. REV. }103, 118 (2005). IDPs, who are not afforded the same protections under international law as refugees, are also extremely susceptible to illness, as they have no access to humanitarian aid, little food or medicine, and no secure shelter. \textit{Id.} at 121; Islam, \textit{supra}, at 356–57. In addition to refugees and IDPs, human rights groups estimate that there are an additional two million “conflict-affected” individuals in Darfur who require some form of food assistance because of the damage the genocide has caused to the Darfurian economy. Human Rights Watch, \textit{Q & A, supra} note 25.

\(^{33}\) Wagner, \textit{supra} note 4, at 193.

\(^{34}\) \textit{See id.} at 242; Gingerich & Leaning, \textit{supra} note 19, at 1.

\(^{35}\) See Amnesty Int’l, \textit{supra} note 4, at 29; U.S. Dep’t of State, Sudan: Country Reports, \textit{supra} note 29. An August 2004 report by the U.S. State Department indicated that sixteen percent of Darfurians interviewed had experienced or witnessed a rape, a high
attacks themselves are bad enough, but when combined with these uniquely horrific after-effects, the continuing sexual violence in Darfur amounts to genocide, a genocide in which the international community must intervene in order to protect the women of Darfur.\(^{36}\)
When scores of women are raped so violently that they suffer injuries preventing them from bearing children or leading them to early deaths due to infection, this constitutes an intentional, planned extermination of the women of Darfur. When women are forced to bear the children of their attackers and forbidden from procreating their own tribes, there is a deliberate attempt to destroy an entire racial group. When these rapes take place in public to cause the humiliation and ostracization of women, this constitutes a cruel plan to displace cultures and communities. This destruction is rape as ethnic cleansing, rape as genocide. This destruction is, as then-United Nations Humanitarian Coordinator in Sudan, Mukesh Kapila, said in March 2004, “the world’s greatest humanitarian crisis.”

B. The Effects of Rape on the Women of Darfur

The Janjaweed’s decision to rape the women of Darfur as part of their genocidal war is a massacre without murder, a deliberate and calculated plan designed to have particularly severe and long-lasting effects on the female population and, by extension, on the society as a whole. They engage in gang rapes, with multiple men raping women instead declared the events in Darfur to constitute war crimes and crimes against humanity—everything except genocide. See Commission of Inquiry Report, supra note 23, ¶¶ 518–19, 522.

See Sackellares, supra note 6, at 140; see also Rome Statute, supra note 19, 2187 U.N.T.S. at 93 (defining genocide as “[c]ausing serious bodily or mental harm to members of the group”).

See Rome Statute, supra note 19, 2187 U.N.T.S. at 93 (defining genocide as “[i]mposing measures intended to prevent births within the group”); Sackellares, supra note 6, at 140; Wagner, supra note 4, at 205 (stating that one notable element of the sexual violence against the women of Darfur has been the Janjaweed’s desire to populate the region with Arab children and hinder the ability of the African tribes to re-populate themselves).

See Rome Statute, supra note 19, 2187 U.N.T.S. at 93 (defining genocide as “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”); Sackellares, supra note 6, at 140, 157. Rape is used not only as an attack on the woman, but is also intended to humiliate, shame, degrade, and terrify the entire ethnic group. Wagner, supra note 4, at 205, 211.

Meier, supra note 10, at 125; Sackellares, supra note 6, at 138; Wagner, supra note 4, at 205, 211. Scholars have distinguished rape from other forms of genocidal crimes because of its unique impact on women. See Veronica C. Abreu, Women’s Bodies as Battlefields in the Former Yugoslavia: An Argument for the Prosecution of Sexual Terrorism as Genocide and for the Recognition of Genocidal Sexual Terrorism as a Violation of Jus Cogens Under International Law, 6 GEO. J. GENDER & L. 1, 16 (2005).

Amnesty Int’l, supra note 4, at 3.

See Naomi R. Cahn, Women in Post-Conflict Reconstruction: Dilemmas and Directions, 12 WM. & MARY J. WOMEN & L. 335, 335–36 (2006) [hereinafter Cahn, Dilemmas and Direc-
multiple times, with vaginal and anal penetration and penetration with objects. They use rape as a form of torture, beating and cutting women, breaking their legs, pulling out their fingernails, mutilating their genitals, and holding them as sex slaves, often as a tactic to try to force the women to reveal where their husbands are hiding. The Janjaweed rape indiscriminately, attacking girls as young as eight and women as old as eighty, single women, married women, pregnant women. The Janjaweed also use rape deliberately as a tool of ethnic cleansing; numerous reports speak of forced pregnancies, with the Janjaweed telling victims that they are being raped to create Arab children and to wipe out the black African tribes.

But the impact of these rapes goes beyond the immediate physical brutalization; for the women of Darfur, rape has long-term and life-threatening consequences. For the Janjaweed, rape is strategic dehumanization; they often rape women in public or in front of their husbands, parents, or children in an attempt to destroy families and communities. They use rape to intimidate, creating a population stricken by fear, a population afraid to leave its villages, afraid to engage in economic activity, afraid to live. Women must live with the scars of rape in a country that stigmatizes rape victims as at fault, refuses to prosecute their attackers, and, most dangerously, that has virtually no medical fa-

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43 Commission of Inquiry Report, supra note 23, ¶¶ 333–34; Gingerich & Leaning, supra note 19, at 15; Meier, supra note 10, at 120.
44 Amnesty Int’l, supra note 4, at 18; Meier, supra note 10, at 120; Sackellares, supra note 6, at 157; Wagner, supra note 4, at 207.
45 See Amnesty Int’l, supra note 4, at 12; Sackellares, supra note 6, at 138.
46 See Sackellares, supra note 6, at 140; Andrea R. Phelps, Note, Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution, 12 WM. & MARY J. WOMEN & L. 499, 503 (2006); Wagner, supra note 4, at 205, 211.
47 See Avery, supra note 32, at 110.
48 See Sackellares, supra note 6, at 140; Wagner, supra note 4, at 193, 205.
49 See Gingerich & Leaning, supra note 19, at 15; Meier, supra note 10, at 121. In one infamous attack, well-documented by human rights organizations, the Sudanese military and the Janjaweed stormed the northern Darfur town of Tawila, surrounded a boarding school that housed 110 girls, and eventually raped at least forty-one students and teachers in one day. Commission of Inquiry Report, supra note 23, ¶ 339; Wagner, supra note 4, at 204.
ilities to treat their injuries. These lingering effects make rape the most devastating and premeditated tactic of the Janjaweed—rape and its after-effects are destroying the very core of Darfuri society and forcing women to live alone, broken, in its rubble. It is these physical, psychological, social, and economic consequences that demonstrate why rape is the first aspect of the Darfur genocide that the international community should be most intent on eliminating.

1. Physical and Psychological Effects

The majority of women raped in Darfur suffer horrific physical injuries. The Janjaweed rape violently, often raping women multiple times in a row and penetrating them with sticks and bayonets. Following the rapes, the Janjaweed have attempted to cause further injury by firing bullets into women’s vaginas, among other atrocities. If the women survive, they often are left with serious medical conditions, most frequently an injury known as a traumatic gynecological fistula. A gynecological fistula occurs when the wall between the vagina and the bladder or bowel is ruptured, leaving women incontinent and highly susceptible to infection. Fistulas are all but unheard

50 See Cahn, Beyond Retribution, supra note 42, at 258; Sackellas, supra note 6, at 140; Wagner, supra note 4, at 205.
51 See Cahn, Dilemmas and Directions, supra note 42, at 335–36 (arguing that women are affected differently by armed conflict due to their second-class status in most war-torn countries and their role as the primary caretakers of homes and families).
52 See id. at 337, 358–59. Some argue that rape should be at the very top of any criminal prosecutions against the perpetrators of the Darfur genocide. Wagner, supra note 4, at 194, 212.
53 Amnesty Int’l, supra note 4, at 18. The severity of these injuries is increased due to the widespread practice of female genital mutilation in Sudan. Id. Most women in Darfur are circumcised, and a large number are infibulated, making intercourse extremely painful and dangerous and greatly increasing the risk of injury. Id.; Gingerich & Leaning, supra note 19, at 20; see also Wagner, supra note 4, at 213; Kristof, Sudan’s Department of Gang Rape, supra note 13.
54 Commission of Inquiry Report, supra note 23, ¶¶ 333–34; Kristof, Sudan’s Department of Gang Rape, supra note 13.
55 Cahn, Beyond Retribution, supra note 42, at 232.
57 See Amnesty Int’l, supra note 4, at 18; The ACQUIRE Project, supra note 56, at 3; U.N. OCHA, Fighting Fistula, supra note 56. Women suffering from gynecological fistulas
of in the developed world, and typically occur in the third world only as a result of problematic labor and delivery. In Darfur, however, they have increasingly become a common conflict-related injury. It is unknown how many women suffer from gynecological fistulas in Darfur. All that is known is that the women who have developed fistulas after being raped are suffering horribly and alone, having been shunned by their families and communities.

Compounding the problem of fistulas and other rape injuries is the lack of adequate medical facilities in Darfur that can provide comprehensive medical care to rape victims. While fistulas can be easily repaired with surgery, surgical facilities are virtually non-existent in the remote villages, makeshift communities, and desperate refugee camps where many Darfurians currently live. There are no sanitary products that can help women with fistulas avoid their high risk of infection, nor are there the necessary rehabilitation services that would allow them to remain part of the community. In addition, the sheer number of rapes has very likely led to a significant spread of HIV/AIDS and other sexually transmitted diseases, none of which are being protected against or treated. As a result, the women of Darfur are essentially left to fend for themselves against a litany of public health crises.

In addition to the horrific physical effects, many of the rape victims in Darfur, like rape victims all around the world, suffer profound
psychological consequences. They often experience depression and post-traumatic stress disorder, as well as feelings of abandonment, isolation, guilt, and constant fear. And without access to psychological care, there is little hope for these women ever to recover fully.

2. Social and Economic Effects

Darfuri women who are victimized by the Janjaweed’s brutality, even the few who escape serious physical injuries, must deal with tangible social and economic ramifications. Rape carries such a strong stigma in Sudanese society that victims are nearly universally shamed and cast out of their families. Rape victims who are married are often abandoned by their husbands and forced to raise their children—including, often, their rapist’s child—alone, without any type of income; those who are still single are typically deemed unfit for marriage and fated to a difficult life. Other victims have been separated from their families, perhaps permanently, and forced to flee to remote IDP or refugee camps. These destructive after-effects are not a byproduct of the sexual violence, but rather are the primary motivation for the attacks. The Janjaweed are acutely aware of the ramifications of rape,

67 Cahn, Beyond Retribution, supra note 42, at 233; Cahn, Dilemmas and Directions, supra note 42, at 359.
69 Cahn, Dilemmas and Directions, supra note 42, at 359. The lack of psychological care for rape victims stems from the overall lack of mental health facilities in Darfur, but also from the traditional beliefs about rape in Sudan. See id. In a country where rape is rarely recognized as a crime and victims are blamed and ostracized, there is obviously little thought given to the psychological needs of victims. See Cahn, Beyond Retribution, supra note 42, at 233; Cahn, Dilemmas and Directions, supra note 42, at 359–60.
70 See Wagner, supra note 4, at 212; see also Cahn, Beyond Retribution, supra note 42, at 218 (arguing that women are disproportionately affected, politically and economically); Cahn, Dilemmas and Directions, supra note 42, at 336–37 (stating that women struggle for economic survival during and after wars).
71 See O’Connell, supra note 68, at 312; Wagner, supra note 4, at 213. O’Connell notes that sexual violence is an especially powerful tool for humiliation and shame. O’Connell, supra note 68, at 312. See generally Kristof, The Face of Genocide, supra note 2 (explaining that Halima was abandoned by her husband after he discovered that she was raped by the Janjaweed).
72 See Wagner, supra note 4, at 213; Lydia Polgreen, Darfur’s Babies of Rape Are on Trial From Birth, N.Y. Times, Feb. 11, 2005, at A8.
73 See Cahn, Beyond Retribution, supra note 42, at 234.
74 See Wagner, supra note 4, at 212.
and use it deliberately to dismantle the family and social relationships at the core of Darfurian society.\textsuperscript{75}

The after-shocks of widespread rape are already clearly visible in the Darfurian economy.\textsuperscript{76} Economic activity in the region has essentially stalled.\textsuperscript{77} Traditionally, the men of Darfur control the farming and agriculture essential to families’ survival, while Darfurian women transport, prepare, and sell the food and other goods.\textsuperscript{78} As the conflict in Darfur has raged on, however, intensifying fears of rape and physical abuse have drastically impacted women’s ability to participate in this economic cycle.\textsuperscript{79} Now, when women do engage in the work outside of the home that is necessary to keep their families alive, such as gathering firewood, they do so with the knowledge that they will most likely be beaten, raped, or killed.\textsuperscript{80} The women of Darfur have been left unprotected, without resources, and with no viable opportunities to generate income and support themselves and their families.\textsuperscript{81} They are alone in the world.\textsuperscript{82}

II. Achieving Legal Justice

There is no hope for sustainable peace in Darfur without immediate access to justice.\textsuperscript{83}

—Louise Arbour, former U.N. High Commissioner for Human Rights

Rape has been used as a tactic of war for centuries, but it is only in the last decade that it has been fully recognized to be as evil as mass killings and other atrocities.\textsuperscript{84} The international community has come to agree that widespread and systematic rape of women can constitute

\textsuperscript{75} See Avery, supra note 32, at 113.
\textsuperscript{76} Commission of Inquiry Report, supra note 23, ¶ 346.
\textsuperscript{77} See id.; Human Rights Watch, Q & A, supra note 25; see also Cahn, Dilemmas and Directions, supra note 42, at 337.
\textsuperscript{78} See Commission of Inquiry Report, supra note 23, ¶ 346; Wagner, supra note 4, at 206.
\textsuperscript{79} See Amnesty Int’l, supra note 4, at 18; Commission of Inquiry Report, supra note 23, ¶ 346.
\textsuperscript{80} See Wagner, supra note 4, at 206; Kristof, The Face of Genocide, supra note 2.
\textsuperscript{81} See Avery, supra note 32, at 105.
\textsuperscript{82} See Jafari, supra note 22, at 9.
\textsuperscript{83} Jon M. Van Dyke, Promoting Accountability for Human Rights Abuses, 8 CHAP. L. REV. 153, 173 (2005).
\textsuperscript{84} See Sackellares, supra note 6, at 149; Phelps, supra note 46, at 500; Wagner, supra note 4, at 214–15. International recognition of rape is a new phenomenon; until recently, international human rights law was a reflection of only the male experience in armed conflict. Sackellares, supra note 6, at 137.
genocide or, at the very least, a war crime and a crime against humanity. In recent years, the international community, led by the U.N., has made great strides in targeting and prosecuting sexual violence against women in internal conflicts. Beginning with the International Criminal Tribunals in Rwanda and the former Yugoslavia and continuing through the development of the Rome Statute, the establishment of the ICC, and the current investigation and indictments by ICC, the international community has taken great steps to protect women when individual countries cannot or will not. This protection must now be extended to the women of Darfur. There must be vigorous prosecution of the perpetrators of the Darfurian genocide, with prosecutions of rape and sexually violent crimes at the forefront.

A. The Recognition of Rape as a Crime of War

The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) announced the international criminal justice community’s first clear condemnations of the use of rape as a weapon of war. The tribunals are independent, temporary courts run by the U.N. that, for the first time, prosecute both the direct perpetrators of international crimes and the government officials who enable them. A hallmark of both tribunals is the recognition of the unique victimization of women during armed conflict and the resulting careful prosecution of those who order, permit, or commit crimes of sexual violence. The ICTY and the ICTR represent a new way of dealing with rape as a war crime, taking a victim-centered approach and focusing on justice for the women rather than pursuing sometimes impossible or harmful prosecu-

85 See Sackellares, supra note 6, at 137; see also discussion supra note 36. In the context of war, mass rape is a uniquely effective tool for undermining the social order of a region. Gingerich & Leaning, supra note 19, at 8.
86 See Sackellares, supra note 6, at 148–53; Wagner, supra note 4, at 210.
87 See Sackellares, supra note 6, at 148–53.
88 See Wagner, supra note 4, at 194.
89 Id.
90 See Sackellares, supra note 6, at 149. The ICTY was established in 1993 after the conflict in Yugoslavia ended; the ICTR was set up in 1994 after the civil war in Rwanda subsided. See Sackellares, supra note 6, at 147–48; International Criminal Tribunal for Rwanda, General Information, http://69.94.11.53/default.htm (last visited Jan. 2, 2008). Sackellares states that the tribunals’ focus on sexual violence stemmed in part from worldwide media attention on mass rapes and pressure from feminists and women’s organizations. Sackellares, supra note 6, at 148–49.
91 Sackellares, supra note 6, at 147–50.
92 See id. at 148–50.
tions.\textsuperscript{93} The ICTY is known for changing the way the international community looks at sexual violence, particularly systematic rape during armed conflict.\textsuperscript{94} The ICTR is responsible for the recognition that rape can be prosecuted as genocide and a crime against humanity and for demonstrating to the international legal community that such prosecutions stand as dramatic statements that there will be no impunity for sexual violence.\textsuperscript{95} This legal significance, however, has not been enough to deter the ongoing genocide in Darfur.\textsuperscript{96}

**B. The Role of the International Criminal Court**

1. Establishment of the ICC

After the ICTY and ICTR, the international criminal justice community recognized the need for a permanent international court to prosecute war crimes, crimes against humanity, and genocide.\textsuperscript{97} In July

\textsuperscript{93} See id. at 150. The ICTR and ICTY are groundbreaking in their recognition of the impact sexual violence crimes have on individual victims. Id.; see Valerie Oosterveld, Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court, 12 New Eng. J. Int’l & Comp. L. 119, 120 (2005).

\textsuperscript{94} See Sackellares, supra note 6, at 150. In Prosecutor v. Tadic, the defendant, a leader of Serbian forces, was acquitted of rape charges, but the case retained significance simply by demonstrating that it was possible to bring such charges. See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (July 15, 1999); Sackellares, supra note 6, at 150. Prosecutor v. Kunarac broadened the definition of rape to require only an unwanted sexual penetration, eliminating the requirement of coercion or force, bringing international law into conformity with rape laws in jurisdictions around the world. See Prosecutor v. Kunarac, Case Nos. IT-96-23, IT-96-23/1, Trial Chamber II, Judgment (Feb. 22, 2001); Sackellares, supra note 6, at 151. Kunarac was also significant because it was the first prosecution of a defendant for a single act of rape, and also the first to recognize the systematic rape of women as a war crime. See Sackellares, supra note 6, at 151.

\textsuperscript{95} See Cahn, Beyond Retribution, supra note 42, at 240–41; Sackellares, supra note 6, at 151. The case of Prosecutor v. Akayesu was groundbreaking because the ICTR defined rape and sexual violence for the first time in international criminal history. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); Sackellares, supra note 6, at 152. In Akayesu, the ICTR also considered rape as a method of torture for the first time. See Oosterveld, supra note 93, at 120–21, 122; Sackellares, supra note 6, at 152. However, despite these legal milestones, some scholars argue that the ICTR has not had a significant impact on the Rwandan people. See Mark A. Drumbl, Law and Atrocity: Settling Accounts in Rwanda, 31 Ohio N.U. L. Rev. 41, 46 (2005). Drumbl argues that the international community, not Rwandans themselves, have been the greatest beneficiaries of the ICTR and that most Rwandans are unaware of the ICTR’s work. Id. at 47.

\textsuperscript{96} See Cahn, Beyond Retribution, supra note 42, at 241.

2002, the U.N. and 104 countries—with the notable exception of the United States—entered into effect the Rome Statute, which established the ICC.\textsuperscript{98} The ICC is an unprecedented international tribunal: a permanent court coordinated by, but independent of, the U.N. and made up of judges and prosecutors from around the world.\textsuperscript{99} The tribunal has jurisdiction to prosecute the most heinous international crimes—war crimes, crimes against humanity, and genocide—in nearly every country.\textsuperscript{100} Most importantly, the ICC, guided by the Rome Statute, recognizes widespread and systematic rape as a form of genocide.\textsuperscript{101}

The ICC has jurisdiction in any country that is a party to the Rome Statute, any country that consents to ICC jurisdiction, or any country referred to the court by the U.N. Security Council; combined, this essentially covers every country in the world.\textsuperscript{102} Although Sudan is not a party to the Rome Statute, the ICC has jurisdiction in Sudan due to a U.N. Security Council Referral made in March 2005.\textsuperscript{103}


\footnotesize{\textsuperscript{99} ICC: About the Court, supra note 98; ICC: Structure of the Court, http://www.icc-cpi.int/about/etaglance/structure.html (last visited Jan. 3, 2008); see Stephens, supra note 98, at 527.}

\footnotesize{\textsuperscript{100} ICC: FAQ, supra note 97; see Sackellares, supra note 6 at 153; Stephens, supra note 98, at 527. Because the ICC has prospective jurisdiction, it can only prosecute crimes committed after July 1, 2002. See Meier, supra note 10, at 105.}

\footnotesize{\textsuperscript{101} See Rome Statute, supra note 19, 2187 U.N.T.S. at 93; Phelps, supra note 46, at 515–16. The statute provides a list of sexually violent crimes that constitute crimes against humanity, including rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and “other forms of sexual violence.” Rome Statute, supra note 19, 2187 U.N.T.S. at 93. When these crimes are committed “with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group,” they constitute genocide. Id. The explicit recognition of these crimes in the statute demonstrates a new, broader way of thinking about sexual violence. See Meier, supra note 10, at 84; Oosterveld, supra note 93, at 124.}


Three months after receiving the referral, in June 2005, ICC Prosecutor Luis Moreno-Ocampo announced that the ICC was opening an investigation in Darfur, over Sudan’s vehement objections.104

2. ICC Indictments

After a twenty-month investigation, the ICC’s work in Darfur reached a crescendo in February 2007, when Moreno-Ocampo announced indictments against two high-ranking Sudanese officials for crimes against humanity and war crimes in Darfur.105 The indictments contain fifty-one counts of atrocious crimes, including rape, murder, and torture, against Ahman Muhammad Harun, the former Minister of

ceived the case in January 2005 from the U.N.’s International Commission of Inquiry for Darfur. See Hewett, supra note 36, at 276. See generally Commission of Inquiry Report, supra note 23 (concluding that the extent of violence in Darfur required a referral to the Security Council). The commission, while declining to find the events in Darfur to be genocidal, detailed serious violations of international criminal law in Darfur and sent the names of fifty-one individuals, including government and Janjaweed officials, believed to be responsible to the Security Council for further action. Hewett, supra note 36, at 276–77; Rubin, supra note 27. See generally Commission of Inquiry Report, supra note 23 (detailing accounts of the violence and documentation proving the government’s involvement). The Security Council gathered further information, including written documentation of the atrocities from human rights groups and anti-government activists in Sudan. See Rubin, supra note 27. On March 31, 2005, the Security Council voted eleven to zero to officially refer Darfur to the ICC, with Algeria, Brazil, China, and the United States abstaining. Van Dyke, supra note 83, at 174; see Hewett, supra note 36, at 277. Because of its objection to the ICC, the United States had threatened to veto the referral, but backed off of this threat, stating that it was important for the international community to speak with one voice. Van Dyke, supra note 83, at 174. The Security Council’s referral in the face of U.S. opposition has been called “remarkable.” Delmas-Marty, supra note 97, at 5.

104 See Hewett, supra note 36, at 277. Sudan immediately rejected the Security Council’s referral to the ICC. Hewett, supra note 36, at 277; Wagner, supra note 4, at 219. President al-Bashir repeatedly reaffirmed Sudan’s sovereignty and stated that he would not hand over any Sudanese nationals to the court. Hewett, supra note 36, at 277; Wagner, supra note 4, at 219. The ICC’s decision to go ahead with an investigation and prosecution in Darfur over Sudan’s objections has been called a “defining moment” for the court. Van Dyke, supra note 83, at 173.

105 ICC, Fact Sheet, supra note 103. In announcing the indictments, the prosecutor stated that he was basing his charges on statements from victims, eyewitnesses, and those with knowledge of the government’s activities; documents and other information provided by the Sudanese government; the Commission of Inquiry Report; and documents, reports, and statements provided by non-governmental organizations. International Criminal Court, Situation in Darfur, The Sudan, Prosecutor’s Application Under Article 58(7), 3 (2007), available at http://www.icc-cpi.int/library/organ/Otp/ICC-OTP_Summary-Darfur-20070227_en.pdf [hereinafter ICC, Prosecutor’s Application]; ICC, Fact Sheet, supra note 103. The defendants are not being charged with genocide, most likely due to the fact that the Commission did not definitively find genocidal intent. Commission of Inquiry Report, supra note 23, ¶ 518
State for the Interior of the Government of the Sudan, and Ali Kushayb, a Janjaweed leader. Harun allegedly managed and personally participated in Janjaweed recruitment, directed Janjaweed activities through the “Darfur Security Desk,” and provided funds and weapons directly to the Janjaweed, all with the full knowledge that the Janjaweed were routinely attacking civilians. Kushayb allegedly commanded thousands of Janjaweed members and personally led attacks on civilians—including a mass rape where he personally “inspected” women who were tied to trees with their legs apart before being raped repeatedly. In May 2007, the ICC’s Pre-Trial Chamber ruled on the merits of the prosecutor’s evidence against Harun and Kushayb and found reasonable grounds to believe that they are criminally responsible for the alleged incidents of murder, rape, and torture. The ICC also issued arrest warrants for Harun and Kushayb, which serve as a request to Sudan and all countries party to the Rome Statute to arrest the defendants and turn them over to the court.

These indictments are an extremely significant step, but, at the same time, barely scratch the surface of what needs to be done in Darfur. There are many more individuals who need to be investigated

106 ICC, Prosecutor’s Application, supra note 105, at 1; ICC, Fact Sheet, supra note 103. The prosecutor’s choice of defendants is significant. See ICC, Fact Sheet, supra note 103. By including one government official who orchestrated the attacks and one Janjaweed leader who carried out the attacks, the prosecutor is showing the depth of the government involvement in the attacks. See id.

107 ICC, Prosecutor’s Application, supra note 105, at 5. Harun was often seen traveling with guards and large boxes of cash, which he distributed directly to the Janjaweed. Id. Harun is reportedly currently in Jordan for medical treatment. Sudan Rejects ICC Jurisdiction, Says One Suspect Held, Sudan Trib., Feb. 27, 2007, available at http://www.sudantribune.com/spip.php?article20473.

108 ICC, Prosecutor’s Application, supra note 105, at 7. Sudan claims to be investigating Kushayb for international crimes and allegedly has him in custody. Sudan Rejects ICC Jurisdiction, supra note 107. The ICC has stated that this is irrelevant because Sudan’s investigation does not involve the same incidents or conduct cited by the ICC. Press Release, International Criminal Court, ICC Prosecutor Presents Evidence on Darfur Crimes (Feb. 27, 2007), available at http://www.icc-cpi.int/press/pressreleases/230.html (last visited Jan. 3, 2008) [hereinafter Press Release, ICC Prosecutor Presents Evidence].


111 See Wagner, supra note 4, at 218. The U.N. has identified ten high-ranking central government officials, seventeen local government officials, fourteen members of the Jan-
and prosecuted by the ICC, including President al-Bashir himself. Until this happens, however, the ICC must dedicate itself to bringing Harun and Kushayb to justice. Although the indictments have been universally applauded by human rights groups and concerned nations, they will be meaningless in stopping and preventing genocide unless justice is actually done.

3. Obstacles to Effective ICC Prosecutions in Darfur

Despite the great progress made by the ICC, there are multiple obstacles to the court’s effectiveness. As a court of last resort, the ICC operates under a complementarity rule: the ICC can exercise its jurisdiction to investigate and prosecute crimes in a country only after it determines that the country is unwilling or unable to handle the prosecution itself. The ICC has determined that Sudan is both unwilling and unable to investigate and prosecute the crimes and perpetrators identified by the ICC, and thus has declared jurisdiction. Sudan disagrees, however, and has attempted to ward off the ICC by establishing its own court to investigate crimes in Darfur, called the Special Court for Darfur. This court, opened in 2005, has conducted very few prosecutions and, in a country that barely acknowledges rape as a crime, is not expected to provide justice to any of the women victimized
by the Janjaweed.¹¹⁹ Many believe that the court completely lacks credibility and will never touch the government officials, military officers, and other influential administrators who orchestrated the campaign of rape.¹²⁰ The ICC, according to the February indictments, is confident that it can overcome the significant hurdle of Sudan’s resistance and continues to press ahead with investigation and prosecution.¹²¹

Beyond the complementarity issue, however, the ICC faces three major limitations to its effectiveness.¹²² First, the lack of support for the court from the United States weakens the ICC’s credibility in the eyes of the rest of the world; it may severely limit the impact of any judgment by the ICC and restrict the international community from following through on punishments.¹²³ Second, ICC judgments may not carry much weight in countries that feel far removed from the prosecution process, and may result in empty punishments and hol-

¹¹⁹ See Lipscomb, supra note 4, at 204. By late fall 2005, the court had heard only six cases—most of them prosecutions of men who refused to take part in the genocide. Amnesty Int’l, supra note 4, at 24; Rubin, supra note 27. The chairman of the court has called allegations of mass rape a “Western fabrication.” Human Rights Watch, Entrenching Impunity: Government Responsibility for International Crimes in Darfur 60 (2005), available at http://hrw.org/reports/2005/darfur1205/darfur1205text.pdf [hereinafter Human Rights Watch, Entrenching Impunity]. Furthermore, many Sudanese citizens are unaware of the court’s existence. Rubin, supra note 27.

¹²⁰ See Hewett, supra note 36, at 279. Hewett quotes the former head of the U.N. Commission of Inquiry as asserting that the trials have “no credibility” and calling the entire Sudanese judiciary “flawed.” Id. Hewett also notes that human rights groups have expressed skepticism of Sudan’s motives. Id.; see Human Rights Watch, Entrenching Impunity, supra note 119, at 1, 52 (describing the Sudanese court as having no accountability or intention to prosecute defendants); Nsongurua J. Udombana, Pay Back Time in Sudan? Darfur in the International Criminal Court, 13 Tulsa J. Comp. & Int’l L. 1, 31 (2005) (calling the Sudanese court a “Kangaroo court”).

¹²¹ See Press Release, ICC Prosecutor Presents Evidence, supra note 108. The prosecutor states that the ICC has devoted considerable resources to assessing admissibility on the jurisdiction issue, and is confident that the indictments do not violate the complementarity rule. Wagner, supra note 4, at 221; Press Release, ICC Prosecutor Presents Evidence, supra note 108. This was confirmed by the ICC in its ruling on the merits of the case. Harun & Al Abd-Ak-Rahman, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, supra note 109, ¶¶ 11–17.


¹²³ See Van Dyke, supra note 83, at 172–73. Some believe that the United States’ refusal to support the Rome Statute has weakened the credibility of the ICC and could make convictions difficult to enforce. See Phelps, supra note 46, at 518–19. Others contend that the United States’ opposition to the ICC is a losing battle and that the United States will eventually have to become a party to the court. Stephens, supra note 98, at 529–30.
low justice. Third, even with the progress brought by the February indictments, it will take several more years for justice truly to be done, as the process of obtaining enough evidence to prosecute war criminals is extremely lengthy.

4. Why the ICC Is Necessary

Despite these limitations, criminal trials are an essential component of the quest for justice for Darfur and, as discussed above, the ICC is the most effective channel available for such trials. Trials, even if they take years, not only hold perpetrators accountable, but

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124 See Blumenson, supra note 122, at 854; Cahn, Beyond Retribution, supra note 42, at 267. Blumenson argues that those with the greatest stake in ICC decisions—the victims—have no power to influence the process or hold the ICC accountable for prosecution failures. Blumenson, supra note 122, at 854. Others argue that because the ICC prosecutions are based in the Hague, they are detached from the political and cultural realities of the victims and may not be effective at promoting reconciliation. Lipscomb, supra note 4, at 193–94. Lipscomb also cautions that the ICC will be less effective if it operates under a traditional Western punitive justice framework focused on retribution and deterrence rather than under a healing framework more reflective of the cultures of the victims. Id. at 194–95.

125 See Sackellares, supra note 6, at 165; Wagner, supra note 4, at 220 (arguing that Sudan’s lack of cooperation could seriously impede attempts at holding the perpetrators accountable for their actions in Darfur); Rubin, supra note 27 (noting that the ICC prosecutor has admitted that his investigation will take years); ICC: How the Court Works, supra note 102 (describing the ICC’s lengthy evidentiary and pre-trial processes). Commentators suggest that the international legal proceedings for Darfur have been exceptionally slow due to a Western bias against Africa and a lack of media attention on the genocide due to this bias. See Sackellares, supra note 6, at 160–61. The investigation into Darfur is not yet complete more than two years after it began, as the prosecutor has acknowledged that there remain a number of outstanding requests for documents. Press Release, ICC Prosecutor Ready With Evidence, supra note 111.

126 Commission of Inquiry Report, supra note 23, ¶ 573; see Pham, supra note 122, at 41–42; Wagner, supra note 4, at 240. Some have advocated the use of a hybrid national and international tribunal rather than a strictly international forum like the ICC. Lipscomb, supra note 4, at 186. Lipscomb argues that a hybrid tribunal involving the Sudanese legal community overseen by the ICC would be more effective because it would also strengthen the Sudanese judicial system. Id. Others, however, have noted problems with hybrid tribunals. See Udombana, Pay Back Time, supra note 120, at 10. A hybrid tribunal currently exists in Sierra Leone, but it has been hampered by credibility and financial problems, largely because of lukewarm support and interest from the international community. Id. Furthermore, others have noted that even if hybrid tribunals are effective elsewhere, one would be impractical in Sudan because the judicial system is completely controlled by the same government officials who are responsible for the genocide. See Delmas-Marty, supra note 97, at 6. Given the fact that the current peace agreements in force in Sudan promise continued power to President al-Bashir, regime change, and thus changes in the judicial system, is extremely unlikely. See Lipscomb, supra note 4, at 186.
also provide victims with a voice they otherwise would not have had.\textsuperscript{127} Trials are important to the legal community as a whole because the establishment of a permanent record condemning atrocities creates a vivid reminder of genocide’s destruction.\textsuperscript{128} This can serve as a powerful legal precedent for punishing future acts of rape as a weapon of war, create more international acceptance of protections for women in armed conflict, and reduce cultural stigmas against rape victims.\textsuperscript{129} Prosecutions may help prevent future genocides by sending a signal to governments around the world that the international community will hold perpetrators of sexual violence accountable.\textsuperscript{130} Furthermore, in the case of Sudan, where the genocide continues and increasingly threatens international peace and security, prosecution is one of the only tools that can bring a permanent end to the violence.\textsuperscript{131} But despite these benefits, prosecution cannot be the only response, as the victims of these atrocities deserve much more complete and immediate justice.\textsuperscript{132}

III. Alternative Forms of Justice

This is ethnic cleansing, this is the world’s greatest humanitarian crisis, and I don’t know why the world isn’t doing more about it.

—Mukesh Kapila, former U.N. Humanitarian Coordinator in Sudan\textsuperscript{133}

Justice is more than simply prosecution.\textsuperscript{134} Justice is also restorative and humanitarian, and does not necessarily come from within the

\textsuperscript{127} O’Connell, \textit{supra} note 68, at 310, 319–20. O’Connell argues that trials can signal society’s new solidarity with victims and acknowledgment of victims’ dignity, which may alleviate some victims’ loneliness and suffering. \textit{Id}.

\textsuperscript{128} See Cahn, \textit{Beyond Retribution, supra} note 42, at 241; Meier, \textit{supra} note 10, at 133.

\textsuperscript{129} Wagner, \textit{supra} note 4, at 241, 242. Vigorous prosecution can delegitimize the cultural stigma attached to rape, educate the public about the true plight of rape victims, and shape public opinion about the unacceptability of rape. Udombana, \textit{Pay Back Time, supra} note 120, at 22; Wagner, \textit{supra} note 4, at 241, 242.

\textsuperscript{130} Rubin, \textit{supra} note 27.


\textsuperscript{132} See, e.g., Pham, \textit{supra} note 122, at 41; Jolie, \textit{supra} note 131; Kristof, \textit{The Face of Genocide, supra} note 2.

\textsuperscript{133} Amnesty Int’l, \textit{supra} note 4, at 3.

\textsuperscript{134} See Cahn, \textit{Beyond Retribution, supra} note 42, at 220, 269; see also Drumbl, \textit{supra} note 95, at 65 (arguing that legal justice must be externalized); Wagner, \textit{supra} note 4, at 240 (stating that no international court will be able to undo the great damage that sexual violence has brought on Darfur).
law.\textsuperscript{135} The standard human rights response to past genocides has been to investigate and prosecute those responsible; although this long and complicated process benefits the international community, it ignores the more immediate needs of the victims.\textsuperscript{136} Survivors of genocide, and rape victims in particular, need more than just legal vindication.\textsuperscript{137} During and after the conflict, they need food and medical treatment for themselves and their families, financial assistance to rebuild their local economies, and protection against future attacks.\textsuperscript{138} These short-term needs cannot be met by the legal system.\textsuperscript{139} Thus, in formulating a response to the Darfur genocide, the international community must recognize the realities of the victims and make justice resonate on the ground.\textsuperscript{140} This is a complementary process; one form of justice cannot supersede or replace the other.\textsuperscript{141} Rather, this approach adds focus to the victims’ physical and social needs during the wait for the legal process to bring its form of justice.\textsuperscript{142}

A. Where Do We Go from Here?

1. Humanitarian Assistance

It is difficult to conceptualize what it would take to make the women of Darfur whole again.\textsuperscript{143} But it is clear that the international community, including the U.N., the United States, other governments, and non-governmental organizations, must take steps to meet the women of Darfur’s immediate physical and economic needs with targeted humanitarian aid.\textsuperscript{144} This cannot wait until after the genocide has

\textsuperscript{135} Cahn, Beyond Retribution, supra note 42, at 220, 269. Cahn argues that legal responses are often inadequate because they only address limited aspects of the victims’ post-conflict needs and not practical aspects of victims’ lives. Id. at 221. As a result, the ICC is not the complete answer to genocide. Id. at 267; see also Chanté Lasco, Repairing the Irreparable: Current and Future Approaches to Reparations, HUM. RTS. BRIEF, Winter 2003, at 18, 18 (2003).

\textsuperscript{136} See Cahn, Beyond Retribution, supra note 42, at 218; see also Drumbl, supra note 95, at 42.

\textsuperscript{137} Cahn, Beyond Retribution, supra note 42, at 220–21.

\textsuperscript{138} Id. at 221, 242, 247; see Udombana, Pay Back Time, supra note 120, at 47.

\textsuperscript{139} Cahn, Beyond Retribution, supra note 42, at 221.

\textsuperscript{140} See id. at 219. This means shaping the administration of aid in ways that address customs within Sudanese society, including the social and familial roles occupied by women. Id.

\textsuperscript{141} See id. at 245.

\textsuperscript{142} Lipscomb, supra note 4, at 195. Some believe that focusing on the long-term economic and social needs of the victims may be more valuable than criminal prosecutions in the prevention of future genocides. Id.

\textsuperscript{143} See Cahn, Beyond Retribution, supra note 42, at 247; Lasco, supra note 135, at 1.

\textsuperscript{144} See Cahn, Beyond Retribution, supra note 42, at 247; Lasco, supra note 135, at 18. The current humanitarian response has been weakened by the failure of many nations to fulfill
ended or the violence has ceased; it must happen now.\textsuperscript{145} There are no legal barriers, no complementarity tests, to ending despair in this way.\textsuperscript{146} The Sudanese government, which continues to deny the existence of the humanitarian crisis in Darfur, is unable or unwilling to fulfill its human rights obligations to its own citizens, and has allowed the country to become a wilderness of atrocity and crime.\textsuperscript{147} Sudan is utterly incapable of providing even the most basic services and protections to its own citizens, including physical security, health care, education, transportation, or economic infrastructure.\textsuperscript{148} The international community must step in where Sudan has failed.\textsuperscript{149}

The international community must immediately devise a plan for distributing both basic short-term and more comprehensive long-term humanitarian aid in Darfur.\textsuperscript{150} Initial distribution of food and clean water must be accompanied by an immediate deployment of skilled physicians to provide comprehensive, gender-sensitive medical care.\textsuperscript{151} In order to save their lives, the women of Darfur, particularly rape victims, desperately need obstetric and gynecological care, HIV/AIDS testing, and psychological counseling.\textsuperscript{152} Next, the international community must make improvements in the living conditions in the refugee camps in Chad and the IDP camps in Sudan, as these will be home to hundreds of thousands of Darfurians for the foreseeable future.\textsuperscript{153} These camps can be made safer for women through increased numbers of female aid workers, the addition of trained medical professionals, promised commitments. See Jafari, supra note 22, at 21. Likewise, the U.N. has been notably slow and ineffective in providing humanitarian aid in Darfur. See Deans, supra note 13, at 1654; see also Islam, supra note 32, at 357 (stating that the U.N. response “has been more than whispering but less than roaring”); Nicholas D. Kristof, Dithering Through Death, N.Y. TIMES, May 16, 2006, at A25 (stating that the U.N. has “barely put a speed bump in the path to genocide in Darfur”).

\textsuperscript{145} Sackellares, supra note 6, at 155–56.
\textsuperscript{146} See Islam, supra note 32, at 370.
\textsuperscript{147} Id.; see Udombana, Pay Back Time, supra note 120, at 5; Wagner, supra note 4, at 200.
\textsuperscript{148} Udombana, Pay Back Time, supra note 120, at 5.
\textsuperscript{149} See id.
\textsuperscript{150} See PHYSICIANS FOR HUMAN RIGHTS, supra note 24, at 5; Lasco, supra note 135, at 20.
\textsuperscript{151} See PHYSICIANS FOR HUMAN RIGHTS, supra note 24, at 5; Avery, supra note 32, at 134–35.
\textsuperscript{152} See AMNESTY INT’L, supra note 4, at 34–35; Cahn, Beyond Retribution, supra note 42, at 247–48, 258; see also Drumbl, supra note 95, at 70 (noting that rape victims require specialized medical and psychological treatment). Providers should ensure that medical and psychological treatment is compatible with the religious and cultural traditions of Darfur. GINGERICH & LEANING, supra note 19, at 2.
\textsuperscript{153} See AMNESTY INT’L, supra note 4, at 34–35. These camps are overcrowded and lack food, water, and basic supplies. Jafari, supra note 22, at 21. In 2004, new arrivals had to wait up to a month just for a tent. Id.
development of economic and education opportunities for women, and the implementation of systems for reporting crimes and catching perpetrators.\textsuperscript{154}

Beyond these immediate life-sustaining measures, the international community should address the long-term economic and social needs of the Darfurian people through programs that provide access to land, credit, and other financial resources.\textsuperscript{155} The community and social structures of Darfur have been depleted, and the survivors of the genocide will require help in reclaiming their homes, rebuilding their communities, and forging sustainable livelihoods.\textsuperscript{156} Currently, women whose husbands have been killed or are missing are under tremendous pressure to provide for their families, and often place themselves at risk of rape to do so.\textsuperscript{157} Thus, long-term reconstruction assistance is imperative to keep the women of Darfur from being re-exposed to violence.\textsuperscript{158}

Complicating these efforts, however, is the fact that the security situation in Darfur is incredibly unstable.\textsuperscript{159} Since the failed peace agreement among the government and the rebel groups in May 2006, violence in the region has spiked considerably and humanitarian operations have begun to suffer as a result.\textsuperscript{160} At least twelve aid workers have been killed, and many more have been attacked, in Darfur since May 2006.\textsuperscript{161} Workers have increasingly found themselves targeted for attack and theft by the Janjaweed, the Sudanese police, and, recently, multiple rebel groups.\textsuperscript{162} The U.N. and United States must take the

\textsuperscript{154} Amnesty Int’l, supra note 4, at 35; Gingerich & Leaning, supra note 19, at 2; Avery, supra note 32, at 128.
\textsuperscript{155} See Physicians for Human Rights, supra note 24, at 7; Avery, supra note 32, at 131.
\textsuperscript{156} See Gingerich & Leaning, supra note 19, at 25; Physicians for Human Rights, supra note 24, at 7; Avery, supra note 32, at 131.
\textsuperscript{157} See Gingerich & Leaning, supra note 19, at 29.
\textsuperscript{158} See id., at 25.
\textsuperscript{160} See Kristof, When Genocide Worsens, supra note 28.
\textsuperscript{162} Gettleman, Darfur Rebels Kill 10 in Raid on Peace Force, supra note 161. In January 2007, Sudanese police raided a social gathering at an international aid compound in Nyala, Darfur and arrested twenty workers, beating and sexually assaulting several. U.S.
lead in providing protection for humanitarian workers, through military or other forces, so that the victims in Darfur can receive the assistance they so desperately need.163

2. Reparations

In addition to tangible humanitarian assistance, the international community must attempt to make victims of genocide whole through financial reparations.164 Reparations promote a sense of justice and contribute to the process of reconciliation by helping victims rebuild their identities.165 Even though reparations have not traditionally been part of international criminal justice, victims’ right to reparations is a well-founded concept in international law.166 The ICC is unique in its power to make reparations orders directly against perpetrators as part of its punishment.167 Through the ICC’s Victims’ Trust Fund, the ICC can award reparations to victims against their perpetrators’ property or from the fund itself.168

Direct reparations, though complicated and time-consuming, are possible.169 In the 1990s, a U.N. Compensation Committee provided restitution to hundreds of thousands of corporations and individuals

Dep’t of State, Sudan: Country Reports, supra note 29; Human Rights Watch, Q & A, supra note 25.

163 See Deans, supra note 13, at 1686; Kristof, A Tolerable Genocide, supra note 17.

164 See Lasco, supra note 135, at 18–19.


167 See Rome Statute, supra note 19, 2187 U.N.T.S. at 134–36; Di Giovanni, supra note 165, at 26. Di Giovanni notes that the Victims’ Trust Fund is a significant step forward in the recognition of victims’ rights and demonstrates the shift in international criminal law from a purely retributive to more restorative focus. Di Giovanni, supra note 165, at 26. The creation of the Trust Fund was influenced by female survivors of the Rwandan genocide who demanded compensation. Oosterveld, supra note 93, at 131.

168 Lasco, supra note 135, at 21; Fischer, supra note 166, at 204–05. Because the Trust Fund will be funded solely by voluntary contributions, the ICC must be aggressive in seeking donations. See Fischer, supra note 166, at 215, 231. Although it is difficult to predict what the level of contributions will be, it is realistic to compare the ICC Trust Fund to the trust fund established for the ICTR, which collected $200 million, and the ICTY, which collected $30 million. Id. at 215–16. Scholars note, however, that there are doubts that the ICC could secure enough funds to fulfill any reparations awards. See Di Giovanni, supra note 165, at 27.

169 See Fischer, supra note 166, at 222 (highlighting problems with distribution and prioritizing the disbursement of reparations among victims).
who suffered losses during Iraq’s invasion and occupation of Kuwait in the early part of the decade.\textsuperscript{170} Additionally, in the twelve years since the end of its destructive ethnic conflict, Bosnia and Herzegovina has successfully managed to return more than 200,000 homes to people displaced during the conflict.\textsuperscript{171} This effort has become a leading model for the emerging post-conflict right of restitution, which argues that compensating victims is a durable solution that helps redress the crimes and restore the rule of law.\textsuperscript{172} The institution of a similar program to provide the return of property and direct financial compensation to the women of Darfur could help rectify the loss of their homes, livelihood, and families.\textsuperscript{173} Whether paid for by the perpetrators, the Sudanese government, the international community, or some combination thereof, these reparations would not only serve as an unmistakable apology, it would also provide the women with a tangible way to rebuild their lives.\textsuperscript{174}

3. Military Protection

In addition to humanitarian and financial assistance, the international community needs to expand and improve current military tactics aimed at ending the genocide.\textsuperscript{175} To put a true end to the violence in Darfur and to ensure the protection of women, the international community, led by the U.N. and the United States, must immediately send a massive peacekeeping force to the region.\textsuperscript{176} Right now, there is


\textsuperscript{172} \textit{See id.} at 448.

\textsuperscript{173} \textit{See Physicians for Human Rights, supra note 24, at 3–4; Lasco, supra note 135, at 20; Kristof, \textit{How Do You Solve a Crisis Like Darfur?}, supra note 28.}

\textsuperscript{174} \textit{See Physicians for Human Rights, supra note 24, at 3–4; Lasco, supra note 135, at 20; Kristof, \textit{How Do You Solve a Crisis Like Darfur?}, supra note 28. The ideal solution would be for the Sudanese government to pay the full amount of reparations using profits from the sale of oil and other commodities, but such an order would be difficult to enforce. See Physicians for Human Rights, supra note 24, at 4.}


\textsuperscript{176} Deans, supra note 13, at 1685–86; Kagan, supra note 36, at 462. With proper international support and adequate financial and logistical resources, which the U.N. is capable of providing, a large peacekeeping mission can be successful. See Gingerich & Leaning,
no force in Darfur capable of protecting civilians or preventing further violence.\textsuperscript{177} Nearly 7000 African Union (AU) troops are stationed throughout the country, but the force is poorly equipped, underfinanced, and, per an agreement with the Sudanese government that gives them no mandate to intervene against violence, nearly powerless.\textsuperscript{178} In response to pleas for additional help, in August 2007 the U.N. announced a plan to send nearly 26,000 additional peacekeepers to Darfur beginning in late 2007.\textsuperscript{179} The Sudanese government, having


\textsuperscript{179} Lydia Polgreen, \textit{Sudan Agrees to U.N. Peacekeepers to Complete African Union Force}, N.Y. TIMES, Aug. 2, 2007, at A8; \textit{see also} Kristof, \textit{A Tolerable Genocide, supra} note 17; Human Rights Watch, Q & A, \textit{supra} note 25. The force will include 20,000 soldiers and 6000 civilian police officers from Senegal, France, Indonesia, Denmark, Sweden, and Norway. Polgreen, \textit{Sudan Agrees to U.N. Peacekeepers, supra}. The U.N. will have general command of the force, but day-to-day decisions will be made by the AU. Alex Perry, \textit{U.N. Darfur Force Aims for Cease-Fire, Time in Partnership with CNN}, July 31, 2007, http://www.time.com/time/world/article/0,8599,1648546,00.html.
previously rejected plans for additional peacekeepers, has agreed to accept this peacekeeping force.\textsuperscript{180}

While a significant step, the U.N. plan is not sufficient.\textsuperscript{181} It does not move peacekeepers into the region quickly enough and, in giving the soldiers only a defensive role, does not provide the necessary protection for the women of Darfur.\textsuperscript{182} Therefore, in addition to this minimal peacekeeping force, the U.N. must also explore the use of other military options with or without Sudan’s consent, such as the deployment of proactive NATO troops into the region, the establishment of a strict no-fly zone over Darfur, and blockades of Sudanese ports.\textsuperscript{183} This idea is a controversial one, as the U.N. and the United States are terrified of establishing a military presence in yet another Muslim country, but with the violence in Darfur only getting worse, it is time to put the lives of the Darfuri people ahead of geopolitical concerns.\textsuperscript{184} Despite optimistic statements by international leaders, the threat of rape and violence in Darfur is not going away.\textsuperscript{185} Rather than abandon Darfur because of the politics involved, the international community must take drastic steps, even those previously considered unthinkable, because of the humanity involved.\textsuperscript{186}

In addition to an immediate military force capable of protecting the people of Darfur, the international community must also make long-range plans to maintain peace in the region.\textsuperscript{187} This must include monitoring peace talks between Darfuri rebel groups, who are oper-

\textsuperscript{180} Polgreen, \textit{Sudan Agrees to U.N. Peacekeepers to Complete African Union Force}, supra note 179. Sudan has reneged on similar promises in the past, however. \textit{Id.}
\textsuperscript{181} Perry, \textit{U.N. Darfur Force Aims for Cease-Fire}, supra note 179.
\textsuperscript{182} Id. The U.N. force is limited to acting only defensively to protect civilians and humanitarian workers and monitoring, but not seizing, weapons. \textit{Id.}
\textsuperscript{183} See Physicians for Human Rights, supra note 24, at 4; Bradley Graham & Colum Lynch, \textit{NATO Role in Darfur on Table}, Wash. Post, Apr. 10, 2006, at A1; Nicholas D. Kristof, \textit{Mr. Bush, Here’s a Plan for Darfur}, N.Y. Times, Aug. 6, 2007, at A19; Peter Beinart, \textit{How to Save Darfur, Time in Partnership with CNN}, Sept. 24, 2006, http://www.time.com/time/magazine/article/0,9171,1538646,00.html. The no-fly zone would be patrolled by NATO fighter jets stationed in Chad and would have a mandate to shoot down Sudanese planes or destroy them on the ground. Beinert, \textit{How to Save Darfur, supra.}
\textsuperscript{184} Beinart, \textit{How to Save Darfur, supra note 183}. The Bush administration has openly stated its reluctance to send U.S. troops to another Muslim country during the current war in Iraq. See Kristof, \textit{Mr. Bush, Here’s a Plan for Darfur}, supra note 183.
\textsuperscript{185} See Gingerich & Leaning, supra note 19, at 14; Kristof, \textit{Spineless on Sudan, supra note 161.}
\textsuperscript{186} Beinart, \textit{How to Save Darfur, supra note 183.}
\textsuperscript{187} Kristof, \textit{Mr. Bush, Here’s a Plan for Darfur, supra note 183.}
ating under an uneasy peace, and the Sudanese government. Long-term peace will also require increased intelligence surveillance of the region, a careful watch of the Sudanese government’s importation of weapons, and contingency plans for more forceful military intervention if the violence does not cease or if the Sudanese government becomes even more uncooperative.

4. Diplomatic Tactics

Beyond peacekeeping and military operations, which are an admittedly unpopular step, there are several political tactics that the United States and the U.N. should take to pressure the Sudanese government to end the genocide. The United States has slowly begun to implement pressure tactics; in 2006, Congress enacted legislation calling for sanctions on Sudan, and in 2007, President Bush announced several small economic repercussions for the country. However, there

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188 Daniel B. Schneider, Darfur Rebels Agree on Approach to Peace Talks, U.N. Says, N.Y. Times, Aug. 7, 2007, at A3. Eight rebel groups met in August 2007 at the request of the U.N. to establish a common platform for peace talks with the government which were scheduled for late 2007. Id. At this meeting, the groups committed to ceasing all violence and to permitting the distribution of humanitarian aid. Id. However, this commitment seems to have already dissolved and many of the rebel groups are beginning to battle each other, endangering the scheduled peace talks. Jeffrey Gettleman, Chaos in Darfur Rises as Arabs Fight with Arabs, supra note 178. For any peace talks to be successful, the U.N. and the United States must become involved; the U.N. can assist immediately by securing the release of Suleiman Jamous, a Darfurian elder who is imprisoned by the Sudanese government and is said to be the key to uniting the rebel factions. Kristof, Mr. Bush, Here’s a Plan for Darfur, supra note 183.

189 See Deans, supra note 13, at 1679–80; Kristof, If Not Now, When?, supra note 17; Kristof, Mr. Bush, Here’s a Plan for Darfur, supra note 183. Military intervention is justified under international law because the situation in Darfur constitutes a threat to international peace and security. Deans, supra note 13, at 1679–80.

190 Kristof, How Do You Solve a Crisis Like Darfur?, supra note 28; Kristof, If Not Now, When?, supra note 17; Kristof, What’s to Be Done About Darfur? Plenty, supra note 177; Kristof, When Genocide Worsens, supra note 28.


The Congressional legislation, known as the Darfur Peace and Accountability Act, which was signed into law by President Bush in October 2006, is a separate sanctions package than the one announced by the President in 2007. See §§ 1–9. If it is ever enforced, the legislation would impose travel bans and asset freezes on Sudanese government officials and deny the government access to oil revenues. §§ 5, 6. In addition, the legislation authorizes the President to give financial and logistical assistance to the AU force, advocates
are many more tangible steps that can and should be taken immediately in order to give the Sudanese government a clear message that its genocidal actions will no longer be tolerated.\footnote{See Jolie, supra note 131; Kristof, Bandages and Bayonets, supra note 13; Kristof, If Not Now, When?, supra note 17.}

To send this message, stricter economic sanctions on the Sudanese government are necessary.\footnote{See Human Rights Watch, Entrenching Impunity, supra note 119, at 2; Deans, supra note 13, at 1675; Nicholas D. Kristof, Death by Dollars, N.Y. Times, Feb. 11, 2007, at D12; Kristof, How Do You Solve a Crisis Like Darfur?, supra note 28.} The plan announced by President Bush will not convince President al-Bashir to end his relentless violence; rather, buoyed by wealth from oil exports, he will continue to blithely ignore weak international pressure.\footnote{Jad Mouawad, Oil May Allow Sudan to Escape Sanctions’ Pain, N.Y. Times, May 30, 2007, at C3; Perry, Will Sanctions End the Darfur Killings?, supra note 36.} Instead, the international community must come up with a unique and comprehensive sanctions plan, one that includes broad economic measures such as blocking ships that transport Sudanese oil from international ports, freezing the bank accounts of Sudanese government officials, and prohibiting international banks from conducting oil-related transactions that benefit the Sudanese government.\footnote{Kristof, Disposable Cameras for Disposable People, supra note 1; Kristof, How Do You Solve a Crisis Like Darfur?, supra note 28; John Prendergast, A “Plan B” with Teeth for Darfur, Boston Globe, May 10, 2007, at A15; Human Rights Watch, Q & A, supra note 25.} This plan must be accompanied by heavy political pressure on China, Sudan’s closest ally, to convince the Sudanese government to end the violence in Darfur.\footnote{See Alfred De Montesquiou, China’s Hu Presses Sudan for Progress on Darfur, Wash. Post, Feb. 3, 2007, at A12; Kristof, Mr. Bush, Here’s a Plan for Darfur, supra note 183. The close political ties and economic interdependence between China and Sudan are well-documented. See De Montesquiou, supra; Kristof, Mr. Bush, Here’s a Plan for Darfur, supra note 183. China buys 400,000 barrels of oil a day from Sudan, financed Sudan’s oil pipelines, sells weapons to the Sudanese military, and recently built a new presidential palace in Khartoum. Chinese Leader Boosts Sudan Ties, BBC News, Feb. 2, 2007, http://news.bbc.co.uk/2/hi/africa/6323017.stm.} As Sudan’s major weapons supplier and the largest buyer of Sudanese oil, China has incredible leverage over the Sudanese government.\footnote{See Kristof, Mr. Bush, Here’s a Plan for Darfur, supra note 183. Human rights groups have already begun exerting pressure on China. Human Rights Watch, Letter to China on the Crisis in Darfur (Jan. 29, 2007), available at http://hrw.org/english/docs/2007/01/29/sudan15189_txt.htm (encouraging China to support the imposition of targeted sanctions against Sudan and monitor its weapon sales to Sudan). Many groups have threatened to boycott or protest the 2008 Summer Olympics, to be held in Beijing, China, and many others plan to use the games as leverage against the Chinese government to force action
and the U.N. must use their combined political leverage to force China to intervene.\textsuperscript{198}

The obligation to stop genocide extends beyond governments.\textsuperscript{199} Individual citizens and businesses must take responsibility for ending the violence in Darfur.\textsuperscript{200} Divestment by corporations, financial institutions, universities, and individuals from all financial ties with Sudan is a small but powerful step that will show the Sudanese government that the entire world condemns its actions in Darfur.\textsuperscript{201} Some progress in divestment efforts has already been made; persistent lobbying by the Save Darfur Coalition, a non-profit organization that advocates for intervention in Darfur, forced two major investors to divest holdings in a large Chinese petroleum company involved in Sudan’s oil industry.\textsuperscript{202} Eight states and dozens of colleges and universities have begun selling their Sudanese-related investments.\textsuperscript{203} If widespread, continued divestment of Sudanese- and Chinese-related investments could be a powerful addition to the fight against genocide in Darfur.\textsuperscript{204}

**Conclusion**

*Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.*

—Martin Luther King, Jr.\textsuperscript{205}

As the genocide in Darfur rages and expands, the rest of the world continues to fail to condemn and intervene.\textsuperscript{206} Beyond the ICC, on Darfur. See Harvey Araton, *Good Guy Is Forgotten in Bad Week for Sports*, N.Y. TIMES, July 31, 2007, at D1.

\textsuperscript{198} See Kristof, *Mr. Bush, Here’s a Plan for Darfur*, supra note 183.

\textsuperscript{199} Kristof, *Death by Dollars*, supra note 193.


\textsuperscript{201} Kristof, *Death by Dollars*, supra note 193. A similar divestment effort was used in the 1980s and 1990s to press South Africa to end apartheid; although it took more than a decade to be successful, the effort eventually left the South African government economically isolated. Kathy M. Kristof, *How Investors Can Help Fight the Darfur Genocide*, supra note 200.

\textsuperscript{202} Jeffrey H. Birnbaum, *Saving Darfur; Multiple Steps at a Time*, Wash. Post, June 1, 2007, at D1. Fidelity Investments and Berkshire Hathaway have completely divested holdings in PetroChina. *Id.*


\textsuperscript{204} *Id.*

\textsuperscript{205} Letter from Martin Luther King, Jr. from Birmingham Jail (Apr. 16, 1963), in *Why We Can’T Wait*, 77–100 (Martin Luther King, Jr. ed., 1963).
the international community’s response has been feeble, painfully slowed by political and economic concerns, resistance by the Sudanese government, and, sadly, a simple apathy on the part of many countries and individuals toward the plight of an invisible people.\textsuperscript{207} Four years of hesitancy and resistance has allowed the genocide in Darfur to spiral essentially to a point of no return, to a point where women like Halima Abdelkarim are being attacked over and over again, with no help in sight.\textsuperscript{208}

The lack of response is not for lack of knowledge, because the genocide in Darfur has certainly not occurred in a vacuum.\textsuperscript{209} There have been numerous—although still not nearly enough—news reports chronicling the destruction of Darfur over the past four years, nearly all containing desperate cries for help directly from Darfurian women.\textsuperscript{210} Major human rights groups, including Human Rights Watch and Amnesty International, have produced painstaking documentation about the atrocities in the country.\textsuperscript{211} Despite the ready availability of bone-chilling stories and statistics, most countries have

\textsuperscript{206} See Commission of Inquiry Report, \textit{supra} note 23, ¶ 592; Alexander, \textit{supra} note 12, at 3; Kristof, \textit{Never Again, Again?}, \textit{supra} note 15.


\textsuperscript{210} See, e.g., Jolie, \textit{supra} note 131; Nordland, \textit{supra} note 159; Polgreen, \textit{Darfur’s Babies of Rape Are on Trial from Birth}, \textit{supra} note 72; Rubin, \textit{supra} note 27. Nicholas Kristof in particular has been a pioneer in bringing attention to the crisis and spurring action from the international community, and should be commended for his work. See Kristof, \textit{A Boy’s Wish: Kill Them All}, \textit{supra} note 159; Kristof, \textit{A Tolerable Genocide}, \textit{supra} note 17; Kristof, Bandages and Bayonets, \textit{supra} note 13; Kristof, \textit{Death by Dollars}, \textit{supra} note 193; Kristof, Disposable Cameras for Disposable People, \textit{supra} note 1; Kristof, \textit{How Do You Solve A Crisis Like Darfur?}, \textit{supra} note 28; Kristof, \textit{If Not Now, When?}, \textit{supra} note 17; Kristof, \textit{Never Again, Again?}, \textit{supra} note 15; Kristof, Sudan’s Department of Gang Rape, \textit{supra} note 13; Kristof, \textit{The Face of Genocide}, \textit{supra} note 2; Kristof, What’s to Be Done About Darfur? Plenty, \textit{supra} note 177; Kristof, When Genocide Worsens, \textit{supra} note 28. An increase in media attention would prompt more international awareness of the conflict and perhaps spur quicker enforcement of international law. See Sackellares, \textit{supra} note 6, at 162.

\textsuperscript{211} See generally Amnesty Int’l, \textit{supra} note 4; Human Rights Watch, \textit{Darfur Destroyed}, \textit{supra} note 13; Human Rights Watch, Entrenching Impunity, \textit{supra} note 119.
distanced themselves from Darfur or paid it only brief lip service.\textsuperscript{212} This is unacceptable, as countering genocide is a shared global responsibility.\textsuperscript{213}

As the alleged leader of the free world, the United States is responsible for defending universal rights and leading the response when these rights are violated.\textsuperscript{214} Other countries must become involved too, whether inspired by their moral duty to stop genocide—which includes confronting its aftermath and helping to ensure that conflict does not recur—or by their own economic and political self-interest in promoting regional security in Africa.\textsuperscript{215} An overwhelming, though belated, international response must now begin, both to send a message to the perpetrators that they can no longer act with impunity and also to reassure the victims, who have been betrayed not only by their attackers but also by those who did not step in to stop the violence.\textsuperscript{216}

By combining long-term legal justice with concrete responses to Darfurian women’s immediate needs, we can punish the perpetrators of this horrific genocide, help repair the suffering the victims have undergone, and provide lessons to the world on the revulsion with which genocide will be treated in the future.\textsuperscript{217} This type of holistic approach, one that places genocide in the broader context of economic disparity, poverty, global political instability, intolerance, and violence, is our best defense against both the current genocide and all future ones.\textsuperscript{218} Failure to respond to this massive human tragedy is a failure of our most basic human instincts.\textsuperscript{219} Continued failure to intervene will cost thousands of lives, undermine advancements in international law, and possibly spell disaster for all of Africa.\textsuperscript{220} We owe Halima Abdelkarim—and thousands of women like her all over Darfur—an apology, in the form of both legal justice and all the redevelopment and protective assistance we can offer. But we also owe something to her baby daughter—a promise that we will never forget the women of Darfur again.

\begin{itemize}
\item \textsuperscript{212} See Kristof, Disposable Cameras for Disposable People, supra note 1; Kristof, Never Again, Again?, supra note 15.
\item \textsuperscript{213} Kristof, A Tolerable Genocide, supra note 17.
\item \textsuperscript{214} See Avery, supra note 32, at 137; see also Daniel Allott, Strategic Compassion in Darfur, AM. SPECTATOR ONLINE, Mar. 24, 2006, http://www.spectator.org/dsp_article.asp?art_id=9574 (predicting that the United States’ work in Darfur is just beginning).
\item \textsuperscript{215} See Cahn, Beyond Retribution, supra note 42, at 250.
\item \textsuperscript{216} See Drumbi, supra note 95, at 68–69.
\item \textsuperscript{217} See Cahn, Beyond Retribution, supra note 42, at 222.
\item \textsuperscript{218} See Islam, supra note 32, at 384.
\item \textsuperscript{219} See id. at 385.
\item \textsuperscript{220} See Alexander, supra note 12, at 47; Kristof, If Not Now, When?, supra note 17.
\end{itemize}
Abstract: In 1995, the Supreme Judicial Court of Massachusetts severely limited the power of courts to review Department of Social Services (DSS) decisions regarding children in its care, in companion cases Care and Protection of Isaac and Care and Protection of Jeremy. All Massachusetts children in DSS’ care are affected by these cases. Isaac and Jeremy may conflict with the federal Adoption and Safe Families Act, which mandates regular review of out-of-home placements for children. In addition, these decisions disproportionately affect children of color. To protect the interests of children in DSS care, the negative impact of Isaac and Jeremy must be addressed by judicially or legislatively overruling them. Other states provide useful statutory examples of addressing this problem.

Introduction

On March 6, 2005, four-year-old Dontel Jeffers arrived at a hospital having already been dead for three hours.1 Dontel died from one of the two major internal injuries he received in the home of his foster mother; his small intestine had been pushed into his spine, causing a hemorrhage one to two days before he died, and a bone inside his throat had been bruised, “indicat[ing] ‘forceful squeezing of the child’s neck.’”2 At the time of his death, Dontel had been living in his foster home for eleven days.3 The Department of Social Services (DSS) had selected this foster home for him.4

When Dontel was an infant, his mother left him in his father’s care.5 When his father was deported, a judge granted custody to Don-
tel’s mother despite her suspected cocaine use.\(^6\) Not long after, DSS discovered Dontel’s mother’s cocaine use and removed him from her care, charging her with neglect.\(^7\) Thereafter, DSS placed Dontel in Bridge Home, a residential facility where children are evaluated for problems after abuse or neglect, for three months.\(^8\) Following his stay at Bridge Home, DSS placed Dontel in the home of a foster mother, despite repeated requests from his grandmother that she be allowed to care for him.\(^9\) The twenty-four-year-old foster mother was supposed to provide Dontel with therapeutic care.\(^10\) While she had previously taken in adolescent foster children, she had never worked with a young child.\(^11\) The consequences were tragic: Dontel died and the foster mother was indicted on a charge of second-degree murder.\(^12\)

Because Dontel was in DSS custody, his placement could only be reviewed by a court for legal error or abuse of discretion.\(^13\) The outcome of Dontel’s case clearly demonstrates why his placement with the foster mother was unsafe: the foster mother had never worked with a young child, she was very young herself, and based on Dontel’s injuries she treated him in a violent manner.\(^14\) DSS’ selected foster home for Dontel was dangerous, and the fact that the courts were powerless to review that decision is troubling.\(^15\) If a court had had an opportunity to review DSS’ placement, perhaps it could have corrected the situation. Dontel’s grandmother was willing and able to provide kinship care for him; a court could have taken advantage of that option and placed Dontel with her.\(^16\) But regardless of the specifics of Dontel’s case, the court should have had the authority to review evidence and make a

\(^6\) Id. The court could have given custody of Dontel to his grandmother, but chose his mother despite her drug problem. See id.

\(^7\) John Ellement & Patricia Wen, Foster Mother Charged in Death of Boy, 4, BOSTON GLOBE, July 1, 2005, at A1; Wen, supra note 5.

\(^8\) Ellement & Wen, supra note 7.

\(^9\) Id. DSS apparently felt that Dontel would benefit from a therapeutic foster home, rather than being with his grandmother. Id.

\(^10\) Id.

\(^11\) Wen, supra note 5.


\(^14\) See Daniel, supra note 1.

\(^15\) See id.

\(^16\) See Ellement & Wen, supra note 7.
determination to provide Dontel with the healthiest, safest possible placement and to take into consideration his long-term well-being.  

The juvenile court could not review DSS’ decision in Dontel’s case because Massachusetts courts are generally precluded from reviewing such DSS choices. In 1995, the Massachusetts Supreme Judicial Court (SJC) issued companion decisions, Care and Protection of Isaac and Care and Protection of Jeremy, which bolstered the authority of DSS over children in its care. These decisions severely limited the power of juvenile courts over children in DSS custody by limiting judicial oversight. The juvenile courts may only review DSS decisions for abuse of discretion under an arbitrary or capricious standard. In Massachusetts, the juvenile courts and DSS have jurisdiction over “care and protection” cases, and also over “children in need of services” (CHINS) cases. Because children in either of these situations may be committed to DSS, Isaac and Jeremy apply to them.

Massachusetts law does not conform to federal law under the regime created by Isaac and Jeremy. In 1997, Congress passed the Adoption and Safe Families Act (ASFA) in an effort to improve permanency

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18 See Care & Prot. of Isaac, 646 N.E.2d 1034 (Mass. 1995); Jeremy, 646 N.E.2d at 1029.

19 See Isaac, 646 N.E.2d at 1034; Jeremy, 646 N.E.2d at 1029.

20 See Isaac, 646 N.E.2d at 1041; Jeremy, 646 N.E.2d at 1033.

21 See Isaac, 646 N.E.2d at 1041; Jeremy, 646 N.E.2d at 1033.

22 See §§ 39E, 51B. When a court receives allegations that a child

(a) is without necessary and proper physical or educational care and discipline;
(b) is growing up under conditions or circumstances damaging to the child’s sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent or unavailable to provide any such care,

then the court may summon the parents to determine whether the child is in need of care and protection. § 24. CHINS is defined in the statute as

a child below the age of seventeen who persistently runs away from the home of his parents or legal guardian, or persistently refuses to obey the lawful and reasonable commands of his parents or legal guardian, thereby resulting in said parent’s or guardian’s inability to adequately care for and protect said child, or a child between the ages of six and sixteen who persistently and willfully fails to attend school or persistently violates the lawful and reasonable regulations of his school.

§ 21.

planning for children out of their parents’ care. ASFA includes mandates for state child welfare agencies such as DSS, and therefore relates to both children in need of care and protection and CHINS. ASFA requires that hearings regarding permanent placement of these children take place earlier and more frequently than its predecessor did; hearings now must occur no more than twelve months after the child’s initial placement and no less than every twelve months thereafter. These permanency hearings are to include review of the child’s placement by either a court or an administrative body appointed or approved by the court. Federal courts interpreting this provision have assumed that such review will include judicial oversight of agency decisions. The Commonwealth of Massachusetts, however, refuses to allow court review of such agency decisions under Isaac and Jeremy.

The failure of Massachusetts law regarding court oversight of DSS decisions to comply with federal requirements under AFSA costs the Commonwealth much-needed federal funds and disproportionately affects children of color. Massachusetts has already lost funds due to its failure to comply substantially with certain federal requirements under ASFA. Specifically, its case review system, including the review of cases by the court, was an area found not to be in substantial compliance, causing the state to lose significant funding. Furthermore, the demographics of children in DSS care do not match the demographics of children in the general population: children of color have

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25 See id.

26 See id. § 302, 111 Stat. at 2128. The Adoption Assistance and Child Welfare Act of 1980 had required that such hearings take place only once every eighteen months. Id. (amending 42 U.S.C. § 675(5)(C) (2000)).


29 See Isaac, 646 N.E.2d at 1038; Jeremy, 646 N.E.2d at 1031, 1033.

30 See notes 158–82 and accompanying text.


32 ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS. CHILD AND FAMILY SERVICES REVIEW: FINAL ASSESSMENT: MASSACHUSETTS 11 (2001) [hereinafter CFSR] (those lacking access to the official report may wish to access it by searching google.com using the following search terms: “administration for children and families final assessment Massachusetts 2001”).
been placed in DSS care in numbers disproportionate to their representation in the state’s population as a whole.\(^{33}\) Because such children are involved with the system in disproportionate numbers, they bear a disproportionate portion of the negative effects of the SJC’s decisions in Isaac and Jeremy.\(^{34}\)

This note will argue that Massachusetts courts should be able to force DSS to make appropriate placement decisions for children who have been adjudicated CHINS in its custody. In order for courts to have such authority, the decisions in Isaac and Jeremy must be overruled, either legislatively or judicially, because these holdings excessively restrict the courts’ control over DSS placement decisions.\(^{35}\) Part I will give a brief overview of Isaac and Jeremy, and will explain how they apply to CHINS under the Massachusetts status offender law. Part II will explore the relevant parts of the Adoption and Safe Families Act as well as the federal decisions which have interpreted it; these decisions suggest that courts should have the power to review agency decisions. Part III will demonstrate the need for a change in the law in light of the disproportionate number of children of color involved with DSS, and then will examine the intersection between the federal cases and Massachusetts’ compliance with ASFA in the context of the CHINS law of Massachusetts then. Part IV will lay out potential remedies to the problem created by the SJC’s decisions in Isaac and Jeremy. This note argues that Isaac and Jeremy should be overruled by the SJC or by the Massachusetts state legislature, and looks to statutes in other states for possible solutions.

I. The Cases

Isaac and Jeremy were decided on the same day, March 7, 1995, by the SJC.\(^{36}\) Both dealt with children who had been committed to the custody of DSS in care and protection cases, although Isaac addressed a child who had been committed permanently, while in Jeremy the child had been committed temporarily.\(^{37}\) In both cases, the court held that when children are in the custody of DSS, the department may make


\(^{34}\) See id.

\(^{35}\) See Isaac, 646 N.E.2d at 1041; Jeremy, 646 N.E.2d at 1033; infra notes 71–103, 192–242, and accompanying text.


\(^{37}\) Isaac, 646 N.E.2d at 1036; Jeremy, 646 N.E.2d at 1030.
decisions regarding the “normal incidents of custody,” including “a child’s specific place of abode.” These decisions significantly limit the degree to which courts may oversee such decisions, leaving open the possibility that a child may be subjected to such considerations as DSS’ funding needs, rather than being placed in an environment which will serve his or her best interests. Thus Isaac and Jeremy set a dangerous precedent for allowing DSS almost free reign over children whom the courts have placed in the department’s custody.

A. A Limited “Arbitrary and Capricious” Review Standard: Care and Protection of Isaac

Isaac was one of four siblings, all of whom were adjudicated children in need of care and protection by the juvenile court. Custody of all four children was granted to DSS and Isaac was placed in a residential school, the Robert F. Kennedy School, on September 4, 1991. Isaac became self-abusive and aggressive, leading to disruptions in the school setting. Eventually, in September of 1993, the school assigned a staff member to work individually with Isaac, but his behavior failed to improve under this close supervision. On October 15, 1993, he was admitted to a psychiatric hospital, but made no progress there either. On November 8, 1993, Isaac’s treating psychiatrist recommended, and Isaac’s guardian ad litem (GAL) agreed, that Isaac should return to the school and that his behavior should be monitored at all times. DSS, however, objected that the cost of this change in placement was prohibitive. There was a consensus that the school was no longer an ap-

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38 Isaac, 646 N.E.2d at 1038; see also Jeremy, 646 N.E.2d at 1033 (“We have concluded that G.L. c. 119 allots to the department the authority to determine the residence of a child committed to its custody on a temporary basis.”).
39 See Isaac, 646 N.E.2d at 1035 (noting that DSS refused to follow the recommendation of Isaac’s treating psychiatrist partly because following it would come at extra expense to DSS).
40 See Isaac, 646 N.E.2d at 1041; Jeremy, 646 N.E.2d at 1033.
41 Isaac, 646 N.E.2d at 1035.
42 Id. at 1035, 1036. Isaac’s older brother was placed at the school with him. Id.
43 Id. at 1036.
44 Id.
45 Id.
47 Isaac, 646 N.E.2d at 1036. In general, DSS had ceased funding individual attention, such as that recommended for Isaac, in 1990 because of its cost. Id.
propriate long-term placement for Isaac. Isaac’s GAL wanted him transferred to another placement right away, but DSS wanted him to remain at the hospital until an alternate long-term placement became available. The court returned Isaac to the school anyway, with the increased staff supervision.

Although Isaac was eventually placed in a long-term residential setting approved by both DSS and the judge, DSS moved to vacate the court’s initial order that Isaac be returned to the school with one-on-one supervision. Arguing that it had a statutory mandate which it could put into practice whenever it chose, DSS insisted that decisions such as placement of a child have an impact on its budget, which is finite and must be divided among a large group of children.

The trial court denied this motion, although it acknowledged that DSS has primary responsibility for these types of decisions. According to the judge, courts do have discretion to resolve disputes between DSS and other parties regarding the residential placements of children in DSS custody. This authority includes the ability to dictate specific placements for the children based on consideration of chapter 119 of the General Laws in its entirety. In 1995, the SJC disagreed.

On appeal, the SJC stated that the issue in this case was the degree of control the care and protection statute gives to a judge reviewing a DSS decision regarding the residential placement of a child in DSS custody. The court held that separation of powers dictated against courts attempting to exercise the functions of executive agencies. If there is only one possible way for an agency to fulfill a mandate, then the court may order it to take that step.

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48 Id.
49 Id.
50 Id. at 1035–36.
51 See id. at 1036 & n.2.
52 See Isaac, 646 N.E.2d at 1036–37.
53 See id. at 1037.
54 Id.
56 Isaac, 646 N.E.2d at 1037.
57 Id. at 1038. The case came to the SJC after a single justice heard the case and reported it to the full court. Id. at 1036.
58 Id. at 1037.
59 Id.
60 Id.
More specifically, Isaac had been placed in the permanent custody of DSS, so decisions “related to normal incidents of custody . . . [were] committed to the discretion of the department” by statute, which included power to make decisions regarding the child’s place of residence.\(^6^1\) Although such decisions are subject to judicial review, the SJC held that it would be inappropriate to engage in a de novo examination of the case.\(^6^2\) Instead, such agency decisions may be reviewed only for error of law or abuse of discretion under an “arbitrary or capricious” test.\(^6^3\) The court laid out three factors for determining when an agency decision qualifies as arbitrary or capricious: whether the decision interferes with a goal of reuniting a child with his or her biological parents; whether the agency has given appropriate consideration to maintaining relationships with siblings and other family members; and whether the department has complied with its own regulations in making the decision in question.\(^6^4\)

The SJC also laid out guidelines for how lower courts should handle challenges to DSS decisions regarding placement of children in its custody.\(^6^5\) The court noted that although there is often a superfluity of information, if a judge deems it necessary, she may ask for additional evidence.\(^6^6\) DSS must then produce evidence supporting its decision regarding the child’s residential placement.\(^6^7\) The party challenging DSS’ action has the burden of proving that DSS did not comply with the law or that it abused its discretion.\(^6^8\) This ruling places a significant encumbrance on the child or the parent dissatisfied with DSS’ choice, who will then be left to fight against a powerful bureaucracy.\(^6^9\) Had the SJC decided that trial courts could order DSS to place children in specific settings, the court would then have been free to follow the rec-

\(^{61}\) Isaac, 646 N.E.2d at 1038.

\(^{62}\) See id. at 1039.

\(^{63}\) See id. (quoting Caswell v. Licensing Comm’n, 444 N.E.2d 922, 930 (Mass. 1983)).

\(^{64}\) Id. at 1041. Although the court mentions agency regulations, it does not mention statutory requirements. See id. The court may have overlooked federal mandates, such as those included in the Adoption Assistance and Child Welfare Act, ASFA’s predecessor. Compare id. with discussion infra notes 112–126 and accompanying text. This oversight supports the notion that Isaac and Jeremy should be overruled either legislatively or judicially, since the SJC failed to take account of something so fundamental as federal law. See discussion infra notes 192–242 and accompanying text.

\(^{65}\) Isaac, 646 N.E.2d at 1041.

\(^{66}\) Id.

\(^{67}\) Id.

\(^{68}\) Id.

\(^{69}\) See, e.g., Jeremy, 646 N.E.2d at 1030–31.
ommendations of Isaac’s GAL, the person best qualified to determine what setting would best serve Isaac’s needs.  

B. Further Limits on Court Authority and An Invitation for Change: Care and Protection of Jeremy

On September 29, 1993, DSS filed a care and protection petition for Jeremy and two of his siblings. The court gave DSS temporary custody of the children. Jeremy initially resided with the former foster sister of his father, but when she moved to Florida in December 1993, Jeremy was moved to a foster home. From this point on, he was moved from one foster home to another because of his aggressive and disruptive behavior. It was not until March 17, 1994, that DSS sought permission from the court to look for a long-term residential program for Jeremy. Jeremy’s attorney and his father both objected to such a placement and argued for specialized foster care, a less restrictive setting. While this issue was in debate, Jeremy was placed in two different short-term residential facilities. On June 7, 1994, the court finally entered an order for DSS to place Jeremy in specialized foster care while waiting for the conclusion of the hearing on placement, which had been ongoing. Although DSS attempted to do so, it was apparently unable to find a specialized foster home for Jeremy, and it moved for relief and to vacate the order. The judge denied these motions, but granted DSS more time to place the child. Jeremy was eventually moved to a long-term residential facility.

A single justice of the SJC vacated the order, declaring that the trial judge had “improperly substituted her ‘view of what is in the best interest of the child for that of the [d]epartment.’” Jeremy, through

70 See Prob. & Fam. Ct. Standing Order 1-05 (The purpose of a GAL is to “gather and report factual information that will assist the court in making custody, visitation, or other decisions related to the welfare of a child.”).

71 Jeremy, 646 N.E.2d at 1030.
72 Id.
73 Id.
74 Id.
75 Id.
76 Jeremy, 646 N.E.2d at 1030 & n.3.
77 Id.
78 Id.
79 Id.
80 Id.
81 Jeremy, 646 N.E.2d at 1031 n.5.
82 Id. at 1030–31 (quoting trial court).
his attorney, and his father both appealed, but the SJC affirmed the single justice’s order.83

The court began its opinion by citing Isaac, once again holding that DSS decisions are only reviewable for abuse of discretion under an arbitrary or capricious test.84 The court supported this deference to the agency by discussing the construction of the care and protection statute.85 It noted that although some parts of it appeared to give a judge the power to make placement decisions, others did not and, taken as a whole, the statute left the authority to DSS.86 For example, courts are authorized to transfer custody of a child to DSS, a licensed agency, or an individual foster family in an emergency situation.87 Similarly, where a child is removed from his or her parents during the pendency of a care and protection proceeding, the court may place the child in a foster family, licensed agency, or in the custody of DSS.88 Within this range of options, however, courts may not require a child to be placed in a specific residential setting.89 Although children should generally be placed in foster homes, if the child is in need of specialized care, treatment, or education, he or she should be placed in a residential facility.90 The court held that such decisions are at the discretion of DSS.91

The SJC rejected arguments under section 26(2), which outlines options for courts.92 Section 26(2) states that whether a court chooses to give custody to a foster parent, an agency, or DSS, such a decision may be subject to conditions and limitations set by the court.93 The SJC, however, read this provision in such a way that, in the context of the statute as a whole, it could not be viewed as granting judges authority to override a reasonable DSS decision under sections 24 and 25 of the same statute.94 Section 24 states that if there is an emergency situation and it is necessary to protect the child from severe abuse or neglect, “the

83 Id. at 1031.
84 Id. In Isaac, the court had stated that “‘review’ requires, in the context of judicial consideration of an administrative decision, a reexamination of an agency’s actions, and not a de novo consideration of the merits of the parties’ positions.” Isaac, 646 N.E.2d at 1039; see supra notes 63–62 and accompanying text.
85 See Jeremy, 646 N.E.2d at 1031–33.
86 See id.
88 § 25; Jeremy, 646 N.E.2d at 1031–33.
89 See Jeremy, 646 N.E.2d at 1031.
90 § 32.
91 Jeremy, 646 N.E.2d at 1031.
92 See § 26(2); Jeremy, 646 N.E.2d at 1032.
94 See Jeremy, 646 N.E.2d at 1032.
court may issue an emergency order transferring custody of the child to the department or to a licensed child care agency or individual.”

Section 25 states that the court is to hold a hearing and that pending such a hearing the court has similar options with regard to a child’s placement: “the court may allow the child to be placed in the care of some suitable person or licensed agency providing foster care for children or the child may be committed to the custody of the department, pending a hearing on said petition.”

It bears noting that the options of placing a child with either foster parents or an agency are set in opposition to the option of placing the child in DSS custody by the use of the word “or,” which is perhaps the source of the court’s argument that once a child has been given into the custody of DSS, DSS may place the child wherever it sees fit.

The SJC also rejected arguments under section 29, which states that “[n]otwithstanding the provisions of this section, the court may make such temporary orders as may be necessary to protect the child and society.”

The court held that the section is intended to safeguard a judge’s ability to grant temporary custody to DSS, another agency, or a foster family even if there is not compliance with the other provisions of this section. The justices refused to view this sentence as a grant of power to judges over the exercise of DSS’ custodial powers.

The SJC did note, however, that “[t]he Legislature may wish to examine the statute to state more definitively the scope of a court’s authority when passing on those decisions,” suggesting that the court would be open to greater judicial leeway to oversee such decisions if the statute were more explicit. This last sentence of the decision provides impetus to increase courts’ control over DSS placement decisions. The SJC acknowledged here that the current situation is detrimental to children and that it would be willing to allow courts to have more control over DSS placement decisions. Given this invitation from the court, it is imperative to examine Isaac and Jeremy, to understand the broad impact

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95 § 24.

96 § 25.

97 See §§ 24, 25; Jeremy, 646 N.E.2d at 1032.

98 § 29; Jeremy, 646 N.E.2d at 1033.

99 Jeremy, 646 N.E.2d at 1033.

100 Id.

101 See id.

102 See id.

103 See id.; see also Adoption of Hugo, 700 N.E.2d 516, 521 n.8 (Mass. 1998) (noting in dicta that DSS placement plans are not entitled to more weight than plans from any other source).
they have on the current legal framework, and to recognize and address the problems that stem from them.

C. Applicability to the CHINS Context

One effect of Isaac and Jeremy is that they govern not only children involved with DSS through care and protection petitions, but also those involved through CHINS petitions; both children in need of care and protection and CHINS may be committed to DSS and fall within the jurisdiction of the juvenile court.\textsuperscript{104} Isaac and Jeremy both involved children who had been committed to the custody of DSS because they had been adjudicated in need of care and protection.\textsuperscript{105} If a child falls within the jurisdiction of the juvenile court as a CHINS, the court may award to custody to DSS; but under Isaac and Jeremy, the court cannot then review DSS’ placement of the child.\textsuperscript{106} The Massachusetts legislature laid out its goals for the juvenile court system, saying, “[t]he health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child.”\textsuperscript{107} These goals are equally applicable to all children who fall under the jurisdiction of chapter 119, including both children in need of care and protection and children in need of services.\textsuperscript{108} For this reason, CHINS are also subject to the provisions of ASFA.\textsuperscript{109}

II. The Adoption and Safe Families Act

Several provisions of ASFA govern the issue addressed in Isaac and Jeremy.\textsuperscript{110} The decisions rendered by various federal courts interpreting

\textsuperscript{104} See Mass. Gen. Laws ch. 119 §§ 1, 39G(c) (2004) (courts may “with such conditions and limitations as the court may recommend, commit the child to the department of social services”); Isaac, 646 N.E.2d at 1035; Jeremy, 646 N.E.2d at 1030; infra notes 106–09 and accompanying text.

\textsuperscript{105} Isaac, 646 N.E.2d at 1035; Jeremy, 646 N.E.2d at 1030.

\textsuperscript{106} §§ 1, 39G; Isaac, 646 N.E.2d at 1035; Jeremy, 646 N.E.2d at 1030.

\textsuperscript{107} § 1.

\textsuperscript{108} See generally ch. 119. The statute also includes those children who have been adjudicated delinquent and those who are youthful offenders. See §§ 52–64. Because such children are committed to the Department of Youth Services, however, rather than the Department of Social Services, they are are not controlled by Isaac and Jeremy, and are beyond the scope of this note. § 58.


the provisions of ASFA help clarify the application of ASFA to CHINS cases through the lens of scenarios such as those in Isaac and Jeremy.\textsuperscript{111}

A. The Statute

The Act gives grants to states which comply with certain requirements for out-of-home care for children.\textsuperscript{112} In order for a state’s children to be eligible for benefits under ASFA, including reimbursements for children needing to be placed outside the home, it must submit a plan for review and approval by the Secretary of Health and Human Services.\textsuperscript{113} Although ASFA seems primarily to address children who have been abused or neglected, in Massachusetts it is equally applicable to children who have been placed outside the home through a CHINS petition, since these children may be committed to the same agency, DSS, as those who have been abused or neglected.\textsuperscript{114}

Several provisions of ASFA support the argument that Isaac and Jeremy should be overruled in order to comply with its mandate.\textsuperscript{115} Particularly relevant is § 672, which states that a child eligible for ASFA benefits may either be placed voluntarily or be subject to a judicial determination that remaining in the child’s home would be contrary to her or his welfare.\textsuperscript{116}

Section 675 lays out procedures for both regular review of the child’s placement and permanency planning for the child.\textsuperscript{117} As part of the state’s required case review system, it must ensure that each child’s status is reviewed at least once every six months.\textsuperscript{118} This review may be conducted either by a court or by an administrative body.\textsuperscript{119} The reviewing body must address the child’s safety, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress toward reducing the need for out-of-home care.\textsuperscript{120} With regard to permanency planning,


\textsuperscript{112} 42 U.S.C. § 671(a).

\textsuperscript{113} Id.


\textsuperscript{116} § 672(a)(3).

\textsuperscript{117} § 675(5)(B), (C).

\textsuperscript{118} § 675(5)(B).

\textsuperscript{119} Id.

\textsuperscript{120} Id.
ASFA’s requirements are more stringent. The hearing must be held either in a court of competent jurisdiction, such as a family or juvenile court, or before an administrative body which has been appointed or approved by a court. Lastly, § 678 provides that ASFA is not to be “construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 671(a)(15)(D).” Although the statute gives states a choice between courts and agencies, nothing in the statute precludes courts from reviewing the decisions of agencies, and in fact, § 678 suggests exactly the opposite, that courts should review agency decisions. Congress clearly expressed an intention that courts should be able to make determinations regarding children’s best interests; the section makes no references to deferring to the decisions of administrative agencies. This legislative intent has been embraced by several federal courts in cases where the decisions of administrative agencies were contravened by the courts.

B. Interpreting the Statute

Particularly useful in evaluating Isaac and Jeremy is a federal case, Lynch v. King, initially decided by the District Court for the District of Massachusetts, and later upheld by the First Circuit. This case arose out of a class action on behalf of all children in foster care and their foster and natural families. The plaintiffs alleged that the Massachusetts foster care system did not meet federal expectations.

122 Id.
123 § 678; see also § 671(a)(15)(D). The final clause of this sentence renders it even more likely that the provisions of the ASFA may be applied to CHINS. See 42 U.S.C. § 678. The section mentioned in the statute, § 671(a)(15)(D), covers children who have been severely abused or whose parents have been convicted of especially violent crimes, but § 678 also clearly states that courts have considerable discretion in many different types of cases. See id.; § 671(a)(15)(D).
124 See §§ 675(5)(B), 678.
125 See § 678.
126 See, e.g., Vt. Dep’t of Soc. & Rehab. Servs., 789 F.2d at 60; Lynch, 719 F.2d at 507–08; Ocean, 123 F. Supp. 2d at 625; King, 550 F. Supp. at 355.
127 See 550 F. Supp. 325, aff’d sub nom. Lynch, 719 F.2d 504.
128 Id. at 327 n.1. Because CHINS may be placed in foster care, this decision applies to them as well. See Mass. Gen. Laws ch. 119, § 39G (2004).
Act were not being met by the Massachusetts child welfare system. They sought an injunction against the Commonwealth which the court granted in part, noting that “the facts are that children have suffered unspeakable injuries to body and spirit” because “DSS is failing to comply substantially with the dictates of sections 675(1), (5)(B).” Particularly informative is the court’s order, in which it enumerated requirements for the mandatory “periodic reviews” by state courts. The court noted that although such reviews may be conducted either by a court or by an administrative agency, they must include findings regarding both the continuing necessity for, and appropriateness of the placement, as well as the extent of compliance with the case plan. Moreover, decisions were to be made “consistent with the best interests and special needs of the child.” Such a mandate gives the reviewing body some discretion regarding the child’s placement.

This decision was upheld on appeal. The First Circuit found that the district court had not abused its discretion. Specifically, the court rejected the Commonwealth’s contention that the district court failed to give DSS discretion to determine how it would comply with Title IV-E of the Social Security Act. The court held that it is appropriate for district courts to declare what is necessary to comply with federal spending programs; if the state wishes to retain federal funding then it must develop a plan for complying with federal law which will be subject to the approval of those courts. The appellate court agreed with the district court that children’s placements could be subject to review by the courts.

130 Id. at 329. Although this case was decided prior to the enactment of ASFA, a number of provisions the court interpreted in its decision were contained in earlier versions of the Social Security Act and were not changed by the adoption of ASFA. See 42 U.S.C. §§ 670–677; King, 550 F. Supp. at 328 n.2. Therefore, this decision remains relevant to the interpretation of ASFA. See King, 550 F. Supp. at 328 n.2.
131 King, 550 F. Supp. at 327, 328, 353.
132 See id. at 355.
133 See id. at 357.
134 Id. at 357.
135 See id.; see also Bruce A. Boyer, Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents, 54 Md. L. Rev. 377, 384 (1995) (“[J]uvenile courts are vested with broad dispositional powers that include the power to second-guess—or even direct—agency action on specific dispositional matters.”).
136 Lynch, 719 F.2d at 506.
137 Id.
138 See id. at 513.
139 See id. at 513–14.
140 See id. at 506; King, 550 F. Supp. at 355. Not only did the court uphold the trial court’s ruling that state courts may render decisions regarding children’s placement, but it
Two other federal decisions are also informative, although not binding on the Commonwealth.\textsuperscript{141} In \textit{Vermont Department of Social and Rehabilitation Services v. U.S. Department of Health and Human Services}, the Vermont department filed suit because its application for federal funding under the Adoption Assistance and Child Welfare Act was denied.\textsuperscript{142} When the Administration for Children and Families, under the auspices of the Department of Health and Human Services, reviewed Vermont’s system, the federal agency found that Vermont’s statutory scheme was not adequate to meet the requirements of federal law.\textsuperscript{143} Specifically, Vermont law did not require frequent enough review of out-of-home placements.\textsuperscript{144} Also, such review only included a hearing in court if a party requested one, or if a court ordered one in its own discretion.\textsuperscript{145} Following this finding, the legislature modified the statute to provide for more frequent review and for review of the child’s placement by a court or a body appointed or approved by the court.\textsuperscript{146} The court cited to the Congressional Record from the debate over the Adoption Assistance and Child Welfare Act, highlighting the testimony of Senator Cranston, who had argued, “‘[y]early judicial reviews of the child’s placement too often become perfunctory exercises with little or no focus upon the difficult question of what the child’s future placement should be.’”\textsuperscript{147} Furthermore, the court noted that the federal Grant Appeals Board, in deciding whether Vermont had complied sufficiently with the federal law to receive funds, had stated that simple judicial approval of agency decisions would be insufficient; any administrative body conducting placement hearings had to be judicially approved.\textsuperscript{148} Thus, the court upheld the decision of the Grant Appeals Board that Vermont was not eligible because of its failure to provide

\textsuperscript{141} See generally \textit{Vt. Dep’t of Soc. & Rehab. Servs.}, 798 F.2d 57; \textit{Ocean}, 123 F. Supp. 2d 618.

\textsuperscript{142} See 798 F.2d at 59. This case, like the Massachusetts cases previously discussed, was decided before ASFA was passed. \textit{See id.} at 57. It did, however, address provisions of the Adoption Assistance and Child Welfare Act, which preceded ASFA, similar to those in the current Act. \textit{See id.} at 59–60. Therefore, it is still a useful tool for evaluating the Massachusetts scheme under ASFA. \textit{See id.}

\textsuperscript{143} \textit{See id.} at 61.

\textsuperscript{144} \textit{See id.}

\textsuperscript{145} \textit{See id.}

\textsuperscript{146} \textit{See id.} at 60–61.

\textsuperscript{147} \textit{See Vt. Dep’t of Soc. & Rehab. Servs.}, 798 F.2d at 63 (quoting 125 \textit{Cong. Rec.} S22684 (daily ed. Aug. 3, 1979) (statement of Sen. Cranston)).

\textsuperscript{148} \textit{See id.} at 65 (quoting Grant Appeals Board decision).
adequate hearings. As in *King*, a federal court declared that there was a clear legislative intent that decisions regarding placement of children who have been removed from their homes and are in agency care should be overseen by courts.

Lastly, and most recently, in a Florida case, *Ocean v. Kearney*, the plaintiff was a foster child whose foster care benefits were summarily terminated without his having been afforded notice or an opportunity to be heard. The plaintiff had been removed from his home and placed in foster care, and was later transferred to a behavioral modification facility, where he wished to remain until he completed his GED. On his eighteenth birthday, however, his case was closed and he was told to pack and get on a bus with only a few of his belongings and fifty dollars. The district court held that because the plaintiff had not been given a hearing prior to his dismissal from the facility, his right to procedural due process had been violated, and that there was an affirmative obligation placed on states that accept federal funds to provide such procedural protections. The court’s holding effectively stated that children who have been in the custody of a state agency are entitled to procedural protection.

Taken together, these cases indicate that the federal government intends for courts to have the authority to oversee agency decisions. Since judicial review of agency decisions is not the practice in Massachusetts, its laws must be updated to bring the Commonwealth into compliance with federal mandates and to better serve the children in DSS custody.

### III. The Need for Change

There is a “wide gap in Massachusetts between the legal standards for the care and protection of children and the actual practices of the

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149 *See id.*
150 *See id.* at 62–65.
151 123 F. Supp. 2d at 620.
152 *Id.*
153 *Id.*
154 *See id.* at 623, 625 ("When limitations exist on agency discretion to terminate or extend benefits, procedural due process must be afforded.").
155 *See id.*
156 *See discussion supra notes 127–55 and accompanying text.*
Department of Social Services.” This gap may stem from courts giving cursory review to the actions of DSS, which has sometimes circumvented the requirements of the law, thereby creating a dangerous combination for the children whom DSS and the courts are intended to protect. Attempts to mold the relationship between the juvenile court and DSS into the confines of a traditional court-agency relationship further widen the gap. In contrast to normal agency-court relationships, DSS and the juvenile court share the mission of protecting children’s interests and therefore should not be set in opposition to each other. When a child welfare agency is performing its mission of protecting children’s interests adequately, then there is little need for courts to overrule its decisions. When such an agency places children where it is convenient for it to do so, however, and not necessarily where the children’s needs dictate they be placed, then courts must have the power to order appropriate placements. The federal government, through ASFA, has agreed with this formulation. As such, Massachusetts should bring its CHINS law into compliance with ASFA to avoid the risk of losing additional federal funding. The need for change is particularly apparent in light of the disproportionately large number of children of color in DSS care, who are therefore inordinately affected by Isaac and Jeremy.

A. Disproportionate Impact on Children of Color

“Child welfare is not usually viewed as a civil rights issue,” but perhaps it should be. DSS itself states that “Black children and Hispanic children are over-represented at all stages in the DSS system.” According to the 2000 Census, 79% of children in Massachusetts were

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158 Leonetti, supra note 157, at 92.
159 See id. at 68, 93.
160 See Boyer, supra note 135, at 379.
161 See id.
162 See id. at 384.
163 See id.; see also Care & Prot. of Isaac, 646 N.E.2d 1034, 1036 (Mass. 1995) (noting that DSS allowed the child to continue to live in a hospital while it waited for a more suitable placement at least partly because of budgetary constraints).
165 See 42 U.S.C. § 671(a) (2000) (laying out requirements for states to be eligible to receive payments under the act); QUARTERLY REPORT, supra note 33, at 3.
167 QUARTERLY REPORT, supra note 33, at 3.
white, 7% black, 4% Asian, and 11% of Hispanic origin.\(^{168}\) Of the 9203 children in DSS placement at the end of the second quarter of 2007, 60% were white, 18% black, 1% Asian, and 26% of Hispanic origin.\(^{169}\) From these numbers it is apparent that both black and Hispanic children are disproportionately represented among children in DSS care. Although the data addresses the DSS population as a whole, it seems reasonable to assume that the same disparities apply to CHINS.\(^{170}\)

Given that Isaac and Jeremy authorize DSS to place children in its care anywhere the agency sees fit, whether or not that decision is appropriate to their particular needs, and given that more children of color are involved with DSS through CHINS, these decisions must disproportionately affect such children.\(^{171}\) Although the statistics cannot explain why children of color are so over-represented in the DSS population, this disproportionate impact is a primary reason that Isaac and Jeremy should be overruled either legislatively or judicially.\(^{172}\)

**B. Updating Massachusetts Law to Comply with ASFA**

The other reason Isaac and Jeremy should be overruled is that Massachusetts has been subject to federal review under ASFA to determine whether or not its child welfare system is in compliance with federal regulations, and it has not performed spectacularly.\(^{173}\) Among the indicators sought in such reviews are judicial determinations that: (1) there will be state responsibility for placement and care of the child after a court order has verified the need to remove the child; (2) the family has been preserved where appropriate; and (3) a permanency

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\(^{168}\) [KIDS COUNT CENSUS DATA ONLINE, RACE OF CHILDREN BY AGE GROUP IN THE 2000 CENSUS, ANALYSIS OF DATA FROM U.S. CENSUS BUREAU, 2000 CENSUS SUMMARY FILE 1 (tbl.P12A–P12G), cited in QUARTERLY REPORT, supra note 33, at 3.]

\(^{169}\) Id. at 1, 5.

\(^{170}\) See id. at 3.

\(^{171}\) See Isaac, 646 N.E.2d at 1041; Care & Prot. of Jeremy, 646 N.E.2d 1029, 1033 (Mass. 1995).

\(^{172}\) See Isaac, 646 N.E.2d at 1038; Jeremy, 646 N.E.2d at 1033; QUARTERLY REPORT, supra note 33, at 3; infra notes 192–242 and accompanying text.

\(^{173}\) See IV-E REVIEW, supra note 31, at 1, 9; CFSR, supra note 32, at 11. Under the IV-E review, whose purpose was to determine whether Massachusetts had complied sufficiently with federal law to receive benefits under Title IV-E, nine out of eighty cases sampled were determined to have been handled erroneously and therefore the state was not found to be in substantial compliance. IV-E REVIEW, supra note 31, at 1. The state was required to return $120,580 in foster care payments and to pay $56,342 in administrative costs, which the state’s children can ill afford, as well as to develop a Program Improvement Plan. See id. at 1, 2, 9.
plan has been finalized. Requiring court oversight of all of these different decisions assumes that courts may review agency decisions for more than just abuse of discretion. In fact, in its initial review by the federal government, one of Massachusetts’ weaknesses was that its case review system was deemed not to be in substantial compliance because permanency hearings were found to be brief and generally inadequate. This finding suggests that the federal government envisions a more active role for state courts in placement decisions. The review stated that Massachusetts “courts often had extremely brief and perfunctory permanency hearings that did not adequately address the ASFA requirements for these hearings.” It also mentioned that the way in which judges view the permanency hearing, which may be inferred from the statement that “brief” hearings are occurring, may be a barrier to substantive and effective hearings.

From these findings, it is apparent that court practices for children in DSS care need to change. Given the grave nature of the decisions being made, it is imperative that they be given due consideration. Although DSS has the opportunity to make these decisions itself, the courts should have the chance to review them in order to

174 45 C.F.R. § 1356.21(b), (c) (2007).
175 See id. Although neither Isaac nor Jeremy mentions the issue, the notion of separation of powers underlies both decisions. See generally Isaac, 646 N.E.2d at 1034; Jeremy, 646 N.E.2d at 1029. Judicial scrutiny of agency decisions, however, is presupposed by any number of different people and entities. See, e.g., 45 C.F.R. § 1356.21(b), (c); supra notes 117–150 and accompanying text. One author has said that separation of powers on the state level is of a different quality than on the federal level, particularly since the concept originated in state constitutions, many of which predate the federal constitution. See Jonathan Feldman, Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government, 24 Rutgers L.J. 1057, 1066 & n.46 (1993). In fact, states deliberately sought to incorporate judicial review into their systems of government because they saw it as an important method of restraining legislative behavior. Id. Those who presume the legality of judicial oversight of agency decisions are presumably relying on the logic that such decisions are permissible under the state, as opposed to federal, doctrines of separation of powers. See id. at 1067.
176 See CFSR, supra note 32, at 2, 11.
177 See id.
178 Id. at 11.
179 See id. at 33.
180 See id. at 11; IV-E Review, supra note 31, at 9.
181 See, e.g., Wen, supra note 5 (describing the death of Dontel Jeffers in his foster mother’s home after he had been placed with her by DSS, despite his grandmother’s willingness and desire to care for him).
ensure that DSS’ decisions have not been driven by considerations unrelated to children’s best interests.\textsuperscript{182}

IV. Remedies

Given the negative effects of Isaac and Jeremy, it is apparent that steps must be taken not simply to comply with the federal scheme, but also to guarantee equal treatment of all children in the system.\textsuperscript{183} Since negative effects are stemming from these decisions, neither the courts nor DSS are living up to the mandate that the child’s health and safety are supposed to come first.\textsuperscript{184} Although the problem is complex, there may be some simple remedies.\textsuperscript{185} In Isaac and Jeremy the court read the statutes as preventing courts from reviewing DSS’ placement decisions except in cases of abuse of discretion.\textsuperscript{186} This reading was not the only possible interpretation; the SJC could have interpreted the statutes differently and should take the opportunity to revisit these decisions in the future.\textsuperscript{187} The SJC noted that it might be open to taking a different view of things in the future if the statutes were amended, to give courts more clear authority in such cases.\textsuperscript{188} The legislature should accept the court’s invitation and address the problem by amending the relevant statutes to give the juvenile court power to oversee DSS placement decisions.\textsuperscript{189} Massachusetts is not the only state to face issues of conflict between courts and child welfare agencies, but other states have resolved cases like Isaac and Jeremy by granting courts more authority to prevent tragedies such as the death of Dontel Jeffers.\textsuperscript{190} Massachusetts should draw inspiration from these other states.\textsuperscript{191}

\textsuperscript{182} See, e.g., Isaac, 646 N.E.2d at 1035 (noting that DSS refused to place the child in accordance with the recommendation of both his psychiatrist and his GAL at least in part because it did not want to fund the placement).

\textsuperscript{183} See supra notes 158–182 and accompanying text.


\textsuperscript{185} See infra notes 192–258 and accompanying text.

\textsuperscript{186} See Isaac, 646 N.E.2d at 1039; Jeremy, 646 N.E.2d at 1033.

\textsuperscript{187} See infra notes 192–230 and accompanying text.

\textsuperscript{188} See Jeremy, 646 N.E.2d at 1033.

\textsuperscript{189} See id.; infra notes 231–42 and accompanying text.

\textsuperscript{190} See, e.g., Md. Code Ann., Cts. & Jud. Proc. § 3-820(a) (LexisNexis 2006) (stating that courts may order specific placements for children in need of assistance); Ellement & Wen, supra note 7.

\textsuperscript{191} See infra notes 243–258 and accompanying text.
A. Overruling Isaac and Jeremy

1. Case Law since Isaac and Jeremy

Since the passage of ASFA, relatively few Massachusetts cases have addressed court oversight of DSS placements of children in its care. Of the few, the most notable are Adoption of Hugo and In re Angela. Hugo addressed a boy with special needs who had been cared for in a foster home for a significant period. DSS determined that he should be moved to the home of his aunt in another state, since she had raised a son who had disabilities similar to Hugo’s, despite the fact that Hugo was very attached to his foster mother and had been calling her “mommy.” Although the SJC grudgingly affirmed the trial court’s decision to remove Hugo to his aunt’s care, it noted in dicta that

a plan proposed by DSS [is not] entitled to any special weight, even if an alternative plan does not implicate the fitness of the biological parents. A judge should provide an “even handed” assessment of all the facts surrounding both the department’s plan and any competing custody or adoption plan.

The SJC suggested here that DSS decisions about children’s placement are less binding on courts than Isaac and Jeremy say they are. The court, however, did not mention Isaac or Jeremy. The ambiguity created by the inconsistency between Hugo and Isaac and Jeremy leaves open the question of how this decision fits within the structure the earlier cases created, or even whether they were tacitly overruled.

In Angela, the court held that prior to continuing an out-of-home placement for an additional six months in a CHINS case, the judge must conduct an evidentiary hearing. At this hearing, the court must find by a preponderance of the evidence that the purposes of the disposition have not been accomplished and that continuing the placement would be reasonably likely to further these purposes. Angela appears to give

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192 See, e.g., In re Angela, 833 N.E.2d 575, 579 (Mass. 2005); Adoption of Hugo, 700 N.E.2d 516, 521 n.8 (Mass. 1998).
193 See Angela, 833 N.E.2d 575; Hugo, 700 N.E.2d 516.
194 See Hugo, 700 N.E.2d at 518, 519.
195 See id. at 520, 521 n.8.
196 See id. at 521 n.8.
197 See id. at 516.
198 See Hugo, 700 N.E.2d at 518.
199 See Hugo, 700 N.E.2d at 516.
200 Angela, 833 N.E.2d at 577.
201 Id.
courts the power not only to oversee DSS’ placement of a child but also the power to continue the placement.202 In fact, the court distinguished CHINS proceedings from other commitment proceedings because the juvenile court has control over the child’s treatment, whereas in other proceedings the person is committed to an agency or department which then determines the person’s treatment.203

As in Hugo, the court did not mention Isaac or Jeremy in its opinion.204 The failure to mention these decisions suggests that the Angela court implicitly distinguished Isaac and Jeremy by holding that CHINS commitments are different from other types of commitment.205 Failure to mention the earlier decisions raises the question of whether the SJC was trying to tacitly overrule them.206 Given that the SJC has not explicitly addressed the decisions, they must be handled in a more direct manner; they remain dangerous precedents that may impede the treatment of children who are supposedly being served by DSS.207

2. Statutory Developments Since Isaac and Jeremy

Section one of chapter 119 of the Massachusetts General Laws, which addresses “Protection and Care of Children, and Proceedings Against Them,” states:

In all matters and decisions by [DSS], the policy of [DSS], as applied to children in its care and protection or children who receive its services, shall be to define the best interests of the child as that which shall include, but not be limited to . . . the child’s fitness, readiness, abilities and developmental levels; the particulars of the service plan designed to meet the needs of the child within his current placement . . . and the effectiveness, suitability and adequacy of the services provided and of placement decisions, including the progress of the child or children therein.208

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202 See id. at 580.
203 Id.
204 See Angela, 833 N.E.2d 575.
205 See id. at 580; Isaac, 646 N.E.2d at 1038; Jeremy, 646 N.E.2d at 1033.
206 See Angela, 833 N.E.2d 575.
207 See Jeremy, 646 N.E.2d at 1030, 1033; see also Isaac, 646 N.E.2d at 1036, 1038 (noting that DSS based its placement decision in this case in part on budgetary constraints).
This paragraph was added in 1999, after Isaac and Jeremy had been decided.\textsuperscript{209} Therefore the SJC’s decisions in these cases were rendered without the benefit of the guidance the Assembly provided in section one.\textsuperscript{210} In light of the new language, Isaac and Jeremy should be overruled to effect the affirmative duty imposed on DSS, and to provide the courts with the authority to enforce that duty.\textsuperscript{211}

3. A Different Reading of Existing Statutes

Even without the benefit of the rewritten section one, a different interpretation of pre-existing sections could also support the argument for judicial rejection of Isaac and Jeremy.\textsuperscript{212} The court based its decisions primarily on sections of chapter 119, which addresses care and protection of children, as well as proceedings against them.\textsuperscript{213} Sections 24 and 25 present particularly useful examples of provisions the court could have interpreted differently.\textsuperscript{214} Section 24 states, “the court may issue an emergency order transferring custody of the child to the department or to a licensed child care agency or [other qualified] individual.”\textsuperscript{215} This language seems to grant the court the freedom to choose which of the enumerated options it prefers for the individual child appearing before it.\textsuperscript{216} Section 25 is similarly phrased and states “the court may allow the child to be placed in the care of some suitable person or licensed agency providing foster care for children or the child may be committed to the custody of the department.”\textsuperscript{217}

The court noted in Jeremy that these two provisions represent alternatives for judges, but focused on the section which allows DSS to decide when a child needs to be placed in a residential facility.\textsuperscript{218} That section does not state that only DSS may order such a placement.\textsuperscript{219} In fact, another section provides courts with even more options, stating

\begin{footnotesize}
\begin{enumerate}
\item See Isaac, 646 N.E.2d at 1034; Jeremy, 646 N.E.2d at 1029.
\item See § 1; Isaac, 646 N.E.2d at 1035; Jeremy, 646 N.E.2d at 1030.
\item See Isaac, 646 N.E.2d at 1037–39; Jeremy, 646 N.E.2d at 1031–33.
\item See §§ 24–26, 29, 32; Isaac, 646 N.E.2d at 1037–39; Jeremy, 646 N.E.2d at 1031–33.
\item § 24.
\item See id.
\item § 25.
\item Jeremy, 646 N.E.2d at 1031; see also § 32 (“[A]ny child who upon examination is found to be in need of special care, treatment or education may, if it is found by the department to be in the best interest of the child, be placed in a public or private institution or school . . . .”).
\item See § 32.
\end{enumerate}
\end{footnotesize}
that once a child has been adjudicated in need of care and protection, the court may “subject to such conditions and limitations as it may prescribe, transfer temporary legal custody to” a foster home, an agency or organization, or DSS.\textsuperscript{220} The SJC, however, refused to read this provision as giving the court power to determine the child’s specific placement.\textsuperscript{221} The court’s only explanation for this holding was that this statute “logically [cannot] be read to override a reasonable placement decision made by the department for a child in its temporary custody.”\textsuperscript{222} Given the additions to section 1 since Isaac and Jeremy were handed down, the definition of reasonable may need to be adjusted.\textsuperscript{223}

Lastly, the court rejected arguments under the section which states “[n]otwithstanding the provisions of this section, the court may make such temporary orders as may be necessary to protect the child and society.”\textsuperscript{224} The court held that this provision merely served to bolster a court’s authority to commit the child to DSS, not to give judges power to oversee DSS decisions regarding the child.\textsuperscript{225}

Although the SJC relied on statutory provisions relating to care and protection proceedings in Isaac and Jeremy, these provisions may be analogized to CHINS cases. The CHINS statute lists persons and organizations, similar to those in the sections on care and protection, to which the child may be committed, also subject to such limitations and conditions as the court sees fit.\textsuperscript{226}

Despite the significant amount of leeway given to the court by the statutes, the SJC declined to accept the task of evaluating whether DSS’ decisions were appropriate.\textsuperscript{227} The court also refused to make placement decisions, leaving them to the whims and hazards of DSS’ discretion.\textsuperscript{228} Despite its unwillingness to act affirmatively, the court encouraged the legislature to make changes.\textsuperscript{229} As the court still refuses to reexamine these decisions, legislation seems a more likely venue for change.\textsuperscript{230}

\textsuperscript{221} See Jeremy, 646 N.E.2d at 1032.  
\textsuperscript{222} Id.  
\textsuperscript{223} See § 1.  
\textsuperscript{224} § 29.  
\textsuperscript{225} See Jeremy, 646 N.E.2d at 1033.  
\textsuperscript{227} See Isaac, 646 N.E.2d at 1041; Jeremy, 646 N.E.2d at 1033.  
\textsuperscript{228} See Isaac, 646 N.E.2d at 1041; Jeremy, 646 N.E.2d at 1033.  
\textsuperscript{229} See Jeremy, 646 N.E.2d at 1033.  
\textsuperscript{230} See id.
B. Living up to the Mandate of Jeremy: Legislative Change

At the end of its decision in *Jeremy*, the SJC stated that legislative action should be considered to remedy any problems caused by the court’s self-imposed restraint.231 Because the SJC refused to allow courts to select appropriate placements for juveniles in DSS custody, including CHINS, who need to enter residential facilities or foster care, courts can avoid taking responsibility for the outcomes of DSS decision-making.232 This lack of accountability renders children in DSS custody vulnerable and leaves them with very little recourse.233

An example of possible legislative action comes from the Pew Commission on Children in Foster Care’s report.234 The report detailed recommendations for legislatures to take in addressing the nationwide deficiencies in the foster care system.235 One of the Commission’s primary recommendations was that courts should take the lead in implementing reforms and improvements.236 More specifically, the Commission recommended that there be strong and effective collaboration between courts and child welfare agencies.237 Given the SJC’s unwillingness to take on any tasks that have not been explicitly and unquestioningly

231 Id. (“The Legislature may wish to examine the statute to state more definitively the scope of a court’s authority when passing on those decisions.”).
232 See id.; see also Isaac, 646 N.E.2d at 1036 (taking note of child’s extended stay in hospital because DSS had not found a more suitable placement for the child and the court was unable to order it to do so); Leonetti, supra note 157, at 68 (“Massachusetts Department of Social Services has repeatedly circumvented the requirements governing substitute care and custody of minor children whose best interests it is supposed to protect.”).
233 See Leonetti, supra note 157, at 92.
234 See Pew Comm’n on Children in Foster Care, Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care 3 (2004), available at http://pewfostercare.org/research/docs/FinalReport.pdf [hereinafter Pew Commission Report]. The Commission was composed of an interdisciplinary group of professionals from fields such as law, health, and social work. Id.
235 See id.
236 Id. at 18 (“Chief Justices and state court leadership must take the lead, acting as the foremost champions for children in their court systems . . . .”).
237 Id. at 38. It is worth noting that the Commission cited a number of states as positive examples of the recommendations it made. Id. at 42. It did not provide any negative examples of states that were not living up to its standards, but rather kept those designations non-state specific. See generally id. Nowhere, however, did Massachusetts appear as one of the positive examples. See id. Moreover, in an update produced by the Pew Commission, Massachusetts was not included among states that had made progress toward adopting the recommendations for court involvement in these cases. See Pew Comm’n on Children in Foster Care, The Pew Commission Recommendations: A Progress Report (2006), http://pewfostercare.org/docs/index.php?DocID=67.
bly delegated to it, the most useful way to implement this recommenda-

Some courts have been given broad powers to overrule or even command agencies with regard to dispositions. Such a grant of power ensures that ultimate authority rests with the court. Since the child’s interests are the primary factors for consideration in any case the juvenile court hears, a certain amount of judicial supervision of agency decisions should be expected and desired. This proposition is strengthened by the fact that in delinquency dispositions, a court may direct the child’s placement.

C. Lessons from Other States

Not all states have refused to allow court oversight of child welfare agency decisions. For example, a Maryland statute states that,

This statute demonstrates that it is possible for courts to oversee agency placement decisions. Although the statute provides that in certain cases an agency may unilaterally remove a child from a court-ordered placement, it normally requires that there be a hearing first. Thus, the statute provides for significant court oversight of children’s place-

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238 See Isaac, 646 N.E.2d at 1041; Jeremy, 646 N.E.2d at 1033.
239 Boyer, supra note 135, at 384.
240 See id. at 385, 387.
242 See, e.g., In re Ronnie P., 12 Cal. Rptr. 2d 875, 882 (Ct. App. 1992) (“In making a dispositional order, of course, the juvenile court can not only direct an appropriate placement but may also issue orders concerning the minor’s conduct.”).
243 See id.
244 MD. CODE ANN., CTS. & JUD. PROC. § 3-820(a) (LexisNexis 2006).
245 See id.
246 See id.
ments.\textsuperscript{247} Furthermore, Maryland law also provides that if a court determines that a child is in need of assistance, the court may “[c]ommit the child on terms the court considers appropriate to the custody of . . . a local department, the Department of Health and Mental Hygiene, or both, \textit{including designation of the type of facility where the child is to be placed}.”\textsuperscript{248} The statute goes on to list a host of other actions the court may take, showing that the Maryland courts have a much broader range of options than those in Massachusetts.\textsuperscript{249} Had the trial courts in \textit{Isaac} and \textit{Jeremy} had such a range of options, perhaps those two boys would not have wound up in placements so wildly inappropriate to their needs.\textsuperscript{250}

In Wisconsin, the statute simply declares that, “[t]he court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court.”\textsuperscript{251} The legislature intended for courts to oversee children’s placements and indeed gave the courts great leeway in making orders regarding these children.\textsuperscript{252}

Georgia explicitly gives judges power, not only to place a child in a wide variety of settings, but also to

\begin{quote}
conduct \textit{sua sponte} a judicial review of the current placement plan being provided to said child. After its review the court may order the division to comply with the current placement plan, order the division to devise a new placement plan within available division resources, or make any other order relative to placement or custody outside the Department of Human Resources as the court finds to be in the best interest of the child.\textsuperscript{253}
\end{quote}

This statute gives the court broad authority not only to select the appropriate placement for a child, but also to review that placement as needed, a particularly useful function if the Department of Human Resources is not placing children in appropriate settings.\textsuperscript{254}

\begin{itemize}
\item \textsuperscript{247} See id.
\item \textsuperscript{248} § 3-819(b)(1)(ii)(2) (emphasis added).
\item \textsuperscript{251} Wis. Stat. Ann. § 48.13 (West 2006).
\item \textsuperscript{252} See id.
\item \textsuperscript{253} Ga. Code Ann. § 15-11-55(c) (2005).
\item \textsuperscript{254} See id.
\end{itemize}
In Nebraska, the Department of Health and Human Services, or any other person or agency to which the court grants custody may determine the placement of the child as well as what other services the child should receive. The statute also grants the courts authority to order the Department to propose a plan for the care of the child, and “modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile’s best interests.”

It is apparent from these examples that other states have found that allowing courts to oversee the decisions of relevant agencies better serves children. Given the example set by these states, Massachusetts should follow it by either enacting legislation similar to that in Maryland, Wisconsin, Nebraska, and Georgia, or through common law by overruling Isaac and Jeremy.

**Conclusion**

The SJC’s decisions in *Care and Protection of Isaac* and *Care and Protection of Jeremy* do not serve the best interests of children who are in DSS care through a CHINS petition. In order to comply with federal law and to avoid losing further funding for the state’s children, they should be reversed. Because there are a disproportionate number of children of color involved with DSS and therefore in the CHINS system, the decisions are having a disproportionate impact on these children, further bolstering the need for change. Given the state statutes enacted since the decisions were rendered, Isaac and Jeremy should be reconsidered to ensure compliance with current statutes. The decisions could have been decided differently under existing state law and could therefore be judicially overruled. They might also be legislatively overruled, as the SJC suggested at the end of Jeremy. The practices of other states may provide useful models on which to base changes in Massachusetts. Ultimately, whatever means is used to bring about changes, they must be made in order for DSS and the juvenile courts of Massachusetts to live up to the mandate laid for them: serving the health and safety of the child.

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256 *Id.* § 43-285(2).