ARTICLES

Jam Tomorrow: Distributive Justice and the Limits of International Economic Law

Barbara Stark

Abstract: The chasm between the rich and the poor has become unfathomable. This Article asks whether existing international economic law can bridge this chasm and effectuate distributive justice. “Distributive justice” itself is an ambiguous goal. This Article inquires, as a threshold question, what, exactly, is required for actual “distributive justice”. It takes as a starting point the relatively modest objective of the Millennium Development Goals—to halve the number living in extreme poverty by 2015. It argues that this objective is not going to be achieved under the aegis of international economic law for two reasons. First, distributive justice is not an objective of international economic law. Second, even if the political will existed, distributive justice would be unattainable because “international economic law” is not a coherent legal subject with the capacity to make it happen. Neoliberalism cannot be relied upon to produce distributive justice, but neoliberalism is not the only game in town.

Beyond Torture: The Nemo Tenetur Principle in Borderline Cases

Luis E. Chiesa

Abstract: The Latin phrase nemo tenetur seipsum accusare means roughly “no man has to accuse himself.” It is the basis of our rights against self-incrimination and forced inculpation. It protects against three practical
problems associated with confessions: (1) untrustworthy confessions; (2) involuntary confessions; and (3) confessions provoked through unacceptable force. This article argues that the *Nemo tenetur* principle was intended primarily to avoid the third problem: confessions obtained through improper methods. It examines the arguments for and against justifying the principle as a protection against either untrustworthy or involuntary confessions. The article also develops a framework to aid in the identification of improper methods of interrogation. Finally, it concludes by applying this framework to three hypothetical cases and arguing that only confessions obtained through unacceptable force should be barred.

NOTES

“Minute and Separate”: Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases After *Crawford* and *Davis*

Kimberly Y. Chin

[pages 67–102]

Abstract: Child sexual abuse is one of the least prosecuted crimes in the United States in part because of the many evidentiary challenges prosecutors face. In 2004, the Supreme Court introduced a new standard for determining the admissibility of out-of-court statements made by declarants who are unavailable to testify at trial. In *Crawford v. Washington*, the Supreme Court held that testimonial statements are only admissible at trial if the declarant is unavailable to testify and there was a prior opportunity for cross-examination. This Note will examine *Crawford’s* impact on the admissibility of videotaped forensic interviews with child victims of sexual abuse and suggest that courts adopt a “minute and separate” approach when deciding whether statements contained in those interviews are testimonial in nature.

Racial Profiling in the Name of National Security: Protecting Minority Travelers’ Civil Liberties in the Age of Terrorism

Yeugenia S. Kleiner

[pages 103–144]

Abstract: Government-sponsored ethnic and racial profiling in the form of computerized and behavioral screening initiatives implemented as a response to 9/11 has led to the subjection of minorities to increased
scrutiny and suspicion in American airports. In the name of national security, safety protocols are being enacted in non-uniform ways that disproportionately infringe on minority passengers’ civil liberties and reinforce harmful racial stereotypes. Focusing on the dissonance between basic freedoms guaranteed by the United States Constitution and the security policies implemented by the federal government, this Note argues that the disparity in scrutiny received by minority travelers is counterproductive because it reinforces racism and ethnocentrism as social norms and fails to ensure a consistent level of protection for all passengers. This Note ultimately advocates for a federal government mandate that delineates a universal, race-blind standard for the level of scrutiny (and accompanying procedures) that all passengers should be subjected to while traveling aboard commercial aircraft.

THE EARLY BIRD GETS THE WORM: A PROPOSAL TO DEVELOP EARLY INTERVENTION SHELTERS THROUGHOUT MASSACHUSETTS

Leah Rabinowitz

Abstract: This Note argues that Massachusetts should create early intervention shelters to aid potential status offenders and other troubled teenagers. The current juvenile justice system deserves critique because it is too reactive and focused on problem-free outcomes such as staying arrest-free, rather than developmental outcomes such as emotional maturity. This Note explores the short-term and long-term benefits of early intervention shelters and suggests that the shelters would be a helpful solution to the problem. Massachusetts should follow the model of other states and enact legislation to create and maintain early intervention shelters on a statewide scale. Such legislation would be attentive to concerns of race, gender, class, and budget.

LEGITIMIZING THE ICC: SUPPORTING THE COURT’S PROSECUTION OF THOSE RESPONSIBLE IN DARFUR

Mary T. Reynolds

Abstract: The conflict in Darfur is one of the world’s worst humanitarian disasters. The fact that the Sudanese government, including its current sitting head of state, played a critical role in orchestrating the murder, rape, and displacement of hundreds of thousands of people in the region
makes the violence perpetrated in this region particularly egregious. In an effort to address these problems, the U.N. Security Council referred the matter to the International Criminal Court (ICC). After its investigation, the ICC granted an arrest warrant for President Bashir, which charged him with crimes against humanity. Under the Rome Treaty, the U.N. Security Council can delay prosecution of President Bashir indefinitely, and certain sectors of the international community are pressuring it to do just that. Those that support the delay fear that allowing the prosecution to move forward will derail potential peace negotiations and result in more violence in the country. To support their contention, they cited threats made by the Sudanese government to escalate attacks. While the U.N. must address these threats, delaying prosecution is the wrong solution. This Note argues that allowing threats of violence to derail the pursuit of justice could irreparably damage the court’s international reputation and credibility. To bolster the legitimacy of the ICC, strengthen international criminal justice, and deter future leaders from following President Bashir’s destructive example, the U.N. and the rest of the international community must support the ICC in its apprehension of President Bashir and support the court in holding him accountable for his crimes.
This fall, the Boston College Law School community became embroiled in an impassioned debate over same-sex marriage. This discussion arose from Professor Scott FitzGibbon’s appearance in television and radio advertisements that argued for the repeal of a Maine state law legalizing same-sex marriage. The ads received national publicity and provoked discussion both inside and outside the BC Law community. Fearing that the controversy might make gay and lesbian students feel alienated, the BC Law community strived to make students of every sexual orientation feel welcomed. In response to the ads and the reaction of students and faculty, Dean Garvey wrote an open letter noting that principles of academic freedom allow professors to express their individual views, even if they are controversial ones—a tenet central to legal education.

No venue has been more genuinely devoted to the free exchange of ideas than the *Boston College Third World Law Journal*. Thirty years prior to this fall’s debate over the equality of marriage, thirty-five Boston College Law students from the school’s Asian-American, Black-American, and Latino law student associations published the first issue of the *Journal* to encourage the dissemination of scholarly views, many of which the legal and academic communities had not previously espoused. Striving to create a dialogue that would broaden the frontiers of legal thought, these editors sought to create a legal publication highlighting the legal struggles of various underrepresented groups. Since then, the *Journal* has consistently evolved to address current issues that directly affect members of the BC Law community.

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1 For example, a majority of faculty members signed a statement which reaffirmed “their belief in the equality of all . . . students. . . . [and] commitment to making our institution a welcome and safe place for all students, including LGBT students.” Statement of Individual Faculty and Administrators at Boston College Law School (Sept. 18, 2009) (on file with author).

2 See Letter from John Garvey, Dean, Boston Coll. Law Sch., to Members of the Boston College Law School Community (Sept. 16, 2009) (on file with author).

3 See From the Editors, 1 B.C. THIRD WORLD L.J. 1, 1 (1980).


5 The *Journal* has addressed changes in immigration law after September 11 and the controversial choice of Michael Mukasey as graduation speaker. It was founded and continues to be “a dynamic, evolving scholarly journal that addresses issues of importance to people and issues often not fully covered in more mainstream legal publications.” See Maurice Hope-Thompson, Charles E. Walker, & Bernard W. Greene, Observations and Re-
In light of the recent debate over same-sex marriage, the *Third World Law Journal*, on its thirtieth anniversary, reaffirms its mission to argue for the underrepresented in the legal community. Each of the articles in this volume advocates for a specific population, but all represent a contribution to the scholarly dialogue that gives a voice to those whom the legal system typically overlooks or neglects.\(^6\) Today, the publication that originally reflected its founding editors’ mission continues to preserve an academic forum that recognizes equality under the law for all—regardless of sex, race, sexual orientation, age, socioeconomic status, or ethnicity.

**Leslie Dougherty**  
Editor-in-Chief  
Volume 30, *Boston College Third World Law Journal*
JAM TOMORROW: DISTRIBUTIVE JUSTICE AND THE LIMITS OF INTERNATIONAL ECONOMIC LAW

BARBARA STARK*

Abstract: The chasm between the rich and the poor has become unfathomable. This Article asks whether existing international economic law can bridge this chasm and effectuate distributive justice. “Distributive justice” itself is an ambiguous goal. This Article inquires, as a threshold question, what, exactly, is required for actual “distributive justice”. It takes as a starting point the relatively modest objective of the Millennium Development Goals—to halve the number living in extreme poverty by 2015. It argues that this objective is not going to be achieved under the aegis of international economic law for two reasons. First, distributive justice is not an objective of international economic law. Second, even if the political will existed, distributive justice would be unattainable because “international economic law” is not a coherent legal subject with the capacity to make it happen. Neoliberalism cannot be relied upon to produce distributive justice, but neoliberalism is not the only game in town.

“I’m sure I’ll take you with pleasure!” the Queen said. “Twopence a week, and jam every other day.”

Alice couldn’t help laughing, as she said “I don’t want you to hire me—and I don’t care for jam.”

“It’s very good jam,” said the Queen.

“Well, I don’t want any to-day, at any rate.”

“You couldn’t have it if you did want it,” the Queen said.

“The rule is, jam to-morrow and jam yesterday—but never jam to-day.”

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“It must come sometimes to ‘jam to-day,’” Alice objected.
“No, it ca’n’t,” said the Queen. “It’s jam every other day: to-day isn’t any other day, you know.”
—Lewis Carroll, Through the Looking Glass and What Alice Found There

**INTRODUCTION**

The chasm between the world’s rich and poor has become unfa-thomable. As a recent UN study explains, global wealth is distributed so that “the richest 2 per cent of adult individuals in the world own half of all global wealth.” While the number of people living in poverty has increased by almost 100 million, there are more billionaires than ever before—people who, as Barack Obama put it, “make more in 10 minutes than a worker makes in 10 months.” Even more disturbing, “the assets


2 James B. Davies et al., The World Distribution of Household Wealth 7 (United Nations Univ. World Inst. for Dev. Econ. Research, Discussion Paper No. 2008/03, 2008). This distributive inequity has been going on for some time. See, e.g., The U.N. High Comm’r for Human Rights, Report of the U.N. High Comm’r for Human Rights to the Econ. and Soc. Council, ¶ 4–6, U.N. Doc. E/1999/96 P (July 29, 1999), reprinted in Henry J. Steiner & Philip Alston, International Human Rights in Context: Law, Politics, Morals 239 (2d ed. 2000) (noting growing economic polarization, in which the poorest increasingly lose ground). In the U.S. alone, “from 1997 to 2001, the top 1 percent captured far more of the real national gain in wage and salary income than did the bottom 50 percent.” Clive Crook, The Height of Inequality, Atlantic Monthly, Sept. 2006, at 36, 37. Until recently, the rate of polarization in the U.S. was increasing. See David Cay Johnston, Report Says That the Rich Are Getting Richer Faster, Much Faster, N.Y. Times, Dec. 15, 2007, at C3 (noting that the increase in income of the top one percent was greater than the total income of the bottom twenty percent). Whether those at the bottom are nevertheless better off is an open question. The bottom line is unclear. “Most likely [globalization] has helped some to escape poverty and thrown others deeper into it.” Peter Singer, One World: The Ethics of Globalization 89 (2d ed. 2004).

3 See Eric Konigsberg, A New Class War: The Haves vs. the Have Mores, N.Y. Times, Nov. 19, 2006, at WK1 (explaining that the “superrich”—the $20 million a year households—“are getting richer almost twice as fast as the rich”—the top one percent of households with an average income of $940,000); Jeff Zeleny, Obama Proposes Tax Cut for Middle Class and Retirees, N.Y. Times, Sept. 19, 2007, at A22; see also Jenny Anderson & Julie Craswell, Make Less Than $240 Million? You’re Off Top Hedge Fund List, N.Y. Times, Apr. 24, 2007, at Al (noting that “the top 25 hedge fund managers last year earned $14 billion—enough to pay New York City’s 80,000 public school teachers for nearly three years”); Stephen Taub, The Top 25 Moneymakers: The New Tycoons, Alpha, Apr. 24, 2007, at 39, 41–42 (noting that the
of the world’s richest three individuals exceeded the combined Gross National Products of *all* of the least developed countries, with a population totaling 600 million people.”

This Article asks whether distributive justice can be realized through existing international economic law. “Distributive justice” is an ambiguous goal. If we simply mean “more fair than what we have now,” “distributive justice” is within easy reach because we could hardly do worse. Merely rolling back some of the generous de-regulation and outright gifts that have brought us here would be a start, and has already begun. The global economic crisis has certainly toppled some of the mighty, but the worst-off may be even worse off, and many are likely to join them.

As a threshold question, it should accordingly be established what, exactly, is required for actual “distributive justice.” I take as a starting point the relatively modest objective of the Millennium Development Goals (MDGs)—to halve the number living in extreme poverty by more than $14 billion earned by the top twenty-five hedge fund managers was equivalent to the GDP of Jordan or Uruguay). An additional 100 million people live in poverty, even as total world income has increased by 2.5%. Joseph E. Stiglitz, *Globalization and its Discontents* 5 (2003); see also Oxfam Faults Response to Famine in Africa, *N.Y. Times*, July 24, 2006, at A10 (noting that “the number of food emergencies has nearly tripled in 20 years”).


See David Leonhardt, *A Bold Plan Sweeps Away Reagan Ideas*, *N.Y. Times*, Feb. 27, 2009, at A1 (describing President Obama’s ten-year budget which, “[m]ore than anything else . . . seek[s] to reverse the rapid increase in economic inequality over the last 30 years” by increasing taxes on the wealthiest). The budget also allocates $51.7 billion for the State Department and foreign aid, which puts the United States “on a path to double foreign assistance,” according to the White House. Sheryl Gay Stolberg, *Help Abroad*, *N.Y. Times*, Feb. 27, 2009, at A17.

See Edmund L. Andrews, *Report Projects a Worldwide Economic Slide*, *N.Y. Times*, Mar. 9, 2009, at B1 (citing economists for the World Bank predicting that “the global economy and the volume of global trade would both shrink this year for the first time since World War II . . . .” with grim consequences for the world’s poor); Editorial, *The Crisis at Home and Abroad*, *N.Y. Times*, Mar. 5, 2009, at A30 (urging “leaders of industrial nations . . . to provide large-scale financial assistance to avert an economic catastrophe in the developing world”); see, e.g., Vikas Bajaj, *Household Wealth Falls by Trillions*, *N.Y. Times*, Mar. 13, 2009, at B1 (noting that while American households lost $5.1 trillion in the last quarter of 2008, “the loss was concentrated among the most affluent”); Andrew E. Kramer, *The Last Days of the Oligarchs?*, *N.Y. Times*, Mar. 8, 2009, at B1 (noting that “few businessmen anywhere have fallen as hard or as fast in recent months” as Russia’s richest men, the top twenty-five of whom lost $230 billion between May and October); Donald G. McNeil Jr., *Global Fund Is Billions Short as Downturn Cuts Pledges from Donor Nations*, *N.Y. Times*, Feb. 3, 2009, at D6 (noting that pledges from donor states “are running about $5 billion short of what is needed through 2010”).
2015. As economist and Director of the MDG Jeffrey Sachs points out, the wealth is there. It is just a matter of moving it around.

My thesis here is that this will not happen under the aegis of international economic law for two reasons. First, distributive justice is not an objective of international economic law. Rather, its objective is to maintain the neoliberal economic order, grounded in free markets and individual autonomy. Second, even if the political will were there, it

See Dep’t of Econ. & Soc. Affairs, The Millennium Development Goals Report 2009, at 4 (2009). Although the goal of “development” has not always been so specific, the general objective of reducing poverty and inequality has characterized a part of the World Bank called the International Development Association (“IDA”) since its inception in 1960. See infra note 12. The extremely poor consist of 1.1 billion humans subsisting on less that one dollar a day. See The World Bank, Dramatic Decline in Global Poverty, but Progress Uneven, Apr. 23, 2004, http://go.worldbank.org/84RMEOWD20.

See Jeffrey Sachs, The End of Poverty 26–50 (2005) (describing the growth of the global economy). The 2008 global gross domestic product was $60,587,016. World Bank, World Development Indicators Database 4 (2009). As recently as February, 2009, Sachs insisted that the wealth was still there, although the wealthy states refused to honor their earlier pledges: “The poor are refused $5 billion, while wealthy countries have found $3 trillion for bank bailouts and Wall Street bankers awarded themselves $18 billion in . . . bonuses while accepting those bailouts. This is absolutely in violation of the life and death pledges that the rich world made to the poor.” McNeil, supra note 6. But see, e.g., Sanjay Reddy & Antoine Heuty, The End of Poverty? 1, http://www.columbia.edu/~sr793/endofpoverty.pdf (last visited Nov. 21, 2009) (noting that Sachs accepts a “questionable orthodox prescription for economic development”).

See Thomas Pogge, World Poverty And Human Rights: Cosmopolitan Responsibilities and Reforms 7 (2002) (noting that a meaningful reduction of global poverty could be accomplished through a redistribution of just “1.2% of the aggregate annual gross national incomes of the high income economies.”); see also Note, Never Again Should a People Starve in a World of Plenty, 121 Harv. L. Rev. 1886, 1892 (2008) (urging law students—and presumably everyone else—to “[d]o the [r]ight [t]hing at [e]very moment,” that is, if, “with a donation of $200, a child’s life can be saved,” you have a moral obligation to do so). But see Paul Collier, The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It, at xì (2007). Collier notes:

Unfortunately, it is not just about giving these countries [where “the bottom billion” live] our money. If it were, it would be relatively easy . . . . [but] aid does not work so well in these environments, at least as it has been provided in the past. Change in the societies at the very bottom must come predominantly from within; we cannot impose it on them.

Id.

I use “neoliberal” here to distinguish a global economy in which “the value of stock markets has lost all grounding in materiality,” replaced by “casino capitalism,” as opposed to earlier forms of liberalism, grounded in more concrete notions of property. See Jean Comaroff & John L. Comaroff, Millennial Capitalism: First Thoughts on a Second Coming, in Millennial Capitalism and the Culture of Neoliberalism 1, 7–8 (Jean Comaroff & John L. Comaroff eds., 2001). Additionally, a crucial aspect of these fundamental values, as Carol Gould notes, is a human rights framework that inadequately recognizes basic economic and social rights. See Carol Gould, Approaching Global Justice Through Human Rights:
would not happen because “international economic law” is not a coherent legal subject with the capacity to make it happen. Rather, “international economic law” is a loose collection of international organizations (IOs) used by states to further a range of shifting objectives. Most recently, states have sought to realize these objectives through the cluster of premises referred to as the “Washington Consensus.” These include, according to Kerry Rittich: “[T]hat the implementation of efficiency enhancing rules is an uncontentious goal, that everyone stands to gain from free trade, that property and contract rights are the paramount legal entitlements, and that rule-based regimes ‘level the playing field’ and ensure fairness among otherwise unequal parties.”

The first argument, that these premises are fundamentally at odds with distributive justice, draws on Marxist theory. The second argu-

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11 This Article draws on critical and postmodern approaches which some commentators perhaps prudently eschew in the context of international economic law. See, e.g., John Linarelli, What Do We Owe Each Other in the Global Economic Order?: Constructivist and Contractual Accounts, 15 J. Transnat’l L. & Pol’y 181, 184 (2006) (“No critical or postmodern approaches are undertaken.”).


15 Marxist theory, of course, is a vast terrain. For a comprehensive introduction to the subject, see Leszek Kolakowski, Main Currents of Marxism: The Founders, the
ment, that “international economic law” could not produce distributive justice if all of the participants at the World Economic Forum burst into *The Internationale*, draws on postmodern theory. But I propose neither a Marxist nor a postmodern “solution” to the problem. Rather, I simply hope to show that neoliberalism cannot be relied upon to produce distributive justice and further that it is not the only game in town. Margaret Thatcher’s edict, “There is no alternative,” is nonsense worthy of Alice’s Queen.

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16 The *Internationale* is the international song of both Marxist and non-Marxist socialist parties, written in French by Eugene Pottier after the fall of the Paris Commune of 1871, and set to the music by P. Degeyter. The Modern Sourcebook, The Internationale, Aug. 1997, http://www.fordham.edu/halsall/mod/internat.html. The World Economic Forum, even in happier years when Bono attended, has been unlikely to burst into song. Indeed, the group of world leaders and financiers that the German economist Klaus Schwab invited to Davos was markedly somber this year. See Nelson D. Schwartz, *At Davos, Economic Crisis Culls the Guest List*, N.Y. Times, Jan. 26, 2009, at B1.

17 See infra Parts II–Conclusion (explaining, respectively, why Marxism, like other Enlightenment metanarratives, is suspect, and why postmodernism does not provide “solutions”). My arguments are not cumulative, as my aim is not to construct a new metanarrative.

18 See also Barbara Stark, *Theories of Poverty/The Poverty of Theory*, 2009 BYU L. Rev. 381, 391–407 (explaining why traditional liberal theory cannot be relied upon for this purpose).

19 See, e.g., Claire Berlinski, "There Is No Alternative": Why Margaret Thatcher Matters 148 (2008) (noting that from 1972 to 1992 the average income of the richest tenth rose sixty-one percent, while the income of the poorest tenth decreased by eighteen percent). As Gardner notes, “In a sense, nonsense itself is a sanity-insanity inversion. The ordinary world is turned upside down and backward; it becomes a world in which things go every way except the way they are supposed to.” Carroll, *supra* note 1, at 142 n.5 (commentary of Martin Gardner, ed.). This is not to downplay, or underestimate, the hegemony of neoliberalism, which many scholars concede. See, e.g., Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 Harv. L. Rev. 1528, 1529 (2008) (arguing that “by the end of the Cold War, the old struggle between right and left over the governance of the economy and the redistribution of wealth within the advanced liberal democracies had yielded to a new pro-market consensus.”) There is, however, a loyal opposition. See, e.g., José E. Alvarez, *Interliberal Law: Comment*, 94 Am. Soc’y Int’l L. Proc. 249, 250 (2000) (expressing “extreme skepticism” regarding “any attempt to draw distinctions between ‘liberal’ and ‘non-liberal’ states”). There are also outliers, ranging from the “new new left,” to globalization’s discontents, to the barbarians at the gate. See Michael Hardt & Antonio Negri, *Multitude: War and Democracy in the Age of Empire*, at xi–xii, 34 (2004); Stiglitz, *supra* note 3, at 1–7; Thomas N. Hale & Anne-Marie Slaughter, *Hardt & Negri’s Multitude: The Worst of Both Worlds*, openDemocracy, May 25, 2005, http://www.opendemocracy.net/globalization-vision_reflections/marx_2549.jsp.
I. MARXIST CRITIQUE

"Face it: Marx was partly right about capitalism."
—Rowan Williams, Archbishop of Canterbury

A. Why Marx Now?

My first argument draws on Karl Marx—not as an economist, but as a political theorist.21 I draw on Marx because, as Tony Judt points out, “From first to last, Marxism’s strongest suit was . . . ‘the moral seriousness of [his] conviction that the destiny of our world as a whole is tied up with the condition of its poorest and most disadvantaged members.’”22 In addition, as Judt further notes, “Marxism . . . is now once again, largely for want of competition, the common currency of international protest movements.”23


21 Marx has been many things to many people. Carol Gould, for example, provides an original and provocative perspective on Marx. See Carol C. Gould, Marx’s Social Ontology, at xi (1978) (proposing a new approach to Marx as a “great systemic philosopher in the tradition of Aristotle, Kant, and Hegel”). Marx remains a useful tool for critique, although the limits of Marxist critique are well-known. As Tony Judt observes, “the predictive powers of Marxisan economics have long been discounted even by the left.” Tony Judt, Goodbye to All That?, N.Y. Rev. Books, Sept. 21, 2006, at 88 (reviewing Jacques Attali, Karl Marx ou L’esprit du Monde (2005); Kolakowski, supra note 15; and Leszek Kolakowski, My Correct Views on Everything (Zbigniew Janowski ed., 2005)).

22 Judt, supra note 21, at 92. For a rigorous and compelling analysis of the challenge of attaining both distributive justice and democratic governance, see Chantel Thomas, Democratic Governance, Distributive Justice and Development, in Distributive Justice and International Economic Law, supra note 10.

23 Judt, supra note 21, at 92. Naomi Klein recently observed, “This is a progressive moment: it’s ours to lose.” Larissa MacFarquhar, Outside Agitator: Naomi Klein and the New New Left, New Yorker, Dec. 8, 2008, at 61, 62; see also Naomi Klein, The Shock Doctrine: The Rise of Disaster Capitalism 466 (2007) (“[L]ocal people’s renewal movements begin from the premise that there is no escape from the substantial messes we have created and . . . do not seek to start from scratch but rather from scrap, from the rubble that is all around.”). As Stiglitz notes, Klein is no economist. Joseph E. Stiglitz, Bleakonomics, N.Y. Times Book Rev., Sept. 30, 2007, at 12. But she may be right. As Judt observes:

What Marx’s nineteenth century contemporaries called the “Social Question”—how to address and overcome huge disparities of wealth and poverty, and shameful inequalities of health, education and opportunity—may have been answered in the West (though the gulf between poor and rich, which once seemed steadily to be closing, has for some years been opening again, in Britain and above all in the U.S.). But the Social Question is back on the international agenda with a vengeance. What appears to its prosperous beneficiaries as worldwide economic growth . . . is increasingly perceived and re-
Marx has been anathema in the United States for decades. Before Senator Joseph McCarthy fell from grace, he eviscerated the American left; disillusionment with the Soviet brand of Marxism finished the job. As the anti-globalism activist Naomi Klein explains,

My grandparents were pretty hardcore Marxists, and in the thirties and forties they believed fervently in the dream of egalitarianism that the Soviet Union represented . . . . They had their illusions shattered by the reality of gulags, of extreme repression, hypocrisy, Stalin’s pact with Hitler . . . . The left has been held accountable for the crimes committed in the name of its extreme ideologies, and I believe that’s been a very healthy process.

The demonization of Marxism has been costly, though. It has chilled debate, prevented labor, civil rights activists, and feminists from taking bold positions, and generally inhibited the development of any robust,

sent by millions of others as the redistribution of global wealth for the benefit of a handful of corporations and holders of capital.

Judt, supra note 21, at 92.

24 Marxism is “out-dated, oversimplified and wrong.” Hale & Slaughter, supra note 19; see also Mark Leibovich, ’Socialism!’ Boo, Hiss, Repeat, N.Y. TIMES, Mar. 1, 2009, at WK1 (NOTING that “the socialist bogey-mantra has made a full-scale return after a long stretch of relative dormancy” as conservatives attack bank bailouts and stimulus bills).


26 MacFarquhar, supra note 23, at 71; see also David Lodge, Goodbye to All that, N.Y. REV. BOOKS, May 27, 2004, at 6 (reviewing TERRY EAGLETON, AFTER THEORY (2003)) (NOTING that Eagleton fails to “explicit[ly] acknowledge[]” that Marxism, as implemented in Russia and Eastern Europe, was “inimical to people’s free development.”). If such an acknowledgement is required here, this footnote is it.

Klein argues that neoliberals should similarly be held accountable:

When you start issuing policy prescriptions, when you start advising heads of state, you no longer have the luxury of only being judged on how you think your ideas will affect the world. You begin having to contend with how they actually affect the world, even when that reality contradicts all of your utopian theories.

MacFarquhar, supra note 23, at 71.
homegrown American socialism. As David Richards observed almost twenty-five years ago:

[T]he painfully evident bankruptcy of coherent political philosophy of the American left may have both political and legal consequences. To address this problem, the American left must develop a philosophically articulate conviction of the justice of its political ideals. To achieve this development, the left must understand and publicly acknowledge both its continuities and discontinuities with the socialist and Marxist perspectives on political philosophy. Unfortunately, these perspectives have traditionally been excluded from serious political discussion in this country. This lacuna, exacerbated by recurrent red-baiting, deprives us of serious discussion of the full range of democratic political alternatives on the left.

Europeans have not been hobbled in the same way. In 2004, for instance, in response to the American invasion of Iraq, a group of prominent European legal scholars convened the Symposium, Marxism and International Law, to explore the causes of the “material economic woes of international society.” Like them, I draw on Marx to explore what Martti Koskenniemi calls “a sense of the loss of international law’s emancipatory promise, [and] a creeping scepticism about whether there ever was any such project to begin with.”

27 See, e.g., Ansley, supra note 25, at 1075 (“All progressive movements for social change in the United States have been buffeted and weakened by these [anti-communist] winds.”); Jon D. Michaels, To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights, 111 Yale L.J. 1457, 1458 (2002) (“[S]ubstantive welfare rights are completely anathema to the Lockean tradition.”). American resistance to welfare rights has affected the international standing of such rights. See generally Philip Alston, Economic and Social Rights, in Human Rights: An Agenda for the Next Century 137, 149 (Louis Henkin & John Hargrove eds., 1994) (describing international neglect of economic, social, and cultural rights).


B. Ideology

The important concept here is Marx’s idea of ideology, that is, the notion that power relations shape the way we think.31 As Marx succinctly put it, “The ruling ideas of each age have ever been the ideas of its ruling class.”32 Today, the “ruling class” is made up of those who drive the neoliberal economic order, including industrialized states and transnational corporations. As Peter Singer notes,

One hundred and fifty years ago, Karl Marx gave a one-sentence summary of his theory of history: “The hand mill gives you society with the feudal lord; the steam mill, society with the industrial capitalist.” Today he could have added: “The jet plane, the telephone, and the Internet give you a global society with the transnational corporation and the World Economic Forum.”33

Singer’s observation rings true because, from a Marxist perspective, international law has supported the ruling class for a long time. As Susan Marks explains, in the 1920s the Russian jurist E.B. Pashukanis described how capitalist states banded together, dividing the world into states which were “civilized” and those which were not.34 The former, consisting of those states which had adopted capitalism, were entitled to the protection of international law. The latter, “the remainder of the world,” were “considered as a simple object of [the capitalist states’] completed transactions.”35 Susan Marks also discusses the work of Anthony Anghie, who has shown how colonialism shaped international

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31 Critical legal scholars, critical race scholars, and feminists, among others, have gotten considerable mileage from this idea. “Marxism, in short, was the ‘deep structure’ of much progressive politics. Marxist language, or a language parasitic upon Marxist categories, gave form and an implicit coherence to many kinds of modern political protest: from social democracy to radical feminism.” Judt, supra note 21, at 8; see also Slavoj Žižek, The Spectre of Ideology, in Mapping Ideology 1, 1–3 (Slavoj Žižek ed., 1994).


33 Singer, supra note 2, at 10.


35 Id.
The influence of colonialism can be gleaned from the example of Francisco de Victoria, who “legitimate[d] Spanish conquest and dispossession in the Americas by defining the peoples of the region as non-sovereign.” Marks concludes by urging scholars of globalization not to neglect the manner in which its “processes intersect with and reproduce pre-existing forms of exploitation and exclusion.” Failure to note these underlying motifs would perpetuate a “long and inglorious tradition in international legal scholarship . . . of covering up for international law,” as revealed through the works of those like Pashukanis and Anghie.

Just as capitalist states shaped international law in the 1920s, and colonialism shaped early international conceptions of sovereignty, today neoliberal ideology shapes the institutions, such as the IMF, the World Bank, the WTO, and even the non-binding MDG, that purport to restrain it. These institutions, whose policies collectively account

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36 See id. at 547; see also Antony Anghie, Imperialism, Sovereignty, and the Making of International Law 223–25 (2005) (arguing that international law is deeply grounded in colonialism).

37 See Marks, supra note 34, at 458. Marks demonstrates her point with a historical example: empire. She sets out a detailed account of Hardt and Negri’s description of empire, which she agrees is qualitatively different from earlier forms of imperialism. See id. at 461–62. Marks’s admonition is buttressed by Hardt and Negri’s, finding that a primary difference between empire and its imperial predecessors was a change in the “structures of domination,” in part through a process of “deterritorialization.” Id. at 463–64.

38 Id. at 464.

39 Id.; see Howse, supra note 19, at 1529. Howse discusses Jürgen Habermas’s definition of globalization, stating:

[T]he cumulative processes of a worldwide expansion of trade and production, commodity and financial markets, fashions, the media and computer programs, news and communications networks, transportation systems and flows of migration, the risks generated by large-scale technology, environmental damage and epidemics, as well as organized crime and terrorism.

Howse, supra note 19, at 1529 (quoting Jürgen Habermas, The Divided West 175 (Ciaran Cronin ed. & trans., 2006)).

40 See Dep’t of Soc. & Econ. Affairs, supra note 7; José E. Alvarez, Factors Driving and Constraining the Incorporation of International Law in WTO Adjudication, in The WTO: Governance, Dispute Settlement, and Developing Countries 611, 611 (Merit E. Janow et al. eds., 2008); Chios Carmody, A Theory of WTO Law, 11 J. Int’l Econ. Law 527, 527 (2008) (stating that there is a general political liberal theory behind the WTO but no established legal theory); Arturo Escobar, Encountering Development: The Making and Unmaking of the Third World 72 (1995) (explaining how the Bretton Woods institutions supported the private sector by expanding domestic and foreign markets); Fernando Teson, Free Trade, in Distributive Justice and International Economic Law, supra note 10 (providing a thought-provoking defense of free trade). For a comprehensive and groundbreaking critique, see Frank J. Garcia, Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade (2003).
for what we understand to be international economic law, arose post-
World War II. In fact, the World Bank was established by those who met
at Bretton Woods in 1944 to finance reconstruction in Europe after
World War II.41 In 1960, the International Development Association
(IDA) was established within the World Bank to focus on the needs of
the poorest states.42 Although that objective was expressly defined, it is
clear that distributive justice has never been the focus of international
economic law. Rather, that law, operating through the institutions of
the IMF and the WTO, has focused more on trade.43 The premise be-
hind this fixation on trade is that “boosting economic growth” through
trade is key to reducing “poverty and inequality.”44

This premise, however, has been criticized as the self-serving ide-
ology of the developed states. Indeed, according to Arturo Escobar, lib-
eral ideology has shaped development discourse for its own purpose
beginning with the “discovery” of poverty after World War II.45 Accord-

41 Elizabeth A. Mandeville, United Nations Development Programme, in 5 Oxford Ency-
clopedia of Human Rights 150, 150–51 (David P. Forsythe ed., 2009) (“[Post World-War
II, there were] two new grand efforts in international cooperation and relations—the hu-
man rights movement, which sought to assure that these political and civil rights were
globally afforded and protected, and the development movement, which sought to create
standards of living and institutions of support in the development world to foster econo-
mies (and thus societies) in which these freedoms could be guaranteed.”). See generally
BARRY CARTER ET AL., INTERNATIONAL LAW 483–84 (4th ed. 2003); STIGLITZ, supra note 3,
at 11–12 (explaining the economic theory behind the Bretton Woods institutions).

42 CARTER ET AL., supra note 41, at 485.

43 This focus is consistent with its liberal roots. Those who shaped post-Cold War ap-
proaches to poverty similarly drew on a wide range of well-known liberal philosophers.
John Rawls, a leading American moral and political philosopher, is conspicuously absent in
part because he did not address the concerns of internationalists. See, e.g., SINGER, supra
note 2, at 8–9 (recalling his astonishment that John Rawls could completely ignore “ex-
tremes of wealth and poverty that exist between different societies [and in] the most influ-
cental work on justice written in twentieth-century America, this question never even arises”);
see also Joel P. Trachtman, Welcome to Cosmopolis, World of Boundless Opportunity, 39
Rawls eventually did address global justice issues, he contemplated closed societies that
generally did not have obligations to aid each other. JOHN RAWLS, THE LAW OF PEOPLES
115–19 (1999) (defending closed societies on “moral hazard” grounds; that is, if people
may freely migrate to more prosperous places, they will have no incentive to invest their
time and effort in the poorer places where they are born).

44 See ESCOBAR, supra note 40, at 21–24.

45 See id. at 21 (describing the “discovery” of mass poverty in Asia, Africa, and Latin
American after World War II); see also Marks, supra note 32, at 13. (“[T]he production of
‘under-development’ is not simply spontaneous. . . . [T]he production of
[N]obody . . . seems to have a clear, and commonly shared, view of poverty.
For one reason, almost all the definitions given to the word are woven around
the concept of ‘lack’ or ‘deficiency.’ This notion reflects only the basic relativ-
ing to Escobar, although development promises a “kingdom of abundance[,] . . . the discourse and strategy of development [has] produced its opposite: massive underdevelopment and impoverishment, untold exploitation and oppression, [including] [t]he debt crisis, the Sahelian famine, increasing poverty, malnutrition, and violence.”

Although there have been isolated successes, the failures of development have been well-documented as Escobar describes. These shortcomings include the failure to improve the material lives of the world’s poor, to get twelve cent medicines to children to prevent malaria, and to provide four dollar bed nets to poor families despite spending $2.3 trillion on foreign aid. Even worse, some critics believe development has continued the destructive processes of colonialism by eviscerating local cultures and by draining least developed countries (LDCs) of their most valuable resources, from oil and gold to the best educated young people and even healthy babies.

Development has been a failure, these
critics contend, but only for the LDCs. It has been quite profitable for the West.  

C. Money Flows Uphill

It has been argued that development has not only benefited the industrial Western states more than it has benefited the LDCs, but that it has done so at the expense of the LDCs. First, as Oxfam and others have pointed out, a significant portion of aid dollars never leaves the developed states. Rather, it is spent on paying the salaries of consultants, bureaucrats and technical advisors. Even aid dollars that actually arrive in the LDCs may not reach their intended beneficiaries. Paul Collier describes a 2004 survey tracking funds intended for rural health clinics in Chad:

The survey had the extremely modest purpose of finding out how much of the money actually reached the clinics—not whether the clinics spent it well, or whether staff of the clinics knew what they were doing, just where the money went. Amazingly, less than 1 percent of it reached the clinics—99 percent failed to reach its destination.

rival social condition or entity as local”); Edward W. Said, Yeats and Decolonization, in Nationalism, Colonialism, and Literature 69, 69–71 (Terry Eagleton et al. eds., 1990) (“By the beginning of World War I, Europe and America held 85 percent of the earth’s surface in some sort of colonial subjugation. This . . . did not happen in a fit of absent-minded whimsy or as a result of a distracted shopping spree.”); Robert S. Gordon, The New Chinese Export: Orphaned Children—An Overview of Adoption of Children from China, 10 Transnat’l Law 121, 129 (1997) (describing the perception of babies as exports); see also infra text accompanying notes 147–151 (describing the New International Economic Order). Nevertheless, others view babies as the most vulnerable refugees. See Elizabeth Bartholet, Family Bonds: Adoption and the Politics of Parenting 143 (1993); Howard Altstein & Rita J. Simon, Introduction to Intercountry Adoption: A Multinational Perspective 1, 13 (Howard Altstein & Rita J. Simon eds., 1991).


51 See id. at 24.

52 See id. at 19, 22, 24 (pointing out that the United States frequently includes clawback provisions in aid packages); see also Collier, supra note 9, at 4 (“The World Bank has large offices in every major middle-income country but not a single person residing in the Central African Republic.”).

53 See Collier, supra note 9, at 66.

54 Id.; see also Jan M. Rosen, Ensuring That Gifts Go Where They’re Needed, N.Y. Times, Nov. 11, 2008, at F26. As Easterly argues, “[i]t’s time for the rich-country public to insist that aid money actually reaches the poor.” Easterly, supra note 46, at 207.
Even where corruption takes less of a bite, Collier and Anke Hoeffler estimate that about eleven percent of aid is diverted to the military, and in Africa, such aid supports approximately forty percent of military spending.\textsuperscript{55} Finally, even when aid actually reaches its intended beneficiaries, it is subject to diminishing returns.\textsuperscript{56} In other words, “the first million dollars is more productive than the second, and so on.”\textsuperscript{57} Generally, when aid exceeds about sixteen percent of GDP, it is no longer effective.\textsuperscript{58} In 2007, aid to Africa was approaching that figure.\textsuperscript{59} This statistic suggests that soon “we [will] have broadly reached the limits to aid absorption, at least under existing modalities.”\textsuperscript{60}

Second, loans to developing states have often been more beneficial to their lenders than to the recipient states.\textsuperscript{61} While credit has been extended, even when it has not been sought, it is invariably given on the creditor’s terms.\textsuperscript{62} During the financial crises in East Asia and Latin America, for example, the IMF provided money for what Nobel prize-winning economist Joseph Stiglitz describes as a “bail-out for Western banks.”\textsuperscript{63} That is, Western banks and investors were repaid but the debtor states were left with the loans.\textsuperscript{64} These loans were often conditioned on rigid structural adjustment plans (SAPs), under which borrowing states were required to tighten their belts and slash social safety nets.\textsuperscript{65} In addition, most risks remained with the borrower. This condi-

\textsuperscript{55} Collier, supra note 9, at 103; see also Elizabeth Powers, \textit{Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries}, 84 N.D. L. Rev. 383, 385 (2008) (explaining the billions in military assistance money spent each year and that many recipients use this money, not for military assistance purposes, but instead for “international antagonism and repression of their citizens”).

\textsuperscript{56} See Collier, supra note 9, at 100.

\textsuperscript{57} Id.

\textsuperscript{58} Id. (citing The Center for Global Development).

\textsuperscript{59} Id.

\textsuperscript{60} Id.


\textsuperscript{62} Id. at 217.

\textsuperscript{63} Id.

\textsuperscript{64} Id.

tion was equally damaging because when exchange rates or interest rates changed, the borrowing state still had to meet its obligation. Indeed, because most loans were payable on demand, those obligations often became due precisely when they were hardest to pay.66

Third, the current system of global reserves is an ongoing source of low cost loans for the West, especially the United States, but a formidable obstacle to investment in infrastructure for LDCs. After the credit crises in Asia and Latin America during the 1990s, LDCs began to hold reserves to back their currencies.67 Before the 1970s, the conventional wisdom was that states needed gold to back their currencies. Now, the idea is that they need “confidence,” which can be grounded in a strong currency such as the U.S. dollar.

LDCs used to hold reserves of three to four months’ imports, but now, they generally hold reserves worth up to eight months of imports.68 China, for example, has $900 billion reserved, mostly in U.S. Treasury bills.69 These are low interest investments, and more importantly, represent capital that China cannot invest in its own infrastructure.70 If an Asian enterprise borrows $100 million from a U.S. bank, the state adds $100 million to reserves.71 Thus, because the state has to have currency reserves equal to the debt, the loans are a wash. For this reason, Stiglitz concludes: “The global financial system is not working well . . . especially for developing countries. Money is flowing uphill, from the poor to the rich. The richest country in the world, the United States, . . . borrow[s] $2 billion a day from poorer countries.”72 This influx of wealth to the United States is part debt repayment and part global reserves. Consequently, development schemes promoted by

66 Stiglitz, supra note 61, at 218–19.
67 See id.; see also Paul Krugman, Revenge of the Glut, N.Y. Times, Mar. 2, 2009, at A23 (explaining that after the Asian financial crisis of 1997–1998, the emerging Asian economies “began protecting themselves by amassing huge war chests of foreign assets, in effect exporting capital to the rest of the world”).
68 Stiglitz, supra note 61, at 247.
69 Id. at 248.
70 See id. But see David Barboza, China Unveils Sweeping Plan for Economy, N.Y. Times, Nov. 9, 2008, at A1 (describing China’s plan to invest $586 billion in infrastructure over the next two years).
71 Stiglitz, supra note 61, at 249.
72 Id. at 245.
these same Western neoliberals who rely on these low cost loans are not likely to reverse this inequitable flow.\footnote{See Audre Lourde, The Master’s Tools Will Never Dismantle the Master’s House, in This Bridge Called My Back 98, 99 (Cherrie Moraga & Gloria Anzaldua eds., 1981) (“The master’s tools will never dismantle the master’s house.”). Development schemes promoted by China, in contrast, may well limit the flow of credit to the West. See Barboza, supra note 70.}

Fourth, global trade regimes likewise continue to benefit developed states at the expense of LDCs. Contrary to presumptions otherwise, trade liberalization does not “make everyone better off.” Rather, even when it makes “the country as a whole better off, it results in some groups being worse off.”\footnote{Stiglitz, supra note 61, at 68.} The rules for world trade are established through periodic negotiations or “rounds” of talks among the members of the WTO, whose agendas are set by the wealthy industrialized states. The Uruguay Round, for instance, promised a “Grand Bargain” in which the LDCs would accept new rules on intellectual property, investments and services in exchange for a reduction of agricultural subsidies and textiles quotas in the industrialized states.\footnote{Id. at 77.} In reality, only the industrialized states benefited from the Grand Bargain. Sub-Saharan Africa lost $1.2 billion.\footnote{Id. at 80–81.} Industrialized countries made no concessions on agricultural subsidies and left textile quotas in place for ten years.\footnote{The United States opened its markets to African cotton producers in 2005. Id. at 80–81. Though the U.S. does not import cotton, cotton subsidies make it the world’s largest cotton exporter and effectively make competition by the LDCs impossible. Id. at 85–86; see also Kenneth A. Bamberger & Andrew Guzman, Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade, 96 Cal. L. Rev. 1405, 1445 (2008) (arguing that encouraging competition among United States and foreign companies, while simultaneously enforcing safety regulations, would significantly benefit U.S. consumers).} Nonetheless, Eleanor Fox has observed that the elimination of subsidies by the WTO Member States would be the single most effective and far-reaching measure to improve human welfare in the developing world. She explains:

“The human costs of unfair trade are immense. If Africa, East Asia, South Asia, and Latin America were each to increase their share of world exports by one per cent the resulting gains in income could lift 128 million people out of poverty. . . .”

\footnote{73 See Audre Lourde, The Master’s Tools Will Never Dismantle the Master’s House, in This Bridge Called My Back 98, 99 (Cherrie Moraga & Gloria Anzaldua eds., 1981) (“The master’s tools will never dismantle the master’s house.”). Development schemes promoted by China, in contrast, may well limit the flow of credit to the West. See Barboza, supra note 70.}
\footnote{74 Stiglitz, supra note 61, at 68.}
\footnote{Id. at 77.}
\footnote{Id.}
\footnote{76 The United States opened its markets to African cotton producers in 2005. Id. at 80–81. Though the U.S. does not import cotton, cotton subsidies make it the world’s largest cotton exporter and effectively make competition by the LDCs impossible. Id. at 85–86; see also Kenneth A. Bamberger & Andrew Guzman, Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade, 96 Cal. L. Rev. 1405, 1445 (2008) (arguing that encouraging competition among United States and foreign companies, while simultaneously enforcing safety regulations, would significantly benefit U.S. consumers).}
If the nations of the WTO were to adopt one and only one human welfare measure, elimination of [subsidies in trade barriers] should be the measure.78

Indeed, “[r]ich countries have cost poor countries three times more in trade restrictions than they give in total development aid.”79

Five years after the WTO’s Uruguay Round, protesters disrupted the next round scheduled to begin Seattle in 1999. Following the debacle of the “Battle in Seattle,” the WTO convened in a more remote location—Doha, Qatar—to avoid large protests.80 The Doha Round was touted as a “development round,” but again, there were few real concessions to the LDCs.81 This seemingly unalterable trend would not have surprised Marx, who concluded his monograph On the Question of Free Trade. “To sum up, what is Free Trade under the present condition of society? [It is] Freedom of Capital.”82


79 Stiglitz, supra note 61, at 78.


81 Some argued that the collapse of the Doha Round of WTO talks precluded agreement on effective measures to “lift millions out of poverty, curb rich countries’ ruinous farm support and open markets for countless goods and services.” The Future of Globalisation, Economist, July 29, 2006, at 11.

82 Karl Marx, On the Question of Free Trade (Jan. 9, 1848), in Micheline R. Ishay, The Human Rights Reader 228, 228 (2007). Marx stated:

But, generally speaking, the Protective system in these days is conservative, while the free trade system works destructively. It breaks up old nationalities and carries antagonism of proletariat and bourgeoisie to the utter-most point. In a word, the Free Trade system hastens the social revolution. In this revolutionary sense alone, gentleman, I am in favor of free trade.

Id. at 229.
Finally, the West has benefited politically as well as economically from the fiasco of development. During the Cold War, for example, aid was used to buy political support. As a result, a brutal lineup of dictators and crooks, whose only redeeming quality was their opposition to the Soviets, received aid from the West.\(^83\) Thus, as Stiglitz notes, although most of those dictators are gone now, their people continue to struggle with the specter of their "odious debts."\(^84\) Under Mobutu, for example, then-Zaire took on $8 billion in debt while its leader amassed a fortune estimated to be between $5–10 billion.\(^85\) As Stiglitz notes, "Chileans today are repaying the debts incurred during the Pinochet regime, South Africans the debts incurred during apartheid."\(^86\)

Marx probably would have been critical of the ideology of aid, just as he was critical of the ideology of rights.\(^87\) As noted above, he explic-
itly equated “free trade” with “freedom of capital.”88 But as Susan Marks notes, “international law was not part of his project.”89 Nevertheless, no one today argues that global capitalism is monolithic. In fact, as explained in Part II, a growing number of legal scholars recognize that the World Bank, the IMF, the WTO, and the MDG might not be able to agree upon objectives, or coordinate their efforts, even if they wanted.90

II. A Postmodern Critique

While “many doubt whether the term [postmodernism] can ever be dignified by conceptual coherence,” two well-known definitions are pertinent here.91 First, as Jean-François Lyotard defines it, “Postmodernism [is] incredulity toward metanarratives.”92 Like Marxists, postmodernists challenge the metanarrative of development and the broader metanarrative of liberalism of which it is a part. For postmodernists, it is not that liberalism is the wrong metanarrative, but that all metanarratives—including Marxism, liberalism, religion, and the Enlightenment itself—are suspect.93 Second, as Fredric Jameson suggests, “postmodernism is the cultural logic of late capitalism.”94 Examining the metanarrative...

Karl Marx, On the Jewish Question, as reprinted in Human Rights, at 54, 56 (Louis Henken et al. eds., 1999).

88 See Marx, supra note 82, at 39. As Marx notes, “[The Bourgeoisie] has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom—Free Trade.” KARL MARX, COMMUNIST MANIFESTO 82 (Penguin Books 1985) (1888).

89 Marks, supra note 32, at 16.


92 JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE, at xxiv (Geoff Bennington & Brian Massumi trans., 1984) (1979). “Metanarrative” refers to an all-encompassing story that promises to explain everything. See, e.g., KOŁAKOWSKI, supra note 15, at 356 (describing the “orthodox majority” which “maintained that Marxist doctrine itself contained the answers to all or most of the problems of philosophy”).

93 See Judt, supra note 21, at 91 (“The Marxist project . . . was one strand in the great progressive narrative of our time: it shares with classical liberalism, its antithetical historical twin, that narrative’s optimistic, rationalistic account of modern society and its possibilities.”).

tive of development with Lyotard’s incredulity exposes its theoretical flaws. Then analyzing development in Jameson’s terms shows how this flawed metanarrative actually plays out in contemporary global culture.

A. Incredulity Toward Metanarratives

The metanarrative of the Enlightenment replaced God with Reason, and religion with science.\textsuperscript{95} Although the Enlightenment was deeply committed to humanism, reason and science do not inevitably lead to progress and human good.\textsuperscript{96} Indeed, some have noted the role of the Enlightenment itself in the Holocaust.\textsuperscript{97} After all, the “final solution” was not a barbarian rampage, but an orderly, systematic, “scientific” program of genocide, bureaucratic and perversely “rational.”\textsuperscript{98}

For postmodernists, all metanarratives have their own “will to power.”\textsuperscript{99} They tell us more about the ambitions of their proponents than about the world they claim to explain. For liberalism, the “univer-

\textsuperscript{95} The substitution of Reason for God, of course, was not so neat. It has been suggested, for example, that God was not entirely replaced by reason. See, e.g., Pierre Schlag, Law as a Continuation of God by Others Means, 85 Cal. L. Rev. 427, 427–28 (1997) (explaining how legal arguments replicate various proofs of the existence of God).

\textsuperscript{96} See Peter Gay, The Science of Man and Society, in The Enlightenment: A Comprehensive Anthology 479, 481 (Peter Gay ed., 1973) (observing that “[t]he philosophers were aware that their enterprise concealed a deep tension: knowledge did not always lead to improvement”) (emphasis omitted).


\textsuperscript{98} See James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed 2–10 (1998) (arguing that states seek to make the life of society “legible” in order to make it controllable by political power); see also Judt, supra note 21, at 92 (“As for those who dream of rerunning the Marxist tape, digitally remastered and free of irritating Communist scratches, they would be well advised to ask sooner rather than later just what it is about all-embracing ‘systems’ of thought that lead inexorably to all-embracing ‘systems’ of rule.”).

\textsuperscript{99} The phrase is Nietzsche’s. See Gillian Rose, The Melancholy Science: An Introduction to the Thought of Theodor W. Adorno 19 (1978) (“Nietzsche, according to Adorno, refused ‘complicity with the world’ which . . . comes to mean rejecting the prevalent norms and values of society on the ground that they have come to legitimise a society that in no way corresponds to them—they have become ‘lies.’”). This includes those who view “universalism,” or secular Western universalism, as a Western “will to power” or quest for hegemony. This critique may be addressed to radicals as well as liberals. See, e.g., Eve Darian-Smith, Power in Paradise: The Political Implications of Santos’s Utopia, 23 Law & Soc. Inquiry 81, 86 (1998) (concluding that Santos’ goal “is, above all, modernist: it conceals relations of power in the march toward emancipation of the oppressed”).
sal” subject turns out to be a Western white man. As Pierre Schlag explains,

[Postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self. . . . For postmodernism, this humanist individual subject is a construction of texts, discourses, and institutions. The promise that this particular human agent would realize freedom, autonomy, etc., has turned out to be just so much Kant.]

The liberal metanarrative of “development,” similarly, may sustain liberals but its value for its purported beneficiaries is less clear. As Bob Sutcliffe explains, the metanarrative of development is captured in the metaphor of a journey—nation states start from roughly the same place, but at different times. Thus, the LDCs are today where Europe was in the fourteenth century. For Sutcliffe, “The form of travel is characterized by the transfer of labor from low-productivity agriculture to higher-productivity industry and modern services.” But everyone ends up at the same place, with high consumption matching high productivity. Economic progress brings electricity, toilets, education, urbanization, medical services, longer lives, democracy, and human rights—in short, modernization.

The metanarrative of development has given rise to three major critiques. Each challenges one of its underlying premises. First, the polarization critique argues that everyone does not end up in the same

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100 See, e.g., Hilary Charlesworth, *Feminist Methods in International Law*, 93 Am. J. Int’l L. 379, 383 (1999) (“International law asserts a generality and universality that can appear strikingly incongruous in an international community made up of almost two hundred different nationalities and many more cultural, religious, linguistic and ethnic groups.”).


102 See, e.g., Sen, *supra* note 46, at 2 (noting that “Easterly’s critique is not confined to foreign aid as it is usually defined; it is a critique of all grand plans to save the world hatched in Washington or London or Paris”).


104 Sutcliffe, *supra* note 103, at 135. Varun Gauri, Senior Economist at the World Bank, suggests that now the transfer of labor is from low-productivity agriculture to high-productivity agriculture. Varun Gauri, Comment Made From the Audience at Symposium on Distributive Justice and International Law at Tillar House (Nov. 7, 2008).
place. Rather, Europe developed, and as a result, nations polarized into developed and underdeveloped states. This was set and unalterable by the end of the nineteenth century. As Sutcliffe explains, “Underdevelopment is, like Dorian Gray’s portrait, development’s alter ego.”\textsuperscript{105} The underdeveloped states can never catch up, in part because of all the trash—from environmental degradation to corrupt regimes—the developed states have left in their way.

Second, the attainability critique is grounded in the realization that it is physically impossible for the whole world to reach the same destination, to enjoy the level of consumption enjoyed by those in the West. Rather, because of greenhouse gases, contaminants, and nonrenewable resources, “development” “cannot be generalized . . . without causing an apocalypse.”\textsuperscript{106}

Third, and finally, a broad range of desirability critiques suggest that not everyone aspires to such levels of consumption. These critiques are diverse, ranging from those who seek spiritual, rather than material fulfillment, to those living off the land or off the grid, who seek a different kind of material fulfillment. What these critiques have in common is their rejection of high consumption/high productivity. They see “[rich developed states] full of needy, oppressed and unfulfilled people.”\textsuperscript{107} In short, even if it were possible for the entire world to live like Americans, many would rather not.

The metanarrative of development raises more questions than it answers. It is economically, politically, and normatively problematic. While there are some inspiring success stories, overall the story of development is dismal.\textsuperscript{108} It is jarringly out of sync with the liberal metanarrative of progress.

B. The Cultural Logic of Late Capitalism

Even if distributive justice was its objective, ‘international economic law’ could neither mandate nor further distributive justice be-

\textsuperscript{105} Sutcliffe, supra note 103, at 136 (emphasis omitted).
\textsuperscript{106} Jared Diamond, Collapse: How Societies Choose to Fail or Succeed 498 (2005); Sutcliffe, supra note 103, at 137. Daniel Butt suggests a sensible response to this critique with his notion of “sufficientarianism.” Daniel Butt, Global Equality of Opportunity as an Institutional Standard of Distributive Justice, in DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW, supra note 10.
\textsuperscript{107} Sutcliffe, supra note 103, at 138.
\textsuperscript{108} See, e.g., Escobar, supra note 40, at 103–211 (discussing the transformation of strategies for development and those strategies’ new problems and successes); supra notes 2, 10–12, and Part I.C.
cause ‘international economic law’ is not a legal subject with the capacity to do so. Almost twenty years ago, Schlag identified this dilemma in American law as “the problem of the subject.”\textsuperscript{109} At that time the question of “who or what it is that thinks or produces law”\textsuperscript{110} became a major focus of domestic legal theory.\textsuperscript{111} In contrast, it has not been a focus of international law because the authority of international law is not taken for granted in the same way.

In fact, the authority of international law has been under relentless attack in this country. During the Cold War, as Harold Koh explains, self-described “realists” in the U.S. saw international law as “naive and virtually beneath discussion.”\textsuperscript{112} Those who defended international law in the U.S. were more inclined to circle the wagons, to insist that international law really was law, than to question its fundamental premises.\textsuperscript{113} Indeed, under the popular logic of the day such questioning could only aid the enemy.\textsuperscript{114}

\begin{flushright}
\textsuperscript{110} Id.
\textsuperscript{113} See, e.g., Harold Hongju Koh, \textit{Is International Law Really State Law?}, 111 Harv. L. Rev. 1824, 1861 (1998) (concluding that international law, the “law of nations,” is more properly viewed as the supreme law of the land).
\textsuperscript{114} This ironically reproduced the silencing of proponents of international law by the “realists.” See Koh, supra note 112, at 2615 (describing the view that, “utopian moralizing about world government . . . like the strategy of appeasement, played into the hands of the Communist bloc”). Koh himself, for example, while noting the postmodern proliferation and fragmentation of “international law, transnational actors, decisional fora, and modes of regulations [which] mutate into fascinating hybrid forms,” firmly grounds his analysis in Anglo-American liberalism. \textit{Id.} at 2630.

While postmodernism has been criticized in the domestic context for similar reasons, no one credibly argues that “might makes right” in the domestic context. See, e.g., infra note 122. Critical theorists are constrained by the self-limiting social contract of the liberal state. In the international context, in contrast, that constraint evaporates. See Noah Feldman, \textit{Cosmopolitan}
The decade following the end of the Cold War, bracketed by the first Iraq war and 9/11, was a tumultuous period for international law. In 1999, the *American Journal of International Law* published a *Symposium on Method in International Law*.\(^{115}\) The organizers, Steven R. Ratner and Anne-Marie Slaughter, sought to “provide a greater grasp of the major theories of international law currently shared by scholars.”\(^{116}\) They described the often jerky crossover of scholarly innovations from domestic law to international law and the Symposium showed how seven such “methods” had successfully made the leap.\(^{117}\) Postmodernism was conspicuous by its absence from this list—an absence attributable, at least in part, to ongoing ontological challenges to international law. Such challenges include ongoing charges that international law is not ‘law’ at all.\(^{118}\)

Thus, American internationalists have been reluctant to recognize the problem of the subject—that is, that there may be no identifiable subject, or coherent principle, that “makes or produces” international economic law—since this might be construed as support for the broader, far more dubious, proposition that international law is whatever the United States says it is.\(^{119}\) But this conflates a normative project...

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\(^{117}\) See *id.* at 292–93. The seven methods selected, with many lawyerly disclaimers and caveats, were: “legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics.” *Id.* at 293.

\(^{118}\) I have explained the reasons for postmodernism’s absence from the Symposium, and the ways in which it nonetheless characterized the Symposium itself in other scholarship. See Barbara Stark, *After/word(s): Violations of Human Dignity’ and Postmodern International Law*, 27 Yale J. Int’l L. 315, 317 (2002). There may be additional reasons, however. See, e.g., Lodge, *supra* note 26, at 43 (explaining how “the excruciating effort of construing this jargon-heavy [postmodern] discourse far exceeded the illumination likely to be gleaned from it, so [general readers] stopped reading it”).

(that international law, in general, should serve the interests of the West) with a descriptive project (that international economic law, in particular, may have no coherent objective at all).

Rather, international economic law’s objectives are shaped by the “cultural logic of late capitalism.” For Jameson, this means the commodification of everything, including art and human well-being. Everything has a price, and everything is for sale. As Schlag points out: “[O]urs is a world . . . where the value of freedom implies at once the downfall of the Berlin Wall and the imbibing of Pepsi.” The problem of distributive justice becomes a marketing problem.

This cultural logic not only allows us to recognize the problem of extreme poverty, it ironically commodifies it by generating a range of money-making responses, two of which are especially pertinent here. First, a personal charity became the “must-have” commodity of the hyper-rich. As journalist Alessandra Stanley observed, “After 25 years of ever-escalating exorbitance, the pendulum has swung towards conspicuous nonconsumption. Extravagance is measured not by how much is

see Mary-Ellen O’Connell, American Society of Int’l Law, The Myth of Preemptive Self-Defense 3 (2002), available at http://www.asil.org/taskforce/oconnell.pdf (stating “the United States as a government has consistently supported the prohibition on such preemptive use of force”); Koh, supra note 112, at 2659 (“By interpreting global norms, and internalizing them into domestic law, [participation in the transnational legal process] leads to reconstruction of national interests and eventually national identities.”). I do not mean to suggest that internationalists are not interested in the question of “who or what makes or produces” international law. Indeed, there is large and growing scholarly literature, including works on: cosmopolitanism, see Appiah, supra note 114; Nussbaum, supra note 114; global networks, see Anne-Marie Slaughter, A New World Order (2004); Anne-Marie Slaughter, America’s Edge: Power in the Networked Century, 88 FOREIGN AFFS. 94 (2009); deliberative democracy, see Slaughter, supra, at 194; Richard Falk, What Comes After Westphalia: The Democratic Challenge, 13 WIDENER L. REV. 243 (2007); Andrew Strauss, Considering Global Democracy An Introduction to the Symposium: Envisioning a More Democratic Global System, 13 WIDENER L. REV. i (2007); Symposium: Envisioning a More Democratic Global Democracy, 13 WIDENER L. REV. 1 (2007).

120 Jameson, supra note 94, at xv.

121 See generally Said, supra note 49, at 9–13 (explaining why imperialism must be understood in cultural, as well as political and economic terms).

122 See, e.g., James Traub, The Celebrity Solution, N.Y. TIMES MAG., Mar. 9, 2008, at 40 (explaining how “Hollywood celebrities have become central players on deeply political issues like development aid”); Action Without Borders, How We’re Funded, http://www. idealist.org/en/about/funding.html (last visited Nov. 21, 2009) (discussing earned income from “Idealist Consultant and Vendor Directory” and “Idealist Nonprofit Career Fairs”). The point is not that such projects are necessarily suspect. In fact, some of these projects may well involve the kind of “piecemeal problem solving” suggested infra note 145. There is, however, always the risk that such projects will become too successful. See, e.g., Elisabeth Malkin, Microloans, Big Profits, N.Y. TIMES, Apr. 5, 2008, at C4 (noting that, while “[p]rofit is not a dirty word in the microfinance world,” a return of 19.6% raises questions).
spent, but by how much is given away.”123 Bill Gates, for example, vowed to eradicate polio.124

Second, multinational corporations agreed to donate a portion of their profits. Bono’s charity enlisted companies, including Dell and The Gap, to market lines which donate a portion of their profits to aid Africa.125 Pursuant to the cultural logic of late capitalism, global poverty would be addressed by shopping, that is, by the very overconsumption that perpetuates it.

Just as conspicuous consumption became a status symbol in Theodore Veblen’s day, conspicuous philanthropy became a status symbol in ours.126 Getting photographed with African children makes celebrities look “good”—not only attractive, but moral as well. It also distracts the public from negative publicity.127 Angelina Jolie, for example, starred in an MTV documentary on The Poverty Crisis in Africa.128

The idea that the extremely well-off should give some of their wealth to the needy became part of the zeitgeist, the air we breathe and the coffee we drink.129 This was true at least until the current economic crisis.130 A recent article in Fortune magazine recognized this truth when


125 See Ron Nixon, Bottom Line for (Red), N.Y. Times, Feb. 6, 2008, at Cl.


127 See, e.g., Cate Doty, Who’s the Most Charitable of Us All? Celebrities Don’t Always Make the List, N.Y. Times, Sept. 10, 2007, at C7 (noting Jolie’s acknowledgement that her charitable work distracts the public from her “colorful” personal life).


129 See, e.g., Starbucks Coffee Company Advertisement, We Have Something in Common, N.Y. Times, Aug. 27, 2006, at N17 (“[In the clean water campaign to raise $10 million, Starbucks partnered with] non-governmental organizations to bring clean water, improved sanitation, and hygiene education to villages in need. What’s amazing is that once these basic needs are fulfilled, opportunities for education, agriculture, and commerce emerge—children go to school, women start businesses, and the whole community begins to look forward to the future, which, it should be said, is another thing we all have in common.”).

130 Jan M. Rosen, In Uncertain Times, Donors Hold Back, N.Y. Times, Feb. 26, 2009, at G4 (noting that charities “have suffered in the economic maelstrom, while their services are needed more than ever”). But see Matthew Bishop, A Tarnished Capitalism Still Serves Philanthropy, N. Y. Times, Nov. 11, 2008, at F25 (noting that the need for philanthrocapitalism is greater now than before, and philanthrocapitalists are looking to make “high performance” and “strategic” donations).
it reported that “leaders of the hedge fund world have banded together to fight poverty—taking gobs of money from the rich . . . and making philanthropy cool among the business elite.”\textsuperscript{131} The almost $65 billion in aid pledged by Buffet and Gates dwarf the contributions of many donor states, and they do not come with the same strings. As Singer observes, “Unconstrained by diplomatic considerations or the desire to swing votes at the United Nations, private donors can more easily avoid dealing with corrupt or wasteful governments. They can go directly into the field, working with local villages and grass-roots organizations.”\textsuperscript{132}

Indeed, private charity may well be more effective than public rights, especially if the former means billions of dollars and the latter means empty promises. But while charity can be a force for good, it is not a particularly dependable force. In the face of a global economic crisis, donors may simply change their minds with regard to past, present, and future pledges.\textsuperscript{133} Even though the impact of the current global economic crisis on international donors is an open question, we can see that no one is more vulnerable to shifting social mores than the

\textsuperscript{131} See Andy Serwer, \textit{The Legend of Robin Hood}, \textsc{Fortune}, Sept. 18, 2006, at 103; see also Jim Dwyer, \textit{Out of Sight, Till Now, And Giving Away Billions}, \textsc{N.Y. Times}, Sept. 26, 2007, at B1 (describing how Chuck Feeney, who made billions from duty-free airport shops, had anonymously given $4 billion to projects ranging from AIDS clinics in South Africa to plastic surgery for children with facial deformities in the Philippines; and $600 million to his alma mater, Cornell). Feeney says that he went public to inspire other billionaires to discover the pleasures of philanthropy. See Matthew Bishop & Michael Green, \textsc{Philanthrocapitalism: How the Rich Can Save the World} 13, 45, 145–47 (2008) (discussing Feeney’s secret and ground-breaking philanthropic efforts); Dwyer, supra.

\textsuperscript{132} Peter Singer, \textit{What Should a Billionaire Give—and What Should You?}, \textsc{N.Y. Times Mag.}, Dec. 17, 2006, at 58, 62. (noting that, adjusted for inflation, the contributions of Buffet are “more than double the lifetime total [of Carnegie and Rockefeller combined]”). The “consequences” of these contributions are generally imposed on recipient states. See, e.g., \textsc{Dep’t of Soc. & Econ. Affairs}, supra 78, at 30 (describing programme under which LDCs can obtain debt relief after meeting “certain criteria”). Donor states, in contrast, merely face an increasingly disappointed Ban Ki-Moon, U.N. Secretary General, when they fail to meet promised goals. Id. at 3; see also Celia Dugger, \textit{U.S. Agency’s Slow Pace Endangers Foreign Aid}, \textsc{N.Y. Times}, Dec. 7, 2007, at A1 (noting that the Millennium Challenge Corporation, a federal agency established almost four years ago, has spent only $155 million of the $4.8 billion approved for aid projects).

\textsuperscript{133} See, e.g., Rosen, supra note 134. Some charities are criticized. See, e.g., Christopher Dickey, ‘I Was Transformed’: Angelina Jolie on Refugees and Fame, \textsc{Newsweek}, Mar. 11, 2007, http://www.newsweek.com/id/34023 (asking Jolie, “Do you worry about people who say this is celebrity tourism?”, to which Jolie responded, “At the end of the day . . . a lot of criticism could keep a lot of people from doing this kind of work. [A] lot of people . . . just don’t want to combine artists with foreign policy. And hey, I understand.”).
poor. Furthermore, charity does not mandate a careful distribution of costs or benefits, or provide an antidote for donor fatigue.

Finally, even in the case of these private charities, the lion’s share of benefits raised remains in the developed states. Western advertising firms, for example, have been the major beneficiaries of the widely recognized “Red” campaign. Red companies spent as much as $100 million in advertising to raise $18 million for Africa. Moreover, the Red companies stop giving as consumers stop spending. Each of these variables make evident that private charity is no panacea for the problem of global poverty.

CONCLUSION: What About Today?

This is a question that neither Marx nor the postmodernists deign to answer, for similar reasons. For Marx, any answer is subject to the “false consciousness” that inspires it; that is, the futile hope that there is a possibility of authentic “species-life” within capitalism. For the postmodernists, the question shows the questioner’s inability to let go of the Enlightenment metanarrative. Surely reason and science, pumped up by our unprecedented ability to generate and manipulate data, will lead to a solution. Alice cannot stop arguing with the Queen.

Perhaps, this Article suggests, she is wasting her time. As Schlag observes, “One might think that destruction is inherently bad and con-
struction inherently good, but . . . it all depends on what is being destroyed and what is being constructed." As Roy Boyne and Ali Rattansi point out, there is a “postmodernism of ‘resistance’ as well as a postmodernism of ‘reaction.’”

Neither should be left unprobed.

You do not have to be a Marxist to share Marx’s conviction that “the destiny of our world as a whole is tied up with the condition of its poorest and most disadvantaged members.” Nor do you have to be a Marxist to realize that the playing field is not level, and that the winners may not even notice. Likewise, you do not have to be a postmodernist to reject the metanarrative of development or to doubt that rich celebrities and more shopping will promote distributive justice. Nor, must you accept the metanarrative of development to believe that the lives of the poorest should, and can, be better. Indeed, it may be necessary to destroy that metanarrative, or “turn it inside out” as Jeffrey Dunoff suggests, to even imagine what might actually work.

Dunoff urges would-be reformers to step aside and leave “development” to those who would be developed. Rittich takes a similar position by urging the would-be developers to “create space for local alternatives.” She reminds us that her advice is grounded in the foundational norm of self-determination, “the intuition behind [which] . . .

140 Boyne & Rattansi, supra note 91, at 29.
141 Judt, supra note 21, at 9.
144 Dunoff, supra note 143. As Easterly concludes: “Aid won’t make poverty history, which Western aid efforts cannot possibly do. Only the self-reliant efforts of poor people and poor societies themselves can end poverty, borrowing ideas and institutions from the West when it suits them to do so.” Easterly, supra note 46, at 382–83; see also Skeel, supra note 84, at 699 (citing Milhaupt and Pistor for the proposition that “[i]nternally generated changes will prove more successful than pure transplants . . . and the effectiveness of transplants will vary depending on how well the local interests adapt them to local circumstances.”). See generally Samantha Powers, For Terrorists, a War on Aid Groups, N.Y. TIMES, Aug. 19, 2008, at A19 (discussing the “nationaliz[ation]” of foreign field operations by “sending conspicuous Westerners home”).
145 Rittich, supra note 14, at 738; see also Collier, supra note 9, at 191 (“Westerners have to give up our grand ambitions. Piecemeal problem-solving has the best chance of success.”) (citing William Easterly).
is that important . . . legal reforms . . . should be made . . . by those who
will have to live with the consequences.”  

Taking such advice does not mean that the rich North should dis-
engage from the poor South, however, because the time for that has
passed. Neither should reformers forget earlier efforts and earlier
failures. In the 1970s, for instance, the industrialized states attempted
to block a major initiative by the former colonies of the European
powers to establish a New International Economic Order (NIEO). Their
numbers enabled the former colonies to pass resolutions in the Gen-
eral Assembly over the objections of the Western industrialized states.
Nevertheless, when Libya tried to nationalize Western property without
adequate compensation, as the NIEO would have allowed, it was firmly
rebuffed.

But it is not too late to ask whether, as Marxists suggest, interna-
tional economic law’s most important client is the neoliberalism that
created it, or whether as the postmodernists might argue, “interna-
tional economic law” is not a subject with the capacity to change direc-

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146 See Rittich, supra note 14, at 738. This might include simply ignoring the advice of Western experts. Malawi, for example, went from famine to surplus by helping farmers buy fertilizer, contrary to the advice of the World Bank. Celia W. Dugger, Ending Famine, Simply by Ignoring the Experts, N.Y. Times, Dec. 2, 2007, at A1.

147 See, e.g., Jonathan Harr, Lives of the Saints: International Hardship Duty in Chad, New Yorker, Jan. 5, 2009, at 47 (describing vast refugee camps entirely dependent on foreign aid for daily sustenance). Easterly, too, recognizes the need for aid “in the meantime”: “But aid that concentrates on feasible tasks will alleviate the sufferings of many desperate peo-
ple in the meantime. Isn’t that enough?” Easterly, supra note 46, at 383.

148 The former colonies, then newly-independent states, were known as the “Group of 77.” See U.N. Declaration on the Establishment of a New International Economic Order, G. A. Res. 3201 (S-VI), U.N. Doc. A/9556 (May 1, 1974). This initiative gave light to the fact that the developing countries constituted seventy percent of the world’s population, but accounted for only thirty percent of the world’s income. See id ¶ 1. Some argued that the developed states owed them compensation for colonialism and the benefits the developed states still reaped from it. See, e.g., Kennedy, supra note 14, at 126–27 (noting that for those who possess wealth, surrendering more of that wealth begins to look confiscatory); R.P. Anand, Attitude of the Asian-African States Toward Certain Problems of International Law, 15 Int’l. & Comp. L. Q. 55, 55–56 (1966) (discussing international law and the increasing involvement of Asian and African states). Accordingly, the NIEO was interpreted very dif-
ferently in different places. The American financial and corporate establishment found it confiscatory—although the liberal intellectuals were inclined to interpret it more mod-
estly. These liberal intellectuals viewed NIEO as a global version of policies that had be-
come politically acceptable in the United States during the New Deal. Differently, in the
developing countries, the NIEO was often seen as the absolute minimum demanded by ele-
mental standards of fairness.

tion. Rather, like normative legal thought, “[international economic law] will [simply] tell you what to do even though there is not the slightest chance that you might actually be in a position to do it.”

There may be little to lose by “laying down the law,” as Schlag suggests, and recognizing that the Queen, along with her entourage, is nothing but a pack of cards.

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151 Schlag, supra note 101, at 28; see Howse, supra note 19, at 1534 (finding that Stiglitz shows that “problems with global economic liberalism identified by the antiglobalizers—such as environmental commons issues, the democratic deficit, and weak and corrupt states—require solutions at the global level”); Williams, supra note 20, at 1 (noting that “Marx long ago observed the way in which unbridled capitalism became a kind of mythology, ascribing reality, power and agency to things that had no life in themselves”). This being said we are left asking who, exactly, can provide such solutions?

152 See Carroll, supra note 1, at 124. This is the realization, of course, with which the dreaming Alice finally awakes. See id.
BEYOND TORTURE: THE NEMO TENETUR PRINCIPLE IN BORDERLINE CASES

Luis E. Chiesa*

Abstract: The Latin phrase nemo tenetur seipsum accusare means roughly “no man has to accuse himself.” It is the basis of our rights against self-incrimination and forced inculpation. It protects against three practical problems associated with confessions: (1) untrustworthy confessions; (2) involuntary confessions; and (3) confessions provoked through unacceptable force. This article argues that the Nemo tenetur principle was intended primarily to avoid the third problem: confessions obtained through improper methods. It examines the arguments for and against justifying the principle as a protection against either untrustworthy or involuntary confessions. The article also develops a framework to aid in the identification of improper methods of interrogation. Finally, it concludes by applying this framework to three hypothetical cases and arguing that only confessions obtained through unacceptable force should be barred.

INTRODUCTION—THREE BORDERLINE CASES

The maxim nemo tenetur seipsum accusare (the “Nemo tenetur principle”) comes from Latin and is usually translated as “no one need accuse himself.” In the United States, this principle is often identified with the right against self-incrimination. In civil law countries, the Nemo tenetur principle guarantees at least five rights of the defendant in a

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1 See also Mark A. Godsey, Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination, 93 CAL. L. REV. 465, 479 (2005) (tracing the development of the Nemo tenetur principle from the use of “imprisonment, exile, and physical torture to punish silence and to provoke suspects to confess to heresy and other crimes”). See generally Claus Roxin, La Evolución de la Política Criminal, el Derecho Penal y el Proceso Penal 123–38 (Tirant Lo Blanch ed., Gómez Rivero & García Cantizano trans., 2000) (author trans.).

2 See Roxin, supra note 1, at 123–38; see also Miranda v. Arizona, 384 U.S. 436, 442–43 (1965) (quoting Brown v. Walker, 161 U.S. 591, 596–97 (1896)) (discussing the origin of the Nemo tenetur principle and how it became part of fundamental constitutional law); Godsey, supra note 1, at 480 (noting that “the doctrine of Nemo tenetur and its abhorrence of the government use of torture and coercive interrogation techniques drove the self-incrimination clause’s ultimate inclusion in the Bill of Rights”).
criminal trial: (1) the right to remain silent; (2) the right not to be called to testify; (3) the right to speak to an attorney before incriminating oneself; (4) the right not to be coerced into inculpating oneself; and (5) the right not to incriminate oneself in a judicial proceeding.\textsuperscript{3}

The main evil the \textit{Nemo tenetetur} principle seeks to avoid is the official use of torture as a means for obtaining incriminating testimony.\textsuperscript{4}

The rationale behind excluding self-incriminating statements obtained through the use of torture can be explained in three different ways. First, confessions obtained by force or violence may not be trustworthy, because a suspect ordinarily would be willing to say anything to stop such mistreatment.\textsuperscript{5} Second, using torture to obtain incriminating statements violates a suspect's autonomy and undermines the volun-

\textsuperscript{3} See \textit{Roxin}, \textit{supra} note 1, at 123–38. Although the United States Constitution protects the same rights, not all derive from the Fifth Amendment's protection against self-incrimination. \textit{See U.S. Const.} amend. V; \textit{see also Miranda}, 384 U.S. at 471–74 (holding that the Fifth Amendment privilege against self-incrimination affords suspects in custodial interrogation the right to counsel); \textit{Massiah v. United States}, 377 U.S. 201, 206–07 (1964) (holding that the government may not deliberately elicit incriminating statements from a suspect after initiation of criminal proceedings against him unless the suspect's attorney is present). For example, the right not to be coerced into incriminating oneself derives from the Fifth and Fourteenth Amendments' Due Process Clauses. \textit{See U.S. Const.} amend. V, XIV. Additionally, the right to speak to an attorney before incriminating oneself comes partly from the protection against self-incrimination and partly from a defendant's Sixth Amendment right to be assisted by counsel. \textit{See Miranda}, 384 U.S. at 471–74 (holding that the Fifth Amendment's privilege against self-incrimination affords suspects in custodial interrogation the right to counsel); \textit{Massiah}, 377 U.S. at 205–07 (holding that the government may not deliberately elicit incriminating statements from a suspect after initiation of criminal proceedings against him unless the suspect's attorney is present).

Therefore, strictly speaking, the right against self-incrimination does not have the same scope in civil law countries and in the United States. \textit{See Kai Ambos, The Right of Non-Self-Incrimination of Witnesses Before the ICC}, 15 \textit{Leiden J. Int'l L.} 155, 166 (2002). This article uses the term \textit{Nemo tenetetur} to include all five rights, which is broader than it is generally used in the United States. \textit{See id.} at 159–62. Ultimately, what matters is that, regardless of their source, the guarantees derived from the \textit{Nemo tenetetur} principle are legally binding both in the United States and continental Europe. \textit{See Godsey, supra} note 1, at 479–81; \textit{Ambos, supra}, at 166.

\textsuperscript{4} \textit{See Godsey, supra} note 1, at 479–81.

\textsuperscript{5} \textit{See In re Gault}, 387 U.S. 1, 47 (1966) (“The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth.”). Early cases addressing the admissibility of confessions in state criminal trials required exclusion of such confessions primarily (and perhaps exclusively) because of their unreliability, but as the course of adjudication proceeded, it became clear that confessions would be held “involuntary” and hence inadmissible, even when their reliability was clearly established. \textit{See, e.g., Brown v. Mississippi}, 297 U.S. 278, 285–87 (1936). Indeed, in 1961, in \textit{Rogers v. Richmond}, the Supreme Court held that a court assessing a voluntariness claim could not even consider the fact that the police tactics would not tend to produce a false confession. 365 U.S. 534, 543–44 (1961).
tariness of the confession. If torture is used to extract a confession, the trustworthiness of the confession is doubtful, the involuntariness of the confession is obvious, and the appropriate-ness of the officers’ conduct is questionable. If all three justifications for excluding a confession are present, then the confession will likely not be admitted into evidence. If, however, the confession is either trustworthy, voluntary, or obtained without resorting to inappropriate conduct, the inadmissibility of such confession is less clear. Consider the following three examples:

The False Confession Case. John goes to the police and confesses to having committed murder. The evidence gathered by the police overwhelmingly suggests that John falsely confessed in order to protect Joseph, his son and chief suspect of the crime.

The Truth Serum Case. Luke dissolves several pills of Amytal, a truth serum, into Peter’s drink. Peter, unaware that it contains the substance, takes the drink. A couple of hours later, Peter is lawfully arrested and interrogated by the police about his possible participation in a robbery. Peter, who had participated in the robbery, confesses to his role. The police do not know and have no reason to suspect Peter is under the influence of Amytal. Later investigation reveals independent evidence which fully confirms Peter’s confession.

The Unnecessary Threat Case. Maria is arrested and interrogated by the police. Just as Maria begins to confess, a police officer interrupts her, threatening to beat her up if she does not incriminate herself. Maria then makes several inculpa-

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6 See Dickerson v. United States, 530 U.S. 428, 433–34 (2000) (summarizing the role of the voluntariness test in confession jurisprudence through the past century); Arizona v. Fulminante, 499 U.S. 279, 285–86 (1991); Edward J. Imwinkelried et al., Courtroom Criminal Evidence § 2303 (3d ed. 1998) (“To successfully offer an admission or confession into evidence, the prosecutor must comply with . . . the voluntariness doctrine . . . . The voluntariness doctrine requires that admissions and confessions be shown to have been made voluntarily.”); Wayne R. Lafave et al., Criminal Procedure § 6.2(b) (3d ed. 2000) (“This due process test is customarily referred to as the ‘voluntariness’ requirement, the term used by the Court in enunciating the due process requisites for admissibility.”).

7 See City of Oklahoma City v. Tuttle, 471 U.S. 808, 843 n.33 (1985) (Stevens, J., dissenting) (“The great advantage of police compliance with the law is that it helps to create an atmosphere conducive to community respect for officers of the law that in turn serves to promote their enforcement of the law.”) (quoting Roger J. Traynor, Lawbreakers, Courts, and Law-Abiders, 41 J. St. B. Cal. 458, 478 (1966)).
tory statements. Other evidence introduced by the state at trial corroborates these statements. At her trial, Maria’s counsel makes a motion to suppress the confession. During the hearing on that motion, Maria testifies that the police officer’s threat did not influence her decision to confess.

In the first example, the *false confession case*, the main reason to exclude the incriminating statements is that there are good reasons to believe that they might be false.\(^8\) John’s decision to confess, however, was completely voluntary. Moreover, the police did not use any inappropriate interrogation techniques to extract the confession.

The second example, the *truth serum case*, presents a different problem. Peter’s confession was independently corroborated by the officers. As such, it cannot be excluded on the grounds that it lacks probative value.\(^9\) Furthermore, because the officers were unaware that Peter had taken Amytal, they could not have intentionally taken advantage of its effects. Consequently, the confession cannot be excluded on the grounds that the officers used inappropriate interrogation methods. The most powerful argument to exclude this confession is that it was involuntary, since the truth serum substantially diminished Peter’s ability to freely choose whether or not to confess.

Finally, in the third example, the *unnecessary threat case*, the confession can be challenged because of the inappropriate methods used in interrogation. In that example, the confession is clearly trustworthy. Moreover, Maria’s testimony during the suppression hearing reveals that the officers’ threat did not influence her decision to confess and

\(^8\) See Hysler v. Florida, 315 U.S. 411, 413 (1942) (holding that “conviction through the use of perjured testimony . . . violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law”) (citation omitted); Mooney v. Holohan, 294 U.S. 103, 111–12 (1935) (holding that the use by a state of testimony known by its “prosecuting authorities” to be false is a denial of due process of law). *But see* Colorado v. Connelly, 479 U.S. 157, 166 (1986) (explaining that courts should not have to “divine a defendant’s motion for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision”); Lisenba v. California, 314 U.S. 219, 236 (1941) (“The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.”). *See generally* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 121–35 (1997) (giving examples of potentially false confessions and analyzing the interrogation strategies in certain cases).

\(^9\) See Hysler, 315 U.S. at 420–22; Mooney, 294 U.S. at 112; *see also* White, *supra* note 8, at 111 (“Interrogation methods likely to lead to untrustworthy confessions should be prohibited, and safeguards designed to reduce the likelihood that false confessions will be admitted . . . should be adopted.”).
therefore that her confession was entirely voluntary. As a result, the best argument in favor of suppressing this confession is that the police used an inappropriate method of interrogation.  

Whether the confessions in these three examples violate the *Nemo tenetur* principle depends on whether the main purpose of this safeguard is: (1) to exclude untrustworthy evidence; (2) to protect the suspect’s autonomy; or (3) to prohibit the use of inappropriate methods of interrogation.  

This Article argues that the main justification of the *Nemo tenetur* principle is as a protection against the use of improper methods of investigation. Under this interpretation, the confessions in the *false confession case* and the *truth serum case* do not violate the *Nemo tenetur* principle. In contrast, under this interpretation, the confession in the *unnecessary threat case* did violate this principle because although the statement in that example was trustworthy and voluntary, the methods of interrogation used by the officers were inappropriate. The argument will be developed in three parts.

Part I of the article argues that the *Nemo tenetur* principle should not be justified solely as a protection against the admission of untrustworthy confessions. First, it examines the counterarguments in favor of justifying the principle primarily as a protection against untrustworthy confessions. Second, it discusses *Spano v. New York* in which the Supreme Court suggested the *Nemo tenetur* principle should not be justified alone on the trustworthiness or untrustworthiness of a confession. As such, this part concludes that there is no necessary connection between a confession’s trustworthiness and its admissibility and therefore that the

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10 See *infra* Part III, for a discussion of what constitutes an inappropriate method of interrogation. See also *Beecher v. Alabama*, 389 U.S. 35, 38 (1967) (suggesting threats of force were inappropriate); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (suggesting promises of protection from force were inappropriate); *Ashcraft v. Tennessee*, 322 U.S. 143, 158–59 (1944) (holding that thirty-six hours of continuous interrogation is “inherently coercive”); *Brown*, 297 U.S. at 285–87 (suggesting confessions induced by force were inappropriate).


12 This does not mean that there are no arguments in favor of excluding these confessions. In the *false confession case*, for example, one could justify excluding the confession not because it was obtained in violation of the *Nemo tenetur* principle, but because it is false. See *Hyster*, 315 U.S. at 413; *Mooney*, 294 U.S. at 112; see also *White*, supra note 8, at 156 (concluding that interrogation methods leading to false confessions violate due process).

Nemo tenetur principle should not be justified primarily as a protection against untrustworthy statements.\textsuperscript{14}

Part II advances three arguments against using the voluntariness of the confession as the standard to determine whether it has been obtained in violation of the Nemo tenetur principle. The first part argues that most, if not all, legal systems sanction methods of interrogation which call into question the voluntariness of a suspect’s confession. The second part argues that the involuntariness of a confession is determined almost entirely by normative criteria, based on society’s legitimate expectations of moral strength.\textsuperscript{15} The third part discusses recent developments in neuroscience suggesting that human behavior is most likely determined almost entirely by factors outside an individual’s control. It then asserts that if these findings were true, every human act would be considered involuntary. Consequently, examining the “voluntariness” of a statement would be a pointless endeavor.

Part III argues that the main purpose of the Nemo tenetur principle is to curb inappropriate police conduct. It contends that the appropriateness of the interrogation methods used by the state should be evaluated before looking to the statement’s trustworthiness or the suspect’s freedom of choice at the time of the confession. From this conclusion,

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\item[\textsuperscript{14}] See Smith v. United States, 348 U.S. 147, 153–54 (1954). For example, uncorroborated confessions are typically unreliable, although they might have been obtained by methods that are perfectly compatible with the Nemo tenetur principle. See id. Conversely, many confessions obtained by torture are later corroborated and are, therefore, reliable. It would be a mistake, however, to conclude that because a confession obtained by physical coercion was trustworthy, it did not violate the Nemo tenetur principle.

It is important to distinguish between the admissibility of an uncorroborated confession and the sufficiency of an uncorroborated confession necessary to establish a conviction. Compare Smith, 348 U.S. at 152–53, and Warszower v. United States, 312 U.S. 342, 345–47 (1941), with Ray v. State, 615 S.E.2d 812, 817 (Ga. Ct. App. 2005) (explaining that when evaluating sufficiency of a conviction, a court does not weigh the evidence or credibility), and Commonwealth v. Kimball, 73 N.E.2d 468, 470 (Mass. 1947) (“The trend . . . is in the direction of eliminating quantitative tests of sufficiency of evidence.”). Although most jurisdictions allow uncorroborated confessions to be admitted into evidence, a majority hold that that a defendant’s uncorroborated incriminating statements are not sufficient evidence to sustain a conviction. See, e.g., Smith, 348 U.S. at 156; Warszower, 312 U.S. at 347–48. A minority of jurisdictions, however, allow the state to secure a conviction solely on the basis of an uncorroborated statement. See, e.g., Ray, 615 S.E.2d at 816–17; Kimball, 73 N.E.2d at 470. The Supreme Court in Smith stated that the purpose of requiring corroborating evidence is to “prevent ‘errors in convictions based upon untrue confessions’ and to exclude statements that although ‘not . . . involuntary within the meaning of [the due process protections against coerced confessions],’ are of suspect reliability. Smith, 348 U.S. at 153 (quoting Warszower, 312 U.S. at 347).

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it reasons that the question of whether an interrogation violates the *Nemo tenetur* principle is above all a normative one. In other words, the relevant question is whether the confession was obtained by interrogation techniques that are incompatible with the fundamental values that inform the United States’ system of justice.

Part III also develops a framework to assist in the identification of interrogation methods which violate the rights guaranteed by the *Nemo tenetur* principle. The four categories of improper methods included in this theoretical framework are: (1) *exploitation* of a suspect by the police; (2) physical or psychological *coercion* of a suspect; (3) certain kinds of *deception*; and (4) the *transgression* of a mutually agreed upon rule to obtain an unfair advantage over a suspect. Finally, the article concludes by applying this framework to the three hypothetical cases outlined above and argues that only the confession obtained through improper methods should be barred.

I. THE *NEMO TENETUR* PRINCIPLE AND THE CONFESSION’S TRUSTWORTHINESS

The *Nemo tenetur* principle should not be justified primarily as a protection against the admission of untrustworthy confessions. An examination in favor of this approach reveals the danger in making the inadmissibility of a confession hinge on its trustworthiness. Were the principle justified primarily as a protection against untrustworthy statements, then the admissibility of a confession would depend primarily on its trustworthiness. Indeed, the United States Supreme Court has said that the right against self-incrimination, derived from the *Nemo tenetur* principle, cannot be justified solely as a protection against the admission of confession.

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16 The clearest cases of *exploitation* occur when the police deliberately place the suspect in a condition of defenselessness or ignorance with the purpose of taking advantage of him. See Stuart P. Green, *Lying, Cheating, and Stealing* 95 (2006). The paradigmatic example of physical coercion employed against the suspect is torture. See id. at 93–95. It is unclear whether the use of all types of deception should be considered incompatible with the *Nemo tenetur* principle. See id. at 95; see also infra Part III. It may be worth distinguishing, for example, between *lying* to obtain a confession and *misleading* the suspect into confessing. See Green, supra, at 95; see also infra Part III. A case of *transgression* takes place when the police obtain a confession from a defendant without allowing him to speak with his attorney or when the defendant gives up his right to legal representation after the criminal proceedings have begun. See *Massiah*, 377 U.S. at 206–07; see also infra Part III.


18 See id.

19 See id.
of untrustworthy confessions. As such, for a confession to be deemed inadmissible, it need not be deemed untrustworthy.

A. The Emergence of Trustworthiness as a Yardstick for Determining the Admissibility of a Confession

One of the earliest cases in which a U.S. court held a confession inadmissible because it had been obtained by torture was *Hector v. State*, which the Missouri Supreme Court decided in 1829. In that case, the defendant, a slave, had been arrested for burglary. He was interrogated and beaten “all night.” During the course of this beating, Hector confessed to the burglary and said that if the police “would release him he would find the [missing] money.” When he was released, however, he was not able to locate it. At trial, Hector’s counsel moved to suppress the confession and other statements made during the interrogation. The trial court denied the motion and admitted the statements as evidence.

In its opinion reversing the trial court, the Missouri Supreme Court expressed serious doubts about the confession’s trustworthiness. It noted that Hector had probably confessed “to gain a respite from pain.” The court also noted that the confession had not been corroborated by other evidence. It is unclear, however, whether the court would still have excluded the confession if Hector had been able tolocate the money. This opinion highlights the link between the confession’s untrustworthiness and its inadmissibility by emphasizing that Hector’s confession was not reliable and was “most probably” made solely to stop the beating. Nevertheless, it also shows the danger of making the admissi-

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20 See id.
21 See id.
22 See Hector v. State, 2 Mo. 166, 168 (1829).
23 See id. at 167.
24 See id.
25 See id.
26 See id.
27 See Hector, 2 Mo. at 167.
28 See id.
29 See id.
30 See id.
31 See id. (noting the confession’s untrustworthiness “was strengthened by the fact that no money was found where the party and prisoner went to look for it”).
32 See Hector, 2 Mo. at 168.
33 See id. Similarly, in *Brown v. Mississippi*, the defendant, who had already been arrested and tortured once, was arrested a few days later and again “severely whipped.” 297 U.S. 278, 281–82 (1936). The deputy told the defendant that “he would continue the
bility of a confession obtained by improper interrogation techniques hinge on its trustworthiness. For example, if Hector had guessed the location of the money correctly or if his interrogators had suggested the correct location, the court may have found his confession trustworthy and admitted it even though it was obtained through inappropriate methods.

Today, about 180 years after Hector, the debate continues over whether a confession’s admissibility should be determined based on its trustworthiness. In the United States, for example, many have argued that terrorists should not be tortured because the information obtained is unreliable. This argument was recently invoked by Senator John McCain, who pointed out that “in [his] experience, abuse of prisoners often produces bad intelligence because under torture a person will say anything he thinks his captors want to hear.” The similarities between McCain’s statements and the ones proffered by the court in Hector are striking and illustrate that the trustworthiness of the information obtained by torture is still a tempting way to determine the admissibility of a confession.

Excluding confessions primarily on “reliability” grounds is problematic because the state could devise methods of torture which produce trustworthy statements. Were the Nemo tenetur principle justified

whipping until he confessed.” Id. At that time, the defendant “agreed to confess to such a statement as the deputy would dictate.” Id.

34 See Hector, 2 Mo. at 167–68.
36 See, e.g., John McCain, Torture’s Terrible Toll, Newsweek, Nov. 21, 2005, at 34.
37 See id.
38 See Wigmore, supra note 11, § 824. As early as 1904, Wigmore suggested that the test for determining the admissibility of confessions obtained as a result of questionable police tactics should be whether the police conduct was “such that there was any fair risk of a false confession.” Id. Wigmore’s test asks whether the interrogation employed by the police was of such a nature that it created a fair risk of a false confession regardless of whether it is proven that the content of the confession was true. Id. Some scholars still defend reliability tests for determining the admissibility of a confession similar to the one advocated by Wigmore more than a century ago. See, e.g., Thomas, supra note 11, at 1294–95.
39 See Thomas, supra note 11, at 1293–96. A recent report suggests that torture might lead to reliable information. See Scott Shane, Inside a 9/11 Mastermind’s Interrogation, N.Y.
primarily as a protection against untrustworthy statements, then the admissibility of a confession would depend primarily on its trustworthiness. The danger of this “reliability” argument, therefore, is that it opens the door to the legalization of torture if the information obtained is trustworthy. To remain respectful of human dignity, it would seem that such statements should not be admitted into evidence regardless of their reliability.

Therefore, the primary justification of this principle should not be that it is a safeguard against untrustworthy statements. Although untrustworthy statements will sometimes be barred by the Nemo tenetur principle, the primary justification should be broader so as to exclude statements obtained through improper methods of interrogation in spite of their trustworthiness.

B. The Limits of Trustworthiness in the Confession Context

The United States Supreme Court has said that the right against self-incrimination—which derives from the Nemo tenetur principle—should not be justified primarily as a protection against untrustworthy confessions. In Spano v. New York, the Supreme Court examined the link between a statement’s trustworthiness and its admissibility under the Due Process Clause guarantee against coerced confessions. In that case, the issue was the admissibility of a confession obtained after interrogating the suspect from approximately 7:00 p.m. until 4:00 a.m. The evidence presented at trial revealed no serious doubts about the truth-

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Times, June 22, 2008, at A1 (explaining how after being tortured, Khalid Sheikh Mohammed became “quite compliant” and produced useful intelligence). But see Mark Bowden, The Ploy, Atlantic, May 2007, at 54 (describing how interrogators, without torture, were able to produce reliable intelligence from people from Abu Musab al-Zarqawi’s inner circle that led to his eventual killing). Wigmore’s “reliability” tests would not bar the admissibility of incriminating statements obtained through torture as long as the government could prove that method of torture predictably and reliably produced useful intelligence. See Wigmore, supra note 11, § 824.

40 See Wigmore, supra note 11, § 824; Charles T. McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Tex. L. Rev. 239, 245 (1946) (“[T]he predominate motive of the courts has been that of protecting the citizen against violation of his privileges of immunity from bodily manhandling by the police, and from other undue pressures . . . of the ‘third degree.’”); Thomas, supra note 11, at 1293–94; White, supra note 8, at 138.

41 See Wigmore, supra note 11, § 824; McCormick, supra note 40, at 245; White, supra note 8, at 138.

42 See infra Part III for further discussion.

43 See Spano, 360 U.S. at 320–21; Godsey, supra note 1, at 480.

44 See Spano, 360 U.S. at 320–21.

45 See id. at 317, 319, 322.
fulness of the confession and, consequently, the guilt of the defendant. Rather, the Court ruled that the confession was inadmissible because it had been obtained in violation of the suspect’s right to not be coerced into self-incrimination. The Supreme Court did not ground its exclusion of the confession in the confession’s trustworthiness. Chief Justice Warren justified the Court’s holding by pointing out that:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

This opinion suggests that justifying the exclusion of a statement obtained by improper interrogation techniques solely on the grounds that the statement is not trustworthy may inadvertently justify the admission of truthful statements obtained through torture. For example, in Spano, independent evidence showed the confession was most likely truthful. Therefore, if the statement’s admissibility was determined mainly by its trustworthiness, the confession obtained after eight straight hours of interrogation may have been admitted.

The Court, however, largely ignored the reliability of the confession. Instead, it focused on factors that had little to do with the confession’s trustworthiness. For example, it noted that the suspect was a poorly educated foreigner with a history of emotional instability. It also noted that one police officer who participated in the interrogation was a good friend of the suspect. This officer told the suspect that the officer would lose his job if the suspect refused to confess.

This decision illustrates how even a trustworthy confession may still violate the Nemo tenetur principle. Indeed, the Supreme Court, since

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46 See id at 324.
47 See id. at 320–21, 324.
48 Id. at 320–21.
49 See Spano, 360 U.S. at 324.
50 See id.
51 See id. at 320–21, 324.
52 See id. at 320–21.
53 Id. at 321–22.
54 Spano, 360 U.S. at 323.
55 Id. The Court also based its holding on the interrogation’s duration. See id.
56 See id. at 320–21; see also White, supra note 8, at 112–13.
Spano, has explicitly stated that some confessions are inadmissible even if they are trustworthy, because “certain interrogation techniques . . . are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.”\(^\text{57}\) Moreover, the Court has stated that “the aim [of the right against self-incrimination] is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.”\(^\text{58}\)

II. The Nemo Tenetur Principle and the Voluntariness of the Confession

It has been suggested that the Nemo tenetur principle protects against “involuntary” confessions.\(^\text{59}\) This view is grounded on the notion that the right to be free from coercive interrogation stems from respect for the suspect’s autonomy.\(^\text{60}\) This justification of the Nemo tenetur principle has been influential both in civil law and common law countries.\(^\text{61}\) In Spain, for example, it has been stated that the exercise of the right against self-incrimination, which derives from the Nemo tenetur principle, seeks to ensure “the . . . freedom and spontaneity” of the suspect.\(^\text{62}\) Similarly, the United States Supreme Court has pointed out that the right against self-incrimination is intended to protect the “mental freedom” of the subject.\(^\text{63}\)

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\(^\text{58}\) Colorado v. Connelly, 479 U.S. 157, 167 (1986) (quoting Lisbena v. California, 314 U.S. 219, 290 (1941) (holding that there must be coercive police activity to determine a confession involuntary under the Due Process Clause)).

\(^\text{59}\) See, e.g., Dickerson v. United States, 530 U.S. 428, 433–34 (2000) (summarizing the role of the voluntariness test in confession jurisprudence through the past century); Arizona v. Fulminante, 499 U.S. 279, 285–86 (1991) (“[A] ‘determination regarding the voluntariness of a confession . . . must be viewed in a totality of the circumstances.’”) (quoting State v. Fulminante, 778 P.2d 602, 608 (Ariz. 1988)); Imwinkelried et al., supra note 6, § 2303 (“To successfully offer an admission or confession into evidence, the prosecutor must comply with [the voluntariness doctrine] . . . . The voluntariness doctrine requires that admissions and confessions be shown to have been made voluntarily.”); Lafave et al., supra note 6, § 6.2(b) (“This due process test is customarily referred to as the ‘voluntariness’ requirement, the term used by the Court in enunciating the due process requisites for admissibility.”).

\(^\text{60}\) See Fulminante, 499 U.S. at 285–88.

\(^\text{61}\) See id.; Alberto Montón Redondo et al., Derecho Jurisdiccional III Proceso Penal 199 (Bosch 1995) (author trans.).

\(^\text{62}\) See Redondo, supra note 61, at 199.

\(^\text{63}\) Lyons v. Oklahoma, 322 U.S. 596, 602 (1944) (examining why coercion of a confession violates principles of liberty and justice).
At first glance, justifying the Nemo tenetur principle as a protection of a suspect’s autonomy does not seem objectionable. After all, the Fifth Amendment bars the government from compelling individuals to incriminate themselves. In fact, justifying the principle as a protection of the suspect’s freedom is more defensible than justifying it as a protection against untrustworthy confessions. Nevertheless the voluntary or involuntary nature of the statement should not be the primary factor in determining whether it was obtained in violation of the Nemo tenetur principle.

Conceiving the Nemo tenetur principle as a vehicle for guaranteeing voluntary confessions presents three different problems. First, suspects in almost every legal system can be lawfully compelled to confess in a way that may diminish the voluntariness of the confession. Second, the definition of voluntariness depends on normative criteria. Third, recent scientific research has challenged whether any act is voluntary. As a result, the Nemo tenetur principle should not be justified primarily as protection of a suspect’s autonomy.

A. Voluntariness in Domestic and Comparative Perspectives: The Problem of Immunity, Efficient Collaboration, and Punishment Mitigation in Exchange for a Confession

The first reason voluntariness should not be considered the primary justification of the Nemo tenetur principle is because suspects in almost every legal system can be compelled to confess in a way that calls into question the voluntariness of the confession. For example, for over 110 years, the Supreme Court has recognized that a suspect who receives immunity can be held in contempt for refusing to testify against himself. The justification for this practice is that a grant of immunity

64 See U.S. Const. amend. V.
66 See Brown v. Walker, 161 U.S. 591, 609–10 (1896) (holding that a witness with immunity was required to testify regarding his knowledge of an alleged offense and could not refuse on the grounds that doing so would result in self-incrimination); see also Kastigar v. United States, 406 U.S. 441, 453 (1972). In Kastigar, the Supreme Court decided that a
leaves a suspect in the same position as if he had invoked his right against self-incrimination because his statements cannot be used against him in a criminal proceeding.67

A statement made under threat of conviction for contempt, however, is not entirely voluntary.68 Consequently, the Fifth Amendment protection against self-incrimination cannot be dependent on the suspect’s freedom or spontaneity. If it were, then this practice of offering immunity in exchange for testimony would violate that right.69

The Rome Statute—ratified by the majority of countries in the world—also allows the use of immunity as a tool to compel a witness to testify.70 Yet, compelling a suspect to testify by giving him immunity is often frowned upon in civil law countries.71 Nevertheless, many countries allow the prosecution to offer a reduction in punishment for a suspect’s “efficient collaboration” with governmental authorities.72 In these cases, the government does not entirely compel self-incrimination.73

A person can be forced to testify if the State guarantees it will not use the self-incriminating statements or any evidence derived from those statements in a prosecution against the declarant. See Kastigar, 406 U.S. at 453. This type of immunity is known as “immunity from use.” See Ambos, supra note 3, at 164. Another type of immunity is “transactional immunity,” which is immunity from criminal liability for any transaction, matter, or thing discussed in compelled testimony. See id. “Immunity from use” grants less protection than “transactional immunity,” because it may allow the use of incriminating statements in a prosecution if there is independent incriminating evidence that is untainted by the suspect’s compelled statements. See id.

67 See Kastigar, 406 U.S. at 453; Ullman v. United States, 350 U.S. 422, 436 (1956) (holding that the Fifth Amendment privilege against self-incrimination only protects a witness from being compelled to give testimony that would result in criminal prosecution and therefore could not be invoked where the Immunity Act had removed the threat of prosecution for actions revealed by the compelled testimony).

68 See Ambos, supra note 3, at 172–74.

69 See generally Kastigar, 406 U.S. at 453.

70 See International Criminal Court, Rules of Procedure and Evidence, R. 74, Sept. 10, 2002, ICC-ASP/1/3 (Part II-A). Despite the fact that the international community endorsed this rule, Professor Kai Ambos has suggested that granting immunity as a means to force a witness to testify is incompatible with the Nemo tenetur principle. See Ambos, supra note 3, at 172–77. Rule 74(3) conflicts with the Nemo tenetur principle only if the principle is justified primarily as a protection against the admission of involuntary statements. See id. at 177. However, the Nemo tenetur principle should not be considered a means to ensure a voluntary confession. Rather, it should be conceived as a right to prevent the state from obtaining a confession by using inappropriate or abusive interrogation methods. See infra Part III.


72 See Farfán & Soledad, supra note 71, § 3.6. Colombia and Peru, among others, allow granting benefits in exchange for efficient collaboration. Id.

73 Id.
reduction in punishment, however, may increase the likelihood that the suspect will “waive” the rights afforded by the *Nemo tenetur* principle, thereby lessening the voluntariness of his confession.\(^{74}\)

Not all civil law countries regulate the legal effect of efficient collaboration.\(^{75}\) Most allow, however, a considerable mitigation of punishment where the suspect gives a “truthful confession” of his participation in the crime.\(^{76}\) Just like statements obtained in exchange for efficient collaboration, it is unclear whether a decision to confess which was induced by a promise of less severe punishment is really “voluntary” and spontaneous. Nevertheless, courts in civil law jurisdictions often allow this practice.\(^{77}\) Indeed, Spain’s Constitutional Court has even asserted that this practice is compatible with the *Nemo tenetur* principle.\(^{78}\) Because the “voluntary” character of this type of confession is questionable, the legitimacy of this practice must be based on a conception of the *Nemo tenetur* principle that is not grounded on the suspect giving the statement voluntarily.\(^{79}\)

As a result, the continental practice of granting benefits for efficient collaboration, like the practice of granting immunity in exchange for testimony in the United States, strengthens the argument against voluntariness as the primary justification of the *Nemo tenetur* principle. Neither practice can be reconciled with a right against self-incrimination unless one adopts a conception of the *Nemo tenetur* principle that is divorced from the voluntariness of the confession.\(^{80}\)

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\(^{74}\) *Id.*


\(^{76}\) See, e.g., *id.* at 20–21. This is the case, for example, in Argentina, Spain, Italy, and Germany. See *id.* at 38, 41; Farfán & Soledad, *supra* note 71, § 3.6.

\(^{77}\) See Farfán & Soledad, *supra* note 71, § 3.6.

\(^{78}\) See STC, May 25, 1987 (R.J., No. 75) (author trans.) (holding that the offer of sentence-mitigation in exchange for a suspect’s confession does not deprive a suspect of the fundamental right not to confess involuntarily).

\(^{79}\) See Farfán & Soledad, *supra* note 71, § 3.6. See generally Godsey, *supra* note 1, at 473 (discussing the departure in U.S. case law from “the involuntary confession rule”).

\(^{80}\) Compare Farfán & Soledad, *supra* note 71, § 3.6 (noting that a reduction in punishment may cause a suspect to “waive” the rights afforded by the *Nemo tenetur* principle, thereby lessening the voluntariness of his confession), with Godsey, *supra* note 1, at 473 (arguing that confessions should be inadmissible where they are compelled by imposing objective penalties on a suspect in order to punish silence and provoke speech).
B. The Difficulty of Identifying the Voluntariness of a Statement Without Appealing to Normative Criteria

The second reason voluntariness should not be the primary justification for Nemo tenetur is that the definition of voluntary depends heavily on normative criteria. In the third book of Nichomachean Ethics, Aristotle contends that an act must be considered voluntary if it is caused by an agent’s desire. Aristotle suggests that a person acts voluntarily if he agrees to commit a crime to spare the lives of his family because he has the option of committing or not committing the offense. Ultimately, Aristotle argues, the cause of his act is not the coercion under which he is placed, but his desire to save his family.

The Aristotelian definition of voluntariness is at the core of criminal theory. Indeed, the Aristotelian concept of voluntariness can be useful in some contexts. Nevertheless, it is broader than the notion of “voluntariness” as it is used by courts and commentators when analyzing the Nemo tenetur principle. For example, an incriminating statement made under torture is voluntary in the Aristotelian sense because the decision to incriminate oneself falls ultimately on the suspect. Such a confession, however, would not be considered voluntary under the Supreme Court’s jurisprudence today.

The concept of voluntariness used in the court’s current jurisprudence is more similar to the analysis under the affirmative defense of duress. Under that defense, an act carried out under coercion is gen-

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81 See Godsey, supra note 1, at 468–69.
83 See id. at 50.
84 See id.
85 See Joseph D. Grano, Confessions, Truth, and the Law 61 (1993) (stating that the “effort to distinguish voluntary from involuntary actions dates back at least to Aristotle”).
86 See id. at 61–62.
87 See, e.g., Dickerson, 530 U.S. at 433–34; Fulminante, 499 U.S. at 285–86; Grano, supra note 85, at 61–62 (“[F]or purposes of assessing blame and praise, we would find our standards . . . intolerably severe were voluntariness under Aristotle’s definition the only relevant consideration.”).
88 See Aristotle, supra note 82, at 50.
89 Compare id., with Dickerson, 530 U.S. at 433–34 (summarizing the role of voluntariness test in confession jurisprudence through the past century), and Fulminante, 499 U.S. at 285–86 (credible threat of violence resulted in a coerced confession in violation of defendant’s due process rights), and Grano, supra note 65, at 863 (documenting the “intolerable uncertainty . . . of the due process voluntariness doctrine”).
90 See Model Penal Code § 2.09 (1985) (prescribing the affirmative defense of duress only where the actor “engaged in criminal conduct because he was coerced to do so by the
erally considered to be voluntary. However, if the defendant is able to prove that his decision to succumb to the coercion was reasonable, he will not be punished for that coerced wrongful act. This defense is justified not because such acts are involuntary, but rather because society cannot fairly expect coerced actors to abstain from engaging in the illegal act when a person of reasonable firmness would have done the same. The defendant’s decision to succumb is analyzed under the “person of reasonable firmness” test. Under this test, a court examines whether a person of reasonable firmness in a similar situation with similar pressure would have abstained from engaging in a wrongful act. If the court concludes that a person of reasonable firmness would have resisted the pressure, then the defense does not apply.

A more accurate definition of voluntary under the Nemo tenetur principle would employ the same type of analysis. It would recognize that threats of torture or other types of coercion, while not completely obliterating the will, substantially reduce the subject’s ability to choose freely whether to confess or not. The subject still has a choice (to confess or to be tortured), but these remaining options are not particularly attractive.

This definition of voluntary, however, raises two questions. First, how much must the suspect’s ability to choose be reduced so that his act should be considered involuntary? Second, when are the remaining courses of action so unattractive that the suspect’s decision to confess should be considered involuntary?

Suppose a suspect has asserted his Fifth Amendment right not to incriminate himself. The police, reasoning that continued interroga-

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91 See, e.g., Model Penal Code § 2.01 (1985) (prescribing that only unconscious body movements or body movements that are the product of a reflex, convulsion, or hypnosis ought to be considered “involuntary” for the purposes of criminal law). The Code suggests acts committed under duress or coercion are voluntary. See id. Therefore, duress or coercion is only a defense to a crime if the defendant’s decision to succumb to the coercion is reasonable. Id. § 2.09.

92 See id. § 2.09.

93 See id.

94 See id.

95 Id.; see also Luis E. Chiesa, Duress, Demanding Heroism, and Proportionality, 41 Vand. J. Transnat’l L. 741, 753 (2008) (“Usually it would be unfair to punish someone for succumbing to a threat that a normal law-abiding citizen would have been unable to resist.”); Dressler, supra note 15, at 1385 (explaining that if a “person of reasonable moral strength cannot fairly be expected to resist the threat,” then the actor has a valid excuse).

96 See Dressler, supra note 15, at 1385.

97 See Grano, supra note 66, at 874–75.
tion will be useless, tell the suspect that he must return to his cell. The suspect, however, is terrified of his cramped and smelly cell and decides to incriminate himself rather than return. Alternatively, suppose the police, instead of merely ordering the suspect back to his cell, threaten to torture him if he does not confess.

Should the suspect’s confession in either scenario be considered voluntary? Was his choice so undermined by the fear of returning to his cell or his fear of being tortured that his confession should be considered involuntary? Can his confession be considered voluntary when his options (incriminating himself, being tortured, or returning to his cell) are unattractive?

To determine if the suspect’s ability to choose has been sufficiently reduced so as to render his act involuntary, one must compare his conduct with the conduct that a person of reasonable firmness would observe in his situation. Most people believe that confessions obtained by torture are involuntary because a person of reasonable firmness would confess under such treatment. In the second scenario, where the police threaten to torture the suspect, the suspect’s ability to act freely has been reduced to the point where his statement must be considered involuntary. A person of reasonable firmness would confess in order to avoid being tortured. A similar analysis could be used to determine if the suspect’s options were so unattractive that it must be concluded that his choice was involuntary. Given that a person of reasonable firmness would not consider confessing to a crime or submitting to torture to be attractive options, the decision to confess under these circumstances must be considered involuntary.

In this way, the “person of reasonable firmness” standard is eminently normative in nature. The “voluntariness” of the act is not determined by the mental pressure experienced by the suspect. Rather the “voluntariness” of the act is determined by examining whether the subject’s choice-making capabilities were reduced in an unfair manner.

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98 See Model Penal Code § 2.09; Chiesa, supra note 95, at 761–62; Dressler, supra note 15, at 1367–68.
99 See, e.g., Model Penal Code § 2.09; Chiesa, supra note 95, at 761–62; Dressler, supra note 15, at 1367–68.
100 See Chiesa, supra note 95, at 758.
101 See, e.g., Model Penal Code § 2.09; Chiesa, supra note 95, at 761–62; Dressler, supra note 15, at 1367–68.
102 See Model Penal Code § 2.09; Chiesa, supra note 95, at 761–62; Dressler, supra note 15, at 1367–68.
103 See Schulhofer, supra note 65, at 874 n.41.
104 See id.
ner.  

In the first scenario, where the police merely order the suspect to return to his cell, the suspect’s confession should be considered voluntary. It should be admissible even if it is demonstrated that he felt compelled to confess because of the mental pressure of returning to his cell. To reject the statement simply because of the suspect’s perceived mental pressure would lead to an overly subjective analysis. Confessions made by a suspect must be considered involuntary and consequently inadmissible only if the officers compromised the suspect’s voluntariness by using inappropriate methods as they did in the second scenario.

As the above scenarios show, the *Nemo tenetur* principle should not be primarily justified as a protection of a suspect’s “freedom” and “spontaneity.” Rather, the admissibility of confessions should be determined by examining whether the government unfairly constrained the suspect’s decision to confess rather than by inquiring into whether the suspect freely chose to incriminate himself.

C. Voluntariness and Neuroscience

The third reason voluntariness should not be the primary justification for the *Nemo tenetur* principle is because recent developments in neuroscience suggest that human behavior is most likely determined almost entirely by factors outside an individual’s control. These discoveries further undermine the argument that the *Nemo tenetur* principle should be justified primarily as a protection of a suspect’s autonomy.

Forty years ago, the neurophysicist Benjamin Libet made an extraordinary discovery. According to his research, the brain unconsciously makes the decision to act almost half a second before a person is aware of his desire or intent to carry out the act. These findings have been corroborated many times, most recently in 2008. The im-

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106 See Colorado v. Connelly, 479 U.S. 157, 167 (1986); infra Part III.
108 See id.
109 See id.
110 See Laurence R. Tancredi, Hardwired Behavior: What Neuroscience Reveals About Morality 71 (2005); Chun Siong Soon et al., Unconscious Determinants of Free Decisions in the Human Brain, 11 Nature Neuroscience 543, 543–45 (May 2008). Using functional MRI technology, Siong Soon and his colleagues were able to successfully predict the bodily movements of their human subjects up to seven seconds before they were aware of
plications of Libet’s experiments are monumental. If the intent to move our body develops after the brain has unconsciously made the decision to move it, it would appear that we do not have the ability to control our acts. These findings suggest that while we may think we consciously control our acts, in reality, our conduct is predetermined by unconscious processes.

According to some neuroscientists, this evidence suggests that our free will “is an illusion.” Others have even suggested that the conscious will is nothing more than a mood, like happiness or sadness. If, according to the results of these experiments, the brain is faster than conscious thought, “[i]t seems that it is not our conscious mind that makes the decision, but instead the sub-conscious mind.”

Philosopher and sociologist Jürgen Habermas explained the impact that neuroscience has had and will continue to have over the debate about free will in the following manner:

[Many] neuroscientists take the position that all mental acts and experiences are not merely instantiated by brain processes but rather are causally determined by brain states alone. If neurological research today already holds the key, as is claimed, to soon explaining any given motivation or deliberation exclusively on the basis of the nomologically determined interaction of neuronal processes, then we would have to view free will as a fiction. For, from this perspective, we must no longer presuppose that we could have acted differently, nor that it was up to us to act one way rather than another. Indeed, within neurological descriptions, the reference to “us,” as agents, no longer makes any sense. Human behavior is then no longer decided by persons but rather fixed by their brains.
“Who or what is this ‘we’ that inhabits the brain? It is a commentator and interpreter with limited access to the actual machinery, more along the lines of a press secretary than a president or boss.”

Some have interpreted Libet’s findings to be compatible with the idea of free will. However, “nothing in the brain sciences would lead an independent observer to conclude that we must be libertarian agents.” Even those who assert that human beings have the ability to act voluntarily acknowledge that “there are at present no accepted scientific models” that indicate that our acts can be consciously controlled. They also acknowledge that there is currently no empirical evidence to suggest that our behavior is significantly determined by factors we can control. Perhaps even more compelling are the numerous studies showing that significant aspects of our behavior are deter-

118 See, e.g., Dennett, supra note 117, at 227–42. Dennett, however, defends an “evolutionary” notion of free will that is very different from what is commonly understood by the concept. Id. at 263. On the other hand, Libet has suggested that his findings can be compatible with the fact that human beings are able to avoid doing the act that the brain unconsciously determined should be done. See Benjamin Libet, Do We Have Free Will?, 6 J. Consciousness Stud., No. 8–9 (1999), at 47, 51–53. In Libet’s own words:

The initiation of the freely voluntary act appears to begin in the brain unconsciously, well before the person consciously knows he wants to act! Is there, then, any role for conscious will in the performance of a voluntary act? To answer this it must be recognized that conscious will [to act] . . . does appear about 150 msec. before the muscle is activated, even though [the brain unconsciously ordered the muscle activation several hundred milliseconds before the subject became aware of it]. An interval of 150 msec. would allow enough time in which the [subject’s] conscious function might affect the final outcome of the volitional process.

Id. at 51 (citation omitted). These statements suggest that it is possible that human beings might be able to willingly avoid doing something, but not to decide positively to do something. See id. at 51–53. Thus, it may be contended that human beings have “free won’t” instead of “free will.” See id.
119 Manuel Vargas, Response to Kane, Fischer, and Pereboom, in Four Views on Free Will 204, 206 (2007).
120 See, e.g., Robert Kane, Response to Fischer, Pereboom, and Vargas, in Four Views on Free Will, supra note 119, at 166, 181 (quoting Manuel Vargas, Revisionism, in Four Views on Free Will, supra note 119, at 126, 143).
121 Id.
mined by genetic and environmental factors outside of our control.  

The results of this research “[are] forcing us to rethink the extent of our personal control over our choices.”

This evidence, which suggests that our acts are not determined by our conscious will, threatens to undermine any argument which seeks to justify the Nemo tenetur principle primarily as a protection of a suspect’s autonomy. After all, why should we believe that such a fundamental right exists to protect a mental faculty whose existence is debated? Because considerable evidence shows we may not be able to control our acts (including illocutionary acts), we should justify the Nemo tenetur principle by appealing to considerations that go beyond the “voluntariness” or “involuntariness” of the statement.

III. Beyond Trustworthiness and Voluntariness

Parts I and II argued that it is undesirable to conceive the Nemo tenetur principle as a guarantee against untrustworthy or involuntary statements. Consequently, the principle should be justified primarily as a safeguard against the use of inappropriate interrogation techniques. Justifying the Nemo tenetur principle primarily as a protection against inappropriate interrogation techniques, however, does not mean that the trustworthiness or voluntariness of a statement will not be taken into account.

Sometimes an untrustworthy confession is inadmissible pursuant to the Nemo tenetur principle. An untrustworthy confession, however, can be obtained in a manner compatible with the Nemo tenetur principle. Conversely, a trustworthy statement can be obtained through coercion or torture, and thus be incompatible with the suspect’s right to be free from coerced interrogation.


123 Tancredi, supra note 110, at 75.

124 See id. at 75–76.

125 See Gazzaniga, supra note 113, at 95, 100–01.

126 See, e.g., id.; Wegner, supra note 114, at 26–27; Soon et al., supra note 110, at 545.


128 See Brown v. Mississippi, 297 U.S. 278, 286 (1936); Hector v. State, 2 Mo. 167, 168 (1829).

129 See, e.g., Gudjonsson, supra note 36, at 227–29 (discussing voluntary false confessions).

It is also possible that a confession obtained in violation of the suspect’s right not to incriminate himself was secured under circumstances that would make the confession involuntary.\(^1\) Confessions obtained by torture, for example, are usually considered to be involuntary.\(^2\) Yet, conceiving the Nemo tenetur principle as a vehicle for guaranteeing the voluntariness of a suspect’s decision to confess presents three different problems. First, suspects in almost every legal system can be compelled to confess in a way that calls into question the voluntariness of the confession.\(^3\) Second, making the admissibility of a statement hinge upon its voluntary character is also objectionable, since the definition of voluntariness or involuntariness depends on normative criteria.\(^4\) Third, recent scientific research suggests humans do not possess the ability to voluntarily control their acts.\(^5\) As a result, the Nemo tenetur principle should be justified by considerations unrelated to the trustworthiness or voluntariness of the confession.\(^6\)

A. The Nemo Tenetur Principle as a Protection Against Improper Governmental Conduct

The Nemo tenetur principle should be understood as a guarantee against the state’s use of improper or abusive interrogation techniques. The right, however, cannot be invoked against private persons in the vast majority of jurisdictions.\(^7\) For example, the protection against self-

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\(^1\) See Kastigar v. United States, 406 U.S. 441, 462 n.53 (1972) (“A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege.”) (quoting Murphy v. Waterfront Comm’n, 378 U.S. 52, 103 (1964) (White, J. concurring)).

\(^2\) Gudjonsson, supra note 36, at 284.

\(^3\) See supra notes 66–80 and accompanying text.

\(^4\) See supra notes 81–106 and accompanying text.

\(^5\) See, e.g., Libet et al., supra note 107, at 640; Soon et al., supra note 110, at 545.

\(^6\) See Spano, 360 U.S. at 324 (holding that the accurate confession by the defendant obtained through coercion was violative of his Fourteenth Amendment rights); Dix, supra note 35, at 275 (stating that whether coercive techniques by police officers pose threats to reliability may be impossible to “address with any certainty”).

\(^7\) See, e.g., Colorado v. Connelly, 479 U.S. 157, 167 (1986) (“[C]oercive police activity is a necessary predicate to finding that a confession is not ‘voluntary’ within the meaning of the due process clause of the Fourteenth Amendment.”); Wigfall v. State, 710 So. 2d 931, 937 (Ala. Crim. App. 1997) (“So long as law enforcement officers do not incite or coach family members to elicit a confession from the accused, the fact that a defendant elects to confess after conferring with family members does not render a confession involuntary.”); Mirabal v. State, 698 So. 2d 360, 362 (Fla. Dist. Ct. App. 1997) (holding that an involuntary confession to private employers cannot tantamount to a second confession to police after defendant waived his rights); Commonwealth v. Cooper, 899 S.W.2d 75, 75–76 (Ky. 1995) (holding that coercive conduct by a private citizen does not render a confession
incrimination does not require that our friends advise us of our right to remain silent before asking potentially incriminating questions.  

Therefore, if someone answers incriminating questions posed by a private person, the statements are admissible against him, regardless of how those answers were obtained. Conversely, if the police torture a suspect to obtain a confession, that confession should be deemed inadmissible. The crucial factor that differentiates these two cases is not the relative voluntariness or trustworthiness of the statements, but the presence or absence of inappropriate police conduct.

B. Identifying Improper Methods of Interrogation

Once the Nemo tenetur principle is conceived as a protection against the use of unacceptable methods of interrogation to obtain incriminating statements, it becomes necessary to provide a framework that helps us to identify improper or abusive interrogation techniques. Such a framework is necessary to provide a concrete conceptual structure that involuntary and therefore inadmissible under state law); Hough v. State, 929 S.W.2d 484 (Tex. Ct. App. 1996) (holding that a confession was voluntary, despite the defendant’s estranged wife telling him that she would reconcile with him). But see State v. Bowe, 881 P.2d 538, 546 (Haw. 1994) (“[A]n individual’s capacity to make a rational and free choice between confessing and remaining silent may be overborne as much by the coercive conduct of a private individual as by the coercive conduct of the police. . . . Therefore . . . admitting coerced confessions regardless of the source of the coercion, is fundamentally unfair.”); State v. Martin, 645 So. 2d 752, 754 (La. Ct. App. 1994) (“[T]his state statute mandates that all confessions, regardless of whether a state actor was involved, must be voluntary.”); Commonwealth v. Brandwein, 760 N.E.2d 724, 732 n.10 (Mass. 2002) (“[C]oercion by a private party may render a defendant’s confession to that private party involuntary, requiring that the confession be suppressed as violative of due process.”); Commonwealth v. Smith, 686 N.E.2d 983, 989 (Mass. 1997) (holding that, in a murder prosecution, the defendant’s confessions made to his sister and brother were admissible, where the “judge correctly instructed [the] jury to disregard statements to family members unless they concluded for themselves that the Commonwealth had proved beyond a reasonable doubt that the statements were voluntary”); People v. Sorbo, 649 N.Y.S.2d 318, 319 (Sup. Ct. 1996) (“[F]ruits of statements made involuntarily to private parties are subject to suppression.”).

138 See Wigfall, 710 So. 2d at 937 (“So long as law enforcement officers do not incite or coach family members to elicit a confession from the accused, the fact that a defendant elects to confess after conferring with family members does not render a confession involuntary.”).

139 See Connelly, 479 U.S. at 165.

140 See id. at 164.

141 See id. at 167 (holding that “coercive police activity is a necessary predicate to finding that a confession is not ‘voluntary’ within the meaning of the due process clause of the Fourteenth Amendment,” and hence a confession coerced by a private citizen is voluntary).
will assist judges in discriminating between acceptable and unaccept-
able methods of interrogation in borderline cases.  

This Part provides such a framework by arguing that the police act improperly when they obtain a confession by methods that involve the use of coercion, certain kinds of deception, exploitation or the transgression of a mutually agreed upon rule with the purpose of obtaining an unfair advantage over the suspect.

1. Coercion

The government acts inappropriately if it coerces the suspect to confess by threatening to use physical force against him. This is the core of the Fifth Amendment’s due process protection against forced confessions. Coerced confessions must be considered inadmissible regardless of their trustworthiness and voluntariness. A confession made under threat of torture must not be admitted as evidence even if there are techniques that allow the state to successfully ascertain the statement’s trustworthiness. By the same token, forced confessions should not be admitted into evidence even if the subject conclusively demonstrates that the police coercion did not influence his decision to confess.

It is also inappropriate to try to compel the suspect to confess by threatening to cause him psychological pain. Examples of psycho-
logical pain may include a threat to take away a suspect’s custody over his children or his property if he fails to incriminate himself.  

In general, coercion occurs when the police obtain a confession by threatening to commit an illegal act.  Conversely, a confession is usually admissible if the suspect is compelled to testify against himself with a threat by the police to commit a legal act.  Suppose, for example, that a police officer asks a car driver if he has ingested alcoholic beverages in the past few hours. The driver refuses to answer, and the officer threatens to administer an alcohol test if the driver refuses again. If it is legal to administer an alcohol test, it is not inappropriate for the officer to threaten the driver with performing the test.

2. Deception

Police can also act inappropriately by using certain kinds of deception to obtain a confession. Not all kinds of deception, however, are equally wrongful. Obtaining a confession by lying to the suspect and obtaining a confession by misleading the suspect are different.

As a general rule, it is more blameworthy to lie than to mislead by asserting something that is not false. Federal criminal law reflects the different culpability of these two types of deception. For example, a witness is guilty of perjury if he lies under oath. Lying is defined as asserting something the witness believes to be false. A witness, however, does not commit perjury if he misleads others by asserting something true or not capable of being true or false.

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147 See id.
148 See id. at 206.
149 See id.
150 See South Dakota v. Neville, 459 U.S. 553, 562 (1983) (holding that the admission into evidence of the defendant’s refusal to submit to a blood-alcohol test does not offend his privilege against self-incrimination because no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal).
151 See White, supra note 8, at 118–19.
152 See Green, supra note 16, at 77–78.
153 See id. at 78.
155 See id.
157 See id. at 357–58 (stating that perjury statutes do “not [deal] with casual conversation and the [perjury] statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true”). In sum, the Supreme Court expressly held in Bronston that the federal perjury statute prohibits lying under oath, but not misleading under oath. See id.
The distinction is morally relevant in non-legal contexts. In the most recent presidential campaign, supporters of John McCain asserted that Barack Obama’s middle name was “Hussein.” They also pointed out that this is a common name in the Muslim world. Both assertions are true. The purpose of the assertion, however, was to mislead the public into believing that Obama is Muslim and it is objectionable, although it would be much more blameworthy to falsely assert that “Obama is Muslim.” The difference between lying and misleading should be taken into account when determining if an inappropriate deception was used to obtain a confession. Lying in order to obtain a statement must always be considered inappropriate. Nevertheless, misleading a suspect by asserting something that is not false is not necessarily unacceptable. For example, a police officer acts in an unacceptable manner if he tells a suspect that it is better for him to confess, since DNA tests reveal that he raped the victim when the officer knows there are no such tests. The officer, however, may try to induce a confession through other methods. For example, he could tell the suspect correctly, though with the intent to mislead, that the police officer is about to receive a DNA test that he believes will implicate the suspect in a rape. Although the purpose of the latter assertion is to mislead the suspect into a belief that DNA tests will confirm his guilt, the suspect cannot rationally conclude this statement is true unless he also believes the DNA test will implicate him in the rape. If the suspect makes the wrong inference without gathering additional information to clarify the situation, the police officer is not entirely responsible for the suspect’s confession.

159 See id.
160 See id.
161 See Green, supra note 16, at 78–79.
162 See id.
163 See id. at 77–78.; White, supra note 8, at 118–19.
164 See Green, supra note 16, at 77.
165 See id. at 78–79.
166 See White, supra note 8, at 132.
167 See id. Surprisingly, scholars have failed to grasp the significance of the lying/misleading distinction in the context of the admissibility of confessions. Professor White, for example, has argued that obtaining confessions by employing “certain types of trickery” should be banned. See id. at 135. Although Professor White’s suggestion that officers should not make false statements about the evidence they have against the defendant is sensible, he glossed over the important difference between lying to the defendant about the evidence against him and misleading him into believing that strong evidence exists against him. See id.
countable for the consequences of their bad acts, why shouldn’t they also be held accountable for the consequences of their bad inferences?\textsuperscript{168}

3. Exploitation

The police also act inappropriately when they exploit a subject’s physical or mental condition or character traits with the aim of obtaining a confession. A suspect is exploited when he is used for someone else’s benefit in a way that is detrimental to his own well-being.\textsuperscript{169} The exploitation of a person can occur in many ways. It is possible, for example, to exploit a suspect’s weaknesses.\textsuperscript{170} It is also possible to exploit a suspect’s strengths.\textsuperscript{171} Sometimes what is exploited is a suspect’s particular circumstances.\textsuperscript{172} These traits or circumstances can be exploited by promises, flattery, or requests.\textsuperscript{173} A suspect can also be exploited by appeals to his sense of friendship, compassion, or a religious, ethical, or legal duty.\textsuperscript{174}

Sometimes it is not clear that the exploitation of the suspect is morally wrong. For example, it is not obviously unacceptable to use a person’s sense of friendship or compassion to get something.\textsuperscript{175} In some contexts, however, it may be inappropriate to exploit these feelings.\textsuperscript{176} For instance, in Spano, an officer who was a good friend of the suspect told the suspect that he would lose his job with the police if he failed to secure a confession.\textsuperscript{177} The Supreme Court condemned this type of behavior.\textsuperscript{178} It suggested, however, that the exploitation of the subject’s sense of friendship and compassion did not necessarily entail the inadmissibility of the confession.\textsuperscript{179} Rather, it stated that the totality at 132. Whereas the former conduct is clearly inappropriate, it is unclear whether the latter type of conduct ought to lead to the inadmissibility of the confession thus obtained. See id.

\textsuperscript{168} See Jonathan E. Adler, Lying, Deceiving, or Falsely Implicating, 94 J. Phil. 435, 444 (1997) (arguing that deception, rather than lies, involve the hearer’s responsibility and mistaken inferences).

\textsuperscript{169} See generally Joel Feinberg, Harmless Wrongdoing 176–78 (1988).

\textsuperscript{170} See id. at 181–82.


\textsuperscript{172} See generally supra note 16, at 95.

\textsuperscript{173} See Feinberg, supra note 169, at 181.

\textsuperscript{174} See id.

\textsuperscript{175} See Spano, supra note 16, at 96–97.

\textsuperscript{176} See Spano, 360 U.S. at 323.

\textsuperscript{177} See id.

\textsuperscript{178} See id. at 323–24.

\textsuperscript{179} See id. at 323.
of the circumstances surrounding the statement must be analyzed in order to determine if the officer’s conduct was sufficiently blameworthy so as to make the confession inadmissible.\textsuperscript{180} Exploiting a suspect by appealing to his sense of friendship and compassion is just one of the factors considered in the analysis.\textsuperscript{181} Ultimately, the exploitation of such character traits should be considered relevant but not determinative when examining whether the police obtained a confession in a manner that is incompatible with the \textit{Nemo tenetur} principle.\textsuperscript{182}

Certain types of exploitation, however, are clearly unacceptable. Take, for example, a shop-owner who drastically increases the price of basic goods after a natural disaster. The shop owner’s behavior is unacceptable because he is purposely taking advantage of his customers’ vulnerable position. This kind of exploitation becomes even more unacceptable when the person who takes advantage of the situation has intentionally caused the other’s defenselessness.\textsuperscript{183} Interrogating a suspect who is under police custody is an example of this type of exploitation.\textsuperscript{184} In these situations, the government purposely reduces the suspect to a state of powerlessness in order to obtain a confession by exploiting the suspect’s acute vulnerability.\textsuperscript{185}

Imagine a suspect newly in police custody. At first glance, it would seem that a suspect in police custody has not been placed in a position of great helplessness. When, however, it is taken into account that the suspect’s basic needs and freedoms are entirely at the mercy of the police, the suspect’s profound vulnerability becomes apparent.\textsuperscript{186} The person in custody cannot move without police permission, and he has no power to interrupt the interrogation to use the bathroom, smoke a cigarette, or grab a bite to eat. If the interrogation room is too cold, the suspect can only wait for the police to decide to turn on the heat or give him a blanket. The police, in sum, have almost total control over the person in custody.\textsuperscript{187} Therefore, it seems wrong for the police to try to obtain a confession by exploiting the defenselessness of the suspect.\textsuperscript{188}

\textsuperscript{180} See id.
\textsuperscript{181} See Spano, 360 U.S. at 323.
\textsuperscript{182} See \textit{Feinberg}, supra note 177, at 176–77.
\textsuperscript{183} See \textit{Green}, supra note 16, at 96–97.
\textsuperscript{184} See Spano, 360 U.S. at 323.
\textsuperscript{185} See id.
\textsuperscript{186} See \textit{Miranda v. Arizona}, 384 U.S. 436, 457 (1966)
\textsuperscript{187} See id.
\textsuperscript{188} See id.
The police may nevertheless remedy the situation by advising the suspect of his constitutional right to remain silent and, more importantly, his right to counsel during the interrogation. After the suspect has been advised that the police have to provide him with an attorney during the interrogation to defend him, the suspect no longer has reason to believe that he is utterly defenseless.

4. Transgression

The Supreme Court has ruled that after the formal commencement of criminal proceedings against a defendant, the Sixth Amendment’s right to counsel bars the State from deliberately eliciting incriminating statements from the defendant unless his lawyer is present. The right to counsel afforded by the Sixth Amendment in such circumstances differs from the protections afforded to suspects pursuant to *Miranda v. Arizona* because it is triggered regardless of whether the suspect is being subjected to custodial interrogation. Therefore, it cannot be argued that the purpose of affording defendants with a Sixth Amendment right to counsel during police interrogations is to avoid the exploitation of the state of vulnerability caused by police custody. Furthermore, it cannot be maintained that the chief objective of this right is to protect the suspect against the use of coercion or deception. What, then, is the evil sought to be avoided by this safeguard?

It is submitted that the Sixth Amendment right to counsel during police interrogations prevents the State from *transgressing* a mutually

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189 See U.S. Const. amend. VI; *Miranda*, 384 U.S. at 444.
190 See, e.g., *Miranda*, 384 U.S. at 444; *Grano*, supra note 88, at 145. The late Professor Joseph Grano suggested that the protections afforded as a result of *Miranda v. Arizona* should be understood as safeguards to guarantee that confessions are obtained in a non-coercive manner. See *Grano*, supra note 88, at 173–74. Grano further concluded that *Miranda* is problematic because, in his view, it could inadvertently bar confessions that were obtained without coercion. See *id.* at 202. Indeed, under *Miranda*, confessions obtained without coercion can be excluded. See *Miranda*, 384 U.S. at 457. Grano, however, failed to consider that *Miranda* seeks to prevent confessions obtained through exploitation, not just coercion. See *id.*; *Grano*, supra note 88, at 195. Once *Miranda* is conceived as a case that seeks to prevent the coercion and exploitation of suspects, Professor Grano’s argument to overrule *Miranda* loses much of its persuasive force. See *Miranda*, 384 U.S. at 477; *Grano*, supra note 88, at 195. After all, exploiting the suspect can sometimes be as wrongful as coercing him. See Part III.

191 *Massiah v. United States*, 377 U.S. 201, 201, 207 (1964) (holding that incriminating statements surreptitiously obtained from the defendant by the government after initiation of criminal proceedings and without the defendant’s attorney present were inadmissible).
192 See *Grano*, supra note 88, at 145.
193 See supra notes 143–174 and accompanying text.
agreed upon rule in order to obtain an undue advantage over the suspect.\textsuperscript{194} Given the complexity of the criminal justice system, those in charge of litigating a criminal case are not the parties (the defendant and the People), but their attorneys (defense attorney and prosecutor). Therefore, once criminal proceedings have commenced, it is understood that the State must communicate with the defendant through his legal representative.\textsuperscript{195} Only then can the defendant’s rights be protected, since his ignorance of the complexities of the criminal justice system could cause him to inadequately manage his case without the steady hand of his defense counsel.\textsuperscript{196}

This mutually agreed upon rule between the suspect and the State is transgressed when the police interrogate the suspect without his lawyer after the criminal process has formally begun.\textsuperscript{197} The conduct is inappropriate because with this transgression, the police have bypassed one of the foundational rules that undergird our criminal justice system in order to obtain an undue advantage over the suspect.\textsuperscript{198} When this happens, the State has essentially “cheated” by violating a basic rule of the legal system in order to prevail over the defendant.\textsuperscript{199}

\textbf{Conclusion}

This Article began by describing three borderline cases in which it was not clear whether a confession had been obtained in violation of the \textit{Nemo tenetur} principle. The \textit{case of the false confession} presented a situation in which a suspect made a voluntary confession but where overwhelming evidence suggested that confession was false. In contrast, the confession obtained in the \textit{case of the truth serum} was highly trustworthy but arguably not voluntary, given that it was induced by a drug. Lastly, in the \textit{case of the unnecessary threat}, the police physically threatened the suspect if she refused to confess. The suspect, however, indicated in a judicial hearing that the threat did not influence her decision to confess.

In order to provide solutions for these three borderline cases, this Article argued that the \textit{Nemo tenetur} principle should be understood as a safeguard against the use of unacceptable methods of police interroga-

\textsuperscript{194} See U.S. Const. amend. VI; \textit{Miranda}, 384 U.S. at 444–45; \textit{Massiah}, 377 U.S. at 207 (White, J. dissenting); \textit{Green}, supra note 16, at 58, 63, 66.  
\textsuperscript{195} See U.S. Const. amend. VI; \textit{Massiah}, 377 U.S. at 205–07.  
\textsuperscript{196} See \textit{Miranda}, 384 U.S. at 444–45.  
\textsuperscript{197} See \textit{Green}, supra note 16, at 58.  
\textsuperscript{198} See \textit{id.} at 58, 63, 66.  
\textsuperscript{199} See \textit{id.}
tion. The trustworthiness or voluntariness of the statement may be important in other contexts, but they should not definitively determine the admissibility of a confession pursuant to the *Nemo tenetur* principle.

This conception of the *Nemo tenetur* principle suggests that the statement in the *false confession case* was secured in a manner that is compatible with the suspect’s constitutional rights and thus would be admissible as evidence of his guilt. That, of course, does not mean that the confession must necessarily be admitted into evidence. In many jurisdictions there are rules that are designed primarily to protect against the admission of evidence with questionable probative value.\(^{200}\)

Similarly, this conception of the *Nemo tenetur* principle suggests that the confession in the *truth serum case* also did not violate the suspect’s right against self-incrimination and is, therefore, also admissible. In this example, the police had no reason to know the suspect was under the influence of a truth serum, so there is no question of whether they used unacceptable methods of interrogation to obtain the confession. If the police had administered the drug in order to obtain a confession or if they had reason to know that the subject was under the effects of the drug, then the analysis would be different.\(^{201}\)

Finally, it seems that the confession secured in the *unnecessary threat case* was obtained in a manner incompatible with the *Nemo tenetur* principle. Despite the fact that the suspect’s statement in this case was entirely voluntary and highly trustworthy, the interrogation techniques used by the police to obtain the confession were repugnant. This alone should be enough to justify not admitting the confession into evidence. The difficulty of explaining this conclusion by appealing to the confession’s voluntariness or trustworthiness counts as a powerful reason in favor of understanding the *Nemo tenetur* principle as a safeguard against the use of inappropriate methods of interrogation rather than as a mechanism for securing the reliability or voluntariness of confessions.

\(^{200}\) See *Mooney v. Holohan*, 294 U.S. 103, 111–13 (1934) (holding that the State’s use of testimony known by prosecuting authorities to be false is a denial of due process).

\(^{201}\) See *supra* Part III (explaining that the purposeful exploitation of a helpless suspect is improper and must be barred under the *Nemo tenetur* principle).
“MINUTE AND SEPARATE”: CONSIDERING THE ADMISSIBILITY OF VIDEOTAPED FORENSIC INTERVIEWS IN CHILD SEXUAL ABUSE CASES AFTER CRAWFORD AND DAVIS

Kimberly Y. Chin*

Abstract: Child sexual abuse is one of the least prosecuted crimes in the United States in part because of the many evidentiary challenges prosecutors face. In 2004, the Supreme Court introduced a new standard for determining the admissibility of out-of-court statements made by declarants who are unavailable to testify at trial. In Crawford v. Washington, the Supreme Court held that testimonial statements are only admissible at trial if the declarant is unavailable to testify and there was a prior opportunity for cross-examination. This Note will examine Crawford’s impact on the admissibility of videotaped forensic interviews with child victims of sexual abuse and suggest that courts adopt a “minute and separate” approach when deciding whether statements contained in those interviews are testimonial in nature.

Introduction

On June 25, 2002, Von, a six-year-old boy, told his mother that a neighborhood boy, Rolandis, had sexually assaulted him.¹ Six days later, Von’s mother took him to the Carrie Lynn Children’s Center in Rockford, Illinois.² The Center serves child victims of sexual abuse.³ There, a child advocate interviewed Von, and the interview was videotaped according to the Center’s protocol.⁴ During the interview, Von described the incident with Rolandis and answered questions posed by the child advocate.⁵ A police officer observed the interview through a one-way

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¹ See In re Rolandis G., 902 N.E.2d 600, 603–04 (Ill. 2008), cert. denied, 129 S. Ct. 2747 (2009). Von told his mother that “Rolandis made [him] suck his dick.” Id. at 603. He told a police officer that “Rolandis had been holding a stick in his hand when he forced [him] to perform this act.” Id. at 604. Von also stated that “he had choked while . . . performing the act and that a fluid had come out of Rolandis’ penis.” Id.

² See id. at 604.

³ Id.

⁴ See id.

⁵ See id.
mirror, but did not participate. When the interview concluded, the police officer obtained a copy of the video into custody, placed it in an evidence bag, and kept it at the police station.

At trial, Von refused to answer questions about the incident with Rolandis. Subsequently, the videotape of Von’s interview at the Carrie Lynn Children’s Center was entered into evidence under exceptions to the hearsay rule. The entire videotape was played at trial. Rolandis was found guilty of aggravated criminal sexual assault. In 2008, the Supreme Court of Illinois held that the videotaped statements Von made during the interview with the child advocate were testimonial and as such, their admission at trial violated the Confrontation Clause of the Sixth Amendment.

On December 7, 2005, Wendy Otto found her husband, Michael Arnold, alone with their four-year-old daughter in their bedroom. After noticing her husband’s boxers were on improperly and discovering

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6 See Rolandis, 902 N.E.2d at 604.
7 Id.
8 See id. at 603.
9 See id. at 605.
10 Id. at 604.
11 Rolandis, 902 N.E.2d at 605.
12 Id. at 619. The court observed:

[T]he Carrie Lynn Children’s Center, where Von’s interview took place, is one of several accredited child advocacy centers in this state “established to coordinate the activities of the various agencies involved in the investigation, prosecution and treatment referral of child sexual abuse.” . . . [T]he record, from an objective viewpoint, indicates that the interview took place at the behest of the police so that a more detailed account of the alleged sexual abuse could be obtained by a trained interviewer and memorialized on videotape. Moreover, because the interview was witnessed by Detective Swanberg and a copy of the videotaped interview immediately turned over to him “as evidence” upon completion of the interview, the objective circumstances indicate that Von’s statement was the product of an interrogation, conducted on behalf of the police, intended to gather information and establish past acts for future prosecution.

Id. at 611. Further, the court could not find “[any] indication that, in the case at bar, Weber’s interview of Von was conducted, to a substantial degree, for treatment rather than investigative purposes.” Id. As a result, it held that “Von’s videotaped statement was testimonial in nature and, because Von did not testify at trial and there was no prior opportunity for cross-examination, it was improperly admitted in violation of respondent’s confrontation rights.” Id. Although the Supreme Court of Illinois found that the statements violated the defendant’s confrontation rights, it also held that the admittance was harmless and thus, affirmed Rolandis’s conviction. See id. at 619.

her daughter’s underwear around her knees, Wendy told her husband to leave the house and proceeded to call 911. The four-year-old child told a responding firefighter that “someone had touched her in her private parts.” The following day, Wendy accompanied her daughter to the Child and Family Advocacy Center at Children’s Hospital. There, a licensed social worker questioned the child about the prior day’s events, and the interview was videotaped. “During the interview, the child accused [Arnold] of conduct that would constitute sexual abuse.” Among other onlookers, a detective observed the interview from another room through a closed-circuit television, but did not participate.

At trial, the four-year-old child was unavailable to testify. Subsequently, the trial court admitted the videotaped interview conducted at the Child and Family Advocacy Center. Arnold was found guilty of rape by vaginal intercourse of a person less than thirteen years of age.

Faced with this in the same year that the Illinois Supreme Court decided In re Rolandis G., the Court of Appeals of Ohio arrived at the opposite conclusion. It held that the statements made during the videotaped interview were not testimonial and that their admission at trial did not violate the Confrontation Clause of the Sixth Amendment.

14 See id.
15 Id.
16 Id.
17 See id.
19 See id.
20 See id.
21 See id.
22 See id.
23 See Arnold, 2008 WL 2698885, at *8 (distinguishing the interview in question from those which only serve the purpose to gather evidence instead of medical diagnosis or treatment).
24 See id. The court held:

[The social worker] acted without police involvement during the interview and questioned the child so that the child could be properly treated. . . . The primary purpose of [the] interview was to gather information for the child’s proper treatment and diagnosis and not to produce evidence for a future prosecution, even though such evidence may have been produced as a result of the interview.

Id. Thus, “the child’s statements are not testimonial for purposes of the Confrontation Clause [and] accordingly, the admission of those statements did not violate appellant’s Sixth Amendment right to confrontation.” Id. The Supreme Court of Ohio has accepted appellate review of this case. See State v. Arnold, 898 N.E.2d 967 (Ohio 2008).
These two cases demonstrate the confusion in the lower courts regarding the implications of the Confrontation Clause on videotaped out-of-court statements made by child victims of sexual abuse. In both of these cases, videotaped interviews with a trained questioner resulted in the child victims making statements describing the abuse and identifying the defendant as the perpetrator. That nearly identical facts resulted in completely opposite holdings in different states suggests that guidance is necessary in order to resolve this conflict among the lower courts.

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When a witness is unavailable to testify at trial, her out-of-court statements are admissible only under specific circumstances. In 1980, the Supreme Court ruled that the reliability of the out-of-court statements would govern their admissibility at trial. But, in 2004, the Supreme Court established a new standard for evaluating when these statements could be introduced at trial. This standard permitted the admission of out-of-court testimonial statements only if the witness was

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25 Compare Rolandis, 902 N.E.2d at 619 (holding that admission of videotaped evidence violated the defendant’s confrontation right), with Arnold, 2008 WL 2698885, at *8 (holding that admission of videotaped evidence did not violate the defendant’s confrontation right).

26 Rolandis, 902 N.E.2d at 604; Arnold, 2008 WL 2698885, at *1.


The most unsettled and contentious area involves statements with multiple purposes. The critical question for the future is whether videotaped statements that ultimately are used in court as the equivalent of testimony will be treated as nontestimonial if they are taken by government officials who are not explicitly pursuing a law enforcement purpose. The test case is the statement taken in a nonemergency situation that has as its primary purpose the general welfare of the child (such as the child’s placement), and results in a videotaped statement which is ultimately offered in evidence at trial describing abuse and identifying the defendant as the perpetrator.

Mosteller, supra, at 996. Professor Friedman believes that “the confrontation issues posed by statements by children are enormously important, complex, and troubling. Sooner or later, the Supreme Court will have to begin resolving many of these issues.” Friedman, supra.


30 See Crawford, 541 U.S. at 68.
unavailable to testify at trial and there was a prior opportunity for cross-examination.\footnote{See id. Rule 804 of the Federal Rules of Evidence states:}

As \textit{In re Rolandis G.} and \textit{State v. Arnold} demonstrate, the testimonial standard has had a particular impact on child sexual abuse cases, with lower courts struggling in its application.\footnote{See Rolandis, 902 N.E.2d at 613 (“We are not unsympathetic to the State’s concern that child abuse victims are often unavailable to testify because of their tender years and, for that reason, ‘Crawford is incompatible with the realities of child abuse prosecutions.’”); \textit{Arnold}, 2008 WL 2698885, at *8; Prudence Beidler Carr, Comment, \textit{Playing by the Rules: How to Define and Provide a “Prior Opportunity for Cross-Examination” in Child Sexual Abuse Cases After Crawford v. Washington}, 97 J. Crim. L. \\& Criminology 631, 631 (2007).} This Note will discuss the impact of the \textit{Crawford} rule of confrontation on statements made by child victims of sexual abuse. Particularly, it will focus on the mixed purpose statements made during videotaped interviews of child sexual abuse victims with forensic interviewers.\footnote{See Mosteller, supra note 27, at 970–71. Although the primary purpose for these statements may be for medical treatment, “a prosecutorial interest may quickly follow.” \textit{Id.} at 971. Thus, mixed purpose statements that are videotaped “present a major Confrontation Clause issue because the videotape is used as evidence at trial.” \textit{Id.} at 966.}

Part I will include a brief history of the Supreme Court’s Confrontation Clause jurisprudence with a focus on its application to child sexual abuse cases. Part II will discuss the evidentiary challenges of prosecuting child sexual abuse and briefly discuss the implications those challenges have on the confrontation rights of the accused. Part III will examine how videotaping and forensic interviewing has helped increase the reliability of a child victim’s out-of-court statements, but has ultimately created inadmissible testimonial statements under \textit{Crawford}. 

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\footnote{\textit{Fed. R. Evid. 804(a)(1)–(5). Child victims of sexual abuse, however, rarely fall into these articulated categories; instead, judges often deem them unavailable to testify because of issues regarding competency and trauma. \textit{See infra Part II.C.}}}
Finally, Part IV will suggest that courts should consider statements made in these videotaped forensic interviews in minute and separate assertions when determining the testimonial nature of a child victim’s disclosures in order to preserve the benefits of these statements while also honoring the defendants’ Sixth Amendment rights.

I. A Brief History of the Confrontation Clause and Child Sexual Abuse Cases: From Roberts to Crawford

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

—the Confrontation Clause

A. Ohio v. Roberts: The Reliability Rule

Until 2004, the reliability rule established in Ohio v. Roberts governed the admissibility of out-of-court statements from unavailable witnesses. Under this rule, an unavailable witness’s out-of-court statement could be admitted at trial if it “[bore] adequate ‘indicia of reliability.’” The Court held that such “reliability can be inferred without more” when such statements “fall[] within a firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.”

In the decade following Roberts, the Supreme Court applied the reliability rule to two child sexual abuse cases. In White v. Illinois, the Court affirmed that the admission of a child’s out-court-statements under established hearsay exceptions did not violate the Confrontation

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34 This history will only cover cases that address the admissibility of out-of-court statements, focusing particularly on child sexual abuse cases. Cases defining what constitutes sufficient confrontation when a child testifies at trial fall outside the scope of this Note and will not be directly addressed. For an introduction to what constitutes sufficient confrontation when a child testifies, see Maryland v. Craig, 497 U.S. 836, 859–60 (1990) (holding that having a child witness testify by one-way closed-circuit television did not violate the Confrontation Clause) and Coy v. Iowa, 487 U.S. 1012, 1016–22 (1988) (addressing the constitutionality of placing a screen between a child witness and the defendant when the child testifies and finding that face-to-face cross-examination is not an absolute component of confrontation).

35 U.S. Const. amend. VI.


37 See id.

38 Id.

Clause even though the child did not testify at trial.\textsuperscript{40} The Court found that these statements carried “sufficient guarantees of reliability” because they “[came] within a firmly rooted exception to the hearsay rule.”\textsuperscript{41} Furthermore, the hearsay statements “had substantial probative value . . . that could not be duplicated” by live testimony.\textsuperscript{42} Thus, in \textit{White}, the Supreme Court affirmed the application of the \textit{Roberts} rule to child sexual abuse cases and identified what constituted a “firmly rooted hearsay exception” in a child sexual abuse case.\textsuperscript{43}

In \textit{Idaho v. Wright}, the Supreme Court held that the admission of a child victim’s out-of-court statements violated the Confrontation Clause

\textsuperscript{40} See \textit{White}, 502 U.S. at 356–57. In \textit{White}, the petitioner, a friend of the victim’s mother, was charged with aggravated criminal sexual assault of a child, who was then four years old. \textit{Id.} at 349. The child described the assault to her babysitter, mother, a police officer and an emergency room nurse and doctor, stating that petitioner had “choked and threatened her,” “touch[ed] her in the wrong places,” and that “petitioner had ‘put his mouth on her front part.’” \textit{Id.} The child’s first statement was to the babysitter and was made immediately after the babysitter “was awakened by [the child’s] scream,” and witnessed the petitioner leaving the child’s room. \textit{Id.} The child’s second statement was made to her mother approximately thirty minutes after the first statement. \textit{Id.} The statement to the police officer was made about forty-five minutes after the babysitter was awakened by the scream. \textit{Id.} at 349–50. Approximately four hours after the babysitter first heard the child’s scream, the child was brought to the hospital and was examined by an emergency nurse and doctor. \textit{Id.} at 350. There, the child “provided an account of events that was essentially identical to the one she had given” previously. \textit{Id.} The child never testified at trial because she “experienced emotional difficulty on being brought to the courtroom.” \textit{Id.} The trial court permitted admission of the child’s statements to her babysitter, mother and the police officer under the hearsay exception for spontaneous declarations and admitted the statements made to the emergency room nurse and doctor under the spontaneous declarations exception and the “exception for statements made in the course of securing medical treatment.” \textit{Id.} at 350–51.

\textsuperscript{41} \textit{Id.} at 356. “[T]he evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.” \textit{Id.} at 355.

\textsuperscript{42} \textit{Id.} at 356. The Court noted that “[a] statement that had been offered in a moment of excitement . . . may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom.” \textit{Id.} Likewise, “a statement made in the course of procuring medical services . . . carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.” \textit{Id.} As a result, exclusion of these statements posed a “threat of lost evidentiary value if the out-of-court statements were replaced with live testimony.” \textit{Id.} at 356. The Court concluded that “[t]o exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness.” \textit{Id.}

\textsuperscript{43} See \textit{id.} at 355–56; Carr, \textit{supra} note 32, at 639. The Court found that the \textit{Roberts} rule applied “with full force to the case at hand.” \textit{White}, 502 U.S. at 355. The Court continued, stating that “[t]here can be no doubt that the two [hearsay] exceptions for spontaneous declarations and statements made in the course of receiving medical care . . . are ‘firmly rooted.”’ \textit{Id.} at 355 n.8.
because they lacked “particularized guarantees of trustworthiness.” Utilizing a totality of the circumstances test, the Court found that the child had been questioned suggestively and, consequently, there was “no special reason for supposing that the incriminating statements were particularly trust-worthy.”

While the Court did not articulate what circumstances would result in a finding of “trustworthiness,” it did draw attention to the lower court’s observation that the statements could have been found trustworthy had “certain procedural safeguards” been used. Specifically, the lower court suggested that had the statements been videotaped, a jury could assess the reliability of the statements. Furthermore, videotaping the statements could have ensured that the interviewing techniques did not mislead the child to make false statements.

Thus, under the Roberts rule, out-of-court statements by child victims of sexual abuse were admissible if they fell under a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.” At trial, most out-of-court statements are admitted under the

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44 Wright, 497 U.S. at 827. In Wright, the petitioner was charged with two counts of lewd conduct with a minor under sixteen. Id. at 808. The victims were the petitioner’s daughters, who were five and a half and two and a half years old at the time the crimes were charged. Id. The statements in question were the ones made by the younger daughter to an examining physician. Id. at 809. The statements were admitted under Idaho’s residual hearsay exception. Id. at 811. The child did not testify at trial because it was determined that she was ‘not capable of communicating to the jury.’” Id. at 809–10.

45 Id. at 826. The Court found that the residual hearsay exception, under which the statements were admitted, was not a firmly rooted hearsay exception. See id. at 817. In addition, the statements did not meet the requirements for admission under the exceptions of excited utterances or statements made for the purposes of medical diagnosis or treatment. See id. at 827. Consequently, the Court evaluated the admissibility of the out-of-court statements by determining whether the statements showed “particularized guarantees of trustworthiness.” Id. at 818.

46 See id. at 818.

47 See id. at 813; Carr, supra note 32, at 640. Justice Sandra Day O’Connor wrote for the majority that, “The [Idaho Supreme Court] found Dr. Jambura’s interview technique inadequate because ‘the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial . . . .’” Wright, 497 U.S. at 812–13 (quoting State v. Wright, 775 P.2d 1224, 1227, 1230 (Idaho 1989)). Further, she noted that “the court found that ‘[t]he circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not [audio or video] recorded, can never be fully assessed.’” Id. at 813 (quoting Wright, 775 P.2d at 1227, 1230).

48 See Wright, 497 U.S. at 813. Justice O’Connor noted that the lower court had found that the “interrogation was performed by someone with a preconceived idea of what the child should be disclosing” and that “children are susceptible to suggestion and are therefore likely to be misled by leading questions.” Id (quoting Wright, 775 P.2d at 1227). The lower court then stated that the “dangers of reliability which, because the interview was not recorded, can never be fully assessed.” Id (quoting Wright, 775 P.2d at 1227).

49 See White, 502 U.S. at 356–57; Wright, 497 U.S. at 827; Roberts, 448 U.S. at 66.
hearsay exceptions for excited utterances, statements made for the purposes of medical diagnosis or treatment, or state law hearsay exceptions for statements made by child victims of sexual abuse. Determination of whether there were “particularized guarantees of trustworthiness” required an examination of the totality of the circumstances, and courts were free to consider factors such as whether the out-of-court statements were videotaped to make that decision.

B. Crawford v. Washington: The Testimonial Standard

In 2004, the Supreme Court decided Crawford, which severely limited the application of the Roberts reliability rule and introduced a new standard for testimonial statements: “Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”

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50 See Carr, supra note 32, at 643 (“Excited utterance and medical diagnosis were two common justifications for hearsay admission in [child sexual abuse] cases.”); Myrna S. Raeder, Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation, 82 Ind. L.J. 1009, 1009 (2007) (“Hearsay [is] primarily introduced in the context of excited utterances, statements for medical diagnosis or treatment, forensic interviews, or via ad hoc exceptions.”); see also White, 502 U.S. at 350–51 (out-of-court statements made to a babysitter, the victim’s mother and the police were admitted pursuant to the hearsay exception for spontaneous declarations and statements made to a nurse and a doctor were admitted under the hearsay exceptions for spontaneous declarations and statements made for the purposes of medical treatment and diagnosis); People v. Vigil, 127 P.3d 916, 920 (Colo. 2006) (out-of-court statements made to the victim’s father and the victim’s father’s friend admitted as excited utterances and statements made to a doctor admitted under the exception for statements made for purposes of medical diagnosis and treatment); State v. Webb, 779 P.2d 1108, 1110 (Utah 1989) (child victim’s out-of-court statements to her mother admitted under state hearsay exception for “hearsay statements of a child who is an alleged victim of sexual abuse”).

51 See Wright, 497 U.S. at 818, 826.

52 See Crawford, 541 U.S. at 68. Writing for the majority, Justice Scalia criticized the Roberts reliability rule, stating:

[The Roberts rule] departs from the historical principles [of the Confrontation Clause] in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of ex parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that do consist of ex parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Id. at 60. He continued:

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable . . . . Whether a
In arriving at the decision, Justice Antonin Scalia, writing for the majority, looked to the historical background of the Confrontation Clause.\textsuperscript{53} Focusing on the 1603 trial of Sir Walter Raleigh for treason, he asserted that this “paradigmatic confrontation violation” revealed “two inferences about the meaning of the Sixth Amendment.”\textsuperscript{54} First, the Confrontation Clause is directed principally at the “use of \textit{ex parte} examinations as evidence against the accused.”\textsuperscript{55} Second, such statements of an unavailable witness could not be used at trial if the defendant did not have “a prior opportunity for cross-examination.”\textsuperscript{56}

With these concerns in mind, Justice Scalia fashioned a new standard by which to evaluate the admissibility of out-of-court statements when witnesses are unavailable to testify at trial.\textsuperscript{57} Looking to the text of the Confrontation Clause, he noted that it “applie[d] to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’”\textsuperscript{58} He then defined a class of out-of-court statements, “‘testimonial’ state-

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\textsuperscript{53} See id. at 42–43 (“The Constitution’s text does not alone resolve this case. . . . We must therefore turn to the historical background of the Clause to understand its meaning.”).

\textsuperscript{54} Id. at 50, 52. During Sir Walter Raleigh’s trial, his alleged collaborator, Lord Cobham, “implicated [Raleigh] in an examination before the Privy Council and in a letter.” \textit{Id}. at 44. These statements were later admitted at trial. \textit{Id}. Raleigh asserted that Cobham was lying to save himself and demanded that the judges present Cobham so that Raleigh could confront him. \textit{Id}. The judges refused and Raleigh was found guilty and sentenced to death. \textit{Id}.

\textsuperscript{55} See id. at 50.

\textsuperscript{56} See id. at 53–54.

\textsuperscript{57} See Crawford, 541 U.S. at 51.

\textsuperscript{58} See id.
ments,” that would trigger the protection of the Confrontation Clause. Based on a dictionary definition of testimony, these statements were characterized as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Although Justice Scalia distinguished between out-of-court statements that are testimonial and those that are not, he left “for another day any effort to spell out a comprehensive definition of ‘testimonial.’”

He did, however, articulate three “various formulations” that testimonial statements could take: (1) “ex parte in-court testimony or its functional equivalent,” (2) “extrajudicial statements contained in formalized testimonial material,” and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” He proceeded to assert that “statements taken by police officers in the course of interrogations are . . . testimonial.”

Thus, under Crawford, out-of-court statements that a judge determines to be testimonial will only be admitted at trial if the witness is unavailable to testify and there was a prior opportunity for cross-examination. What constituted a testimonial statement, however, remained vaguely defined.

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59 See id.
60 See id.
61 Id. at 68. When distinguishing between testimonial and non-testimonial out-of-court statements, Justice Scalia noted that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Id. at 51.
62 See Crawford, 541 U.S. at 51–52. Materials in the first category consist of “affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” Id. at 51. The second formulation consists of “affidavits, depositions, prior testimony, or confessions.” Id. at 52. Justice Scalia further stated that “[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” Id. at 68.
63 See id. at 52. Justice Scalia explained that “[i]nvolve[ment] of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.” Id. at 56 n.7. He also clarified that “[j]ust as various definitions of ‘testimonial’ exist, one can imagine various definitions of ‘interrogation.’” Id. at 53 n.4. Like the definition of testimonial, however, Justice Scalia did not expound on the definition of interrogation, stating “we need not select among [its definitions] in this case.” Id.
64 See id. at 68. In Crawford, admission of Sylvia’s statements to the police violated the Confrontation Clause because her statements were testimonial and petitioner did not have an opportunity to cross-examine her. Id.
65 See id.
C. Davis v. Washington: The Primary Purpose Test

Two years after Crawford, Justice Scalia had the opportunity to provide clarification to the definition of “testimonial.” In Davis v. Washington, the Supreme Court considered when statements made to the police are testimonial, and thus, subject to the Confrontation Clause. Justice Scalia, again writing for the Court, introduced the primary purpose test as a means to determine whether statements to the police are testimonial:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis combined two cases in which the Court evaluated, using the newly minted primary purpose test, the statements of two domestic violence victims that were made to police officers or government personnel. In the first case, Davis v. Washington, the issue was whether “the interrogation that took place in the course of the 911 call produced testimonial statements.” The Court determined that the circumstances of the call “objectively indicate[d that] its primary purpose was to enable police assistance to meet an ongoing emergency.” As such, the victim

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67 See id.
68 Id. at 822.
69 See id. at 817–21. In Davis v. Washington, the domestic violence victim, Michelle McCottry, made statements to a 911 emergency operator identifying her abuser as Adrian Davis. Id. at 817–18. Davis was charged with a “felony violation of a domestic no-contact order.” Id. at 818. At trial, the 911 call was admitted into evidence, and McCottry did not testify. Id. at 819. Davis was convicted. Id. In Hammon v. Indiana, after being questioned by the police, the domestic violence victim, Amy Hammon, filled out a battery affidavit describing the actions of her husband, Hershel. Id. at 820. Hershel was then charged with domestic battery. Id. Amy’s statements to the police and the affidavit were admitted at Hershel’s bench trial, and Amy did not testify. Id. Hershel was found guilty. Id. at 821.
70 Id. at 826. In regards to whether 911 operators are police officers for the purposes of the Confrontation Clause, the Court stated: “If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.” Id. at 823 n.2.
71 Davis, 547 U.S. at 828. The Court noted:
The caller “was not acting as a witness; she was not testifying.” Consequently, her statements identifying her abuser were not testimonial.

The second case, *Hammon v. Indiana*, involved statements that the victim made to police during an interrogation and wrote in an affidavit. The Court found that the circumstances surrounding these statements indicated that “they were not much different from the statements . . . found to be testimonial in *Crawford*. The Court held that

In *Davis*, McCottry was speaking about events as they were actually happening, rather than “describ[ing] past events[]” . . . Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry’s call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator’s effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

*Id.* at 827 (citations omitted).

72 *Id.* at 828.
73 *See id.* at 829.
74 *See id.* at 820.
75 *See id.* at 829. Regarding the circumstances surrounding the challenged statements, the Court noted:

There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) “what is happening,” but rather “what happened.”

*Id.* at 829–30 (citations omitted). Furthermore, the Court noted the similarities between the statements made in the present case and in *Crawford*:

What we called the “striking resemblance” of the *Crawford* statement to civil-law *ex parte* examinations is shared by Amy’s statement here. Both declarants were actively separated from the defendant-officers forcibly prevented Hershel from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an ob-
“[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.”76 Consequently, the statements were “inherently testimonial.”77

Thus, Davis provides that a court should look to the primary purpose of the interrogation to determine whether out-of-court statements to law enforcement officials or their agents are testimonial.78 Statements made during an emergency or in an effort to obtain help are not testimonial.79 Nevertheless, statements made to establish events that may be relevant to future prosecution are testimonial.80

D. Melendez-Diaz v. Massachusetts: A Reaffirmation

In 2009, Justice Scalia reaffirmed the testimonial standard set forth in Crawford.81 In Melendez-Diaz v. Massachusetts, the Supreme Court considered whether affidavits reporting the results of forensic analysis were “testimonial,” thus making those who performed the lab tests “wit-

Id. at 830 (citations omitted).

76 Davis, 547 U.S. at 830.

77 See id.

78 See id. at 822.

79 See id.

80 Id.

81 Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531–32 (2009). In the days following the Melendez-Diaz decision, the Supreme Court granted certiorari to Briscoe v. Virginia, which presents the question:

If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

nesses” and subject to a defendant’s right of confrontation. In a five to four decision, Justice Scalia, writing again for the Court, asserted that “[t]his case involves little more than the application of our holding in Crawford v. Washington.”

In deciding whether “certificates of analysis” were testimonial, the Court noted that these documents were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” Invoking Crawford’s various formulations of testimonial statements, the Court stated that “[t]here is little doubt that the documents at issue . . . fall within the ‘core class of testimonial statements’ thus described.” In fact, these certificates of analysis fit into all three of the various formulations set forth in Crawford.

Notably, the Court stressed, in particular, that the certificates were “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” It highlighted that under Massachusetts law, the sole purpose of such documents was “to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.” As such, because the analysts knew of the certificates’ evidentiary purpose, the certificates were testimonial statements and the lab analysts were “witnesses” for the purposes of the Confrontation Clause. Absent a showing of unavailability and a prior opportunity for cross-examination, the Court concluded that under the Sixth Amendment, the defendant was entitled to confront the lab analysts at trial.

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82 Melendez-Diaz, 129 S. Ct. at 2530. In Melendez-Diaz, the defendant, Luis Melendez-Diaz, was charged with distributing and trafficking cocaine after the police found nineteen small plastic bags in the backseat of the police cruiser where the defendant had previously been. Id. The police submitted these bags to the state laboratory for chemical analysis. Id. At trial, the prosecution entered into evidence the “certificates of analysis” showing the results of the forensic analysis performed on the seized substances.” Id. at 2530–31. The certificates contained “the following results: The substance was found to contain: Cocaine.” Id. at 2531. The defendant objected to the admission of the certificates based upon Confrontation Clause concerns, asserting that Crawford required the lab analysts testify in person. Id. The objection was overruled and a jury found Melendez-Diaz guilty. Id.

83 Id. at 2542.

84 Id. at 2532 (quoting Davis, 547 U.S. at 830).

85 Id.

86 See id. The Court noted that “[t]he documents at issue here . . . are quite plainly affidavits” and that affidavits fall into two of the formulations described in Crawford. Id.; see also Crawford, 541 U.S. at 51, 52.

87 Melendez-Diaz, 129 S. Ct. at 2532 (quoting Crawford, 541 U.S. at 62).


89 See id.

90 See id.
Consequently, Melendez-Diaz not only affirms Crawford’s testimonial standard, but also provides greater guidance regarding its application. Most importantly, the opinion rests heavily on the third formulation of “testimonial”—the standard that requires a finding of testimonial for any statement “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” The decision to apply this standard suggests that while Crawford articulated three forms that testimonial statements could take, lower courts should be most concerned with the third, most expansive formulation. Melendez-Diaz demonstrates the Court’s embrace of a broad, encompassing definition of testimonial.

II. CHALLENGES TO PROSECUTING CHILD SEXUAL ABUSE CASES

Notwithstanding the difficulties posed by the evolving Confrontation Clause standard, the prosecution of child sexual abuse cases itself has historically been challenging. These challenges stem primarily from the nature of such cases and the overwhelming reliance on children as witnesses. Consequently, these cases present unique frustra-

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91 See id. at 2532, 2542.
92 See Melendez-Diaz, 129 S. Ct. at 2532. Professor Friedman, in his initial reaction to the decision, commented:

[T]hen the Court gives an underlying basis. Although it had just quoted the three definitions of “testimonial” recited by Crawford, now it just applied one, the right one (or at least the one closest to right)—the statements were made “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” And under that standard, the case is an easy one; indeed, the sole purpose of the certificate was evidentiary. Easy case.

93 See Melendez-Diaz, 129 S. Ct. at 2532; Friedman, supra note 92.
94 See Melendez-Diaz, 129 S. Ct. at 2532; Friedman, supra note 92.
95 See Brief for the National Ass’n of Counsel for Children as Amicus Curiae Supporting Respondents at 9, Davis v. Washington, 547 U.S. 813 (2006) (No. 05–5224) [hereinafter Davis Amicus Brief] (“‘Child abuse is one of the most difficult crimes to detect and prosecute. . . .’ This has long been the case.” (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987)); Robert D. Friedman, The Conundrum of Children, Confrontation, and Hearsay, LAW & CONTEM. PROBS., Winter 2002, at 243, 243 (“The adjudication of child abuse claims poses an excruciatingly difficult conundrum. The crime is a terrible one, but false convictions are abhorrent.”).
96 See Davis Amicus Brief, supra note 95, at 7 (noting that “most sexual abuse is perpetrated by adults who are close to the child”); John C. Yuille et al., Interviewing Children in
tions in regards to ensuring the confrontation rights of the accused, especially in light of the Supreme Court’s decisions in \textit{Crawford} and \textit{Davis}. Specifically, the secretive nature of child sexual abuse, the fact that children are often the only eyewitnesses to the crime, concerns about the reliability of child testimony, and the unavailability of child witnesses to testify at trial challenge prosecutors and courts in their attempt to balance the effective prosecution of child sexual abuse and the constitutional rights of the accused.

\textbf{A. The Nature of the Crime and Children as Eyewitnesses}

Prosecution of child sexual abuse cases is difficult primarily because the crime is committed in secret. In most cases, the perpetrator is a person close to the victim and induces silence through threats and violence. In an amicus brief filed in support of the respondents in \textit{Davis}, the Counsel for Children’s Amicus Brief stated that “more than

\textit{Sexual Abuse Cases, in Child Victims, Child Witnesses: Understanding and Improving Testimony} 95, 96 (Gail S. Goodman & Bette L. Bottoms eds., 1993) (stating that knowledge of what happened in child sexual abuse cases often depends on the child victim’s statement); \textit{Raeder, supra} note 50, at 1009 (noting that child sexual abuse usually takes place in secret).


\textit{See, e.g., Davis Amicus Brief, supra} note 95, at 9 (stating that “prosecutors face a number of hurdles when presenting child witnesses”); \textit{Yuille et al., supra} note 96, at 95–96 (describing the dearth of helpful evidence in child sexual abuse cases); Friedman, \textit{supra} note 95, at 243 (acknowledging the “conundrum” of “adjudication of child abuse claims” and noting that “[o]ften the evidence does not support a finding of guilt or innocence with sufficient clarity to allow a decision free of gnawing doubt”); \textit{Mosteller, supra} note 27, at 921 (discussing the limitations and deficiencies of child testimony, including legal determinations of unavailability).

\textit{Raeder, supra} note 50, at 1009.

\textit{Davis Amicus Brief, supra} note 95, at 2; \textit{see also In re Rolandis G.}, 902 N.E.2d 600, 604 (Ill. 2008) (child victim stated that his abuser “threatened him with a stick” . . . and made him “’pinky swear’ not to tell anyone”), \textit{cert. denied}, 129 S. Ct. 2747 (2009); \textit{State v. Muttart}, 875 N.E.2d 944, 948 (Ohio 2007) (child victim reported that her abuser threatened that “if she told her mother or grandmothers [of the abuse], her mother would be taken to jail”), \textit{cert. denied}, 128 S. Ct. 2473 (2008). The Counsel for Children went on to state, “child sexual abuse and other forms of child maltreatment are pervasive, yet most victims suffer in silence.” \textit{Davis Amicus Brief, supra} note 95, at 2. For further discussion regarding the reasons victims often fail to disclose sexual abuse, see \textit{id}. at 6–9.
500,000 children fall victim to abuse every year” and that “only about ten percent of child sexual abuse is ever reported to the authorities.”

Furthermore, if the sexual abuse is disclosed, there is often limited evidence from which to prosecute. Physical evidence is rare, and even if present, usually does not identify the accused. In addition, the child victim and the accused are typically the only witnesses to the crime. Consequently, child sexual abuse remains one of the least prosecuted crimes.

B. The Reliability of Child Witnesses

Notwithstanding the evidentiary challenges, the prosecutorial reliance on child witnesses raises general concerns about the reliability of child testimony. Specifically, when evaluating the reliability of out-of-court statements made by child victims, courts have expressed particular concern with a child’s susceptibility to leading questioning and outside influences during investigative interviews.

Most disclosures in child sexual abuse cases occur first to family members and then to police officers, doctors, nurses, and social work-

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101 Davis Amicus Brief, supra note 95, at 5–6. For more information regarding the pervasiveness of child sexual abuse, see id. at 5–6.

102 See id. at 9; Yuille et al., supra note 96, at 95–96; Raeder, supra note 50, at 1009.

103 See Yuille et al., supra note 96, at 95. “No physical evidence . . . may be present because of the nature of the abuse or because children heal quickly and the crime is often reported well after it occurred.” Raeder, supra note 50, at 1009.

104 See Tome v. United States, 513 U.S. 150, 166 (1995) (“In almost all cases [of child sexual abuse] a youth is the prosecution’s only eyewitness.”); Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (“Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.”); Davis Amicus Brief, supra note 95, at 9; Yuille et al., supra note 96, at 95; Raeder, supra note 50, at 1009.

105 Davis Amicus Brief, supra note 95, at 9.

106 See Orenstein, supra note 97, at 909; Raeder, supra note 50, at 1009. Professor Orenstein writes:

Concerns that arise with adult witnesses are heightened with children. . . . With children, whose practical knowledge of the world is incomplete and who are especially dependent on others emotionally and physically, the potential for undue influence and bias increases. Relatedly, outright intimidation, another potential problem for adult witnesses, demands a more complicated and sensitive inquiry when child witnesses are involved.

Orenstein, supra note 97, at 909.

107 See, e.g., Idaho v. Wright, 497 U.S. 805, 826 (1990) (finding that the child had been questioned suggestively by a doctor); People v. Stechly, 870 N.E.2d 333, 343 (Ill. 2007) (defendant’s expert witness, a clinical psychologist, criticized the questioning techniques utilized to interview the child victim).
ers. Often, police officers, doctors, nurses, and social workers are not specifically trained to question children about sexual abuse; consequently, untrained questioning can lead to errors in interviewing. The problem with untrained interviewing is two-fold. First, without specific training on how to properly question children, questioners are often unaware of developmental changes in language ability and cognition. This unawareness can result in misinterpretations of the child’s statements and misunderstandings between the questioner and the child. Second, untrained questioners may engage in suggestive questioning because of professional biases. As a result, these untrained questioners are unable to obtain reliable and valid information.

Even if, however, an interview is properly conducted, juries often perceive statements by child witnesses as unreliable. Jurors regard children’s statements with skepticism as a result of “concerns about [a child’s] susceptibility to suggestion, manipulation, coaching, or confusing fact with fantasy.” These jury expectations ultimately make the presentation and effectiveness of child witnesses extremely difficult.

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108 See Davis Amicus Brief, supra note 95, at 8.
109 See Yuille et al., supra note 96, at 97; Lindsay E. Cronch et al., Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions, 11 Aggression & Violent Behavior 195, 196 (2006). The Cronch article notes that, “bad interviewing can lead to serious consequences. These may include eliciting false allegations, putting children and families through unnecessary stress, decreasing a child victim’s credibility in court, contaminating facts, reducing probability of conviction, draining resources through unsuccessful trials and investigations, and reducing resources for legitimate abuse cases.” Cronch et al., supra, at 196.
110 See Yuille et al., supra note 96, at 98.
111 See id. For example, children who disclose their sexual abuse use a variety of words to describe their own anatomy and that of their abuser. See, e.g., People v. Vigil, 127 P.3d 916, 919 (Colo. 2006) (child victim reported that his abuser “stuck his winkle in his butt”); State v. Henderson, 160 P.3d 776, 778–79 (Kan. 2007) (child victim stated that her abuser touched her “potty place” with his “ding ding”); Commonwealth v. DeOliveira, 849 N.E.2d 218, 222 (Mass. 2006) (child victim referred to her abuser’s penis as a “pee pee”); State v. Justus, 205 S.W.3d 872, 876 (Mo. 2006) (child victim described her abuser’s penis as “looking like a ‘tail’ with a ‘knob’ on the end”). Often, these terms are not precise and are not used consistently. See, e.g., Henderson, 160 P.3d at 779–80 (child victim identified a penis as both a “ding ding” and a “hot dog”); Justus, 205 S.W.3d at 876 (child victim referred to both her abuser’s penis and her vagina as a “pee-pee”).
112 See Yuille et al., supra note 96, at 98. These professional biases can include beliefs that children are inherently incorrect or that children never lie about abuse. See id.
113 See id. at 97.
114 See Davis Amicus Brief, supra note 95, at 10–11.
115 Raeder, supra note 50, at 1009.
116 See Davis Amicus Brief, supra note 95, at 10–11. The Counsel for Children also cited other unrealistic jury expectations such as “medical evidence of sexual abuse” although
Lastly, child victims of sexual abuse often do not testify at trial because courts usually declare them legally unavailable.\textsuperscript{118} The reasons for unavailability, stemming primarily from the age of the child, fall into two general categories: competency and trauma.\textsuperscript{119}

In the first category, courts find children unavailable because they lack the competency to testify in court.\textsuperscript{120} Generally, courts have found “there usually is none” and “strong emotional reactions when describing abuse” when “children usually do not.” \textit{Id.}

\textsuperscript{118} See, e.g., \textit{Wright}, 497 U.S. at 809 (child victim was found unavailable to testify because of an inability to effectively communicate); \textit{Rolandis}, 902 N.E.2d at 603 (child victim refused to answer questions regarding the abuse when called to testify); \textit{Stechly}, 870 N.E.2d at 340–41 (child victim found unavailable because of the risk of trauma); \textit{Henderson}, 160 P.3d at 781 (child victim unavailable to testify because she could not understand the importance of the proceedings, the oath, or the need to tell the truth).

\textsuperscript{119} See \textit{Davis Amicus Brief}, \textit{supra} note 95, at 9–10. \textit{Compare Wright}, 497 U.S. at 809 (finding a child unavailable to testify because she could not effectively communicate to the jury), \textit{and Henderson}, 160 P.3d at 781 (finding a child unavailable to testify because she was unable to understand the questions, the importance of the trial, the relevance of the oath, or the necessity to tell the truth), with \textit{State v. Contreras}, 979 So. 2d 896, 899 (Fla. 2008) (finding a child unavailable to testify because emotional and psychological trauma would result), \textit{and Stechly}, 870 N.E.2d at 340–41 (finding a child unavailable to testify because she “would likely experience trauma symptoms”).

\textsuperscript{120} See, e.g., \textit{Wright}, 497 U.S. at 809; \textit{Henderson}, 160 P.3d at 781; \textit{Justus}, 205 S.W.3d at 875. Professor Friedman distinguishes between “two different levels of incompetence”: “[t]he child who is capable of testifying, but not in a satisfactory manner” and “the child who is incapable of testifying.” Richard D. Friedman, Child Witnesses on the Academic & Judicial Front, The Confrontation Blog, http://confrontationright.blogspot.com/2007/09/child-witnesses-on-academic-and.html (Sept. 7, 2009, 17:10 EST). The first level refers to a child who “lacks a sufficient sense of obligation to tell the truth for her testimony to be accepted in court.” \textit{Id.} In other words, “the child is not capable of testifying in court in a satisfactory manner.” \textit{Id.} Thus, “a deeper level of incompetence [occurs when] the child is (or a child of ordinary understanding of her age would be) so insufficiently developed that the statement should not be deemed testimonial at all.” \textit{Id.} The child “is just not capable of engaging in the kind of activity—witnessing—covered by the confrontation right.” \textit{Id.} While this distinction is helpful in considering whether or when children are capable of making testimonial statements and may (or should, as Professor Friedman argues) influence whether the out-of-court statements are admitted at trial, it does not have direct bearing on the primary issue addressed in this Note. The distinction is mentioned here to acknowledge the academic distinction, but for the purposes of this Note, the child victim is assumed to be found unavailable for any legitimate legal reason. Case law and legal scholars support this assumption. See, e.g., \textit{Bobadilla v. Carlson}, 570 F. Supp. 2d 1098, 1102 (D. Minn. 2008) (judge ruled child victim “not competent to testify”), \textit{aff’d}, 575 F.3d 785 (8th Cir. 2009); \textit{Rolandis}, 902 N.E.2d at 603 (on the stand, child victim “could not bring himself to answer questions about the allegations concerning [the defendant]”; \textit{Henderson}, 160 P.3d at 781 (judge ruled that the child witness was unavailable to testify as a witness because she is unable to understand the questions or the importance of the proceedings or oath); see also Friedman, \textit{supra} note 95, at 252 n.34 (“The key point is that, whatever the precise nature of
a child incompetent to testify when the child demonstrates that he or she cannot effectively communicate to the jury, fails to qualify to take the oath, or generally lacks the requisite understanding of what constitutes the truth.  

In the second category, children are deemed unavailable because of the trauma associated with testifying in court. In these cases, there is a general concern that the circumstances surrounding testifying, such as the unfamiliar legal environment or the aggressive cross-examination, will emotionally and psychologically harm the child. In addition, even if child victims take the stand, occasionally they freeze during testimony and refuse to answer questions regarding the abuse, resulting in no valuable testimony. Consequently, the high rate of unavailability for child witnesses causes prosecutors to rely heavily on out-of-court statements.

the critical capacity may be, at some point a child will be insufficiently mature to be deemed a witness.”).

See, e.g., Wright, 497 U.S. at 809 (three-year-old victim was found unavailable to testify because she “was ‘not capable of communicating to the jury’”); Henderson, 160 P.3d at 781 (child victim found unavailable because she is “unable to really understand the questions,” “the importance of [the] proceedings,” “the application of the oath, the relevance of the oath or the requirement to tell the truth”); Justus, 205 S.W.3d at 875 (three-year-old victim found unavailable “because of severe emotional distress”).

See, e.g., Contreras, 979 So. 2d at 899; Stechly, 870 N.E.2d at 340–41.

See, e.g., Contreras, 979 So. 2d at 899 (child victim was found unavailable to testify because the child would “suffer emotional and psychological harm if required to testify”); Stechly, 870 N.E.2d at 340–41 (child victim was found unavailable because, “if . . . forced to testify, [the child] would likely experience trauma symptoms such as anxiety, sleep disturbances, and difficulties in concentrating and paying attention”).

See, e.g., White, 502 U.S. at 350 (child victim “experienced emotional difficulty on being brought to the courtroom and in each instance left without testifying”); Rolandis, 902 N.E.2d at 603 (child victim “resolutely refused to respond” to questions about the abuse and “could not bring himself to answer questions about the allegations”).

See, e.g., White, 502 U.S. at 350 (prosecution introduced out-of-court statements the child victim made to her babysitter, mother, a police officer, nurse and doctor); Contreras, 979 So. 2d at 899 (prosecution introduced a videotaped interview with the child victim conducted by the coordinator of a child protection team); Rolandis, 902 N.E.2d at 603–04 (prosecution introduced out-of-court statements the child victim made to his mother and two police officers and a videotaped interview conducted by a child advocate at a children’s center); Henderson, 160 P.3d at 781 (prosecution introduced the child victim’s out-of-court statements to her mother, a nurse practitioner, and a police officer and a videotaped interview with the child conducted by a social worker).
D. Confrontation Clause Implications

The collective effect of these prosecutorial challenges has particular implications for the confrontation rights of the accused. Because most child victims are eyewitnesses to the crime and they are usually found unavailable to testify at trial, prosecutors must rely on the child victim’s initial disclosures to parents, police officers, nurses, doctors, and social workers. These out-of-court statements are generally the focus of Confrontation Clause attacks because the child victim does not testify at trial and the accused rarely has an opportunity to cross-examine the child victim regarding the statements.

Pre-\textit{Crawford}, these confrontation clause challenges were easily overcome as long as the prosecution could show that these out-of-court statements were sufficiently reliable—specifically, that they “[fell] within a firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.” Under the “testimonial standard” set forth in \textit{Crawford v. Washington} and clarified in \textit{Davis}, however, these out-of-court statements remain inadmissible as long as they can be shown to be “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” and there was no prior opportunity for cross-examination.

\begin{footnotesize}
\begin{enumerate}
\item See Raeder, \textit{supra} note 50, at 1009 (“\textit{Crawford} and \textit{Davis v. Washington} up the ante for prosecutors who are trying to protect vulnerable young children who are unable or unwilling to testify at trial, because they defeat the admission of testimonial statements.”).
\item See, \textit{e.g.}, \textit{White}, 502 U.S. at 350 (prosecution introduced out-of-court statements the child victim made to her babysitter, mother, a police officer, nurse and doctor); \textit{Contreras}, 979 So. 2d at 899 (prosecution introduced a videotaped interview with the child victim conducted by the coordinator of a child protection team); \textit{Rolandis}, 902 N.E.2d at 603–04 (prosecution introduced out-of-court statements the child victim made to his mother and two police officers and a videotaped interview conducted by a child advocate at a children’s center); \textit{Henderson}, 160 P.3d at 781 (prosecution introduced the child victim’s out-of-court statements to her mother, a nurse practitioner, and a police officer and a videotaped interview with the child conducted by a social worker).
\item See, \textit{e.g.}, \textit{White}, 502 U.S. at 351 (stating that the Supreme Court granted certiorari to decide whether admission of a child victim’s out-of-court statements violated the petitioner’s confrontation rights); \textit{Contreras}, 979 So. 2d at 900 (defendant arguing on appeal that the child victim’s videotaped out-of-court statement violated his confrontation rights); \textit{Rolandis}, 902 N.E.2d at 605 (defendant arguing on appeal that the child victim’s out-of-court statements to a police officer and social worker violated his confrontation rights); \textit{DeOliveira}, 849 N.E.2d at 224 (defendant arguing on appeal that the child victim’s out-of-court statements to a doctor violated his confrontation rights).
\item See \textit{Ohio v. Roberts}, 448 U.S. 56, 66 (1980).
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III. Videotaping and Forensic Interviewers: The Solution and the Problem

A. A Solution: Increasing the Reliability of Out-of-Court Statements Pre-Crawford

In response to pre-Crawford Confrontation Clause concerns, law enforcement officials and child advocates took steps, such as using forensic interviewers and videotaping interviews with child victims, to ensure the reliability of out-of-court statements made by child victims.\textsuperscript{131} This would guarantee that, under Roberts, the out-of-court statements of child victims would be admissible at trial.\textsuperscript{132} Eventually, the use of forensic interviewers to question child victims and videotaping those interviews became best practices in order to increase the reliability of a child victim’s out-of-court statements.\textsuperscript{133}

1. Forensic Interviewers

One of the main challenges to the reliability of a child victim’s out-of-court statements arises from the concern that the interviewer is inexperienced in questioning children, which can result in misunderstandings and suggestive interviewing.\textsuperscript{134} As a result, law enforcement officials and child advocates now rely on forensic interviewers to interview child victims of sexual abuse.\textsuperscript{135}

\textsuperscript{131} See Idaho v. Wright, 497 U.S. 805, 812–13 (1990) (suggesting that proper interviewing technique and recording of the interview could guarantee the reliability of a child victim’s out-of-court statements so to ensure the admission of these statements at trial under Roberts); Cronch et al., supra note 109, at 196, 197 (stressing the importance of forensic interviews in protecting victims and falsely accused individuals and strongly suggesting that interviews should be videotaped).

\textsuperscript{132} See Wright, 497 U.S. at 812–13; Ohio v. Roberts, 448 U.S. 56, 66 (1980).

\textsuperscript{133} See Theodore P. Cross et al., U.S. Dep’t of Just., Evaluating Children’s Advocacy Centers’ Response to Child Sexual Abuse 2–3 (2008) (citing forensic interviews as a way to increase the effectiveness of child sexual abuse investigations and to address concerns that “investigation procedures were insensitive to children”); 1 John E.B. Myers, Evidence in Child Abuse and Neglect Cases 84–88 (3d ed. 1997) (suggesting that judges favor videotaping and identifying eight arguments for videotaping investigative interviews).

\textsuperscript{134} See Yuille et al., supra note 96, at 98.

\textsuperscript{135} See, e.g., Bobadilla, 570 F. Supp. 2d at 1101 (police contacted a social worker who was trained in the “CornerHouse technique” — an approach used . . . in interviewing children about allegations of sexual abuse” to interview the child victim); State v. Hooper, No. 31025, 2006 WL 2328233, at *1 (Idaho Ct. App. Aug. 11, 2006) (responding police officer arranged for a nurse at the Sexual Trauma Abuse Response (STAR) Center to interview the child victim); Bentley, 739 N.W.2d at 297 (police and child protective services arranged for a counselor at a child protection center to interview the child victim); State v. Hender-
Forensic interviews typically serve multiple purposes: they gather information to ensure the health and safety of the child victim while also obtaining evidence for law enforcement officials. Forensic interviewers are trained specifically to speak to and interview children who are victims of abuse. Their training thus benefits investigations of child sexual abuse by overcoming two distinct obstacles. First, be-
cause of their training, forensic interviewers can minimize the trauma upon the child victims when they recount their abuse. Second, they are knowledgeable about the developmental issues that can complicate efforts to secure accurate information about the abuse.

As a result, forensic interviews increase the reliability of a child victim’s out-of-court statements because they counter the main challenge of an inexperienced questioner. The forensic interviewer’s training in questioning children lessens the risk of misunderstanding and misinterpretation between the interviewer and the child victim. In addition, the use of particular interviewing techniques by forensic interviewers minimizes the possibility of suggestive and leading questioning. Lastly, a thorough forensic interview preserves the child victim’s fresh recollection of the abuse, thus resulting in more reliable statements.

2. Videotaped Interviews

Videotaping interviews with child sexual abuse victims also helps increase the reliability of their out-of-court statements. Videotapes capture the demeanor of the child victim during the interview, which allows a more accurate presentation of the child’s reactions to questions and their behavior while answering questions. They also provide assurances against suggestive and leading questioning because those viewing the videotape can observe how the interviewer questioned the child.

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141 See Cross et al., supra note 133, at 1; Yuille et al., supra note 96, at 97–98, 111; What Is Forensic Interviewing?, supra note 139, at 2.
143 See Wright, 497 U.S. at 812–13; Myers, supra note 133, at 84–88; Cronch et al., supra note 109, at 197 (“[S]upervision is highly beneficial in reducing improper and clumsy interviewing. Interviews should be taped . . . .” (citations omitted)).
144 Myers, supra note 133, at 85.
145 See Wright, 497 U.S. at 812–13; Torres v. Warden, No. CV054000278S, 2008 WL 2426600, at *4 n.1 (Conn. Super. Ct. May 28, 2008) (expert witness testified that the “documents and video reflect that there were a variety of problems with the way in which the victim in this case was interviewed, both by professionals and by her mother’’); Myers, supra note 133, at 85.
Furthermore, videotapes have the added benefit of reducing trauma on the child victim by limiting the number of interviews.\textsuperscript{148} Instead of the child having to retell the account of the abuse multiple times to different agencies (law enforcement officials, health care providers, social workers, and prosecutors), the interview can be videotaped and passed along to the different agencies.\textsuperscript{149} This encourages and facilitates inter-agency cooperation.\textsuperscript{150}

3. Confrontation Clause Implications Pre-\textit{Crawford}

Under the \textit{Roberts} rule of reliability, a child victim’s out-of-court statements were admissible at trial only if they fell under a “firmly rooted exception to the hearsay rule” or contained “particularized guarantees of reliability.”\textsuperscript{151} Using forensic interviewers and videotaping the interviews work primarily to ensure that these statements have those “particularized guarantees of reliability” so that they are admissible at trial.\textsuperscript{152} As stated earlier, the Supreme Court noted in \textit{Wright} that “certain procedural safeguards” could help determine the trustworthiness of a child

\begin{footnotes}
\item[148] See \textit{Bobadilla}, 570 F. Supp. 2d at 1110; \textit{Cross et al.}, \textit{supra} note 133, at 2; \textit{Myers}, \textit{supra} note 133, at 85; Mosteller, \textit{supra} note 27, at 966; \textit{What Is Forensic Interviewing?}, \textit{supra} note 140, at 2. In \textit{Bobadilla v. Carlson}, the District Court noted the Minnesota Supreme Court’s observation:

Avoiding multiple interviews is a critical concern when dealing with children not only because the interviews are often traumatic for the child, but also because multiple interviews increase the chance that the children will be confused by unnecessarily suggestive questions. . . . Given the clear need to limit a child’s exposure to stressful and confusing interviews, and the accompanying need to accurately assess risks to the child, there is a compelling need for a single recorded assessment interview solely in order to best protect the health and welfare of the child.

570 F. Supp. 2d at 1110 (quoting State v. Bobadilla, 709 N.W.2d 243, 255 (Minn. 2006)). The Cronch study on forensic interviewing techniques also reported that “[r]epetitive interviewing and repeatedly asking similar questions have both been associated with inaccurate reporting and recanting allegations, particularly if early interviews are conducted inappropriately. Furthermore, the child’s suffering is exacerbated when they are repeatedly and unnecessarily subjected to stressful and upsetting interviews with multiple strangers.” Cronch et al., \textit{supra} note 109, at 203.

\item[149] See \textit{Rolandis}, 902 N.E.2d at 604 (videotape of the interview conducted by a child advocate at a children’s center was given to police); \textit{Bentley}, 739 N.W.2d at 300 (copy of videotape of interview conducted by child protection center counselor given to police according to protocol); State v. Barnes, 149 Ohio Misc. 2d 1, 29 (Ct. Common Pleas 2008) (social worker testified that “videotapes of the interviews [with victims of sexual abuse] would be turned over to the police”); Mosteller, \textit{supra} note 27, at 966.

\item[150] See Mosteller, \textit{supra} note 27, at 966.

\item[151] See \textit{Roberts}, 448 U.S. at 66.

\item[152] See \textit{Wright}, 497 U.S. at 812–13.
\end{footnotes}
victim’s out-of-court statements. In fact, the Supreme Court specifically stated that videotaping interviews could create circumstances under which a court could find out-of-court statements reliable.

B. A Problem: Creating Inadmissible Testimonial Statements Post-Crawford

While forensic interviewers and videotaped interviews worked to increase the reliability of out-of-court statements made by child victims of sexual abuse, the testimonial standard of Crawford has essentially rendered these statements inadmissible. In general, courts have evaluated the circumstances surrounding the videotaped statements to forensic interviewers and concluded that they fall into the definitional formulations of “testimonial” laid out in Crawford.

1. Forensic Interviewers

Despite the introduction of forensic interviewers as a means to increase reliability, the very presence of forensic interviewers has led many lower courts to deem the resulting statements as testimonial.

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153 See id. at 818.
154 See id. at 812–13.
155 See, e.g., Bobadilla, 570 F. Supp. 2d at 1107, 1112 (finding that the Minnesota Supreme Court was “unreasonable” in holding that the admission of a child victim’s videotaped interview with a forensic interview was “not a ‘police interrogation’ within the meaning of Crawford”); State v. Contreras, 979 So. 2d 896, 905, 911 (Fla. 2008) (finding that the Child Protection Team (CPT) interviewer’s videotaped interview with the child victim was testimonial and thus, its admission at trial violated the Confrontation Clause); Rolandis, 902 N.E.2d at 611 (finding that a child advocate’s videotaped interview with a child victim was testimonial and that it was “improperly admitted” at trial); Bentley, 739 N.W.2d at 301–02 (affirming the state district court’s ruling that the child protection center (CPC) counselor’s videotaped interview with the child victim was testimonial, and thus violated the defendant’s Confrontation Clause rights when admitted at trial); Justus, 205 S.W.3d at 880–81 (holding that a social worker’s videotaped interview with a child victim was testimonial and its admission at trial violated the Confrontation Clause).

156 See, e.g., Bobadilla, 570 F. Supp. 2d at 1107–09 (considering the time between when the abuse took place and when the interview was conducted, who initiated the interview, the location of the interview, and the forensic training of the social worker when determining whether the videotaped interview was testimonial); Contreras, 979 So. 2d at 905 (considering the coordination between police and the child protection team, the influence the police had over the interview, and the presence of police at the interview in determining whether the videotaped interview was testimonial); Rolandis, 902 N.E.2d at 611 (considering who initiated the interview, the purpose of the interview, and the fact that the videotape was turned over to the police in determining whether the videotaped interview was testimonial); Justus, 205 S.W.3d at 880–81 (holding that a social worker’s videotaped interview with a child victim was testimonial and its admission at trial violated the Confrontation Clause).

157 Mosteller, supra note 27, at 961.
For some courts, the term “forensic” automatically results in a finding of testimonial for the resulting statements.\(^{158}\) In these circumstances, the court relies on the definition of the word “forensic” to determine that the child victim’s out-of-court statements are testimonial under the formulations set forth in *Crawford.*\(^{159}\) Here, the term “forensic” implies a prosecutorial or trial use, and thus, falls under any of *Crawford’s* three formulations of “testimonial.”\(^{160}\)

Other courts determine that forensic interviewers are government agents, and are thus, testimonial under *Davis.*\(^{161}\) Under the primary purpose test established in *Davis,* statements made to government officials are testimonial if the primary purpose of the interview was to establish past events as opposed to information being provided during an emergency.\(^{162}\) In these instances, courts often look to the circumstances in which the forensic interviews take place, find that there is no ongoing emergency, and conclude that the resulting statements are testimonial because they establish past events.\(^{163}\) Particularly, the courts look to how the forensic interviewers came to interview the child victim.\(^{164}\) In many cases, the police invite forensic interviews to question

\(^{158}\) See id. at 961 & n.157.

\(^{159}\) See Mosteller, *supra* note 27, at 961 n.157; see also *Hooper,* 2006 WL 2328233, at *4 n.6 (relying on the New Oxford American Dictionary for definitions of forensic).

\(^{160}\) See *Crawford,* 541 U.S. at 51–52; Mosteller, *supra* note 27, at 961 n.157.

\(^{161}\) See, e.g., *Bobadilla,* 570 F. Supp. 2d at 1108–09 (finding that the social worker “was acting as a ‘surrogate interviewer’ for the police” and that the interview “appeared to be aimed toward one goal: getting [the child victim] to repeat, on videotape, his assertion that Bobadilla had abused him”); *Contreras,* 979 So. 2d at 905 (finding that “the CPT coordinator was serving as a police proxy in this interview” and that “the primary, if not the sole, purpose of the CPT interview was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to a later criminal prosecution”); *Rolandis,* 902 N.E.2d at 611 (holding that the social worker “was acting as a representative of the police” and that “there is absolutely no indication that . . . [the social worker’s] interview of [the child victim] was conducted, to a substantial degree, for treatment rather than investigative purposes”); *Justus,* 205 S.W.3d at 880 (finding that the social worker “was acting as a government agent” and that the “interview was performed to preserve [the child victim’s] testimony for trial”).


\(^{163}\) See, e.g., *Henderson,* 160 P.3d at 790–79 (finding that “[t]here was no emergency; [the child victim] was speaking of past events . . . ; her demeanor was calm”); *Justus,* 205 S.W.3d at 880 (holding that the child victim’s videotaped statements “were not produced in the midst of an ‘ongoing emergency’” and that the child victim’s “demeanor in the videotaped interview was calm”).

\(^{164}\) See, e.g., *Bobadilla,* 570 F. Supp. 2d at 1108 (noting the testimony of the social worker who stated, “[the detective] from the Police Department asked me to assist him in interviewing [the child victim]”); *Rolandis,* 902 N.E.2d at 611 (noting that “the interview took place at the behest of the police so that a more detailed account of the alleged sexual abuse could be obtained by a trained interviewer and memorialized on videotape”); *Bent-
the child. This police invitation often contributes to some courts’ findings that there is sufficient government involvement to support a decision that the resulting interview contains testimonial statements.

Finally, some courts hold that the forensic interviews are themselves the functional equivalent of police interrogations and serve a law enforcement purpose. As a result, the statements obtained through forensic interviews are testimonial under the Crawford formulations and the Davis primary purpose test.

2. Videotaped Interviews

While videotaping interviews also helped to ensure the reliability of interviews with child victims, the very act of videotaping has led courts to find that the resulting statements are testimonial. Some lower

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See, e.g., Bobadilla, 570 F. Supp. 2d at 1108 (police detective invited social worker to interview child victim); Rolandis, 902 N.E.2d at 611 (interview with child advocate “took place at the behest of the police”); Bentley, 739 N.W.2d at 299 (“[t]he police department’s standard operating procedure calls for the referral of child victims of sexual abuse to the CPC for ‘forensic interviews’”).

See, e.g., Bobadilla, 570 F. Supp. 2d at 1112 (finding unreasonable the Minnesota Supreme Court’s holding that the videotape interview was not testimonial despite “that a recorded interview . . . was conducted at the request of a police detective”); Contreras, 979 So. 2d at 905 (noting that “the CPT coordinator was serving as a police proxy in this interview” when concluding that the child victim’s videotaped statements were testimonial); Rolandis, 902 N.E.2d at 611 (noting that the videotaped interview was “conducted on behalf of the police” when holding that the child victim’s “videotaped statement was testimonial in nature”).

See, e.g., Bobadilla, 570 F. Supp. 2d at 1110–11 (finding that “the social worker’s interview of a child is expressly intended to substitute for a separate interrogation by the police” and that the purpose of the interview was both child protection and law enforcement); Contreras, 979 So. 2d at 905 (noting that the “CPT coordinator was serving as a police proxy in this interview” and that “the primary, if not the sole, purpose of the CPT interview was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to a later criminal prosecution”); Rolandis, 902 N.E.2d at 611 (holding that the child advocate “was acting as a representative of the police” and that “there is no indication that . . . [the] interview . . . was conducted, to a substantial degree, for treatment rather than investigated purposes”); Justus, 205 S.W.3d at 880 (holding that the social worker “was acting as a government agent when she interviewed [the child victim]” and that “[w]hile there is no doubt that one purpose of the interrogations was to enable assistance to the child, the circumstances indicated that their primary purpose was to establish or prove past events potentially relevant to later criminal prosecution”).

See, e.g., Bobadilla, 570 F. Supp. 2d at 1112; Contreras, 979 So. 2d at 905; Rolandis, 902 N.E.2d at 611; Justus, 205 S.W.3d at 880–81.

See, e.g., Rolandis, 902 N.E.2d at 611; Bentley, 739 N.W.2d at 300; Henderson, 160 P.3d at 790.
courts find that videotaping interviews evinces a formality that overwhelmingly points to the testimonial nature of the resulting statements. In these cases, the formality of videotaping suggests future evidentiary use, and as such, the court finds the videotape testimonial under Crawford.

In addition, for some courts, the fact that the videotape can be shared between agencies is yet another reason to support a finding of “testimonial.” In many instances, the videotaped interview takes place at a child protection center, and the video is then passed onto the police and placed into evidence. While this share-ability originally served as a benefit to encourage inter-agency cooperation and reduce the potential trauma on the child victim by reducing the number of interviews, it now only heightens the risk that a court will find the child victim’s statements “testimonial” because of its potential evidentiary use.

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170 See, e.g., Bentley, 739 N.W.2d at 300, 301 (stating that the “video equipment that was used to make a record of the interview” contributed to an “indicia of ‘formality’ surrounding [the child victim’s] statements” and concluding that the videotaped interview was testimonial); Henderson, 160 P.3d at 790, 794 (observing that “the interview was conducted in a formal setting with question and answer format and was recorded, with both video and audiotape,” which led to a conclusion that the videotaped statements were testimonial) (citations omitted); see also Mosteller, supra note 27, at 961 (noting that “courts are concerned about the degree of ‘formality’ of the statement, which may also involve its recordation, often on videotape”).

171 See, e.g., Bentley, 739 N.W.2d at 300, 302 (stating that the videotaping equipment contributed to an “indicia of ‘formality’ surrounding [the child victim’s] statements” and concluding that the videotaped interview was testimonial); Henderson, 160 P.3d at 790, 794 (observing that “the interview was conducted in a formal setting, with question and answer format and was recorded, with both video and audiotape,” which led to a conclusion that the videotaped statements were testimonial) (citations omitted).

172 See, e.g., Rolandis, 902 N.E.2d at 611 (observing that “because the interview [was] immediately turned over to [the police] ‘as evidence’ . . . the objective circumstances indicate that . . . the videotaped evidence was testimonial”); Bentley, 739 N.W.2d at 300 (stating that because the videotaped interview was given to the police, the “factual circumstances make it objectively apparent that ‘the purpose of the [recorded interview] was to nail down the truth about past criminal events’”) (quoting Davis, 547 U.S. at 830).

173 See, e.g., Rolandis, 902 N.E.2d at 604 (videotape of the interview conducted by a child advocate at a children’s center was given to police); Bentley, 739 N.W.2d at 299–300 (copy of videotape of interview conducted by child protection center counselor given to police according to protocol); Barnes, 149 Ohio Misc. 2d at 29 (social worker testified that “videotapes of the interviews [with victims of sexual abuse] would be turned over to the police”).

174 See, e.g., Bobadilla, 570 F. Supp. 2d at 1110, 1112 (noting the benefits of videotaped interviews with child victims of sexual abuse, but still finding the videotape testimonial); Rolandis, 902 N.E.2d at 611 (also noting the benefits of videotaped interviews but finding the videotape testimonial); Bentley, 739 N.W.2d at 302 (likewise acknowledging the treatment benefits of the interview circumstances, but ultimately concluding that the videotape was testimonial).
Lastly, these videotaped statements often contain powerful “identity statements,” statements in which the child victim identifies his or her abuser.\(^{175}\) The fact that these statements are made even more reliable because they are videotaped only increases the courts’ scrutiny of the admissibility of these statements in order to prevent violations of defendants’ Sixth Amendment constitutional rights.\(^{176}\)

3. Confrontation Clause Implications Post-\textit{Crawford}\(^{177}\)

Overall, the attempts to increase the reliability of out-of-court statements by child victims in order to assure their admissibility at trial under \textit{Roberts} has essentially provided lower courts with more leverage to find the statements inadmissible under \textit{Crawford’s} testimonial standard.\(^{177}\) While the use of forensic interviewers and video recording directly addressed the evidentiary concerns that prosecutors face regarding the reliability of child witnesses and jury expectations, these improvements are minimally beneficial if the statements remain inad-

\(^{175}\) See, e.g., \textit{Bobadilla}, 570 F. Supp. 2d at 1101; \textit{Henderson}, 160 P.3d at 779; \textit{Justus}, 205 S.W.3d at 876. For example, in \textit{Bobadilla}, the following exchange occurred between the child protection worker (CPW) and the child victim (T.B.), where the child victim ultimately identified the defendant as her abuser:

\begin{quote}
CPW: [H]as anyone hurt your body?
T.B.: Mmm, MmmMmm (affirmative)
CPW: Yeah. Who hurt your body?
T.B.: Orlando did.
\end{quote}

570 F. Supp. 2d at 1101 (footnote omitted). Likewise, in State v. Henderson, the following exchange took place between the social worker (LC) and the child victim (FI), and again, the child victim identified the defendant as her abuser:

\begin{quote}
LC: A body, you’re right. That’s what you said. It’s a body and that nobody is supposed to touch us on our body. Did you know that?
FI: Tae touched my body and it was hurting.
LC: He did?
FI: With the ding ding.
LC: With the ding ding?
FI: Uh huh (positive).
\end{quote}

160 P.3d at 779.

\(^{176}\) See \textit{Mosteller}, supra note 27, at 996 (“Where the interview is mechanically recorded, its formality and enormous utility for use at trial should cause courts to presume the statement’s testimonial character absent clear evidence of a substantial independent purpose.”).

\(^{177}\) See, e.g., \textit{Bobadilla}, 570 F. Supp. 2d at 1110–11; \textit{Contreras}, 979 So. 2d at 905; \textit{Rolandis}, 902 N.E.2d at 611; \textit{Bentley}, 739 N.W.2d at 300; \textit{Henderson}, 160 P.3d at 789–93; \textit{Justus}, 205 S.W.3d at 880.
Thus, in practice, *Crawford* does very little to help the prosecution of child sexual abuse; instead, it often stands directly in the way of prosecuting one of the least prosecuted crimes in the nation.  

570 F. Supp. 2d at 1110. In this way, the District Court asserts that the reason why a single recorded interview protects the “health and welfare of the child” is not by virtue of the fact that there is only one interview, but rather, because the single recorded interview produces an interview that is beneficial to law enforcement. See *id*. Consequently, the District Court ruled that the Minnesota Supreme Court was unreasonable in concluding that the videotaped interview was not testimonial. *Id.* at 1112. Furthermore, in *Rolandis*, the Supreme Court of Illinois recognized that “the purpose of this type of interdisciplinary, collaborative protocol is to ‘minimize the stress created for the child and his or her family by the investigatory and judicial process, and to ensure that more effective treatment is provided for the child and his or her family.’” 902 N.E.2d at 611 (quoting *Ill. Comp. Stat.* 80/3(d) (2008)). However, the court still found the videotaped statements testimonial and thus, improperly admitted at trial. *Id.* In *Bentley*, the Supreme Court of Iowa stated:

We credit the State’s assertion that the CPC performs very important and laudable services in furtherance of the protection of children. . . . It is beyond dispute that information gathered from [the child victim] in such a child-friendly, safe environment could have been very useful in the treatment of her well-documented psychological conditions.

739 N.W.2d at 302. Nevertheless, the court still held:

The actors were doing important work intended to investigate past alleged crimes and prevent future crimes. Although one of the significant purposes of the interrogation was surely to protect and advance the treatment of [the child victim] . . . , the extensive involvement of the police in the interview rendered [the child victim’s] statements testimonial. *Id.*  

178 See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1110; *Rolandis*, 902 N.E.2d at 611; *Bentley*, 739 N.W.2d at 302. In *Bobadilla*, the District Court for the District of Minnesota criticized the observations of the Minnesota Supreme Court, stating:

The problem with [the Minnesota Supreme Court’s] explanation is that it skips over the reason *why* making a videotape of the assessment interview protects “the health and welfare of the child.” It protects the child by minimizing the chances that the child will have to be interviewed a second time, and it minimizes the chances that the child will have to be interviewed a second time by giving law enforcement officers a recorded statement for use in their investigation.

See *id*. Consequently, the District Court ruled that the Minnesota Supreme Court was unreasonable in concluding that the videotaped interview was not testimonial. *Id.* at 1111. In *Rolandis*, the Supreme Court of Illinois recognized that “the purpose of this type of interdisciplinary, collaborative protocol is to ‘minimize the stress created for the child and his or her family by the investigatory and judicial process, and to ensure that more effective treatment is provided for the child and his or her family.’” 902 N.E.2d at 611 (quoting *Ill. Comp. Stat.* 80/3(d) (2008)). However, the court still found the videotaped statements testimonial and thus, improperly admitted at trial. *Id.* We credit the State’s assertion that the CPC performs very important and laudable services in furtherance of the protection of children. . . . It is beyond dispute that information gathered from [the child victim] in such a child-friendly, safe environment could have been very useful in the treatment of her well-documented psychological conditions.  

739 N.W.2d at 302. Nevertheless, the court still held:

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179 See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1113 (in finding the videotape interview testimonial, the court granted petitioner’s habeas corpus petition, vacated his conviction, and ordered his release); *Contreras*, 979 So. 2d at 911–12 (in finding the videotaped interview testimonial, the court found the trial court’s error not harmless in regards to the defendant’s capital sexual battery conviction); *Henderson*, 160 P.3d at 794 (affirming the appeals court’s finding that the videotaped interview was testimonial and reversal of conviction); *Justus*, 205 S.W.3d at 881 (in holding that the circuit court “erred in admitting the videotaped interview,” the court reversed the judgment and remanded the case). In some cases, however, the court will find that despite the use of testimonial statements at trial in violation of the Confrontation Clause, the admission constituted harmless error and the court will uphold the defendant’s conviction. See *Rolandis*, 902 N.E.2d at 619. In other cases,
IV. A Limited Solution

A brief examination of case law in the area of child abuse prosecution reveals that prosecutors rely heavily on the out-of-court statements of child victims when the child victims are unavailable to testify.\footnote{See, e.g., Bobadilla v. Carlson, 570 F. Supp. 2d 1098, 1101 (D. Minn. 2008) (videotaped interview admitted into evidence when judge found child victim not competent to testify); In re Rolandis G., 902 N.E.2d 600, 603–04 (Ill. 2008) (videotaped interview played at trial when child victim refused to respond to question), cert. denied, 129 S. Ct. 2747 (2009); State v. Henderson, 160 P.3d 776, 781 (Kan. 2007) (judge determined that child victim was unavailable to testify and the child victim’s videotaped interview was played at trial).} While forensic interviewers and videotaping work to address health and policy concerns regarding the investigation of child abuse claims, these efforts have generally ensured that the resulting out-of-court statements are inadmissible at trial despite claims that the interviews serve health and treatment purposes in addition to law enforcement objectives.\footnote{See, e.g., Bobadilla, 570 F. Supp. 2d at 1110 (recognizing the benefits of videotaped forensic interviews but still finding them testimonial); Rolandis, 902 N.E.2d at 611 (recognizing the benefits of videotaped forensic interviews but still finding them testimonial); State v. Bentley, 739 N.W.2d 296, 302 (Iowa 2007) (recognizing the benefits of videotaped forensic interviews but still finding them testimonial).} A simple solution may be to encourage courts to look at videotaped interviews in “minute and separate assertions” when determining the primary purpose of the statement.\footnote{Mosteller, supra note 27, at 956 n.132.}

Currently, courts appear to admit videotapes of forensic interviews in their entirety.\footnote{See, e.g., State v. Hooper, No. 31025, 2006 WL 2328233, at *1 (Idaho Ct. App. Aug. 11, 2006) (child victim was “too frightened to take the oath or testify” so the “trial court admitted the videotaped interview in lieu of her live testimony”); Rolandis, 902 N.E.2d at 604 (“videotape was played in its entirety for the court”); State v. Justus, 205 S.W.3d 872, 877 (Mo. 2006) (“the videotape was played for the jury”); State v. Arnold, No. 07AP-789, 2008 WL 2698885, at *1 (Ohio Ct. App. July 10, 2008) (“trial court ruled that the victim was unavailable to testify” and “allowed the State to present, in lieu of the victim’s live testimony, her recorded interview from the Child and Family Advocacy Center”).} This approach fails to consider that videotaped forensic interviews often encompass multiple purposes, suggesting that testimonial and non-testimonial statements could be dispersed throughout a single interview.\footnote{See Mosteller, supra note 27, at 955–56, 956 n.132.} Adoption of the “minute and separate” approach would allow a court to closely examine a videotaped interview for testimonial statements and exclude only those statements.\footnote{See id. at 956 n.132.}
In fact, this approach is suggested in *Davis*. In *Davis*, the Court encouraged trial courts to “redact or exclude the portions of any statement that have become testimonial.” Furthermore, courts are accustomed to performing this type of fact-intensive inquiry. For instance, when determining whether a statement is against interest, the Supreme Court held in *United States v. Williamson* that courts cannot assume that a statement is self-inculpative just because it falls within a greater confession. Instead, the Court found that “[w]hether a statement is in fact against interest must be determined from the circumstances of each case.” This type of analysis is exactly the approach being encouraged here.

This approach, however, does leave one obstacle of how to address the powerful “identity statements” that are often found within these videotaped interviews with forensic interviewers. Luckily, prosecutors may have to address this issue in very limited circumstances where the videotaped interview is the only evidence suggesting the accused’s involvement in the alleged abuse. In the majority of cases, courts find a

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187 Id.
188 See *Williamson v. United States*, 512 U.S. 594, 599–602 (1994) (suggesting a minute and separate approach to determining whether statements made within a confession are statements against interest); *Mosteller*, supra note 27, at 956 n.132.
189 *Williamson*, 512 U.S. at 600–01. The Court stated:

> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Id.

190 Id. at 601.
191 *Bobadilla*, 570 F. Supp. 2d at 1101 (Child victim identified the defendant as his abuser in the course of a forensic interview.); *Henderson*, 160 P.3d at 779 (Child victim identified the defendant as his abuser in the course of a forensic interview.); *Justus*, 205 S.W.3d at 876 (Child victim identified the defendant as his or her abuser in the course of a forensic interview.). This problem has arisen in instances regarding a child victim’s statements to medical treatment personnel. See *Mosteller*, supra note 27, at 950–51, 950 n.115. Some courts have found that the accusatory nature of identity statements demands a finding of testimonial although, generally, statements to medical treatment personnel are not considered testimonial. See id. at 950–51.
192 There is a lack of case law in which a videotaped interview with a forensic interviewer is the only inculpatory evidence probably because initial disclosures are “usually to a family member or friend, and virtually never to authorities.” See *Davis Amicus Brief*, supra note 95, at 8. Thus, the prosecutor has the child victim’s out-of-court statements to family members as evidence in addition to the videotaped interview. See, e.g., *Rolandis*, 902 N.E.2d at 603–04 (child victim’s mother testified at trial as to the child victim’s disclosure to her);
child victim’s identity statements to a family member or nurse or doctor non-testimonial, and thus, admissible at trial. As a result, even if courts exclude a child victim’s videotaped identity statement, there still may be sufficient evidence to support a conviction.

**CONCLUSION**

The adoption of a “minute and separate” approach by the courts could lessen *Crawford*’s impact on the prosecution of child sexual abuse. A “minute and separate” approach to determining whether a child victim’s statements in a videotaped interview with a forensic interviewer are testimonial will better address the medical and prosecutorial concerns that these interview protocols were developed to address. This approach would take advantage of the developments in child sexual abuse investigations without fully forestalling the prosecution of this abhorrent crime. While the impact of the suggested solution would be minimal in scope, this suggestion would work to better balance the desire to adequately prosecute child sexual abuse with the accused’s Confrontation Clause rights in a post-*Crawford* world.

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193 See Mosteller, *supra* note 27, at 950. Professor Mosteller writes, “[w]ith only highly infrequent exceptions, statements by children to parents, family members, and friends are treated as nontestimonial. . . . Even if the child’s statement is strongly accusatory, the outcome is generally the same.” *Id.* at 944–45. Likewise, Professor Mosteller states, “statements of children to doctors and nurses who are the first to examine the child after the report of assault are almost universally treated as nontestimonial.” *Id.* at 950. He notes, however, that some courts have treated “the specific identity of the perpetrator” with exception, finding that “the part of the child’s statement that names the perpetrator as testimonial based on its accusatory nature.” *Id.* at 950–51.

194 See, e.g., *Bobadilla*, 570 F. Supp. 2d at 1110 (noting that the prosecution offered other evidence of Bobadilla’s guilt, granted his habeas corpus petition, but ordered the state to “take[] affirmative steps to reinstate a criminal prosecution of petitioner within sixty days,” suggesting a belief that there is sufficient evidence without the videotaped interview to prosecute); *Rolandis*, 902 N.E.2d at 619 (stating that “the error in admitting [the videotaped interview] was harmless beyond a reasonable doubt because the properly admitted evidence overwhelmingly supports respondent’s conviction”); *Henderson*, 160 P.3d at 794 (holding that after “[r]eviewing all of the remaining evidence, . . . a rational fact-finder could have found Henderson guilty beyond a reasonable doubt”).
RACIAL PROFILING IN THE NAME OF NATIONAL SECURITY: PROTECTING MINORITY TRAVELERS’ CIVIL LIBERTIES IN THE AGE OF TERRORISM

YEVGENIA S. KLEINER*

Abstract: Government-sponsored ethnic and racial profiling in the form of computerized and behavioral screening initiatives implemented as a response to 9/11 has led to the subjection of minorities to increased scrutiny and suspicion in American airports. In the name of national security, safety protocols are being enacted in non-uniform ways that disproportionally infringe on minority passengers’ civil liberties and reinforce harmful racial stereotypes. Focusing on the dissonance between basic freedoms guaranteed by the United States Constitution and the security policies implemented by the federal government, this Note argues that the disparity in scrutiny received by minority travelers is counterproductive because it reinforces racism and ethnocentrism as social norms and fails to ensure a consistent level of protection for all passengers. This Note ultimately advocates for a federal government mandate that delineates a universal, race-blind standard for the level of scrutiny (and accompanying procedures) that all passengers should be subjected to while traveling aboard commercial aircraft.

INTRODUCTION

Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.

—Benjamin Franklin

On January 1, 2009, AirTran Airways officials ordered nine Muslim passengers off AirTran flight 175, a Washington, D.C. flight bound for Orlando, Florida. The group of travelers, all of South Asian descent,
consisted of three young boys ages two, four and seven, two adult brothers, their wives, a sister-in-law, and a family friend who coincidentally happened to be on the same flight. All but one of the nine passengers were U.S.-born American citizens. Moreover, Abdul Aziz, the family friend, is an attorney for the United States Library of Congress. The Irfan family was on their way to a vacation in Orlando, Florida, where they planned to visit family and attend a religious retreat. When two teenage girls aboard the aircraft reported a conversation between Atif Irfan and his wife regarding the “safest seats” on an airplane, federal air marshals aboard the flight notified the Transportation Security Administration (TSA) about a potential security concern. In response to the notification by the air marshals, the FBI ordered the Irfan family and Mr. Aziz off the plane.

While the Irfan family and Mr. Aziz were questioned in a quarantined area of the passenger lounge (where authorities forbade the three young boys from consuming food contained in the family’s carry-on luggage), the plane’s remaining ninety-five passengers and their luggage were re-screened, as were the crew and the airplane itself. Although the FBI concluded that Mr. Aziz and the Irfan family posed no danger to the airline or its passengers and informed AirTran that the passengers were cleared to travel, the airline refused to rebook the flights and offered only to refund the cost of the original tickets. While AirTran spokesman Tad Hutcheson agreed that the incident was the result of a misunderstanding, he affirmed that AirTran’s “better safe than sorry” approach complied with strict federal rules on responding to potential security threats and downplayed the ethnic-profiling aspect of the incident. In a similar statement, Ellen Howe, a spokeswoman for the TSA, told the Washington Post that this incident “just highlights that security is

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4 See Robbins, supra note 2.
5 See Ahlers, supra note 3; Robbins, supra note 2. Among the Irfan family members on the flight were thirty-four year old Kashif Irfan, an anesthesiologist, and his twenty-nine year old brother, Atif Irfan, an attorney. See Gardner, supra note 2.
6 See Gardner, supra note 2; Ahlers, supra note 3.
7 See Ahlers, supra note 3; Robbins, supra note 2.
8 See Ahlers, supra note 3.
9 See id.; Robbins, supra note 2.
10 See Gardner, supra note 2; Robbins, supra note 2. The FBI agents were able to assist the family in booking a later U.S. Airways flight to Orlando, but the flight was twice as expensive as the family’s original AirTran seats. See Robbins, supra note 2.
11 See Gardner, supra note 2; Robbins, supra note 2.
everybody’s responsibility. Someone heard something that was inappropriate, and then the airline decided to act on it. We certainly support [the pilot’s] call to do that.”

Not surprisingly, the Muslim passengers removed from the flight reacted differently to the experience. Atif Irfan told CNN, “Really, at the end of the day, we’re not out here looking for money. I’m an attorney. I know how the court system works. We’re basically looking for someone to say . . . ‘We’re apologizing for treating you as second class-citizens.’”

In an age where terrorists use mass transportation as a forum to execute attacks, federal agencies have their hands full as they work to protect the American people and keep public transportation running smoothly and safely. In recent years, the U.S. government has taken steps to improve its ability to ensure domestic security—steps that have earned criticism for subordinating civil liberties protections to national security interests. Perhaps the most notorious of these measures was the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, more commonly known by the nationalistic acronym, USA PATRIOT Act, which President George W. Bush signed into law on October 26, 2001. Drafted in secrecy “under [the] cloak of national security,” the government used the USA PATRIOT Act to include domestic terrorism in

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12 See Gardner, supra note 2.
13 See Ahlers, supra note 3.
14 Id.
17 See id. The USA PATRIOT Act’s stated intention is “to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.” See id. Just as many of the provisions of the 2001 USA PATRIOT Act were about to sunset in 2005, the House of Representatives passed the USA Terrorism Prevention and Reauthorization Act, aimed to reinstate and maintain most of the original language from the 2001 USA PATRIOT Act. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-77, 120 Stat. 192 (codified in 18 U.S.C.A. § 1). In the same month, the Senate passed its own version of the Act and made revisions to parts of the original Act that were criticized as violating individuals’ civil rights. 151 Cong. Rec. S13546–61 (daily ed. Dec. 14, 2005) (statements of Sens. First, Feingold and Sessions).
its definition of the types of terrorist activities under its purview—a move that garnered criticism for the broad scope of power it afforded the government.\textsuperscript{18}

Of all of the federal agencies criticized for abusing their discretion under the PATRIOT Act, the TSA has perhaps suffered the most vehement attacks for violating travelers’ civil liberties.\textsuperscript{19} Formed in response

\textsuperscript{18} See Walter M. Brasch, America’s Unpatriotic Acts 4 (2005). The PATRIOT Act allows police officers to search suspects’ homes and offices without a warrant and without notifying them prior to the search. See id. at 12. The bill also allows the Attorney General to detail persons based on mere suspicion. See id.

\textsuperscript{19} See generally National Security Letters: The Need for Greater Accountability and Oversight: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 1–34 (2008) (statements of Sens. Patrick J. Leahy, Arlen Specter, Russell Feingold, Benjamin L. Cardin, Sheldon Whitehouse; statements of James A. Baker, Former Counsel for Intelligence Policy, Dep’t of Just.; Gregory T. Nojeim, Director, Project on Freedom, Security & Technology, Center for Democracy & Technology; Michael J. Woods, Former Chief, National Security Law Unit, Office of the General Counsel, Federal Bureau of Investigation) (discussing the dangers of reauthorizing and expanding the USA PATRIOT Act); Misuse of Patriot Act Powers: The Inspector General’s Findings of Improper Use of the National Security Letters by the FBI: Hearing Before the S. Comm. on the Judiciary, 110th Cong. S4039 (2007) (statement of Sen. Feingold). Since September 11th, Arab, Middle Eastern and Muslim women, particularly those who wear the traditional hijab, or veil, have been the targets of street and airport profiling and have endured discriminatory searches because of their appearance. See Andrea J. Ritchie & Joey L. Mogul, In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States, 1 DePaul J. Soc. Just. 175, 208 (2008). Several incidents that took place in U.S. airports in late 2001, when post-September 11th fear was at a high, are illustrative of this discrimination. See id. In November 2001, a twenty-two year-old Muslim-American woman was subjected to a full body search and was made to remove her head-scarf so that security officers (albeit females) could run their fingers through her hair after the woman passed through an airport security metal detector without setting it off and after a metal detector passed along her body also did not go off. See Leadership Conference on Civil Rights Education Fund (LCCREF), Wrong Then, Wrong Now: Racial Profiling Before & After September 11, 2001, at 28 (2003), available at http://www.civilrights.org/publications/wrong-then/racial_profiling_report.pdf. In December 2001, police stopped a Muslim woman in a hijab for driving with suspended plates. See Ritchie & Mogul, supra, at 208. In any other situation, the police would have likely demanded the driver to produce her driver’s license and registration and then issued her a ticket. See id. In this case, however, the officer arrested the driver, shoved her into the patrol car and made inappropriate remarks about her veil and her religion. Id.

Even five years after September 11, the merits of racial profiling in airports continue to be debated in the media. See, e.g., Editorial, The “Profiling” Debate, Wall St. J., Aug. 19, 2006, at A10. The editorial states:

Nobody is suggesting using ethnicity or religion as the only—or even the primary—factors in profiling terrorists. But it also makes no sense to take zero account of the fact that every suicide attack against U.S. aviation to date has been perpetrated by men of Muslim origin. While al Qaeda is no doubt seeking recruits who don’t obviously display such characteristics, that doesn’t mean we should ignore the likeliest candidates.
to the terrorist attacks of September 11, 2001, the TSA is an agency of the Department of Homeland Security and is responsible for screening all airline passengers. Now that airlines can no longer use independent contractors to supply their security personnel, all of the screeners currently employed in U.S. airports are federal employees. In implementing directives aimed at ensuring the nation’s security, TSA employees, and thus the federal government, have been accused of discriminating against minority travelers in violation of constitutionally protected rights. As the experiences of the Irfan family and countless others demonstrate, the TSA’s current methods of ensuring passengers’ safety often result in unnecessary delays and examinations prompted by loose directives and unconstitutional prejudices.

The law on this is settled, and in the other direction. On multiple occasions the federal courts have upheld programs that treat groups differently when a “compelling” public interest can be identified: affirmative action, minority set-asides, composition of Congressional districts, and the all-male draft have all met that legal test. Yet the same people who would allocate jobs, federal contracts and college admissions by race or ethnicity object to using them merely as one factor in deciding whom to inconvenience for a few minutes at an airline checkpoint. Surely aviation security is a far more compelling public interest than the allocation of federal set-asides.


See TSA, What is TSA, http://www.tsa.gov/who_we_are/what_is_tsa.shtm (last visited Nov. 19, 2009). In response to September 11, 2001, Congress federalized the aviation security system. See Ravich, supra note 19, at 20 n.95. Before 2001, airline security was the responsibility of individual airline companies. See id.


See Kip Hawley, TSA’s Take on the Atlantic Article, The TSA Blog, http://www.tsa.gov/blog/2008/10/tsas-take-on-atlantic-article.html (Oct. 21, 2008, 14:19 EST) (writing on a blog site maintained by the TSA in which the public is encouraged to react—and often does, negatively—to the TSA’s methods of ensuring security on public transportation).

See Gardner, supra note 2. On August 4, 2007, a new TSA policy permitting all persons wearing head coverings through airport security checkpoints to be searched went into effect. See Aliah Abdo, The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf, 5 HASTINGS RACE & POVERTY L. J. 441, 494 (2008). Although the TSA maintains that this policy requires those passengers wearing cowboy hats and baseball caps to remove them, Muslim and Sikh community leaders have argued that because enforcement of the policy is at the discretion of TSA screeners, the policy provides TSA officials “an opportunity for profiling and violating civil rights.” See id. at 494–95. To be sure, TSA has been taken to court for discrimination: although the case settled for $240,000 on January 5, 2009, the ACLU filed suit against the
The tragic events of September 11, 2001 introduced a fear of terrorism into Americans’ daily lives and inspired in many a suspicion of immigrants of Muslims and Middle Eastern descent.\textsuperscript{24} Compounding the dangerous environment of racism these fears engender is what Jeffrey Goldberg, an acclaimed Israeli-American journalist, calls American “security theater.”\textsuperscript{25} Goldberg argues that airport security in America is a sham, entirely incapable of dealing with a myriad of security vulnerabilities, and accuses the security system of being able to catch only the most careless and “stupid” of terrorists.\textsuperscript{26} If Goldberg is right, his argu-
ment lends support to the idea that existing security programs can be only partially successful because they assume that terrorists will wage future attacks using the same methods they used in the past. If true, this theory would mean that the U.S. government is wasting millions of dollars on security equipment that is either obsolete or more likely to be put to use on an unsuspecting minority traveler than against a real terrorist. Some authorities on the subject go so far as to argue that the United States would be better served if airport security was returned to pre-September 11 levels and the remaining funds allocated for intelligence, investigations and emergency response. Until then, airlines continue to run the risk of conducting the most in-depth security checks on those who fit a certain ethnic or racial category—a method that succeeds primarily in embarrassing and delaying travelers of certain ‘inconvenient’ backgrounds while trampling on their civil rights.

The history of the United States is littered with similar examples of (what are now regarded as) civil rights abuses during periods of mass

for Elite Status have the convenience of expedited boarding on some airlines, suggesting perhaps that the wealthy may be less carefully scrutinized during the boarding process. See id. at 102. Medical supplies, such as saline solution for contact lens cleaning, do not fall under TSA’s three-ounce rule, which means that a terrorist could not only carry a bottle of contraband labeled “saline solution” through security with little difficulty, but that he could mix the contents of several three-ounce vials once aboard. See id. at 103. Passengers are checked against No-Fly Lists when they purchase their tickets, but not before they board the plane. Id. This means that a terrorist could well purchase a ticket with someone else’s credit card (a stolen one, for instance), thus avoiding a comparison of his name against those on the No-Fly List. Id. Furthermore, airlines have ceased to compare passengers’ IDs with the names on their boarding passes before allowing them to board the aircraft. See id. In their interview, Kip Hawley did tell Goldberg that TSA can follow passengers’ progress from the printer to the gate. See id. at 104. Finally, Goldberg found fault with the efficacy of TSA’s SPOT (Screening of Passengers by Observation Techniques) Program, which is intended to identify terrorists through “behavior detection.” See id. at 103. The training program for officers who perform behavior detection work is one week long, but this was insufficient training to prepare officers to detect the contraband Goldberg had hidden among his carry-ons. See id.

27 See id. at 102–103.
29 See Goldberg, supra note 25, at 103.
30 See U.S. Const. amend. IV, XIV (guarding against unreasonable searches and seizures and providing for substantive and procedural due process rights, respectively); LCCREF, supra note 19, at 28; Ritchie & Mogul, supra note 19, at 208; Goldberg, supra note 25, at 103.
hysteria and great fear. Historical examples include the Alien and Sedition Acts (late eighteenth century statutes that allowed for the expatriation, fining and sentencing of persons found to oppose or defame the United States) and the Supreme Court’s 1944 Korematsu decision (affirming the constitutionality of the evacuation of Japanese-Americans during World War II), as well as the passage of the PATRIOT Act (expanding the federal government’s ability to investigate individuals and entities suspected of threatening national security interests), all of which stand for putting civil liberties on the proverbial ‘back burner’ in times of national crisis. However, the Supreme Court’s recent holding in Boumediene v. Bush as well as President Barack Obama’s vow to close the prison in Guantanamo Bay within a year of taking office suggest that the general holding of Korematsu has been weakened and should be re-examined with respect to the importance of civil liberties.

This Note analyzes the implications of recent government action and constitutional interpretation for the TSA’s approach to ensuring the security of commercial air travel. Part I provides background on the U.S. government’s profiling of suspects in the War on Terror based on race and ethnicity and introduces, from a constitutional perspective, the danger racial profiling poses to minorities’ civil liberties. Part II presents the government’s dual challenges of ensuring the safety and welfare of airline passengers while simultaneously protecting their constitutionally-guaranteed rights in an efficient and non-arbitrary manner. Part III then evaluates the constitutionality and effectiveness of the government’s computer technology and behavioral profiling mechanisms. This section also evaluates the government’s new Secure Flight program and the Secure Flight Final Rule that went into effect December 29, 2008. Part IV considers the challenges and merits of incorporating a race-blind security clearance system in airports and discounts various alternatives to a race-blind system. In concluding that race-blind, universally stringent security measures are the only method by which a constitutionally sound airport security system may be established, Part V reasons that TSA and U.S. airports must abandon computerized and behavioral

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33 See Boumediene v. Bush, 128 S. Ct. 2229, 2262–63, 2277 (2008) (holding that detainees are not barred from seeking habeas relief or invoking the Suspension Clause merely because they have been designated as enemy combatants or held at the Guantanamo Bay prison); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).
profiling programs in favor of a better-developed and more extensive physical security screening program that assumes that every airline passenger is equally capable, and even equally likely, to pose a security threat.

I. CIVIL LIBERTIES AND THE GOVERNMENT’S WAR ON TERROR

While no one definition of racial profiling can be held above others as the most accurate, government agencies, non-profit groups, and bills proposed in Congress have all attempted to define the phrase.\textsuperscript{34}

\textsuperscript{34} See, \textit{e.g.}, End Racial Profiling Act (ERPA) of 2005, S. 2138, 109th Cong. § 2 (2005) (defining racial profiling as the reliance of law enforcement on race, ethnicity, national origin, or religion in selecting which individuals to subject to investigations); AMNESTY INT’L, USA, \textit{supra} note 25, at v (defining racial profiling as the targeting of individuals and groups by law enforcement officials, even partially, on the basis of race, ethnicity, national origin, or religion, except where there is trustworthy information, relevant to the locality and timeframe, that links persons belonging to one of the aforementioned groups to an identified criminal incident or scheme); CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 1 (2003), available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.php (defining racial profiling as the invidious use of race or ethnicity in conducting stops, searches and seizures and other law enforcement investigative procedures and finding it to be premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity). In its June 2003 Guidance, the Department of Justice condemned racial profiling in law enforcement as “not merely wrong, but also ineffective” and stated that “[r]ace-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society.” See CIVIL RIGHTS DIV., \textit{supra}. The Guidance defined racial profiling as:

\[\text{T}h\text{e invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.}\]

\textit{Id.} The version of ERPA proposed in 2005 defines racial profiling as:

The practice of a law enforcement agent relying, to any degree, on race, ethnicity, religion, or national origin in selecting which individuals to subject to routine or spontaneous investigatory activities, or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except where there is trustworthy information, relevant to the locality and timeframe, that links persons of a particular race, ethnicity, religion, or national origin to an identified criminal incident or scheme.

ERPA, S. 2138, at § 2. In an October 2004 report, Amnesty International defined racial profiling as:

\[\text{T}h\text{e targeting of individuals and groups by law enforcement officials, even partially, on the basis of race, ethnicity, national origin, or religion, except} \]
Although the definitions entail varying levels of contempt for racial profiling, all hold that the use of criteria based on race, national origin, religion or ethnicity as the sole rationale for scrutinizing and searching certain individuals constitutes unlawful racial profiling based on the erroneous belief that these individuals are more likely than others to engage in proscribed conduct.\(^{35}\) Not surprisingly, overt racism brought to light is loudly and vehemently condemned by the courts and in the media.\(^{36}\) But whereas law enforcement agents rarely target individuals solely based on race, empirical evidence indicates that race is often "the" decisive factor in law enforcement decisions regarding who should be searched and questioned.\(^{37}\) It is the position of this Note that racial profiling is wrong because it is both ineffective in ensuring security and constitutionally unlawful.\(^{38}\)

In his introduction to the 2004 Amnesty International (AIUSA) report, \textit{Threat and Humiliation: Racial Profiling, Domestic Security and Human Rights in the United States}, the Honorable Timothy K. Lewis admonished the U.S. government that "focusing on race, ethnicity, national origin, or religion as a proxy for criminal behavior has always failed as a means to protect society from criminal activity."\(^{39}\) Instead, profiling has left society more susceptible to discriminatory abuse.\(^{40}\) The AIUSA report identified racial profiling as a threat to U.S. national security, finding that targeting millions of innocent Americans has "undermined . . . law enforcement agencies' ability to detect actual domestic security threats and apprehend serial killers, assassins, and other purveyors of terror."\(^{41}\) Race-based profiling jeopardizes the effectiveness of anti-terrorist security measures because it prevents law enforcement officials from focusing on the real target—dangerous behaviors and legitimate

\begin{footnotesize}
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\item Am\textsc{nesty Int’l} USA, \textit{supra} note 25, at v.\(^{35}\)
\item See Am\textsc{nesty Int’l} USA, \textit{supra} note 25, at v; LCCREF, \textit{supra} note 19, at 11.\(^{36}\)
\item See LCCREF, \textit{supra} note 19, at 11; Kamdar, \textit{supra} note 20; \textit{The “Profiling” Debate, supra} note 20.\(^{37}\)
\item See LCCREF, \textit{supra} note 19, at 11. The Department of Justice, in the absence of a description of the suspect, defines “profiling” as relying in whole or in part on an individual’s race. See id. at 11 n.17.\(^{38}\)
\item See \textit{infra} Part III.\(^{39}\)
\item See Am\textsc{nesty Int’l} USA, \textit{supra} note 25, at ix. The Honorable Timothy K. Lewis is Chair of Amnesty International’s National Hearings on Racial Profiling and is a former Judge of the United States Court of Appeals for the Third Circuit. \textit{Id.} \(^{40}\)
\item See LCCREF, \textit{supra} note 19, at 19–22.\(^{41}\)
\item See Am\textsc{nesty Int’l} USA, \textit{supra} note 25, at xv.\(^{42}\)
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\end{footnotesize}
threats—and poses great risks to our society’s criminal justice system and constitutional protections. Despite the hidden risks racial profiling poses to national security, AIUSA’s report conservatively estimates that one in three people living in the United States, or approximately eighty-seven million individuals out of a population of approximately 281 million, are at risk of being subjected to some form of racial profiling.

Although racial profiling implies the identification and singling-out of suspects of color, the reality is that anybody can be a terrorist, regardless of background, age, sex, ethnicity, education and economic status. The recent cases of alleged “American Taliban” John Walker Lindh and British “shoe bomber” Richard Reid, for example, revealed that Al Qaeda has the ability to recruit sympathizers of diverse backgrounds. Lindh, a white U.S. citizen, and Reid, a British citizen, would not have necessarily been identified by existing programs like the National Security Entry Exit Registration System (NSEERS) and US-VISIT, which target Arab, Muslim and South Asian men and boys. Like Lindh and

42 See id., at 23; LCCREF, supra note 19, at 11. Reacting to Amnesty International’s report, Curt Goering, senior deputy executive director of AIUSA, told Indian Country Today, “Racial profiling blinds law enforcement to real criminal threats and creates a hole in the national security net large enough to drive a truck through.” See Brenda Norrell, Amnesty International: Victims of Racial Profiling, INDIAN COUNTRY TODAY, Sept. 10, 2008, http://www.indiancountrytoday.com/archive/28173234.html. Other effects of racial profiling include feelings of degradation, alienation and humiliation in those subjected to it. See LCCREF, supra note 19, at 19, 21. Furthermore, racial profiling contributes to the disparity in arrest and crime rates between minority and majority populations. See id.

43 See AMNESTY INT’L USA, supra note 25, at 2. This figure was based on the number of U.S. citizens, permanent residents, and “other long-term visitors” whom the U.S. Census categorizes as African Americans, Native Americans, Hispanic/Latino Americans, Arab Americans, Iranian Americans, Asian Americans (including South Asians), Muslim Americans, Sikh Americans, and immigrants and visitors from Africa, Asia, South America, Mexico, Central American and the Caribbean. See id., at 1–2. These figures do not accommodate for the U.S. Census’s widely reported undercounting of citizens, residents and others of color. See id., at 2.

44 See Ravich, supra note 19, at 3 n.6 (citing Richard W. Bloom, Commentary on the Motivational Psychology of Terrorism Against Transportation Systems: Implications for Airline Safety and Transportation Law, 25 Transp. L.J. 175, 179 (1998)) (“Most profilers analyze external features, such as physical characteristics, behaviors or demographics. However, intrapsychic processes may be more robust correlates of terrorist behavior, but are more difficult to identify. Yet, some psychologists even believe that these correlates either do not exist or are irrelevant in analyzing behavior.”)

45 See AMNESTY INT’L USA, supra note 25, at ix–x.

46 See id., at 16–17. NSEERS established a series of regulations and registration requirements (including fingerprinting and being photographed and questioned) for all male nationals of twenty-five countries which, with the exception of North Korea, are all Arab and Muslim. See ACLU, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11, at 6–7 (2004), available at http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf. US-VISIT is a U.S. Department of Homeland Security Program that provides visa-issuing posts
Reid, Oklahoma City Bomber Timothy McVeigh eluded arrest in 1995 while law enforcement searched for Arab suspects and detained a Jordanian.

While minority groups are most frequently singled out as suspects because of their race, racial profiling can also cause law enforcement officials to wrongly pursue majority targets. During the 2002 search for the D.C. area snipers, police officers focused on finding a white suspect because the standard profile of a serial killer is a disaffected white male acting alone or with a single accomplice. The police ignored the possibility that two black men, whose blue Chevrolet Caprice was seen near one of the shooting sites and who were stopped at least ten times during the course of the investigation, were actually at fault, allowing snipers John Allen Muhammad and Lee Boyd Malvo to continue their killing spree while officials searched for “a white man in a white van.”

Overly focused on race, the officials overlooked the fact that Muhammad had a military background and was embittered at having lost custody of his children following his divorce—characteristics that are often associated with serial killers.

This reality leads scholars, security experts and political pundits to disagree over whether racial profiling systems are able to accurately predict which individuals are likely to commit acts of terror. Further exacerbating the problem is that attempts at racial profiling are often improperly executed, resulting in the ‘mis-targeting’ of individuals who are mistaken for Muslim Arabs. American Sikhs, for example, are one...
group that has experienced unfair prejudice as a result of their skin color, accents and style of dress because they have been confused with Muslim Arabs.\textsuperscript{54} Such mistakes highlight the ignorance of many security officials; the fact is that “all Arabs are not Muslim, and all Muslims are not Arab.”\textsuperscript{55} In the United States, most Arab Americans are not Muslim and most Muslim Americans are South Asian or African American.\textsuperscript{56} Some Muslims who are assumed to be Arab are, for example, Iranian; a majority of Arab-Americans who are assumed to be Muslim are Christian Arabs.\textsuperscript{57}

Finally, racial profiling is wrong as a matter of constitutional law because it treats travelers unequally and discriminates against those who are perceived, often wrongly, as posing the greatest security risk.\textsuperscript{58} Critics of airline passenger profiling have argued that computerized screening programs—such as CAPPS I, CAPPS II, Registered Traveler and the new Secure Flight program—are inherently “biased against passengers with connections to areas of the world whose behavior or policies conflict with the interests of the United States—namely the Middle East. As such, critics believe that profiling promotes an unconstitutional categorization of travelers by ethnicity, race, religion, or a combination of all three.”\textsuperscript{59} Many such critics fear that TSA will be unable to design and implement egalitarian screening programs that “ignore the shared ethnic, geo-cultural, or religious backgrounds of the September 11 terrorists” and therefore urge the government to consider alternative solutions.\textsuperscript{60}

World War, the government “permit[ted] low probabilities to prevail over civil liberties” in trying to identify the opposition).

\textsuperscript{54} See id.
\textsuperscript{55} See LCCREF, supra note 19, at 43 n.85.
\textsuperscript{56} See Wu, supra note 53, at 58.
\textsuperscript{58} See U.S. Const. amends. IV, XIV; Ravich, supra note 19, at 8.
\textsuperscript{59} Ravich, supra note 19, at 8. For more information regarding these computerized screening programs, see infra Part III.A.
\textsuperscript{60} See Ravich, supra note 19, at 8–9.
II. Striking a Balance: The Government’s Post-9/11 War on Terror and its Efforts to Protect Civil Liberties

The United States has a dark history pertaining to the treatment of racial and ethnic minorities in times of war and domestic conflict. As Wisconsin Democratic Senator Russell Feingold stated in his 2001 Congressional address criticizing the contents of the USA PATRIOT Act:

There have been periods in our nation’s history when civil liberties have taken a back seat to what appeared at the time to be the legitimate exigencies of war. Our national consciousness still bears the stain and the scars of those events: The Alien and Sedition Acts, the suspension of habeas corpus during the Civil War, the internment of Japanese-Americans, German-Americans, and Italian-Americans during World War II, the blacklisting of supposed Communist sympathizers during the McCarthy era, and the surveillance and harassment of anti-war protesters, including Dr. Martin Luther King Jr., during the Vietnam War.

One explanation for these stains in our nation’s history is that in times of mass hysteria, the legislature and the courts tend to subordinate civil rights in their effort to keep the peace. Many scholars have

61 See Wu, supra note 53, at 52–53, 57–58.
62 Senator Russell Feingold, Statement on the Anti-Terrorism Bill, From the Senate Floor (Oct. 25, 2001) [hereinafter Feingold, On the Anti-Terrorism Bill]. Senator Feingold went on to warn his fellow lawmakers, “We must not allow these pieces of our past to become prologue.” See id. The Democratic leadership at the time rejected attempts by Senator Feingold, then the chair of the Constitution, Civil Rights, and Property Rights subcommittee of the Committee of the Judiciary to introduce amendments to the USA PATRIOT Act. See Brash, supra note 18, at 5; see also Russell Feingold, Why I Opposed the Anti-Terrorism Bill, COUNTERPUNCH, Oct. 26, 2001, http://www.counterpunch.org/feingold1.html (explaining that the USA PATRIOT Act should be opposed as detrimental to Americans’ civil liberties). Russell Feingold was the only senator to vote against the bill that would enact the USA PATRIOT Act into law, warning on the day of the vote, “We must redouble our vigilance to ensure our security and to prevent further acts of terror. But we must also redouble our vigilance to preserve our values and the basic rights that make us who we are.” See Brash, supra note 18, at 7.
63 See Brash, supra note 18, at 21. In the brief of amicus curiae in the al Odal v. United States, Rasul v. Bush, and Hamdi v. Rumsfeld cases, Fred Korematsu, the plaintiff in the 1942 case against the U.S. government over the internment of Japanese Americans, was cited as arguing against the detention of terrorist suspects without due process of law:

It is only natural that in times of crisis our government should tighten the measures it ordinarily takes to preserve our security. But we know from long experience that we often react too harshly in circumstances of felt necessity and underestimate the damage to civil liberties. Typically, we come later to
argued that the federal government and TSA would do well to learn from the Korematsu decision and particularly Fred Korematsu’s petition for a writ of coram nobis.\(^64\) In his petition, Mr. Korematsu contended that the government knowingly concealed contradictory evidence as to its claim of military necessity for the internment of thousands of Japanese Americans.\(^65\) The U.S. District Court, relying largely on the finding by the Commission on Wartime Relocation and Internment of Citizens that “a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II,” granted Mr. Korematsu’s petition despite acknowledging that it would be impossible to predict whether the concealed evidence may have led the Supreme Court to have reached a different outcome in 1942.\(^66\)

A. The USA PATRIOT Act

The USA PATRIOT Act of 2001 attracted serious criticism even before it was enacted into law.\(^67\) Some scholars argued against the adoption of the Act because of its double standard of ensuring due process for citizens but not for legal immigrants, a violation of equal regret our excesses, but for many that recognition comes too late. The challenge is to identify excess when it occurs and to protect constitutional rights before they are compromised unnecessarily. These cases provide the Court with the opportunity to protect constitutional liberties when they matter most, rather than belatedly, years after the fact.


\(^{64}\) See Singer, supra note 57, at 317, 321; see also Liam Braber, Comment, Korematsu’s Ghost: A Post-September 11th Analysis of Race and National Security, 47 Vill. L. Rev. 451, 473 (2002) (“[T]hough wartime and national security interests do command an importance rarely matched, these interests should not simply grant the government a free pass to target Arabs merely because it sees fit.”).

\(^{65}\) See Singer, supra note 57, at 318.


protection principles embodied in the United States Constitution.\textsuperscript{68} Others, such as Senator Feingold, warned that the PATRIOT Act fell “short of meeting even basic constitutional standards of due process and fairness [because it] continues to allow the Attorney General to detain persons based on mere suspicion.”\textsuperscript{69}

The passage of the USA PATRIOT Act signaled the beginning of an era of reduced judicial oversight of surveillance by the federal government.\textsuperscript{70} Although the Fourth Amendment protects against unreasonable searches and seizures and normally requires probable cause for government interference, no convenient provision exists to explicitly define the way the Amendment should be read in light of a potential terrorist threat.\textsuperscript{71} As a result, the USA PATRIOT Act granted the government wide-sweeping investigative powers by permitting it to obtain warrants without a demonstration of the truthfulness of its allegations.\textsuperscript{72} Furthermore, provisions under Section 505 of the USA PATRIOT Act granted the Department of Justice the freedom to use administrative subpoenas called National Security Letters to obtain records of individuals’ electronic communications without judicial oversight.\textsuperscript{73} This

\textsuperscript{68} See U.S. Const. amend XIV; Ramasastry, \textit{supra} note 67. All too prophetically, Ramasastry warned in 2001:

Indefinite detention upon secret evidence—which the Patriot Act allows—sounds more like Taliban justice than ours. Our claim that we are attempting to build an international coalition against terrorism will be severely undermined if we pass legislation allowing even citizens of our allies to be incarcerated without basic U.S. guarantees of fairness and justice.

\textit{See} Ramasastry, \textit{supra} note 67.

\textsuperscript{69} See Feingold, On the Anti-Terrorism Bill, \textit{supra} note 62.

\textsuperscript{70} See Brasch, \textit{supra} note 18, at 10.


\textsuperscript{72} See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-77, 120 Stat. 192 at § 114 (codified in 18 U.S.C. § 2516); Brasch, \textit{supra} note 18, at 10, 11 (noting that the government must believe the materials it seeks to be “relevant” to its inquiry). Of course, countless political activists and civil libertarians disagreed. As Jameel Jaffer, a staff attorney with the ACLU explained:

The FBI can obtain records . . . merely by specifying to a court that the records are ‘sought for’ an ongoing investigation. . . . That standard . . . is much lower than the standard required by the Fourth Amendment, which ordinarily prohibits the government from conducting intrusive searches unless it has probable cause to believe that the target of the investigation is engaged in criminal activity.

\textit{Brasch, supra} note 18, at 12.

\textsuperscript{73} See Brasch, \textit{supra} note 18, at 15.
provision essentially means that National Security Letters enable federal officials to obtain information on anyone, because the Act does not require officials to demonstrate probable cause or a compelling need for access to the information.\textsuperscript{74}

It was not until 2003 that Attorney General John Ashcroft finally admitted in a statement before the House Judiciary Committee that the USA PATRIOT Act had lowered the standard of proof for a warrant to something “lower than probable cause,” and that it had enabled federal officials to investigate citizens who were neither spies nor terrorists.\textsuperscript{75} Unfortunately, this admission did not lessen the burden on wrongfully targeted minorities who wish to assert their constitutional rights: in addition to proving a violation of their Fourth Amendment Due Process rights, individuals alleging a racial profiling claim against the government are required to show that the relevant government agency violated the Equal Protection Clause of the Fourteenth Amendment by complying with a “purposefully discriminatory policy.”\textsuperscript{76} Not surprisingly, meeting such a high burden of proof is usually difficult, if not impossible since government agencies are reluctant to admit such grievous error.\textsuperscript{77}

B. Presidential Promises Broken, International Treaties Contravened

Besides its accountability for constitutional protections against racial profiling, the United States is also responsible for honoring the race-related provisions of international treaties that it has ratified.\textsuperscript{78} The International Convention on the Elimination of All Forms of Racial Discrimination (“the Convention”) is a United Nations treaty that was adopted in order to eliminate racial discrimination and promote understanding among all races.\textsuperscript{79} Along with dozens of other nations,

\textsuperscript{74} See id.
\textsuperscript{76} See Singer, supra note 58, at 298 n.29 (citing Jeremiah Wagner, Racial (De)Profiling: Modeling a Remedy for Racial Profiling After the School Desegregation Cases, 22 Law & Ineq. 73, 82 (2004)).
\textsuperscript{77} See id. at 289 n.30 (citing R. Richard Banks, Beyond Profiling: Race, Policing, and the Drug War, 56 Stan. L. Rev. 571, 600 (2003) (“racial profiling is clearly unconstitutional only if irrational”).
\textsuperscript{79} See id. at art. 2, § 1.
the United States expressed reservations regarding specific portions of the Convention but nevertheless ratified the Convention in 1994.80

Echoing the recommendations of the Convention, former President George W. Bush promised in 2001 to end racial profiling in the United States.81 It took the government two years to follow through on President Bush’s promise, as it was not until June 17, 2003, that the Department of Justice issued its Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (“the Guidance”).82 Although the Guidance contains a definition of racial profiling modeled after a definition endorsed by AIUSA and other human and civil rights organizations, it “fails to address religious and ethnic profiling, provides no enforcement mechanisms for victims of profiling, does little to ensure accountability, and provides a blanket exception for cases in which national security is threatened.”83 Furthermore, the Guidance is merely advisory and therefore lacks the authority of a legally binding statute.84

A 2007 report prepared for the United Nations Committee on the Elimination of Racial Discrimination argues that despite the federal governments’ ratification of the Convention, the United States, thirteen years after ratification, has failed to “prevent and punish acts of excessive force, rape, sexual abuse and racial profiling committed by law enforcement officers against people of color.”85 The report additionally

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81 See Amnesty Int’l USA, supra note 25, at vii; 30. President Bush stated in his February 27, 2001, address to a joint session of Congress, “Earlier today I asked John Ashcroft, the Attorney General, to develop specific recommendations to end racial profiling. It’s wrong, and we will end it in America.” See id. at vii. President Bush repeated his promise later in 2001 during his appearance at the annual convention of the National Association for the Advancement of Colored People (NAACP), stating: “Finally, my agenda is based on the principle of equal opportunity and equal justice. Yet, for too long, too many African-Americans have been subjected to the unfairness of racial profiling. That’s why, earlier this year, I asked Attorney General John Ashcroft to develop specific recommendations to end racial profiling.” See id. at 30.

82 See Amnesty Int’l USA, supra note 25, at 30.

83 See id. at vii; 30–31; see also Norrell, supra note 42.

84 See Amnesty Int’l USA, supra note 25, at vii.

85 See Ritchie & Mogul, supra note 19, at 179. Ritchie and Mogul’s report for the U.N. Committee on the Elimination of Racial Discrimination was prepared on the occasion of the U.N. Committee’s review of the United States’ progress under the Convention. See id. at 175.
alleges that the government has failed to collect and ensure access to “comprehensive statistical or other information on complaints, prosecutions, and convictions relating to acts of racism and xenophobia as well as compensation awarded to the victims” as required by the Convention.86 This information is vital to the government’s protection of minorities’ civil liberties because it is required to include records of acts perpetrated against civilians by law enforcement officials.87

Furthermore, the 2007 report found that the U.S. government has failed to take “any meaningful action” to address discriminatory law enforcement practices in the United States.88 The report attributed this state of affairs to the absence of binding federal legislation that would prohibit and monitor the racial profiling by law enforcement officers at the federal, state and local level.89 Existing federal guidelines, such as the Guidance, have little legal significance because they are not mandatory; furthermore, they are inapplicable to the majority of state law enforcement agents because, at the time of the report, twenty-six states lacked explicit prohibitions on racial profiling by law enforcement officials.90 The ability of government agencies and independent third parties to evaluate discrimination in law enforcement officials’ treatment

87 See Ritchie & Mogul, supra note 19, at 204 (citing CERD, supra note 86, at § 1(A)(1)–(3)).
88 See id. at 207.
89 See id. at 205.
90 See id. at 205 n.111 (citing AMNESTY INT’L USA, supra note 25, at 33). To demonstrate the dearth of binding federal legislation enacted to protect racial minorities, the authors point to Congress’s failure to pass the End Racial Profiling Act (ERPA), introduced on February 26, 2004, in the House of Representatives by Congressmen John Conyers, Jr. (D-MI) and Christopher Shays (R-CT), which would have defined and banned racial profiling at all levels of government, prohibited the use of race, ethnicity, national origin or religion in making routine spontaneous law enforcement decisions, and provided funding and training for data collection and monitoring in compliance with the Act’s terms. See id. The Act also included provisions for remedial measures and would allow courts to respond to individual complaints by ordering specific police departments to stop engaging in racial profiling. See AMNESTY INT’L USA, supra note 25, at 30. Along with fourteen colleagues, Senator Feingold simultaneously introduced an identical bill in the U.S. Senate, but this bill was also defeated. See id. ERPA was reintroduced in the House and Senate in 2004 and 2005, but it “languished in committee without ever receiving an up-or-down vote.” See Press Release, ACLU, ACLU Applauds Senate Reintroduction Of Racial Profiling Bill, Urges Congress To Finally Pass Comprehensive Legislation Next Year (Dec. 19, 2005) (on file with ACLU). Most recently, ERPA was reintroduced to the 110th Congress by Senator Feingold and Representative Conyers on December 13, 2007. See ACLU, The 110th Congress So Far, http://www.aclu.org/legislative/34133leg20080215.html.
of minorities is further hindered by the U.S. government’s failure to collect the comprehensive statistical information on “acts of excessive force, racial profiling, or false arrests and wrongful prosecutions” as required by the Convention.91

Finally, because individuals seeking remedies must demonstrate proof of intent to discriminate, the judicial process itself presents another factor that perpetuates racial profiling.92 In the United States, victims of racial profiling have three forms of recourse against law enforcement officials who subject them to racial profiling.93 A first option is to request that the appropriate government body prosecute the official(s), a method that puts the onus of initiating a criminal prosecution on the agency that employed the official.94 A second option is to file a complaint with an internal disciplinary agency or civilian complaint board, but even when such an agency or board exists, fair investigations and adequate resolutions are rare.95 The final option is to file a civil rights challenge to racial profiling by the government or private individuals and institutions in the form of a civil suit under 42 U.S.C. § 1983.96 Overall, however, these mechanisms have been criticized as

91 See Ritchie & Mogul, supra note 19, at 204. The authors cite a 2006 report issued by the U.S. Department of Justice’s Bureau of Statistics entitled Citizen Complaints About Use of Force. See id. at 204 n.109. Although the report tracked excessive force complaints filed with a police disciplinary agency in 2002 against some fifty-nine percent of U.S. law enforcement officers, the report “failed to collect or analyze the number of excessive force complaints against all law enforcement officers nationwide, or to include information regarding the racial demographics of complainants and officers, or regarding whether any of the officers faced any criminal investigation, prosecution or sanctions for any misconduct.” Id. The Department of Justice’s report also recognized that the report captured only a small portion of allegations of excessive force by law enforcement officials since only an estimated ten percent of individuals actually report such incidents to police disciplinary agencies and only an estimated one percent actually report such incidents to civilian complaint review boards. See id. (citing Matthew J. Hickman, Bureau of Justice Statistics, U.S. Dep’t of Justice, Special Report: Citizen Complaints About Police Use of Force 4 (2006), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf).

92 See id. at 205.

93 See id. at 232.

94 See id.

95 See id. at 232–33.

96 See Ritchie & Mogul, supra note 19, at 232–33; see also Howard Friedman & Charles J. DiMare, Strategies in Litigating Intentional Tort Cases, 4 Litigating Tort Cases § 50:46 (2008) (explaining how challenges to civil rights violations may be brought in court). This method was cited at page 157 of the U.S. Report as evidence of compliance with article 6 of the Convention, which requires member States to assure “everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as
“largely ineffective and insufficient to meet the U.S. Government’s obligations to provide remedies and redress for violations of rights under the Convention” because such suits, even in rare instances of success, seldom lead to individual or systemic changes in law enforcement policies and practices.\footnote{97}

\section*{C. The Role of the TSA}

Shortly after the attacks of September 11th, Congress created the Transportation Security Administration (TSA), an entity now responsible for the security of domestic U.S. airports as well as all remaining United States mass transportation systems.\footnote{98} The TSA’s aim is to execute a “risk-based and multi-layered approach to security,” a strategy that its immediate past Assistant Secretary, Edmund S. “Kip” Hawley, described in a 2007 statement to Congress as requiring “a broad range of interlinked measures that are flexible, mobile, and unpredictable.”\footnote{99} Under the Aviation and Transportation Security Act (ATSA), airport security measures such as screenings have both a private and public component.\footnote{100} Because the federal government is directly responsible for airport security, airports and airlines partner with private entities to execute these activities under Federal Aviation Administration (FAA) supervision.\footnote{101}

No doubt in part to assuage fears that such “flexible, mobile and unpredictable” measures risk jeopardizing travelers’ civil liberties, the TSA formed an Office of Civil Rights and Liberties and charged the External Compliance Division (“the Division”) with ensuring that “the civil rights and liberties of the traveling public are respected throughout screening processes, without compromising security.”\footnote{102} Among its

\footnote{97}{See Ritchie & Mogul, \textit{supra} note 19, at 233.}
\footnote{98}{See \textit{Aviation & Transportation Security Act}, 49 U.S.C.A. § 114 (2001); \textit{Mock}, \textit{supra} note 71, at 215; TSA, \textit{supra} note 20.}
\footnote{99}{See \textit{One Year Later: Have TSA Airport Security Checkpoints Improved?: Hearing Before the H. Comm. on Oversight and Gov’t. Reform}, 110th Cong. 4 (2007) (statement of Kip Hawley, Assistant Secretary, Transportation Security Administration). Kip Hawley was succeeded by Acting Administrator Gale Rossides in late January of 2009. See TSA, Gale D. Rossides, Acting Administrator, \textit{http://tsa.gov/who_we_are/people/bios/gale_rossides_bio.shtm} (last visited Nov. 18, 2009).}
\footnote{100}{See \textit{LCCREF}, \textit{supra} note 19, at 27.}
\footnote{101}{See \textit{id}.}
\footnote{102}{See \textit{One Year Later, supra} note 99, at 4 (statement of Hawley); TSA, Civil Rights for Travelers, \textit{http://www.tsa.gov/what_we_do/civilrights/travelers.shtm} (last visited Nov. 19, 2009).}
several responsibilities, the Division provides “civil rights guidance and services to TSA program offices, including security offices, technology offices, and communications offices.” The Division is also responsible for reviewing TSA policies and procedures “to ensure that the civil rights and liberties of the traveling public are taken into account.” Additionally, the TSA issued a civil rights policy statement asserting the organization’s vision of excellence in transportation security. In the civil rights policy statement, the TSA pledges that “[w]ith this vision, comes a commitment that all TSA employees and the public we serve are to be treated in a fair, lawful, and nondiscriminatory manner.”

Besides the confines of the laws of the United States and the TSA’s own Civil Rights Policy Statement, the TSA is obligated to comply with unique rules applicable to particular modes of transportation—specifically, civil aviation security rules, maritime and land transportation security rules, and rules that apply to many other modes of transportation. The airport security rules require that airport operators adopt and carry out TSA-approved security programs. The rules delineate

103 See TSA, Civil Rights, supra note 102.
104 See id.
105 See id.
106 TSA, CIVIL RIGHTS POLICY STATEMENT 1 (2008), available at http://www.tsa.gov/assets/pdf/civil_rights_policy.pdf. The Civil Rights Policy Statement provides that it is TSA’s policy that:

• TSA employees, applicants for employment, and the public we serve are to be treated in a fair, lawful, and nondiscriminatory manner, without regard to race, color, national origin, religion, age, sex, disability, sexual orientation, status as a parent, or protected genetic information.
• TSA’s equal employment opportunity policy applies to all personnel and employment programs and management practices and decisions.
• TSA will comply with all applicable Federal laws and Executive Orders regarding civil rights protections.
• TSA has no tolerance for harassment in the workplace or in the treatment of the public we serve.
• TSA will not tolerate reprisal against those who exercise their rights under the civil rights laws.
• TSA will scrutinize processes, review results, and work to remove any barriers that may impede equal opportunity for recruitment, hiring, promotion, reassignment, career development, or other employment benefits.
• TSA will review and analyze from a civil rights perspective how its programs, policies, and operations impact the public we serve.

Id.

108 See § 1542.101. Subsections 1542.201 through .209 lay out a variety of security measures and regulations. § 1542.201 (security of the secured area); § 1542.203 (security of the air operations area); § 1542.205 (security of the identification area); § 1542.207 (require-
the requirements for such programs and discuss expectations for established secured areas, air operations areas, security identification display areas, security directives issued to airports, and access control systems.\textsuperscript{109}

As TSA’s efforts are constantly expanding, on September 9, 2009, it announced that during that day’s morning and evening commutes, Amtrak police, TSA personnel, and law enforcement officers from over one hundred federal, state and local rail, and transit agencies were deployed at approximately 150 rail stations in the Northeast Corridor as “an exercise of expanded counterterrorism and incident response capabilities.”\textsuperscript{110} TSA’s far-reaching efforts are also targeting children: On September 8, 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano and Girl Scouts of the USA CEO Kathy Cloninger announced a new partnership between the Department of Homeland Security’s Citizen Corps and the Girl Scouts.\textsuperscript{111} In addition to collaborating on a “preparedness patch,” which may be earned by Girl Scouts of any level who identify and prepare for potential emergencies, learn about local alerts, and warning systems and engage in community service activities, Secretary Napolitano and Ms. Cloninger formally agreed to an affiliation between Citizen Corps and the Girl Scouts.\textsuperscript{112} According to the TSA press release, this new partnership will “motivate young women to become community leaders in emergency management and response fields and raises public awareness about personal preparedness, training and community service opportunities.”\textsuperscript{113}

\section*{III. Failed Airport Security “Solutions”, Past and Present}

In response to the increased airliner hijackings of the 1960s, the Federal Aviation Administration (FAA) instituted its Anti-Air Hijack Profile, a passenger profiling system that identified potential hijackers based on a combination of approximately twenty-five empirically-linked characteristics that hijackers were thought to possess.\textsuperscript{114} The luggage of

\begin{footnotesize}
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\item[\textsuperscript{109}] See § 1542.103.
\item[\textsuperscript{110}] See Press Release, TSA, AMTRAK, TSA and Local Law Enforcement Deploy Across Northeast Corridor Rail Stations (Sept. 9, 2009) (on file with TSA).
\item[\textsuperscript{111}] See Press Release, Dep’t of Homeland Sec., Secretary Napolitano and Girl Scouts of the USA Announce New Preparedness Patch (Sept. 8, 2009) (on file with author).
\item[\textsuperscript{112}] See id.
\item[\textsuperscript{113}] See id.
\item[\textsuperscript{114}] See Ravich, \textit{supra} note 19, at 9. In computer-based profiling, pattern-based or subject-based data is typically used. See James X. Dempsey & Lara M. Flint, \textit{Commercial Data and
passengers who fit the Anti-Air Hijack Profile was X-rayed or otherwise investigated.\textsuperscript{115} In 1974, Congress enacted two statutes to further improve safety on passenger airlines.\textsuperscript{116} The Anti-Hijacking Act made it illegal to bring a concealed weapon aboard an aircraft, and the Air Transportation Security Act required the screening of all carry-on luggage.\textsuperscript{117} The primary difference between these procedures and passenger profiling is that these procedures were in effect for every passenger, regardless of whether they were thought to possess certain characteristics prevalent among terrorists.\textsuperscript{118}

Some scholars argue that airline passenger profiling is necessary because “screening for bad people is at least as important as screening for bad things.”\textsuperscript{119} Proponents of profiling see it as an effective tool that allows security personnel to “use what [they] know” about past terrorists to identify potential future ones.\textsuperscript{120} The FAA, however, found such profiling to be ineffective and abandoned it in 1972 in favor of performing X-rays on all passengers’ carry-on luggage.\textsuperscript{121}

Although eventually determined to have been caused by a faulty fuel tank and not an act of terror, the explosion of TWA flight 800 on July 17, 1996 spurred the U.S. government to revisit airline passenger

\textit{National Security}, 72 Geo. Wash. L. Rev. 1459, 1464 (2004). Pattern-based searches are typically used in the consumer sector to track customer purchases and prevent credit card fraud and identify information that matches or departs from a pattern. See \textit{id}. On the other hand, “subject-based” queries “are data searches that seek information about a particular subject already under suspicion based on information derived from traditional investigative means, whether that subject is represented by a name, a telephone number, or a bank account number.” See \textit{id}.

\textsuperscript{115} See Ravich, \textit{supra} note 19, at 10.


\textsuperscript{118} See Rhee, \textit{supra} note 116, at 853. In \textit{United States v. Slocum}, the federal appellate court found that because the Anti-Hijacking Profile was based on a “statistical comparison of . . . passengers to past hijackers” using “nondiscriminatory indicia characteristic of the hijacking problem,” the Profile did not necessarily attempt to establish probable cause and therefore was not subject to scrutiny under the Fourth Amendment. See \textit{United States v. Slocum}, 464 F.2d 1180, 1183 (3d Cir. 1972).

\textsuperscript{119} See Ravich, \textit{supra} note 19, at 2.

\textsuperscript{120} See \textit{id}. at 9.

\textsuperscript{121} See \textit{id}. at 10 (citing Gregory T. Nojeim, \textit{Aviation Security Profiling and Passengers’ Civil Liberties}, Air & Space L. 3, 6 (1998)) (“In 1972, the last year[,] the United States used profiles to determine whose carry-on luggage would be X-rayed to stop hijacking, there were 28 hijackings of U.S. passenger aircraft. Hijacking dropped off when profiling was abandoned and every passenger’s carry-on luggage was X-rayed.”).
In response to initial fears that terrorists had caused the accident, then-President William J. Clinton announced the creation of the White House Commission on Aviation Safety and Security, also known as the “Gore Commission,” on August 22, 1996. The Gore Commission’s role was to “advise the President on matters involving aviation safety and security, including air traffic control” and to “develop and recommend to the President a strategy designed to improve aviation safety and security, both domestically and internationally.”

Among its several security recommendations, the Gore Commission advised in favor of reinstating a form of the FAA’s 1960s passenger profiling system. The Gore Commission took care to warn against racial profiling and recommended eight important safeguards, the first of which was that profiles should not “contain or be based on material of a constitutionally suspect nature” such as race, religion or national origin and that the elements of a profiling system ought to be developed “in consultation with the Department of Justice and other appropriate experts.”

The Gore Commission Report’s eight recommended safeguards are:

1. No profile should contain or be based on material of a constitutionally suspect nature—e.g., race, religion, national origin of U.S. citizens. The Commission recommends that the elements of a profiling system be developed in consultation with the Department of Justice and other appropriate experts to

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122 See id. Government officials did initially believe that terrorists had caused the accident. See id.

123 See id. at 10–11.


125 See Ravich, supra note 19, at 11. The Gore Commission recommended three steps to improve and promote passenger profiling:

First, FBI, CIA, and BATF (Bureau of Alcohol, Tobacco, and Firearms) should evaluate and expand the research into known terrorists, hijackers, and bombers needed to develop the best possible profiling system. They should keep in mind that such a profile would be most useful to the airlines if it could be matched against automated passenger information which the airlines maintain.

Second, the FBI and CIA should develop a system that would allow important intelligence information on known or suspected terrorists to be used in passenger profiling without compromising the integrity of the intelligence or its sources. Similar systems have been developed to give environmental scientists access to sensitive data collected by satellites.

Third, the Commission will establish an advisory board on civil liberties questions that arise from the development and use of profiling systems.

be considered for government-sponsored profiling should be based on “measurable, verifiable data indicating that the factors chosen are reasonable predictors of risk, not stereotypes or generalizations” and that the factors chosen would need to correspond in a demonstrable way with the risk of illegal activity.”


The first airline passenger profiling program to be widely implemented in response to the Gore Commission’s findings was the Computer Assisted Passenger Prescreening System (CAPPS). Developed by Northwest Airlines in 1996 with an FAA grant, CAPPS was initially presented not as a profiling system, but rather as a “management tool” that would be used “not to pick a needle out of the haystack . . . but to make

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127 See id. at app. A.
128 See Ravich, supra note 19 at 11–12.
the haystack smaller.”\textsuperscript{129} CAPPS worked by collecting approximately thirty-nine pieces of data intended to identify those travelers that warranted being subjected to heightened security procedures.\textsuperscript{130} The specifics of these data points, however, are unknown because the FAA has declined to reveal the nature of the criteria.\textsuperscript{131} Predictably, the FAA has insisted that race, ethnicity, religion and gender were not factors in the CAPPS analysis but refuses to make the profiles or the criterion on which the profiles were compiled public, alleging that such transparency would eliminate the profiles’ effectiveness.\textsuperscript{132} Those who have tried to discern the factors on which a CAPPS profile is compiled suggest that:

CAPPS focuses on specific features such as the method of payment for an airline ticket (i.e., cash or credit); the timing of a purchase (i.e., immediately before departure or much earlier); the identity of travelers, including with whom, if anybody, the passenger is traveling; the activity at the destination, including whether the passenger intends to rent a car; the flight itinerary, including where the flight originates and its ultimate destination; the passenger’s specific travel plans, including ultimate destination when different from the flight on which the traveler is aboard; and whether the flight is round trip or one-way.\textsuperscript{133}

In the event that a particular passenger’s profile were to trigger the CAPPS system’s selection criteria, that passenger would be identified as a “selectee” and would undergo additional security measures.\textsuperscript{134} The type and extent of such measures would depend on several factors, in-


\textsuperscript{130} See id.

\textsuperscript{131} See Rhee, \textit{supra} note 116, at 865.


\textsuperscript{133} Ravich, \textit{supra} note 19, at 12.

\textsuperscript{134} See id. at 12–13. The security measures taken typically involve “bag-matching,” or ensuring that any luggage checked by the passenger be flown only if that passenger boards the aircraft, examination by a certified explosive detection system, and the use of other advanced technology such as trace detectors and explosive detection devices. See id. at 13.
cluding the passenger’s destination and the advanced technology available.\footnote{135} In 1997, a Department of Justice analysis of CAPPS selection criteria concluded the CAPPS program to be non-discriminatory.\footnote{136} Not surprisingly, opponents to the profiling program assigned little weight to the Department’s conclusions.\footnote{137} Objections to the use of the CAPPS system came primarily in two forms.\footnote{138} First, CAPPS was criticized as ineffective in preventing against certain kinds of terrorist threats, and second, the CAPPS system facilitated unconstitutional discrimination as well as an invasion of privacy (and possibly enabled identity theft) of all those who were vetted by the system.\footnote{139} Proponents of the first part of this argument contended that a computer-assisted passenger screening system is insufficient to uncover explosives planted on a terrorist’s unsuspecting friend or relative.\footnote{140} For instance, CAPPS’ detractors have argued that CAPPS would not have prevented even the earliest documented U.S. bombing of a commercial airplane—a 1955 incident in which a son, scheming to collect on his mother’s life insurance policy, planted a bomb in his mother’s luggage.\footnote{141}

\footnote{135} See id. at 13. Some scholars have argued that because the CAPPS program identified ten of the nineteen September 11 terrorists, profiling and even a “corresponding infringement of some existing travel and privacy rights” may be justified. See id. at 32. Professor Ravich, for example, argues that the subsequent failure of TSA officials to prevent the hijackers from boarding (instead, officials focused on the hijackers’ baggage) constituted a failure in enforcement, but not in the CAPPS profiling system. See id.

\footnote{136} See id. at 14.

\footnote{137} See id.

\footnote{138} See Ravich, supra note 19, at 46.

\footnote{139} See id.

\footnote{140} See id. at 13, 32–33. It is interesting to compare the American airport security system with that of Israel, a nation under constant terrorist threat and where El Al (the primary Israeli airline) passengers are routinely subjected to profiling, among other security measures. See id. at 33. One 1986 incident is telling: when officials selected a pregnant woman flying alone from London to Tel Aviv for additional screening, they discovered that a bomb had been planted in her suitcase by her Jordanian boyfriend. See id. Not one successful hijacking has ever taken place out of an Israeli airport. See id.

\footnote{141} See id. (citing Ted Rohrlich, Response to Terror Aviation Security, L.A. TIMES, Nov. 5, 2001, at A1). One critic stated:

How long does it take the United States to counter a threat to commercial aviation? In the case of a bomb stowed in luggage in the belly of an airliner, the answer is nearly half a century. And counting. Since a man placed a bomb in his mother’s suitcase in 1955 and blew up a United Airlines flight over Colorado, more than two dozen fatal explosions have been recorded on aircraft around the world.

\textit{Id.}
Proponents of the second part of this argument believe that the potential for CAPPS to facilitate unlawful discrimination and the invasion of profiled travelers’ privacy is significant because the integrity of CAPPS data and the reliability of CAPPS sources is questionable. An- 142 other concern is that CAPPS profiles and travelers’ personal data may be distributed to government agencies beyond the FAA for purposes unrelated to terrorism or aviation security. As an alternative to CAPPS, the ACLU suggested the implementation of methods other than profiling, such as, “training security personnel to identify tangible evidence of suspected criminal activity on reasonable; articulable bases other than stereotypes; screening airline personnel and employees of air security vendors (within constitutional means); adding measures to enforce security standards at foreign airports; and limiting FBI and law enforcement access to passenger records” in order to ensure airline passenger privacy without jeopardizing aviation security.

Instead, in 2003, the federal government gave Lockheed Martin a five-year grant and $12.8 million during the first year in order to develop an enhancement of CAPPS called CAPPS II. TSA intended that CAPPS II would “bridge law enforcement and intelligence databases” and enable airlines to authenticate commercial airline passengers’ identities by comparing a travelers’ passenger name record (PNR) against governmental databases. A large portion of the data used by the CAPPS II computer system was obtained from airlines that had already once supplied passenger data to the U.S. Army for what was billed as a non-CAPPS-like program.

142 See id. at 15.
143 See Ravich, supra note 19, at 15. These concerns regarding personal privacy are not unfounded. See id. As the ACLU has pointed out, computerized profile systems permit information collected by airlines for non-profiling purposes—to book flights or enroll in frequent flyer programs, for example—to be used for other purposes. See id. The information computerized profiling systems collect about their passengers includes, inter alia, passengers’ names, addresses, flight destinations, method of purchasing tickets (who paid and the method of payment), whom the passenger traveled with, and whether the passenger also reserved a car or hotel. See id. The information might also include passengers’ addresses over the span of several years, the kinds of cars the passenger owns or has owned and the length of ownership of those cars, the names and addresses of businesses the passenger has used, and a list of the newspapers the passenger has subscribed to. See Brasch, supra note 18, at 142.
144 Ravich, supra note 19, at 15 (citing Nojeim, supra note 121, at 7).
145 See Brasch, supra note 18, at 142.
146 See id.; Ravich, supra note 19, at 16. A passenger’s PNR typically contains his “full name, home address, telephone number and date of birth.” See Ravich, supra note 19, at 16.
147 See Brasch, supra note 18, at 142.
Civil liberty and privacy advocates’ primary argument against CAPPS II was that it would enable information provided and intended for one purpose to be exploited for another.\textsuperscript{148} CAPPS II would single out passengers of interest to the government, even when they posed non-travel-related risks, such as those with outstanding warrants and those who had filed for bankruptcy or were late paying their bills.\textsuperscript{149} This concern proved to be CAPPS II’s undoing, as the use of private data provided to the government by commercial data miners could result in “arrest, deportation, loss of a job, greater scrutiny at various screening gates, investigation or surveillance, or being added to a watch list.”\textsuperscript{150} TSA halted the application of CAPPS II after the U.S. General Accounting Office (GAO) issued a report stating that CAPPS II faced significant implementation challenges and that “[u]ntil TSA finalizes its privacy plans for CAPPS II and addresses [concerns over the combined analysis of PNR data with commercial and law enforcement databases], we lack assurance that the system will fully comply with the Privacy Act.”\textsuperscript{151}

Subsequent testimony before the Senate Governmental Affairs Committee and an investigation by \textit{Wired News} revealed that TSA had in fact continued to mine data without meeting the safeguards the GAO had required.\textsuperscript{152} By the time the Department of Homeland Security


\textsuperscript{149} See \textit{id}. at 16.

\textsuperscript{150} See Dempsey & Flint, \textit{supra} note 113, at 1471; Ravich, \textit{supra} note 19, at 16. In testimony before the Aviation Subcommittee of the House Transportation and Infrastructure Committee, Nancy Holtzman, Executive Director of the Association of Corporate Travel Executives argued that CAPPS II was “in direct conflict with privacy policies of most major American corporations” and that “distinguished experts on personal freedoms can easily make the case that CAPPS II can be extended into every aspect of American life from the purchase of train tickets to real estate.” Brasch, \textit{supra} note 18, at 142. Organizations such as the ACLU, the Electronic Privacy Information Center and others similarly argued against the implementation of CAPPS II. See \textit{id}. at 143.

\textsuperscript{151} See U.S. Gen. Accounting Office (GAO), \textit{Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges} 42 (2004), \textit{available at} http://www.gao.gov/new.items/d04385.pdf. Among its criticisms, the GAO highlighted that TSA had not fully addressed seven of eight issues identified by Congress as issues TSA would have to fully address before CAPPS II could be implemented. See \textit{id}. at 13.

finally suspended CAPPS II in July 2004, about $102 million had been spent on the program and another $60 million was earmarked for CAPPS II-related spending during the coming fiscal year. The Department of Homeland Security claimed that it would review CAPPS II data and confine it to the names of potential terrorism suspects, but within two weeks of George W. Bush’s reelection, the Department of Homeland Security converted CAPPS II into a program called Secure Flight and required U.S. airlines to supply the government with personal data on all of their passengers.

As of December 29, 2008, the government’s Secure Flight program aims to ensure the uniform prescreening of passengers on domestic and international flights by concentrating the task of passenger watch list-matching in the hands of the TSA. Under the program, the name,
birth date, gender and itinerary of each passenger is compared against
government watch lists to identify known and suspected terrorists, pre-
vent individuals on the government’s No Fly Lists from boarding air-
craft, and identify individuals on the government’s selectee lists for en-
hanced screening.\textsuperscript{156} The TSA insists that Secure Flight does not assign
security scores to individuals, collect or use commercial data to conduct
Secure Flight watch list matching or attempt to predict passengers’ be-

In an August 12, 2009 press release, the TSA announced that it
would begin the second publicly noticeable security phase of its Secure
Flight program on August 15, 2009.\textsuperscript{158} This phase of the TSA’s pas-
enger vetting program involves participating U.S. airlines requiring certain
passengers to provide their birth date and gender when making air
travel reservations.\textsuperscript{159} This step comes on the heels of a phase that be-
gan on May 15, 2009, when airlines participating in the Secure Flight
program began asking passengers to provide their name as it appears on
the government-issued identification they will use while traveling in
making their airline reservations.\textsuperscript{160} According to its website, TSA’s lar-
ger goal is to vet “100 percent of passengers on all domestic commercial
flights by early 2010 and 100 percent of passengers on all international
commercial flights into, out of, or over the U.S. by the end of 2010.”\textsuperscript{161}

Critics of Secure Flight are nonetheless as mistrustful of the new
program as they were of its predecessor, CAPPS II.\textsuperscript{162} The ACLU, for
example, has argued that Secure Flight requires the acceptance of the
“dubious premise” that terrorists use legitimate documentation con-
taining their true names to book airline tickets and to pass airport se-

Secure Flight will also apply to point-to-point international flights operated by U.S.-based
aircraft operators.” See TSA, \textit{supra}.

\textsuperscript{156} See TSA, \textit{supra} note 155. While the program does not require individuals to provide
other information, such as passport information and known redress numbers to aircraft
operators, aircraft operators are required to transmit such data to TSA when passengers
voluntarily provide it to them. See \textit{id}. The TSA website announcing the launch of the Se-
cure Flight program argues that “[p]roviding the optional information is beneficial to
passengers as it helps ensure they are not misidentified as a person on a watch list.” See \textit{id}.

\textsuperscript{157} See \textit{id}.

\textsuperscript{158} See Press Release, TSA, Secure Flight Program Enters Next Public Phase (Aug. 12,
2009) (on file with author).

\textsuperscript{159} See \textit{id}.

\textsuperscript{160} See \textit{id}.

\textsuperscript{161} See \textit{id}.

\textsuperscript{162} See \textit{Secure Flight & Registered Traveler, supra} note 28 (testimony of Sparapani).

\textsuperscript{163} See \textit{id}.
United States and the ability of terrorists to forge identification documents enabling the purchase of tickets under an assumed name, Secure Flight is likely to result in “False Negatives” and fail to achieve its goals.\(^\text{164}\) Secondly, critics argue that the use of “bloated” No Fly Lists will prevent innocent people from traveling and thus deprive them of a constitutionally protected right to travel.\(^\text{165}\) Furthermore, the failure to establish a working, comprehensive redress process under CAPPS II suggests that those who are wrongly put on the Secure Flight List have no guarantee that their names will be removed permanently, if at all.\(^\text{166}\) Finally, the ACLU warns that because of the types of names most likely to appear on the No Fly and selectee lists, travelers of Arab and Middle Eastern descent will be most vulnerable to being targeted for additional screenings and prevented from flying altogether.\(^\text{167}\)

**B. Behavioral Profiling: Racial Profiling Poorly Disguised**

Behavioral profiling appears at first glance to be a race-blind, politically neutral mechanism for ensuring the safety of all passengers.\(^\text{168}\)

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\(^{164}\) See id.; Ravich, \textit{supra} note 19, at 8. As early as 2003, the U.S. Federal Trade Commission estimated that “over a one-year period nearly 10 million people—or 4.6 percent of the adult population—had discovered that they were victims of some form of identity theft.” See \textit{Secure Flight \& Registered Traveler}, \textit{supra} note 28 (testimony of Sparapani). Mr. Sparapani made clear that the ACLU does not oppose the TSA’s comparison of passenger lists against a \textit{narrowly constructed list of known terrorists} who pose a specific threat to aviation security. See id.

\(^{165}\) \textit{Secure Flight \& Registered Traveler}, \textit{supra} note 28 (testimony of Sparapani) (citing United States v. Guest, 383 U.S. 745, 757 (1966) (confirming the existence of a “constitutional right to travel from one State to another”) and Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (concluding that the right to travel is “assertable against private interference as well as government action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all”)).

\(^{166}\) See \textit{Secure Flight \& Registered Traveler}, \textit{supra} note 28 (testimony of Sparapani). Mr. Sparapani argued in February 2006, “if TSA cannot build a redress process after nearly four and one-half years for Secure Flight to prevent against civil liberties violations, how can TSA be trusted to build an effective, civil liberties–respecting passenger pre-screening program?” See id. Mr. Sparapani’s fears are not unfounded: On January 5, 2005, Maya Shaikh, an American citizen and a graduate of Stanford University School of Law, was arrested by the FBI, led through Honolulu International Airport before her own teenage daughter and other airport patrons in handcuffs, detained, questioned and placed in a holding cell because her name was on a No-Fly List. See James Fisher, \textit{What Price Does Society Have to Pay for Security? A Look at the Aviation Watch Lists}, 44 \textit{Willamette L. Rev.} 573, 573 (2008). Subjected to secondary security screenings and unpleasant interrogations on subsequent trips, Ms. Shaikh contacted TSA to have her name cleared from the list. See id. at 574. She was informed, however, that her name would not be removed from the list and that “this was the price she and society ha[d] to pay for security.” See id.

\(^{167}\) See Fisher, \textit{supra} note 166, at 573.

\(^{168}\) Ritchie & Mogul, \textit{supra} note 19, at 217.
Grasping at this superficial solution, federal and state agencies and law enforcement bodies—ranging from the Department of Homeland Security itself to local police departments—have issued security advisories to guide officials and civilians alike as to what constitutes “suspicious” behavior.\textsuperscript{169} Unfortunately, this unscientific practice threatens to disguise some racial profiling as permissible behavior and risks doing more harm than good in the effort to ensure aviation security.\textsuperscript{170}

1. Inadequate Training

As discussed above, critics have accused TSA’s weeklong Screening of Passengers by Observation Techniques (SPOT) Program, an existing system for training security officials to identify suspicious behavior, of being a grossly inadequate preparatory tool.\textsuperscript{171} The program is designed to teach security personnel to employ objective criteria to identify individuals who are trying to disguise their emotions.\textsuperscript{172} Under it, TSA officers compare the suspicious behavior indicators they observe in passengers against a list of approximately thirty behaviors that are assigned numerical scores.\textsuperscript{173} When a passenger’s score exceeds a certain predetermined sum, that passenger is questioned by an officer.\textsuperscript{174} If the conversation arouses further suspicion, as happens in approximately twenty percent of cases, the passenger is considered for a secondary search.\textsuperscript{175}

The SPOT training program entails a mere four days of classroom training on observation and questioning techniques and three days of “field practice” and prepares officers to look for suspicious behavioral

\textsuperscript{169} See id.
\textsuperscript{170} See Goldberg, \textit{supra} note 25, at 103.
\textsuperscript{171} See id. Apart from the SPOT program, transportation security officers are required to complete a minimum of one hundred hours of training—forty hours of classroom training and sixty hours of on-the-job training to receive certification permitting them to administer the checkpoint screening process. See Mock, \textit{supra} note 71, at 216–17. This certification allows TSA security personnel to conduct primary screening searches, the routine searches currently performed on all passengers regardless of the level of suspicion they arouse. See \textit{id.} at 217. These routine searches entail the use of magnetometers (metal detectors) and baggage scanning machines that are employed at screening checkpoints. See \textit{id.} at 217–18.
\textsuperscript{172} See Mock, \textit{supra} note 71, at 218.
\textsuperscript{173} See \textit{id.} at 218–19.
\textsuperscript{174} See \textit{id.} at 219.
\textsuperscript{175} See Goldberg, \textit{supra} note 25, at 219. Whether a conversation arouses further suspicion is determined on a case-by-case basis by individual security officials employing the SPOT technique, meaning that this subjective standard has the potential to mask discriminatory conduct. See \textit{id.}. 
indicators, such as “vocal timbre, gestures, and facial movements.”\footnote{176} TSA’s officials are required only to have a high school diploma and to pass a criminal background check.\footnote{177} However, longer training programs alone do not seem to be the answer, because human beings, not error-proof machines, are ultimately responsible for the profiling.\footnote{178} Even if the danger of racially-based motivations could be eliminated from behavioral profiling, “discriminatory determinations” may still lead security officials to identify “quirky” passengers as potential terrorist threats.\footnote{179}

As some critics have warned, “[for terrorists], [l]earning to defeat poorly-trained screeners is a lot easier than learning to fly a jumbo jet.”\footnote{180} If the security measures that have thwarted all hijacking attempts at Ben-Gurion airport near Tel Aviv, Israel, are to be implemented in the United States, the type of individuals chosen as security officers will need to change.\footnote{181} In Israel, most security officers are recruited from the military and are subjected to stringent tests to eliminate “all but those with above–average intelligence and particularly strong personality types.”\footnote{182} Israeli airport security personnel are given nine weeks of behavior recognition training, but all departing passengers are interviewed, all passengers are subjected to one-on–one searches, and the behavioral profiling program is supplemented by other security measures, including an extensive sky marshall program.\footnote{183} Not surprisingly, a primary goal of this system is to eliminate potentially discriminatory judgment calls while ensuring universal safety.\footnote{184}

\footnote{177} See Harcourt, \textit{supra} note 176.
\footnote{178} See Ravich, \textit{supra} note 19, at 33. In contrast, the Israeli airline El Al, whose planes have never been hijacked, offers passengers the protection of officers recruited largely from the Israeli military. See Harcourt, \textit{supra} note 176. These officers are subjected to stringent tests and undergo over two months of behavior recognition training. See id.
\footnote{179} See Ravich, \textit{supra} note 19, at 33. As Professor Ravich astutely points out, “[n]aturally, not every passenger who is anxious about flying, with sweaty palms and nervous movements, is a terrorist.” \textit{Id}.
\footnote{180} See Harcourt, \textit{supra} note 176.
\footnote{181} See \textit{id}.
\footnote{182} See \textit{id}.
\footnote{183} See \textit{id}. One-on-one searches of passengers by El Al officials have been reported to take an average of 57 minutes per person. See \textit{id}.
\footnote{184} See \textit{id}.
2. A Cover for Racism

Because behavioral profiling requires security officials to identify conduct that is perfectly natural in a variety of situations, those whose actions trigger scrutiny under this security method are prone to abuse by security officers based on “race-based preconceptions as to which racial groups are more likely to represent a ‘terrorist’ threat.” Critics warn that security officials engaged in behavioral profiling will disproportionately scrutinize racial and ethnic minorities and ‘observe’ suspicious behavior where none actually exists, causing racially disparate impacts similar to those caused by racial profiling. The brunt of this discrimination, critics warn, will be borne by those who are (or are perceived to be) Muslim, Arab and South Asian, wrongly reinforcing the idea that terrorist suspects can be successfully identified by their race, ethnicity or religion and reiterating prejudicial stereotypes in the mind of the public instead of devoting resources to “genuine threats to security.”

A prime example of the inappropriateness of behavioral profiling is the list of behaviors the Department of Homeland Security determined to be “indicative behaviors of suicide bombers.” The list of behaviors—a list that fails to recognize legitimate motives for any of the described conduct—includes culturally and racially insensitive items such as “clothing is loose,” “clothing is out of sync with the weather,” “pale face from recent shaving of beard,” and “does not respond to authoritative voice commands or direct salutation from a distance” as well as statements that could easily apply to any traveler, such as “eyes appear to be focused and vigilant,” “suspect may be carrying heavy luggage, bag or wearing a backpack,” and “suspect is walking with deliberation but not running.”

186 See Ritchie & Mogul, supra note 19, at 217–18.
187 See Ctr. for Hum. Rts. and Global Justice, supra note 185, at 30; Ritchie & Mogul, supra note 19, at 218–19.
188 See Advisory, U.S. Dep’t of Homeland Sec., Maintaining Awareness Regarding Al-Qaeda’s Possible Threats to the Homeland (Sept. 4, 2003).
189 See id. Ritchie and Mogul point out that many of these characteristics highlight cultural misunderstandings. See Ritchie & Mogul, supra note 19, at 218 For example, the reluctance to make eye contact and the general aversion of the eyes is a sign of respect among some Arabs. See id. Similarly, exhibitions of nervous behavior are not indicators of criminal intent or wrongdoing, but rather genuine displays of discomfort and fear stemming from previous experiences with authority figures both in their home countries and in
with no future, e.g., individual purchases one-way ticket or is unconcerned about receipts for purchases, or receiving change,” might have some correlation with the behavior of a terrorist; it could also apply to individuals who are wealthy, scatterbrained, or just in a hurry.190

IV. THE CONSTITUTIONALLY-VIABLE, RACE-BLIND SOLUTION FOR AMERICAN AIRPORTS: A UNIVERSALLY STRINGENT PHYSICAL SECURITY PROGRAM

In an address on the future of air travel delivered at the October 29, 2001 Freedom Versus Fear: The Future of Air Travel Conference, Robert Crandall, former president and chairman of American Airlines declared, “You want to travel on the airline system? You give up your privacy. You don’t want to give up your privacy? Don’t fly. Your privacy isn’t equal to the safety of the rest of us.”191 Like Professor Timothy M. Ravich, this author rejects the argument that commercial airline passengers must choose between security, liberty and privacy.192 Instead, a compromise must be reached and a new national aviation security system must be implemented.193

Because today’s airline security programs identify potential terrorists largely, if not entirely, based on passengers’ racial, national, religious or ethnic origins, these programs are racially discriminatory and therefore unconstitutional.194 Furthermore, the majority of TSA’s security initiatives, past and present, contravene the Convention for the

the United States. See id. Still other behavioral profiles have been known to explicitly name Muslims as targets for suspicion. See id. As recently as October 4, 2007, the behavioral profile available on the Temple Terrace, Florida police department website explicitly referenced Muslim individuals in declaring it suspicious for an individual to “expend[,] energy not to stand out as a Muslim, despite professed Islamic beliefs.” See id. at 218 & n.162. Perhaps because of the thoroughness of the 2007 report prepared for the U.N. Committee on the Elimination of Racial Discrimination the Temple Terrace police department has since revised its website. See Temple Terrace Police Department, Homeland Security Terrorist Indicators, http://www.templeterrace.com/police/terrorist.htm (last visited Oct. 19, 2009). As of October 19, 2009, the website’s closest association between Muslims and terrorism is the inclusion of “Jihadist literature, terrorist training manuals, security plans, encoded materials, or instructions for the use of codes and ciphers in residence or vehicle” in its list of “Possible Indicators of Terrorist Activity.” See id.

190 See Dep’t of Homeland Sec., supra note 188.
191 See Ravich, supra note 19, at 5 & n.14.
192 See id. Professor Ravich, however, endorses an aviation security policy “in which profiling plays an integral and lawful role.” See id. at 5. This author disagrees that any level of racial profiling may be lawful. See id.
193 See id.
Elimination of Racial Discrimination as ratified by the U.S. government.\textsuperscript{195} In situations where officials seek to identify terrorist threats but do not conduct investigations based on specific descriptions of suspects, the Fourth Amendment’s protection against unreasonable searches and seizures and the Fourteenth Amendment’s guarantee of equal protection demand that no distinctions be made among commercial airline travelers.\textsuperscript{196} As dissenting Supreme Court Justice John Harlan wrote in \textit{Plessy v. Ferguson}:

In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. . . . In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man . . . when his civil rights as guaranteed by the supreme law of the land are involved.\textsuperscript{197}

Rather than selectively using behavioral profiling or expensive computer programs (like CAPPS, CAPPS II, Registered Traveler and Secure Flight) that employ secret and possibly unconstitutional criteria to calculate the risk posed by particular passengers, the TSA should invest its resources in improving physical screening capabilities such as baggage screening technology and training security officials who can properly conduct one-on-one searches of all commercial airline passengers.\textsuperscript{198} As one critic has argued,

If we want to change the system, a better idea would be to eliminate most carry-ons and emulate high-security prisons.

Sure, this would not be 100 percent foolproof. But, in combination with our sky marshal program, it would be far more likely to prevent future terrorist hijackings than giving a bunch of unqualified screeners a cursory education in face reading.\textsuperscript{199}

\textsuperscript{195} See International Convention on the Elimination of All Forms of Racial Discrimination, \textit{supra} note 78.
\textsuperscript{196} See U.S. \textit{Const.} amends IV, XIV.
\textsuperscript{197} \textit{Plessy v. Ferguson}, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
\textsuperscript{198} See Harcourt, \textit{supra} note 176 at A21.
\textsuperscript{199} See id. Harcourt reports that in his experience, most prisons operate in the same way: “[F]irst I check my briefcase, overcoat, belt, cell-phone and all unnecessary items at the reception. I then take everything out of my pockets—wallet, pen and paper. A guard conducts a thorough pat-down search and physically inspects my property and shoes. We’re done in less than a minute.” \textit{See id.}
Fortunately, the Department of Homeland Security’s Science and Technology Directorate (“the Directorate”) has already begun to develop several new innovations to improve TSA’s screening capabilities. Over the past year, the Directorate has developed a plethora of new screening and detection technologies in working towards its 2010 congressional deadline of screening 100% of cargo carried onto commercial airplanes. Among other initiatives, a congressionally-directed Air Cargo Explosives Detection Pilot Program has been completed, a Digital Imaging and Communications for Security standard has been developed as the accepted imaging file format that will enable data exchanges between security screening equipment, the feasibility of creating a Magnetic Visibility program to identify the chemical contents of any liquid being carried through a security checkpoint has been confirmed, and homemade Explosives detection technologies and screening methods are in development.

Rather than spending millions of tax dollars on programs that profile and inadvertently discriminate against minority passengers, the TSA should concentrate on the continued development and expansion of these and other physical security initiatives. To encourage the TSA to develop the necessary technology, binding federal legislation should be passed to prohibit, monitor and provide redress for unconstitutional racial profiling in airports. If the implementation of advanced technology security programs forces airports to spend more time and human capital on screening passengers, so be it: not only does this approach avoid unconstitutional scrutinizing of those who fit into protected class categories, but this method will enable TSA to identify individuals like Richard Reid, John Walker Lindh, and Marwan al-Shehhi (those intending to commit acts of terror) as well as individuals like Jeffrey Goldberg and Nathaniel Heatwole (those merely seeking to underscore the inadequacies of existing national security measures).

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201 See id.
202 See id.
203 See id.
204 See Ritchie & Mogul, supra note 19, at 205.
Critics of this method are likely to argue that such an elaborate, “Big Brother”—style physical security system is untenably expensive and even unnecessary since the overwhelming majority of airline passengers are not terrorists. Significantly more frightening, however, are the warnings of some critics of the current security regime that TSA will soon develop variations of existing behavioral and computerized profiling programs and regularly apply them to other, non-aviation forms of travel. This fear is not unfounded, as the TSA’s complete objective is to ensure the security of all U.S. transportation systems, including city mass transit systems, trains, railroads, buses and airports. In addition, the argument that a universally stringent physical security system does not offer the least intrusive means of ensuring public aviation safety is misguided, because it measures “least restrictive” by the number of people searched and not the disparity in treatment between those searched and not searched. Finally, those who opposed CAPPS II’s use of personal data originally supplied to airlines for reasons unrelated to terrorism should be pleased to note that an enhanced, advanced physical security system requires no special data because it presumes that each passenger is equally capable, if not of acting as a terrorist, then of being targeted by one as a “bomb mule.”

Rather than spending millions of dollars on computerized security clearance systems that terrorists will strive to avoid with fake IDs, fake boarding passes and Registered Traveler cards, federal funding should be used to buttress intelligence and emergency response programs and to design an efficient way to search and X-ray every individual passenger’s person and belongings in an expedient but effective manner. Larger waiting rooms and a longer check-in process, as well as a veritable obstacle course of bomb-sniffing dogs, trace detectors, high-tech body scanners and thousands of new TSA baggage screeners will likely

206 See Ravich, supra note 19, at 7.
207 See, e.g., Secure Flight & Registered Traveler, supra note 28 (testimony of Sparapani) (warning that the ACLU suspects that “TSA will soon begin to apply the Secure Flight concept to those who travel by train, interstate bus, boat and ferry”).
208 See TSA, supra note 20.
209 See Brasch, supra note 18, at 12. But see Mark V. Tushnet, Emergencies and the Idea of Constitutionalism, in AT WAR WITH CIVIL LIBERTIES AND CIVIL RIGHTS 177, 177 (Thomas E. Baker & John F. Stack, Jr. eds., 2006) (suggesting that “a race-based classification system that would be unconstitutional during peacetime might be constitutional during wartime—not because the constitutional standards differ, but because their rational application leads to different results”).
210 See Ravich, supra note 19, at 15 (discussing the improper use of expensive, secret computerized security profiles).
211 See Goldberg, supra note 25, at 103.
be required to implement this policy. Increasing security precautions in this way could be massively expensive. Nevertheless, having to be at the airport for an extra hour or two before one’s flight is a small price to pay in exchange for protecting not only all travelers’ physical safety, but also each passenger’s constitutionally guaranteed civil rights.

**Conclusion**

Racial profiling, or indicia of it, is unconstitutional and often ineffective in eliminating the threat of terrorist attacks on commercial aircraft. In fact, the use of racial profiling to detect terrorists hinders the anti-terrorist effort more than it bolsters it: profiling serves to “divert[] precious anti-terrorism resources, alienate[] potential allies in the anti-terrorism struggle, and is inconsistent with cherished notions of freedom and equality” because it is contrary to basic rights guaranteed by the U.S. Constitution. As others have suggested, the ability to travel by airplane is not a right, but rather a privilege. Those who would prefer not to have their things and their person carefully examined are

212 See id. at 103–04.

213 See Harcourt, supra note 176, at A21. Groups of concerned citizens, such as the nearly 24,000-member Coalition for Airline Passenger’s Bill of Rights, have formed to petition Congress to pass legislation to protect airline passengers. See Flyersrights.org, About Us, http://flyersrights.org/about.php (last visited Nov. 19, 2009). FlyersRights.org was founded by Executive Director Kate Hanni, one of hundreds of passengers who was stranded on a plane for hours in December 2006. See id. An online petition currently featured by the Coalition on the flyersrights.org website proclaims, “[p]lease support the greatly needed Airline Passenger Bill Of Rights. We are committed to solutions for promoting airline passenger policies that forward first and foremost the safety of all passengers while not imposing unrealistic economic burdens that adversely affect airline profitability or create exorbitant ticket price increase.” See Flyersrights.org, Airline Passenger Bill of Rights, at http://www.petitiononline.com/airline/petition.html (last visited Nov. 19, 2009). As of November 19, 2009, the petition had 27,071 signatures. See id. The organization takes some credit for the introduction by Senator Barbara Boxer and Representative Michael Thompson of Passenger Bill of Rights legislation in their respective houses. See Flyersrights.org, Who We Are/About the Issue, at http://flyersrights.org/ (last visited Nov. 19, 2009). Four airline passenger rights bills are currently pending in Congress. See Airline Passenger Bill of Rights Act of 2009, S. 213, 111th Cong. (2009); Airline Passenger Bill of Rights Act of 2009, H.R. 624, 111th Cong. (2009); FAA Reauthorization Act of 2009, H.R. 915, 111th Cong. (2009); FAA Air Transportation Modernization and Safety Improvement Act, S. 1451, 111th Cong. (2009).

214 But see Ravich, supra note 20, at 56–57.

215 See LCCREF, supra note 19, at 21.

216 See Ravich, supra note 19, at 5 n.15 (citing the reasoning of a former president and chairman of American Airlines).
of course free to travel by other means.\textsuperscript{217} In the meantime, uniform screening of airline passengers achieves several goals. First, it eliminates the discrepancy in the way TSA treats individuals in light of their cultural, ethnic and religious backgrounds. Second, it provides for ‘equal scrutiny’ and thus ensures equal protection. Third, it prevents the possibility that unsuspecting passengers whose profiles fail to trigger a match with the government’s No Fly and selectee lists under Secure Flight will board flights while unknowingly carrying ticking explosive devices.

Decades ago, security experts realized that profiling is less effective than consistent, uniform X-raying of each passenger’s luggage, suggesting that a combination of X-raying and the development of more advanced screening devices would bring the government significantly closer to developing an aviation security system that is both effective \textit{and} constitutionally sound. Even if it is not mandated by the government, TSA can and should establish a universal, race-blind approach and corresponding procedures to establish airline security programs that can simultaneously eliminate threats to aviation security without infringing on travelers’ constitutional rights.\textsuperscript{218}

Achieving security for all commercial airline passengers while refusing to compromise on travelers’ civil liberties? Nothing could be more patriotic.

\textsuperscript{217} See id.

\textsuperscript{218} See id. at 10 (citing Nojeim, \textit{supra} note 121, at 6).
THE EARLY BIRD GETS THE WORM:
A PROPOSAL TO DEVELOP EARLY
INTERVENTION SHELTERS
THROUGHOUT MASSACHUSETTS

Leah Rabinowitz*

Abstract: This Note argues that Massachusetts should create early intervention shelters to aid potential status offenders and other troubled teenagers. The current juvenile justice system deserves critique because it is too reactive and focused on problem-free outcomes such as staying arrest-free, rather than developmental outcomes such as emotional maturity. This Note explores the short-term and long-term benefits of early intervention shelters and suggests that the shelters would be a helpful solution to the problem. Massachusetts should follow the model of other states and enact legislation to create and maintain early intervention shelters on a statewide scale. Such legislation would be attentive to concerns of race, gender, class, and budget.

INTRODUCTION

[Early intervention shelters] have boundaries. A kid needs that, and I don’t have any at home.

—Early Intervention Shelter Resident

After Amanda Cooksey, age seventeen, and her adoptive mother Sarah had an argument, Amanda ran away from her Florida home. A police officer picked her up and she agreed to go to a local shelter called the Capital City Youth Services (CCYS) shelter. Amanda had been experiencing difficulty adjusting to her new home, where she had moved two years prior. Amanda’s adoptive mother recalls that Amanda

* Note Editor, Boston College Third World Law Journal (2009–10).


3 See Eckholm, supra note 1.
was defiant towards her and had a habit of lying. At the shelter, Amanda received therapy and was ready to return home after a brief stay. Since then, Amanda reports that she is able to better understand her feelings, communicate, suppress the impulse to lie, and avoid confrontation with her mother. Reflecting on her experience at the shelter, Amanda said, “I know it’s going to take time, but I’m trying with all my heart to make a different life.”

The shelter that Amanda visited was an early intervention shelter, also known as a respite shelter. These facilities provide troubled teenagers with a range of services including lessons in anger management, social skills classes and various forms of counseling. With few exceptions, these shelters address the needs of those at risk of becoming status offenders. Status offense cases are a legal category distinct from delinquency or parental abuse cases. Status offenses include running away from home, truancy and persistent stubbornness in refusing to obey the rules of the home. Each state sets its own slightly different

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5 See id.
6 See id.
7 See id.
8 See id.
9 See Fiza Quraishi, Heidi J. Segal & Jennifer Trone, Vera Inst. of Justice, Respite Care: A Promising Response to Status Offenders at Risk of Court-Ordered Placements 2 (2002); Eckholm, supra note 1.
10 See Eckholm, supra note 1.
11 See Cheryl L. Maxson & Malcolm W. Klein, Responding to Troubled Youth 25 (1997); Quraishi et al., supra note 9, at 7 (noting that the Kids Oneida shelter is an exception to the rule, as the families there all have open child welfare cases). Status offenders are those alleged to have committed an offense that applies only to those below the age of majority, age eighteen. See Maxson & Klein, supra, at 25.
12 See Eckholm, supra note 1.
age parameters, but in all cases, status offenders are below age eighteen.\(^\text{14}\)

Unfortunately, status offenders too often fall between the cracks.\(^\text{15}\) Our triage-like legal system gives top priority to extreme cases—the worst behaving delinquents and the most traumatized abuse victims.\(^\text{16}\) Especially in urban areas, a youth’s first few minor offenses are usually ignored; only violence or other serious consequences are enough to catch a court’s attention.\(^\text{17}\) To some extent, the juvenile justice system must function this way just to stay afloat—a 2008 report calculated that approximately two million young people enter the American juvenile justice system each year.\(^\text{18}\) Given this high number, it is essential that children in extreme situations receive necessary assistance, yet it is unfortunate that as a result of providing services to those at the height of crisis, children with important but less immediate needs are often left to fend for themselves.\(^\text{19}\)

In general, early intervention, sometimes called diversion, enjoys wide public support.\(^\text{20}\) Diversion programming refers to services that aim to “prevent youth from entering the status offense court system.”\(^\text{21}\) For many, early intervention is a critical function of the juvenile justice system.\(^\text{22}\) Society depends on the court to promote positive outcomes for children and enhance their social, emotional, and intellectual functioning.\(^\text{23}\) The public also widely supports the notion that “the family is a central—if not the most central—social institution in American


\(^{15}\) Jessica R. Kendall, Juvenile Status Offenses: Treatment and Early Intervention, 29 A.B.A. Technical Assistance Bull. 1, 9 (2007) (remarking that “[i]t has been decades since any national attention has been paid to families on the brink” of the status offender system).

\(^{16}\) See Jeffrey A. Butts, Beyond the Tunnel Problem: Addressing Cross-Cutting Issues That Impact Vulnerable Youth 7 (2008).

\(^{17}\) Id.

\(^{18}\) See id. at 9.

\(^{19}\) See id. at 7; Tina Chiu & Sara Mogulescu, Vera Inst. of Justice, Changing the Status Quo for Status Offenders: New York State’s Efforts to Support Troubled Teens 1 (2004) (discussing the lack of programs and resources available to status offenders); see also Commonwealth v. Florence F., 709 N.E.2d 418, 421 (Mass. 1999) (remarking that status offenders “fall between the chairs”).

\(^{20}\) See Butts, supra note 16, at 7.

\(^{21}\) See Kendall, supra note 13, at 59.

\(^{22}\) See Butts, supra note 16, at 7.

\(^{23}\) Weithorn, supra note 13, at 1501.
life.”24 Despite public opinion in favor of early intervention, surprisingly few states vigorously pursue this option.25 Early intervention shelters, however, are an important step in bridging this gap.26

Massachusetts is one state that has not yet pursued a robust program for early intervention shelters.27 Massachusetts has a system of shelters in place for youth, but it primarily targets those who are homeless, victims of domestic violence, or victims of parental abuse or neglect.28 While Massachusetts has established some diversion programming as well, it does not receive nearly enough emphasis.29 Massachusetts does have a foundation to build upon, but the narrow scope of current programs and the limited resources of facilities dampen the state’s ability to make substantial changes.30 Massachusetts teenagers, families, and society at large would benefit greatly from the widespread creation and maintenance of early intervention shelters.31

Part I of this Note describes early intervention shelters with an emphasis on programs in Florida, New York, and Canada. Part II outlines the current framework in Massachusetts and critiques it as an overly reactive and under-resourced system that has not succeeded in addressing troubled teens’ underlying problems. Part III explores the benefits of early intervention shelters, both short-term and long-term. Part IV lays out and addresses criticisms of such shelters, ultimately concluding that the benefits outweigh any deficiencies. Part V argues that Massachusetts should create widespread early intervention shelters via legislation, as was done in Florida. This Note concludes by addressing some practical concerns that might heighten the effectiveness of future legislation in Massachusetts regarding early intervention shelters. Thus, future legislation should target the most at-risk teenagers and ensure a stable funding stream for early intervention shelters.

24 Id. at 1389.
26 See Quraishi et al., supra note 9, at 2.
27 See Eckholm, supra note 1.
30 See Chiu & Mogulescu, supra note 19, at 1; Quraishi et al., supra note 9, at 2.
31 See Chiu & Mogulescu, supra note 19, at 1; Quraishi et al., supra note 9, at 2.
I. EARLY INTERVENTION SHELTERS EXPLAINED

A. General Description

The central premise of early intervention shelters is that they proactively assist teenagers with their personal and family issues before the problem reaches a boiling point.32 These shelters provide teens with a "cooling off" period during which the roots of the teens' misbehavior are identified and a plan is put in place to address those issues.33 The causes of teenage misbehavior are varied, indeed, but common themes identified by the National Center for School Engagement include school factors, family and community factors, and personal characteristics.34 "School factors" may involve an unsafe school environment and the inadequate identification of special education needs.35 "Family and community factors" encompass negative peer influences, financial problems in a family, and a lack of family support for a child's goals.36 "Personal characteristics" include a lack of ambition, poor academic performance, and drug or alcohol abuse.37 Early intervention for teens dealing with these issues gives them and their families time to heal and can help avoid long-term placement in detention facilities or foster care.38

Early intervention shelters align with the treatment rationale for dealing with troubled teenagers.39 This rationale is one way to understand states' efforts at dealing with status offenders and potential status offenders.40 Under the treatment rationale, status offense behavior is seen as symptomatic of a more serious disturbance, whether personal or familial.41 Such a disturbance simply festers barring an intervention by the appropriate professionals.42 Early intervention shelters put these theories into practice by recognizing the symptomatic significance of

32 See Quraishi et al., supra note 9, at 2; Eckholm, supra note 1.
33 See Quraishi et al., supra note 9, at 2 (describing the intake process and noting that, at the outset, the child, parents, and counselors all meet to "negotiate the terms that will enable children to return home quickly"); Eckholm, supra note 1. After the negotiation process, the teens and parents usually sign a contract in which they agree to abide by the rules of the program. See Quraishi et al., supra note 9, at 3. Violating the rules is grounds for dismissal. See id.
34 Kendall, supra note 13, at 3–4.
35 Id. at 3.
36 See id.
37 See id. at 4.
38 See Eckholm, supra note 1.
39 See Maxson & Klein, supra note 11, at 39.
40 See id.
41 Id.
42 Id.
status offending behavior and responding accordingly. The response under the treatment rationale emphasizes therapy, decision-making and overall prevention services. Successful treatment strategies for teens include providing immediate feedback about positive and negative behaviors, an explanation of individualized rewards and consequences, and programming that emphasizes structure and predictability.

Troubled teens that have not visited early intervention shelters (and likely have not reaped the benefits of the treatment rationale) report feeling frustrated with the lack of available counseling or efforts to understand their home lives. As one runaway youth stated, “[There should be] a place where you [can] stay and get help. Not a foster home—it’s like Russian roulette [whether you get placed] in a good home or not. [Kids need] a program with loving parents who realize you’re not a baby.”

Another important goal of the shelters is to divert troubled youth from engaging in delinquency during their teenage years and criminal behavior later in their adult lives. The implementation of early intervention shelters is left to the states, but recently, Congress has passed legislation suggesting support for their use. Congress has expressly endorsed the use of prevention programs to avert delinquency.

43 See id.
44 Maxson & Klein, supra note 11, at 55.
45 Patricia Chamberlain, Residential Care for Children and Adolescents with Oppositional Defiant Disorder and Conduct Disorder, in Handbook of Disruptive Behavior Disorders 495, 503 (Herbert C. Quay & Anne E. Hogan, eds., 1999). At early intervention shelters, such techniques would be implemented by counselors, supervisors, and other staff members. See Eckholm, supra note 1.
46 See Maxson & Klein, supra note 11, at 173.
47 Id.
48 See Citizens for Juvenile Justice, Issue Briefing: DSS Gateway to Juvenile Crime 3 (2000), available at http://www.cfjj.org/Pdf/102-DSS.pdf (finding that fifty-four percent of adjudicated CHINS are arraigned in either juvenile or adult court within three years of first appearing in court); Quraishi et al., supra note 9, at 2 (noting that shelters enable youth to avoid detention, the experience of which alone can lead to criminal behavior); Jay D. Blitzman, Gault’s Promise, 9 Barry L. Rev. 67, 92 (2007) (calling for preventative programs that shift juveniles away from incarceration).
49 See 42 U.S.C. § 5601(a)(10)(A)(i)–(ii) (2006) (finding that the problem of juvenile offenders should be addressed with quality prevention programs); 42 U.S.C. § 5651(a) (authorizing the availability of grants to states for the purpose of creating and maintaining programs to prevent juvenile delinquency); 42 U.S.C. § 5782(2) (directing the Administrator of the Office of Juvenile Justice Delinquency Prevention (OJJDP) to “make such arrangements as are necessary and appropriate to facilitate coordination and policy development among all activities funded through the Department of Justice relating to delinquency prevention”).
50 See 42 U.S.C. § 5601(a)(10) (stating that problems affecting juveniles, detailed in the same section, should be addressed with “quality prevention programs”).
Moreover, Congress has made grants available to states so that they can create or expand intervention programs.\textsuperscript{51}

\section*{B. Florida}

Florida is at the forefront of the early intervention shelter movement, and its efforts serve as a model for other states.\textsuperscript{52} In Florida, early intervention shelters are part of the Families in Need of Services (FINS) framework.\textsuperscript{53} FINS represents the first phase in Florida’s two-phase approach to status offenses.\textsuperscript{54} Only if this initial level proves unsuccessful may a Child in Need of Services (CINS) petition be filed.\textsuperscript{55} Florida’s early intervention shelters were created via statute as part of the state’s delinquency prevention efforts.\textsuperscript{56} Like almost all states, Florida has expressly incorporated delinquency prevention into its status offender laws, most recently updated in 2007.\textsuperscript{57}

Presently, there are twenty-eight early intervention shelters spread across the state of Florida.\textsuperscript{58} The shelters are primarily financed by the State Department of Juvenile Justice (DJJ) and are operated by a non-profit umbrella organization called the Florida Network of Youth and Family Services.\textsuperscript{59} The Florida Network subcontracts with twenty-seven agencies, trains those subcontractors, and collects data from them for analysis.\textsuperscript{60} The Florida Network also establishes minimum standards of service and benchmarks that agencies must meet in order to keep their contracts.\textsuperscript{61} For instance, eighty percent of youth in the program must complete it, and ninety percent must not commit crimes while receiv-

\begin{footnotesize}
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\item \textsuperscript{52} See Eckholm, \textit{supra} note 1. In fact, Nebraska officials are studying the Florida model in response to Nebraska’s recent safe-haven law scandal in which parents tried to give custody of their preteen and teenage children over to the state. See \textit{id}.
\item \textsuperscript{53} See Kendall, \textit{supra} note 15, at 6.
\item \textsuperscript{54} See \textit{id}.
\item \textsuperscript{55} See \textit{id}.
\item \textsuperscript{56} See FLA. STAT. ANN. § 985.601(1) (West 2007) (providing a general statement supporting early intervention); FLA. STAT. ANN. § 985.61(1) (detailing the early intervention program); see also FLA. STAT. ANN. § 985.605 (detailing a prevention service program that helps kids to attend school, avoid violence, and acquire job skills).
\item \textsuperscript{57} See FLA. STAT. ANN. § 984.02(3)(b) (calling for the development and implementation of programs to “intervene at the early stages of delinquency”).
\item \textsuperscript{58} See Eckholm, \textit{supra} note 1.
\item \textsuperscript{59} See \textit{id}; Florida Network of Youth and Family Services, http://www.floridanetwork.org/about.htm (last visited Oct. 16, 2009).
\item \textsuperscript{60} Kendall, \textit{supra} note 13, at 77.
\item \textsuperscript{61} \textit{Id}.
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ing services.\textsuperscript{62} Sub-contracting agencies that do not comply risk having their contracts cancelled by the Florida Network.\textsuperscript{63}

Every year, approximately 7000 Florida teens voluntarily stay in the state’s early intervention shelters.\textsuperscript{64} A resident typically stays at the shelter for around two weeks.\textsuperscript{65} These youths are alleged to be runaways, truants, or incorrigible, and are usually referred to the shelters by parents, schools, or occasionally the police.\textsuperscript{66} In addition, 11,000 more children and families not needing shelter stays receive free or reduced-cost counseling and referrals.\textsuperscript{67} Overall, 20,000 to 22,000 families receive services from the Florida Network each year.\textsuperscript{68} Consistent with the treatment rationale, the shelters have a long list of services available, including substance abuse treatment, education services, parenting skills, and independent living skills.\textsuperscript{69}

Florida’s early intervention shelter residents have praised the shelters.\textsuperscript{70} In one study by the Crosswinds shelter in Cocoa, Florida, youth and families who completed a client satisfaction survey overwhelmingly reported overall satisfaction with the services they received.\textsuperscript{71} Additionally, the Florida Network’s Client Service Survey in 2004 commended the program in Orange County, where client satisfaction surpassed the statewide average.\textsuperscript{72} There, the majority of youth agreed that counseling had helped their family, that their counselor understood their feelings, that their family was in a better position to make positive changes, and that they were able to get services quickly.\textsuperscript{73} Beyond this positive feedback, the Florida Network is also meeting many of its own internal requirements.\textsuperscript{74} For instance, only five percent of youth receiving residential services

\textsuperscript{62} Id.
\textsuperscript{63} See id.
\textsuperscript{64} Eckholm, supra note 1.
\textsuperscript{65} See id. The CCYS shelter reports that the average stay for CINS/FINS youth is eleven days. See CAPITAL CITY YOUTH SERVS., ANNUAL REPORT ’07, at 14 (2008), available at http://www.ccys.org/images/PDF/2007annualreport.pdf.
\textsuperscript{66} Eckholm, supra note 1.
\textsuperscript{67} Id.
\textsuperscript{68} See Kendall, supra note 13, at 83.
\textsuperscript{69} See § 985.61(1)(b)–(h).
\textsuperscript{71} Id. Overall satisfaction was reported by an impressive ninety-nine percent of participants. Id.
\textsuperscript{72} See Kendall, supra note 13, at 79–80.
\textsuperscript{73} Id. at 80.
\textsuperscript{74} See id. at 83. The figure for non-residential youth was six percent, again well below the ten percent benchmark. See id.
committed an offense during the service period, well below the benchmark of ten percent.\(^{75}\) Given these impressive results, other states have followed in Florida’s footsteps and have made promising efforts toward creating early intervention shelters, albeit on a less sweeping scale.\(^{76}\) These states include Arizona, Illinois, Connecticut, and New York.\(^{77}\)

C. New York

In New York City, the Family Assessment Program (FAP) runs the status offender diversion program, which includes early intervention shelters.\(^{78}\) As the first state to officially recognize status offenders as a distinct category, it is unsurprising that New York is on the cutting edge of addressing the problems of teens in this group.\(^{79}\) FAP reflects a re-engineering of the status offender system, the system for those referred to as Persons in Need of Supervision (PINS).\(^{80}\)

In 2005, the New York Senate amended its PINS law, the Family Court Act, to include an emphasis on diversion services.\(^{81}\) Most importantly, New York law now requires attempts at diversion before a PINS

\(^{75}\) See id.

\(^{76}\) See Eckholm, supra note 1.


\(^{78}\) See Chiu & Mogulescu, supra note 19, at 4; Claire Shubik & Ajay Khashu, Vera Inst. of Justice, A Study of New York City’s Family Assessment Program 1 (2005); see also The Family Assessment Program, http://www.nyc.gov/html/acs/html/support_families/family_assessment_program.shtml (last visited Oct. 16, 2009). The first FAP office opened in Manhattan in 2002. The Family Assessment Program, supra. New York state also has early intervention programs outside of New York City, including the Family Keys Program, established in Orange County in early 2003; the Juvenile Release Under Supervision program, established in Albany County in September 2003; and the Probation Rehabilitation Intensive Services and Management program, established in Onondaga County (where Syracuse is located) in 1995. See Chiu & Mogulescu, supra note 19, at 3, 6, 7.


\(^{80}\) See N.Y. Fam. Ct. Act § 712 (McKinney 2005); Chiu & Mogulescu, supra note 19, at 1.

\(^{81}\) See N.Y. Fam. Ct. Act § 735(a).
petition may issue and a PINS case subsequently opens.\textsuperscript{82} Such efforts must be documented in writing.\textsuperscript{83} Prior to these changes, a PINS petition could issue before any efforts were made to avoid court involvement.\textsuperscript{84} New York courts have reinforced this reform by finding that a failure to fully investigate diversion services in a PINS case is a non-waivable jurisdictional defect.\textsuperscript{85} The 2005 amendment also requires that youths taken into custody by police or peace officers are brought to a respite shelter rather than a detention center.\textsuperscript{86}

To begin the intake process at FAP, parents complete a “Request for Services” form explaining their situation while teens complete a “Youth Response” sheet.\textsuperscript{87} The youths and their families are interviewed separately by a Family Assessment Specialist (FAS), who then determines the necessary services for the families.\textsuperscript{88} All parents seeking FAP’s assistance receive an immediate response and are always seen the same day they request assistance.\textsuperscript{89} Referrals generally occur on the same day as the intake, as well.\textsuperscript{90} In this way, FAP seeks to remedy the ineffectiveness that plagued the old PINS system, which funneled too many cases into court and thereby “exacerbated family tension, reduced engagement in school, and [contributed to] an increased likelihood of deeper involvement in criminal behavior.”\textsuperscript{91} Thus, FAP has generated a paradigm shift away from reliance on courts and police and towards alternative, community-based solutions, such as early intervention shelters.\textsuperscript{92}

New York’s early intervention shelters have proved quite successful.\textsuperscript{93} FAP has helped more than 18,000 families since 2002.\textsuperscript{94} As a result of this new approach, probation intakes have decreased by over eighty percent, court referrals have been cut in half, and long-term out-of-

\textsuperscript{82} See id. A PINS petition, like a CHINS petition in Massachusetts, alleges that the child in question is in need of supervision and services due to his or her misbehavior. See id. § 712.

\textsuperscript{83} Id. § 735(c).

\textsuperscript{84} See Shubik & Khashu, \textit{supra} note 78, at 3.


\textsuperscript{86} See N.Y. Fam. Ct. Act § 724(b)(iii).

\textsuperscript{87} See Shubik & Khashu, \textit{supra} note 78, at 4.

\textsuperscript{88} See The Family Assessment Program, \textit{supra} note 78.

\textsuperscript{89} See Shubik & Khashu, \textit{supra} note 78, at 15.

\textsuperscript{90} See id.

\textsuperscript{91} See Chiu & Mogulescu, \textit{supra} note 19, at 1; The Family Assessment Program, \textit{supra} note 78.

\textsuperscript{92} See Chiu & Mogulescu, \textit{supra} note 19, at 2, 3.

\textsuperscript{93} See Shubik & Khashu, \textit{supra} note 78, at 1, 15.

\textsuperscript{94} See The Family Assessment Program, \textit{supra} note 78.
home placement for PINS youth has dropped by more than twenty percent.\(^95\) This last figure is particularly heartening because placing PINS youth is the most expensive and often least effective service option.\(^96\)

**D. Canada**

In addition to the early intervention shelters in the United States, similar programs exist in other countries, such as Canada.\(^97\) There, the Families Gardiennes project serves a high-risk community located in a medium-sized French Canadian city.\(^98\) The program offers many of the same counseling and family healing services that American shelters offer.\(^99\) It also includes opportunities for parents to meet socially and recreationally, which provides a welcoming and relaxed setting for sharing frustrations and brainstorming solutions.\(^100\) The Families Gardiennes project is slightly different than American shelters in that it focuses more on pre-teen children (those below age twelve) rather than on teens.\(^101\)

Like American shelters, the Families Gardiennes project has been successful.\(^102\) Twenty-five percent of mothers interviewed for an evaluation of the program noted positive changes in their relationships with their children.\(^103\) A full fifty percent noted positive changes in their children’s behavior, such as “greater independence, better eating habits [and] language skills.”\(^104\) Most importantly, at least some of the families serviced were able to avoid placing their children in foster homes.\(^105\)

**II. The Early Intervention Problem in Massachusetts**

Massachusetts would benefit from recognizing that maintaining an overly reactive system for status offenders is highly problematic.\(^106\) In Massachusetts, status offense cases involve children in need of services

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\(^95\) *Shubik & Khashu*, supra note 78, at i.
\(^96\) *See id.*
\(^97\) *See Alice Home & Lise Darveau-Fournier, Respite Child Care: A Support and Empowerment Strategy for Families in a High-Risk Community, 12 Prevention in Human Services. 69, 72 (1995).*
\(^98\) *See id.* The authors of the study do not name the city in question. *See id.*
\(^99\) *See id.* at 73–74.
\(^100\) *See id.* at 83.
\(^101\) *See id.* at 73.
\(^102\) *See Home & Darveau-Fournier, supra* note 97, at 85.
\(^103\) *See id.* at 80.
\(^104\) *Id.* at 80–81.
\(^105\) *See id.* at 81.
\(^106\) *See Kendall, supra* note 13, at 15–16.
(CHINS), a category defined by statute. The CHINS statute makes clear that such cases are non-criminal, non-delinquent, and rehabilitative. Like most states, Massachusetts’ express and long-standing goals are to promote child welfare and the parent-child relationship.

To its credit, Massachusetts places some importance on diversion in CHINS cases. As the Honorable Martha P. Grace, former Chief Justice of the Juvenile Court Department in Massachusetts has remarked, “[CHINS] are the truants, the runaways, and the stubborn children. We take them very seriously since it may be the first time that we see a child in our system. It is at that point that we need to intervene to prevent them from becoming delinquent.” It is reassuring that many in Massachusetts understand the complexity of CHINS cases and do not push such matters to the side by derogatorily calling them “Mickey Mouse” or “cream puff” cases, as some in police and probation departments have been known to do.

Nevertheless, more tangible change is needed in Massachusetts to decrease reliance on the court system and to encourage early intervention. Currently, intervention occurs in the “informal assistance” phase of a CHINS proceeding. Rather than issuing a CHINS petition and scheduling a trial on the merits, a probation officer or judge can arrange for informal assistance. The probation officer can then refer the child for services and schedule follow-up conferences for up to six months. This decision represents a critical stage in the case.

The informal assistance framework in Massachusetts is problematic, however, because it depends too heavily on the discretion of pro-

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108 See id.
109 See Commonwealth v. Florence F., 709 N.E.2d 418, 421 (Mass. 1999) (noting the state’s “long-standing interest in protecting the welfare of children living within its borders”) (quoting In re Gail, 629 N.E.2d 1308, 1311 (Mass. 1994)).
110 See Blitzman, supra note 48, at 95.
111 Martha P. Grace, Are We Really Willing to Commit to Prevention?, 34 New Eng. L. Rev. 645, 646 (2000).
112 See Maxson & Klein, supra note 11, at 20; Grace, supra note 111, at 646. Terms like “Mickey Mouse” and “cream puff” cases reflect the view of some in the justice system that cases involving kids are of minimal if any importance and therefore are not worthy of their time or resources. See Maxson & Klein, supra note 11, at 20. Similarly, some have been known to mock juvenile officers, calling them the “Kiddie Corps” or “Diaper Dicks.” See id.
113 See Citizens for Juvenile Justice, supra note 29, at 3.
114 See id.
115 See id.
116 See id.
117 See Kendall, supra note 15, at 4.
bation officers and judges. The Massachusetts system fundamentally differs from those in states like New York, where diversion attempts are mandatory before a status offense petition may issue. In Massachusetts, then, a child can be brought into the court before voluntary efforts have failed and before a determination that there is no substantial likelihood that the child will benefit from diversion services. In addition, a child brought before the court as a potential CHINS immediately following an arrest is not eligible for informal assistance.

The consequences of inaction on status offender reform are dire for Massachusetts. The court dockets for CHINS cases are sorely overcrowded. Nationally, the number of status offender cases has increased dramatically in recent years. In fact, between 1987 and 1996, status offender petitions nationwide more than doubled. This inevitably results in a backlog of cases and delays in processing. Resources are also spread thin. Overall, such inefficiencies drain the court’s time and prevent troubled youths from gaining full and speedy access to services they need.

While “[b]usiness is booming” for the juvenile

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118 See Citizens for Juvenile Justice, supra note 29, at 8–9 (giving Massachusetts a grade of “needs improvement” for its diversion services and a grade of “failure” for its informal assistance program).


120 See Shubik & Kendall, supra note 119, at 386.

121 See Kendall, supra note 13, at 6.

122 See Rinik, supra note 29, at 154.

123 See id. (“One assessment of the system concluded that ‘there is repeated recognition of the limited capability of juvenile courts for dealing adequately with the numbers of children presented to it [sic]. Such references as understaffed, overcrowded, inadequate are used repeatedly with reference to juvenile courts.’”) (quoting Phillip Z. Cole, Diversion and the Juvenile Court: Competition or Cooperation, 27 Juv. Just. 33, 34 (1976)).

124 See Kendall, supra note 13, at vii.

125 See id.


127 See Rinik, supra note 29, at 154; Kristen Mack, County May Close Homes for At-Risk Children: Savings, Availability of Alternatives Cited, Wash. Post, Jan. 15, 2009, at PW01. Both general and specialized resources, such as gender-sensitive programs, also suffer under the strain. See Alexander, supra note 13, at 591.

128 See Alexander, supra note 13, at 586, 591 (noting that the waiting list for rehabilitative programs, particularly for girls, can be “notoriously long”); Richtman, supra note 126, at 428; Rinik, supra note 29, at 154.
court, not all “customers” are satisfied.\textsuperscript{129} Thus, Massachusetts fails to live up to the potential of the treatment rationale.\textsuperscript{130}

Not only is it difficult to secure the juvenile court’s attention, but other problems arise when a CHINS case finally hits a juvenile court judge’s desk.\textsuperscript{131} In Massachusetts, a juvenile court judge cannot give specific directives to the Department of Children and Families (DCF), which thereby affords DCF vast discretion.\textsuperscript{132} This limitation on juvenile court judges applies to decisions of residential placement as well as educational placement.\textsuperscript{133}

Moreover, juvenile court judges lack the power to hold a child in contempt.\textsuperscript{134} In the seminal case, \textit{In re Vincent}, a juvenile court judge ordered a CHINS child to attend school regularly and later held the child in contempt for failing to comply.\textsuperscript{135} The reviewing court overruled the order as unlawful because the CHINS statute does not authorize the juvenile court to issue such orders.\textsuperscript{136} According to \textit{Vincent}, the juvenile court can only impose conditions of custody, which would not include school attendance.\textsuperscript{137} Nine years later, in \textit{Commonwealth v. Florence F.}, the court reaffirmed the core of \textit{Vincent}.\textsuperscript{138} But \textit{Florence F.} went even farther, holding that even violation of a custodial condition does not allow a juvenile court to impose criminal contempt sanctions.\textsuperscript{139}

In sum, even if a judge invests hours pouring over a file and finds an optimal treatment program for a child, the judge has no authority to order DCF to provide the child with that particular program, or to order the child to actually participate.\textsuperscript{140} In this way, the CHINS statute

\begin{itemize}
\item \textsuperscript{129} See Rinik, \textit{supra} note 29, at 154.
\item \textsuperscript{130} See Maxson & Klein, \textit{supra} note 11, at 47 (noting that Baltimore, too, fails to live up to the potential of the treatment rationale by neglecting to provide the resources necessary under that rationale); Eckholm, \textit{supra} note 1.
\item \textsuperscript{132} See Mass. Gen. Laws ch. 119, § 39G (2008) (stating that when a CHINS disposition involves out-of-home placement, DCF “shall direct the type and length” of the placement).
\item \textsuperscript{133} See Oscar F. v. County of Worcester, 587 N.E.2d 208, 210 (Mass. 1992) (holding that the juvenile court lacks the authority under the CHINS statute to mandate a specific educational program).
\item \textsuperscript{134} See \textit{Florence}, 709 N.E.2d at 420; \textit{Vincent}, 562 N.E.2d at 467.
\item \textsuperscript{135} See \textit{Vincent}, 562 N.E.2d at 465–66.
\item \textsuperscript{136} \textit{Id.} at 467–68.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} See \textit{Florence}, 709 N.E.2d at 420.
\item \textsuperscript{139} See \textit{id.}
\item \textsuperscript{140} See \textit{id.}; \textit{Vincent}, 562 N.E.2d at 467. The judge can of course voice his or her recommendation to DCF, but obstacles like cost or lack of facility space can swiftly shoot down the suggestion. See \textit{Vincent}, 562 N.E.2d at 467.
\end{itemize}
“lack[s] teeth.” As a result, many troubled teenagers are forced to wade through bureaucratic red tape and to withstand inter-governmental tensions beyond their control before they can receive proper evaluation and treatment.

Massachusetts teenagers that enter the court system as CHINS only to escalate their misbehavior demonstrate that the system is flawed. Numerous studies, both nationwide and in Massachusetts, have documented the link between status offenses and subsequent delinquency. Bluntly stated, status offenders tend to engage in delinquent behavior—at a whopping 72.3%. Another study concluded that a truant child is fifty-four percent more likely to be arrested for alleged delinquency than if that same child were in school.

While Massachusetts’s approach to status offenders does touch upon the treatment rationale, other rationales, the deterrence and normalization rationales, are in play as well. The deterrence rationale suggests that the juvenile justice system is the way solve teenagers’ problems. Conversely, the normalization rationale views misbehavior as a regular part of adolescence and calls for little to no intervention at all. Massachusetts takes elements from all three rationales, and is therefore categorized as adopting an “eclectic” rationale pattern.

By embracing early intervention shelters, however, Massachusetts would make its treatment rationale much more robust. The treatment rationale should be favored because treatment goes to the very core of what the juvenile court is meant to encompass. From the inception of the juvenile court in Illinois in 1899, it has emphasized

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141 See Alexander, supra note 13, at 585.
142 See id.
143 See Kedia, supra note 79, at 543, 553 (“status offenses are considered a gateway to delinquent behavior”).
144 See Blitzman, supra note 48, at 95; Kedia, supra note 79, at 543, 553; Rinik, supra note 29, at 169–70 (“[A] substantial number of status offenders subsequently become involved in misconduct that is generally viewed as more serious.”).
145 See Maxson & Klein, supra note 11, at 81.
146 See id.
147 See Blitzman, supra note 48, at 95.
148 See id. at 89–90 (citing a study conducted by the Massachusetts Citizens for Juvenile Justice in 1994).
149 See id.
150 See id.
151 See id. at 126.
152 See id.
153 See Maxson & Klein, supra note 11, at 47; Weithorn, supra note 13, at 1328.
treatment and rehabilitation. The deterrence rationale is troubling in that it over-values negative rather than positive success; it would rather have a child simply avoid a future crime than develop a strong sense of self so that he or she no longer desires to commit a future crime. Additionally, the normalization rationale is problematic because it is untested; its methods have not gained any general acceptance, either among juvenile law scholars or in society as a whole. In fact, in all three normalization states recently studied, there was pending legislation and highly visible pressure designed to steer the states toward the more generally accepted treatment rationale.

Luckily, status offense law is an area that has seen dynamic change and growth. Given Massachusetts' willingness to pay attention to status offense issues, the atmosphere in the state is ripe for CHINS reform and for the adoption of a more comprehensive treatment rationale approach to juvenile justice.

### III. The Benefits of Early Intervention Shelters

#### A. Short-Term Benefits

Massachusetts should adopt early intervention shelters because they bring many short-term benefits. Most importantly, the shelters allow teenagers and their families in a state of crisis to “cool off,” thereby putting on a metaphorical band-aid to stop the bleeding. This break reduces the immediate threat of family violence and lowers tension in the home. The shelters offer a controlled yet relaxed environment in which teenagers can work on calming down. Residents are supervised at all times and are given a list of rules to abide by during their stay. Many former residents speak highly of the sense of se-

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154 See Weithorn, supra note 13, at 1328.
156 See Maxson & Klein, supra note 11, at 47.
157 See id.
158 See Shubik & Kendall, supra note 119, at 385.
159 See Grace, supra note 111, at 647.
160 See Eckholm, supra note 1.
161 See id.
162 See Quraishi et al., supra note 9, at 2; Eckholm, supra note 1 (noting that Amanda went to the CCYS shelter following a “vicious physical fight” with her adoptive mother).
163 See Quraishi et al., supra note 9, at 2.
164 See id. at 3, 5.
curity and peace that the shelters provide.\textsuperscript{165} This cooling off period is implemented with as little instability as possible.\textsuperscript{166} In states that have many shelters, such as Florida, teens are placed within or close to their community.\textsuperscript{167} Residents are also bused to and from their regular schools, which minimizes disruption to their daily lives.\textsuperscript{168} The shelters thereby recognize the importance of school, which often represents a child’s earliest and most important tie to his or her community and to society at large.\textsuperscript{169}

In these ways, early intervention shelters represent a vast improvement over the foster care system, in which children might end up in a placement far from home, where they must struggle to adjust to a wholly unfamiliar setting.\textsuperscript{170} In this scenario, rather than helping the child, removal actually causes further stress.\textsuperscript{171} In contrast, early intervention shelters keep youth in their local setting and minimize the academic and behavioral problems that are often associated with an emergency removal from the home.\textsuperscript{172}

Along with a sense of safety, early intervention shelters also seek to help troubled teenagers build a new positive outlook.\textsuperscript{173} The shelters are designed to be places of personal growth.\textsuperscript{174} They are responsive to the children’s need for physical activity and offer ways for teens to have fun without breaking the law.\textsuperscript{175} Many shelters provide dormitory-style bedrooms, recreation rooms with televisions, and a space outside for athletics.\textsuperscript{176}

Further, residents are encouraged to participate in constructive interactions with their peers, both inside and outside of group therapy

\textsuperscript{165} See Eckholm, supra note 1; Joshua Dohan, Dir., Youth Advocacy Project, Presentation to the Juvenile Rights Advocacy Project: The Youth Development Approach to Zealous Advocacy (Feb. 4, 2009) (emphasizing that feeling safe is a primary concern for many youth). In a survey of residents at the CCYS shelter, ninety-four percent responded that they felt safe at the shelter. See Capital City Youth Servs., supra note 65, at 13.

\textsuperscript{166} See Home & Darveau-Fournier, supra note 97, at 74.

\textsuperscript{167} See Eckholm, supra note 1.

\textsuperscript{168} See id.

\textsuperscript{169} See Weithorn, supra note 13, at 1428.


\textsuperscript{171} See Home & Darveau-Fournier, supra note 97, at 74.

\textsuperscript{172} See id.

\textsuperscript{173} See Eckholm, supra note 1.

\textsuperscript{174} See id.

\textsuperscript{175} See BUTTS, supra note 16, at 8.

\textsuperscript{176} See Eckholm, supra note 1.
This is in contrast to the interactions in detention, which are often destructive given the prevalence of “negative peers.” Peer support groups at early intervention shelters allow youth to share information and to benefit from listening to other teens facing similar circumstances. The shelters emphasize “meaningful, pro-social engagement.” Some teens specifically note that they prefer friend-to-friend counseling over the traditional psychological model. Positive peer relationships empower residents by decreasing feelings of helplessness. They also combat isolation and provide a critically important sense of “belongingness.”

In addition, residents acquire tools to boost their self-esteem. Self-esteem is a crucial element for teens getting a foothold on their new lives. Early intervention shelters’ emphasis on self-worth is particularly important for girls, especially for those whose cultures de-value women. By helping youth to adopt new attitudes, however, the process of washing away pessimism, low self-worth, or anxieties about the future can begin. The shelters also help their residents by reducing the stigma attached to status offenses.

From the parental perspective, early intervention shelters represent an attractive and non-intimidating option for services. Under the traditional emergency foster care system, some parents shy away from services, feeling that their child’s troubles are their fault and that seeking help constitutes an admission of failure. Moreover, many parents actively resist foster care, even when temporary, because they fear losing their children permanently. Early intervention shelters address this barrier by providing an informal, judgment-free environment where parents are not blamed for a child’s bad behavior, but rather are invited...
to participate in the healing process.\footnote{See id. at 70, 81.} In this way, seeking help ceases to be a weakness and instead becomes a family strength.\footnote{See id. at 70.}

Early intervention shelters are also appealing to parents because of their accessibility.\footnote{See Home & Darveau-Fournier, supra note 97, at 80.} In some cases, a single phone call is enough to get the process rolling.\footnote{See id. at 73.} Surveyed parents are generally satisfied with shelters’ accessibility, especially when compared with traditional services, which tend to be slow and highly bureaucratic.\footnote{See id. at 80.}

\section*{B. Long-Term Benefits}

In addition to short-term benefits, early intervention shelters also carry substantial long-term benefits.\footnote{See Quraishi et al., supra note 9, at 6.} Because teenagers’ problems are almost never resolved overnight, it is important to think long-term.\footnote{See Richtman, supra note 126, at 426 (noting that the TIP program structures itself around long-term planning). For instance, TIP cases carry over from year to year, “meaning that the TIP steps would not have to be repeated if the student’s attendance problems spread out over a number of years.” Id.} Along these lines, most shelters offer after-care to their residents in the weeks and months following re-unification.\footnote{See Quraishi et al., supra note 9, at 6.} This aligns with the treatment rationale, in which youth receive services for several months or more.\footnote{See Maxson & Klein, supra note 11, at 55.} The after-care takes the consistent daily structure and support offered at the shelters and attempts to simulate it in the home.\footnote{See Chamberlain, supra note 45, at 501.} Research reveals that the availability of after-care services correlates with positive outcomes from treatment in a residential facility.\footnote{See id. at 496.}

In addition to after-care, teens have the option of returning to the shelter for additional stays if needed.\footnote{See Quraishi et al., supra note 9, at 7.}

Early intervention shelters also recognize that, in some cases, returning home is simply not a viable resolution.\footnote{See id. at 6.} In those cases, shelter staff will first turn to the teen’s family members for a housing solution.\footnote{See id.} Unfortunately, if that proves unsuccessful, younger children

\begin{itemize}
\item \footnote{See id. at 70, 81.}
\item \footnote{See id. at 70.}
\item \footnote{See Home & Darveau-Fournier, supra note 97, at 80.}
\item \footnote{See id. at 73.}
\item \footnote{See id. at 80.}
\item \footnote{See Quraishi et al., supra note 9, at 6.}
\item \footnote{See Richtman, supra note 126, at 426 (noting that the TIP program structures itself around long-term planning). For instance, TIP cases carry over from year to year, “meaning that the TIP steps would not have to be repeated if the student’s attendance problems spread out over a number of years.” Id.}
\item \footnote{See Quraishi et al., supra note 9, at 6. For instance, at CCYS where Amanda Cooksey attended, discharged youth can avail themselves of The Family Place program for continued services. See Capital City Youth Servs., supra note 65, at 6–7.}
\item \footnote{See Maxson & Klein, supra note 11, at 55.}
\item \footnote{See Chamberlain, supra note 45, at 501.}
\item \footnote{See id. at 496.}
\item \footnote{See Quraishi et al., supra note 9, at 7.}
\item \footnote{See id. at 6.}
\item \footnote{See id.}
usually are referred to the child welfare agency or to the juvenile court. For older adolescents, however, shelters can set up independent living services to assist in the transition to adulthood.

1. Rehabilitation of the Troubled Teenager

One of the most significant long-term benefits of early intervention shelters is increasing the odds that future offenses, delinquencies, and crimes will not occur. Proponents of the shelters recognize that status offenses and delinquency are often symptoms of deeper underlying distress, which the shelters strive to cut off at the pass. This distress may come from a variety of sources, including peer groups, family members, or school staff. By providing teenagers and their families with continuous therapy and counseling, the shelters put teenagers on track to overcome obstacles. In Florida, the shelters have proven successful. For instance, ninety percent of children who stayed at early intervention shelters in Florida did not enter juvenile custody during the six-month period that followed.

Furthermore, the teenagers at early intervention shelters are equipped with tools that enable them to correct their own behaviors over time. Such efforts are meant to build upon the short-term changes in outlook and self-esteem already undertaken. Understandably, teenagers often arrive at early intervention shelters filled with confusion and sadness. Many report having an “overwhelming rush of thoughts and feelings.” Others describe their emotions as a tangled puzzle. It is this web that early intervention shelters seek to dismantle and surmount.

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206 See id.
207 See id.
208 See Quraishi et al., supra note 9, at 8.
209 See Alexander, supra note 13, at 586; Richtman, supra note 126, at 422.
210 See Alexander, supra note 13, at 586.
211 See Quraishi et al., supra note 9, at 6.
212 See Eckholm, supra note 1.
213 See id.
214 See Alexander, supra note 13, at 594.
215 See id.; supra notes 183–86.
216 See Maxson & Klein, supra note 11, at 163.
217 See id.
218 See id.
219 See Eckholm, supra note 1.
One step in the therapeutic process is to provide youths with a sense of resiliency.\(^\text{220}\) This empowers teenagers to overcome adversity, whether at home or elsewhere.\(^\text{221}\) Such approaches do not turn a blind eye to the substantial obstacles that residents face; rather, they encourage residents to bravely confront these challenges.\(^\text{222}\) Early intervention shelters also offer problem-solving skills so that teenagers can work through their issues calmly, without resorting to verbal or physical lashing out.\(^\text{223}\) Problem-solving skills encourage teens to think about what they want in life as well as how to achieve their goals.\(^\text{224}\) An additional step involves character-building.\(^\text{225}\) The shelters therefore maintain forward-looking attitudes, avoiding the “blaming scheme” that can overwhelm the juvenile court system.\(^\text{226}\)

These efforts are fully consistent with the Positive Youth Development (PYD) approach to juvenile justice.\(^\text{227}\) PYD is a way of thinking about youth by emphasizing various aspects of their psychological growth.\(^\text{228}\) PYD focuses on a youth’s assets and strengths rather than lingering problems or weaknesses.\(^\text{229}\) PYD de-values problem-free outcomes—avoiding re-arrest, for instance—which juvenile courts tend to emphasize.\(^\text{230}\) Instead, PYD focuses on achievement outcomes and developmental outcomes.\(^\text{231}\) To this end, the Search Institute has identified forty developmental assets that serve as building blocks for the

\(^{220}\) See Jeffrey Butts et al., Chapin Hall Ctr. for Children, Focusing Juvenile Justice on Positive Youth Development 4 (2005).

\(^{221}\) See Dohan, supra note 165.

\(^{222}\) See id.


\(^{224}\) See Dohan, supra note 165.

\(^{225}\) See 42 U.S.C. § 5651(a)(22)–(23) (calling for programs that will build the character of troubled youth).

\(^{226}\) See Dohan, supra note 165. The juvenile justice system, particularly with respect to delinquency, operates a “blaming scheme” in that it tells teens that they are lacking, expects them to change without equipping them with the tools to do so, and scorns them when they fail. See id. Rather than blame children for their misbehavior, reformers call for an enhanced understanding of children’s circumstances and increased efforts to address their problems. See id.

\(^{227}\) See Butts et al., supra note 220, at 4.

\(^{228}\) Id. The PYD movement cemented in the mid-1990s, with support from the U.S. Department of Health and Human Services and the OJJDP. See Catalano et al., supra note 155, at 3–4.

\(^{229}\) See Butts et al., supra note 220, at 4.

\(^{230}\) See Dohan, supra note 165.

\(^{231}\) See id.
healthy development of adolescents. The assets are both external (relating to the child’s environment) and internal (relating to the child him- or herself).

As to external assets, the Institute emphasizes four categories. Early intervention shelters provide “support” by encouraging a loving family life and promoting positive communication within a family. The shelters provide “empowerment” by showing residents that they are valued and helping them feel safe. The shelters provide “boundaries and expectations” by clearly outlining acceptable behaviors and then offering examples through adult role models and positive peers. Finally, early intervention shelters promote “constructive use of time” by providing residents with creative activities and other programs to enhance their stay and minimize idleness.

As to internal assets, the Institute again lists four categories. Early intervention shelters show a “commitment to learning” by busing residents to their regular schools and motivating residents to excel academically. The shelters foster “positive values” by encouraging honesty and responsibility in residents. The shelters promote “social competencies” by emphasizing decision-making skills, resistance to pressure from negative peers, and nonviolent resolutions to conflict. Finally, early intervention shelters promote “positive identity” by helping residents to build their self-worth and envision a positive, purposeful future.

Recent evidence suggests that PYD principles make a tangible difference in children’s lives. PYD was championed in a recent federal
initiative called Helping America’s Youth (HAY), and also enjoys wide support in the scientific community.\textsuperscript{245} Overall, the methods of early intervention shelters have proven effective.\textsuperscript{246} One scholar from the Vera Institute of Justice notes that this type of intervention often fares well and is “what a lot of places are moving towards.”\textsuperscript{247} Another scholar describes the Search Institute’s framework as widely successful.\textsuperscript{248} Anecdotal evidence supports this conclusion, as well.\textsuperscript{249} As one former resident at the CCYS shelter reports, “I’m learning to control my aggression and communicate better.”\textsuperscript{250} At CCYS, the teen developed ways to deal with his aggression issues; such methods included playing basketball and meditating.\textsuperscript{251}

2. Services to the Parents

Another notable aspect of early intervention shelters involves the parents of residents.\textsuperscript{252} An important goal of early intervention is getting parents involved and engaged in their child’s treatment process.\textsuperscript{253} The youths concerned are plagued by many “intra-familial stressors,” sometimes including parental deficiencies.\textsuperscript{254} Given this, parental involvement in early intervention makes a child’s long-term success much more likely.\textsuperscript{255} Indeed, parents are an integral part of status offense cases, as evidenced by a recent decision by the Supreme Judicial Court of Massachusetts.\textsuperscript{256} There, the court held that parents are so integral to a CHINS cases that, though not formally a party, they have a right to counsel at the dispositional phase of their child’s case.\textsuperscript{257} Parents are so crucial that a failure to include them in a child’s treatment is the single biggest barrier to transferring the treatments implemented in residential care to the family home.\textsuperscript{258}

\textsuperscript{245} See id.
\textsuperscript{246} See Eckholm, supra note 1.
\textsuperscript{247} See id. (citing remarks by Sara Mogulescu, Director of the Center on Youth Studies at the Vera Institute of Justice, a nonprofit research group in New York City).
\textsuperscript{248} See Butts, supra note 16, at 6.
\textsuperscript{249} See Eckholm, supra note 1.
\textsuperscript{250} See id.
\textsuperscript{251} See id.
\textsuperscript{252} See Quraishi et al., supra note 9, at 4.
\textsuperscript{253} See Richtman, supra note 126, at 428.
\textsuperscript{254} See Kendall, supra note 13, at 5.
\textsuperscript{255} See Rinik, supra note 29, at 183.
\textsuperscript{256} See In re Hilary, 880 N.E.2d 343, 352 (Mass. 2008).
\textsuperscript{257} See id.
\textsuperscript{258} See Chamberlain, supra note 45, at 502.
Fortunately, in many cases, parents are more than willing to participate in treatment.\textsuperscript{259} As a society, “we expect that most parents strive to promote their children’s welfare.”\textsuperscript{260} Nevertheless, early intervention shelters also account for those parents whose own problems, such as substance abuse, may spill over into the family dynamic.\textsuperscript{261} One study of runaway teens found that alcohol and drug abuse by parents were common motivations for the children’s acting-out behavior.\textsuperscript{262} Another study in 1999 identified almost 1.7 million runaway or “thrownaway” youths, of which twenty-one percent had experienced physical or sexual abuse in their homes.\textsuperscript{263} Parents with these issues can avail themselves of therapeutic services as part of the family healing process.\textsuperscript{264} Parents are offered meetings where they can learn about parenting and community resources.\textsuperscript{265} As parents become better able to manage their needs and their children’s needs, it becomes less likely that the children will have to endure the pains of foster care.\textsuperscript{266}

Families in crisis take a variety of forms.\textsuperscript{267} The majority of families coming in contact with early intervention shelters have at least one biological parent in the picture and, more often than not, two parental figures are available to participate in services.\textsuperscript{268} Perhaps surprising to some, many troubled teenagers come from traditional nuclear families, in which both biological parents are present in the home.\textsuperscript{269} One study

\textsuperscript{259} See Eckholm, supra note 1. While many troubled teenagers have parents who are battling their own demons in life, early intervention shelters do not generally handle families in which there is court involvement for parental abuse or neglect, for at this point it is too late for “early intervention.” See id.

\textsuperscript{260} Weithorn, supra note 13, at 1395.

\textsuperscript{261} See Maxson & Klein, supra note 11, at 156. Capital City Youth Services, for instance, has a “Family Place” program that offers family counseling and treatment programs. See Capital City Youth Services, Capital City Programs: The Family Place, http://www.ccys.org/family_place.html (last visited Oct. 16, 2009).

\textsuperscript{262} See Maxson & Klein, supra note 11, at 156.

\textsuperscript{263} Weithorn, supra note 13, at 1378–79. A thrownaway youth is defined as one who spends at least one night outside the home because he or she is either told to leave home with no alternative care arranged or is prevented from returning home with no alternative care arranged. See Kedia, supra note 79, at 547.

\textsuperscript{264} See Quraishi et al., supra note 9, at 4.

\textsuperscript{265} See Home & Darveau-Fournier, supra note 97, at 74.

\textsuperscript{266} See Maxson & Klein, supra note 11, at 161, 167 (noting one runaway girl who had been a ward of the court since age eight and had bounced from one foster home to another, twenty-one in all, and another boy who reported that he had been in “half the foster homes in Maine”); Quraishi et al., supra note 9, at 4.

\textsuperscript{267} See Maxson & Klein, supra note 11, at 146–47.

\textsuperscript{268} See id. at 146.

\textsuperscript{269} See id.
puts this group at twenty-eight percent. Single-parent households, in which only one biological parent is present in the home, represent the most common household structure being serviced. This group comes in at thirty-one percent. One-parent households are an especially important group to target because they are “particularly vulnerable.” There are also reconstituted households, in which a biological parent brings a step-father or step-mother into the home. Twenty-three percent of serviced families fall under this category. Early intervention shelters account for these different family structures early in the process and react accordingly.

One final benefit to both teens and parents is the willingness of early intervention shelters to work collaboratively with other programs and agencies. Many scholars encourage “intersystem boundary crossings” so that children and families are not locked into a single system and can access the full spectrum of services. Collaborative services have proven effective for dealing with status offenders, particularly truants. One program in Los Angeles involved collaboration among area schools, the district attorney’s office, and the courts. The program had a remarkable impact on truancy reduction. The Los Angeles program then served as the model for the Truancy Intervention Program (TIP) in Ramsey County, Minnesota, which involved collaboration among five school districts, the juvenile court, the corrections department, and private agencies. As in Los Angeles, TIP dramatically reduced the truancy problem in Ramsey County.

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270 See id. at 147.
271 See id. at 146–47.
272 See Maxson & Klein, supra note 11, at 147.
273 Home & Darveau-Fournier, supra note 97, at 70 (noting that one-parent households are burdened by “excessive demands on their time, energy and financial resources,” “unexpected expenses,” and a lack of “community support”).
274 See Maxson & Klein, supra note 11, at 146–47.
275 See id. at 147.
276 See id.
278 See Weithorn, supra note 13, at 1478.
279 See Richtman, supra note 126, at 423–24.
280 See id. at 423.
281 See id.
282 See id. at 423–24.
283 See id. at 430.
As early intervention shelters become more prominent in society, parents will grow to see them as valuable therapeutic resources.\(^{284}\) Moreover, the shelters will become viable alternatives to the juvenile courts as measures of first resort.\(^{285}\) This will alleviate the burdens on juvenile courts and allow them to focus more resources on the most serious cases.\(^{286}\) It will also discourage frustrated parents from using the courts as a “dumping ground” for their family problems.\(^{287}\)

3. Cost-efficiency

Not only do early intervention shelters assist troubled teenagers and their families, but they do so at a reasonable cost.\(^{288}\) Numerous commentators have noted that substantial costs attach to juvenile services, particularly long-term out-of-home placements.\(^{289}\) One scholar from the Youth Advocacy Project notes that a failure to intervene can cost as much as $2.3 million per person.\(^{290}\) Clearly, cost is an issue of concern, particularly during difficult economic times, when state budgets are even tighter than normal.\(^{291}\) Yet it is clear that if the problems of minors are left unaddressed, they will only escalate and result in higher costs for the system at some point in the future.\(^{292}\)

Early intervention shelters alleviate some of this financial pressure by saving money both directly and indirectly.\(^{293}\) Direct savings result from the detention and foster home placements that are rendered unnecessary by the successful intervention of shelters.\(^{294}\) One study of Florida’s early intervention shelters concluded that the state is probably saving fifteen million dollars or more a year by keeping potential of-

\(^{284}\) See Home & Darveau-Fournier, supra note 97, at 70; Eckholm, supra note 1. On the other hand, the shelters are careful not to allow parents to become too dependent on their services because to do so would let parents “escape” their problems rather than work on them. See Quraishi et al., supra note 9, at 7.

\(^{285}\) See Home & Darveau-Fournier, supra note 97, at 70.

\(^{286}\) See Butts, supra note 16, at 8 (noting that diversion allows courts to “avoid drawing youth into the legal system unnecessarily”).

\(^{287}\) See Barry C. Feld, The Transformation of the Juvenile Court, 75 Minn. L. Rev. 691, 697 (1991).

\(^{288}\) See Kendall, supra note 13, at 24; Quraishi et al., supra note 9, at 7–8.

\(^{289}\) See Eckholm, supra note 1.

\(^{290}\) See Dohan, supra note 165.

\(^{291}\) See Eckholm, supra note 1.

\(^{292}\) See Weithorn, supra note 13, at 1484.

\(^{293}\) See Quraishi et al., supra note 9, at 7–8.

\(^{294}\) See id.
fenders out of detention.295 Similarly, a California study revealed savings of $1.40 for every dollar spent on prevention programming.296

Indirect savings grow from the delinquency cases that are prevented due to the early intervention of the shelters.297 The same holds true for the adult criminal cases that are averted by early intervention, not to mention the exorbitant cost of incarcerating criminal adults that is consequently avoided.298 Corollary savings arise out of the “payback” to society from potential status offenders who are assisted in becoming productive, contributing, well-functioning adults.299 As one scholar has remarked, investing “in the future of at-risk girls equals a net gain for all in social capital and in real dollars.”300 Simply put, early intervention shelters save states money in the long run.301

IV. Addressing Criticisms of Early Intervention Shelters

While early intervention shelters are largely praised, they are not impervious to criticism.302 The main concern raised by critics is that the shelters do not do enough to address children’s sometimes severe mental health issues.303 A large number of troubled teens arrive at the gates of the juvenile justice system already on medication, and a great many more receive prescriptions thereafter.304 Mental health is often a significant factor in child misbehavior, including status offending behavior.305 In response, Congress has directed via statute that addressing mental illness in children should be a top priority.306

Given the importance of children’s mental health, critics allege that early intervention shelters fall short of providing a full panoply of necessary services to troubled teens.307 Scholars are particularly concerned with the children who suffer the most severe behavioral prob-

295 See Eckholm, supra note 1.
296 See Alexander, supra note 13, at 601.
297 See Weithorn, supra note 13, at 1503.
299 See Weithorn, supra note 13, at 1503.
300 See Alexander, supra note 13, at 603.
301 See Quraishi et al., supra note 9, at 7–8.
302 See Eckholm, supra note 1.
303 See id.
304 See Alexander, supra note 13, at 596–97. One judge in Massachusetts estimated that as many as seventy percent of the children appearing before her are on medication. Id.
305 See Kedia, supra note 79, at 555.
307 See Eckholm, supra note 1.
lems.\textsuperscript{308} For these children, they argue, a brief stay at an early intervention shelter is seldom enough to render real change.\textsuperscript{309} Rather, these children need long-term psychiatric care from trained experts.\textsuperscript{310}

Even so, supporters of early intervention shelters have several responses to critics.\textsuperscript{311} First, many shelters will not accept children with serious mental illness.\textsuperscript{312} In accordance with the critics’ theory, these teens in fact are referred to facilities able to provide specialized care over a longer time span.\textsuperscript{313}

Second, some early intervention shelters do take in teens with mental health issues, but this is an asset, not a defect.\textsuperscript{314} One such shelter is the Kids Oneida shelter in upstate New York.\textsuperscript{315} Upon arriving at a shelter like Kids Oneida, a teen receives a full physical and psychological assessment.\textsuperscript{316} The shelter then addresses mental health issues with “wraparound” services.\textsuperscript{317} Such services enable counselors to spend substantial time with children and their families, teaching them new ways to interact.\textsuperscript{318} The services also help teachers, coaches and others in the child’s life to work together on the child’s behalf.\textsuperscript{319} Wraparound services have been implemented in a number of facilities across the United States and Canada, and initial studies of their efficacy have been favorable.\textsuperscript{320}

Third, in many cases, early intervention shelters openly recognize that they cannot fully solve a child’s problems, but strive instead to just make the first dent.\textsuperscript{321} Counseling at the shelter begins the road to recovery for the troubled teen, which can continue after he or she ends the shelter stay.\textsuperscript{322} This saves money because mental health services at

\begin{itemize}
\item \textsuperscript{308} See id.
\item \textsuperscript{309} See id.
\item \textsuperscript{310} See id.
\item \textsuperscript{311} See Quraishi et al., supra note 9, at 3.
\item \textsuperscript{312} See id. These illnesses would be revealed and gauged at the physical and psychological assessments conducted upon intake. See id. at 2; infra note 317.
\item \textsuperscript{313} See Chiu & Mogulescu, supra note 19, at 4.
\item \textsuperscript{314} See Quraishi et al., supra note 9, at 3.
\item \textsuperscript{315} See id.
\item \textsuperscript{316} See id. at 2.
\item \textsuperscript{318} See id.
\item \textsuperscript{319} See id.
\item \textsuperscript{320} See Weithorn, supra note 13, at 1496.
\item \textsuperscript{321} See Eckholm, supra note 1.
\item \textsuperscript{322} See id.
\end{itemize}
early intervention shelters may prevent the need for expensive psychiatric hospitalization later in a child’s life.\textsuperscript{323}

In addition, early intervention shelters may alleviate the burden on the foster care system by providing an alternative path to treatment.\textsuperscript{324} Naturally, this would allow troubled children already in the system to receive more attention from counselors.\textsuperscript{325} It would simultaneously deter families outside the foster care system from seeking admittance simply so their children can receive mental health services.\textsuperscript{326} The U.S. General Accounting Office (GAO) identified precisely this problem in a 2003 report.\textsuperscript{327} This misuse of the foster care system weighs the system down and is clearly an inferior option.\textsuperscript{328}

Similarly, mental health services at early intervention shelters decrease the burden on over-extended mental health facilities.\textsuperscript{329} Scholars have documented an over-reliance on hospital emergency rooms, where children in emotional crisis often end up.\textsuperscript{330} For instance, in July 2004, Clark County, Nevada had to declare a state of emergency when children with symptoms of mental disorders flooded hospital emergency rooms.\textsuperscript{331} Additionally, there is not always enough space at psychiatric hospitals and residential treatment centers for emotionally disturbed children.\textsuperscript{332} Such deficiencies largely result from the limited funds that mental health needs receive.\textsuperscript{333} According to a 2005 article, spending for mental health treatment represented a shockingly low 7.6\% of all health care spending in 2001.\textsuperscript{334} Thus, while early intervention shelters certainly do not present a panacea for the mental health issues of teenagers, they do play a valuable role in the treatment process.\textsuperscript{335}

\textsuperscript{323} See Weithorn, supra note 13, at 1503.
\textsuperscript{324} See Kendall, supra note 13, at 32–33.
\textsuperscript{325} See id.
\textsuperscript{326} See id.
\textsuperscript{327} Id. In response to the GAO report, the House of Representatives proposed, though never passed, the Keeping Families Together Act, which would have addressed the problem of mental health services in the foster care system. Id.
\textsuperscript{328} See id. at 32–33.
\textsuperscript{329} See Weithorn, supra note 13, at 1309–10.
\textsuperscript{330} See id. at 1309.
\textsuperscript{331} See id.
\textsuperscript{332} See id.
\textsuperscript{333} See id. at 1471.
\textsuperscript{334} See Tami L. Mark et al., U.S. Spending for Mental Health and Substance Abuse Treatment, 26 HEALTH AFF. W5–133, W5–135 (2005), available at http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.133v1. Data from 1996 yielded similar results: only seven percent of dollars spent on health care, both public and private, went towards mental health care. See Weithorn, supra note 13, at 1471.
\textsuperscript{335} See Eckholm, supra note 1.
V. Suggestions for Early Intervention Shelter Legislation in Massachusetts

Given the tremendous benefits of early intervention shelters, Massachusetts should follow Florida and New York’s lead by enacting legislation to create and fund shelters throughout the Commonwealth. This would re-haul the CHINS system and vastly benefit the Commonwealth’s youth and families.

One vital component that Massachusetts legislation should include is a minimum level of services. Key services would include therapy from trained counselors, supervised recreation, educational assistance, and outreach to parents. This would ensure that shelter services in counties across the state are delivered in a more uniform and organized manner. Clear benchmarks would hold shelters accountable for their clients’ progress. For instance, Massachusetts could require that ninety percent of youths in shelters do not commit crimes while receiving services. Massachusetts should adopt this approach because it has proved successful, particularly in Florida, where the Florida Network has established and met specific requirements for the shelters there. By enacting a statute replete with specific features, Massachusetts would better bridge the gap between practice and theory.

A. Focus on At-Risk Youth

If Massachusetts adopts legislation in favor of early intervention shelters, it should target the most at-risk juveniles for services. In this way, early intervention shelters will be able to help more teens and will become increasingly reflective of the treatment rationale. Massachusetts should accomplish this as Congress did in its delinquency prevention statute, explicitly noting the groups that it deems most at-risk and calling for programs specifically tailored to their needs.
One crucial at-risk category is minority youth. Studies have found that African-American youth are over-represented among status offenders, particularly truants. In 2002, African-American juveniles nationwide constituted sixteen percent of the population but a full twenty-nine percent of the delinquency caseload. Early intervention shelters could work to reduce these figures and balance out the population in the system. Of course, non-minority youth are in need of services as well. Therefore, Massachusetts legislation should focus on minority teens but also strive to ensure that ultimately all children in need are able to receive services.

Another key group to target is female youth. Numerous scholars have noted the growing trend of girls in the juvenile justice system, especially the delinquency population. By 2004, girls accounted for a full thirty percent of all juvenile arrests. The female status offender population has also recently increased across the United States. Between 1985 and 2002, females constituted sixty-one percent of all status offense cases involving runaways. As a matter of fact, one national study concluded that females represent the majority of status offenders. At the same time, however, gender-sensitive programs are severely limited in number. As of 2007, only three states (Connecticut, Massachusetts, and Rhode Island) have gender-sensitive programs. Therefore, if Massachusetts legislation focuses on minority teens but also strives to ensure that ultimately all children in need are able to receive services, it should also consider the needs of female youth.

349 See Richtman, supra note 126, at 433.
350 Snyder & Sickmund, supra note 348, at 163.
351 See Kedia, supra note 79, at 551 (noting that “minority youth are more likely to be charged with delinquent or criminal behavior rather than given services or treatment”).
352 See Maxson & Klein, supra note 11, at 52, 54.
353 See id.
354 See Alexander, supra note 13, at 599 (remarking that girls in the juvenile justice system “present many unique needs and problems”).
355 See id. at 587.
357 See Kendall, supra note 13, at 49.
358 Snyder & Sickmund, supra note 348, at 191.
359 See Kedia, supra note 79, at 552. The study was conducted by the Community Research Associates in 1998. Id. Another study from 2000 found a roughly equal gender division across all CHINS categories, but noted that girls are the clear majority for runaway cases at about two-thirds. See Citizens for Juvenile Justice, supra note 29, at 3.
360 See Flores, supra note 356, at 1; Kendall, supra note 13, at 49.
Oregon, and Minnesota) have “enacted legislation that promotes gender-responsive services, treatment, and programs.”\textsuperscript{361}

Therefore, as Congress has done, legislation in Massachusetts creating early intervention shelters should include a focus on girls as part of delinquency prevention.\textsuperscript{362} The legislation should list specific gender-sensitive services, including programs reflective of issues like teenage pregnancy and sexual health, intimate partner violence and family violence, and eating disorders and body image.\textsuperscript{363} The efforts of early intervention shelters on behalf of female residents are even more likely to succeed given girls’ pre-disposition toward interpersonal communication and the expression of emotion.\textsuperscript{364}

One final at-risk group is the socio-economically disadvantaged.\textsuperscript{365} Congress recently noted that low-income families deserve added services and attention.\textsuperscript{366} Scholars, too, have reasoned that children from higher-income households are better able to avoid the status offender system due to the availability of private resources.\textsuperscript{367} Since the parents of poorer children do not have as many resources at their disposal, they are more likely to turn to the courts for assistance.\textsuperscript{368} Early intervention shelters in Massachusetts would provide an extra-legal alternative to these families in need.\textsuperscript{369}

\textbf{B. Provide an Adequate Budget}

Massachusetts would save money should it adopt legislation in favor of early intervention shelters.\textsuperscript{370} Such legislation would safely allow for a reduction of the vast funds poured into incarcerating juvenile delinquents and adult criminals.\textsuperscript{371} It would also keep more families intact and reduce reliance on long-term out-of-home placements in the foster care system.\textsuperscript{372}

\textsuperscript{361} Kendall, supra note 13, at 49.

\textsuperscript{362} See 42 U.S.C. § 5651(a)(10), (a)(15).

\textsuperscript{363} See Alexander, supra note 13, at 594; supra notes 183–185.

\textsuperscript{364} See Alexander, supra note 13, at 597.

\textsuperscript{365} See Kedia, supra note 79, at 551–52.

\textsuperscript{366} See 42 U.S.C. § 5651(a) (calling for a focus on “juveniles residing in low-income and high-crime areas” as part of delinquency prevention).

\textsuperscript{367} See Kedia, supra note 79, at 551–52.

\textsuperscript{368} See id.

\textsuperscript{369} See id.

\textsuperscript{370} See Quraishi et al., supra note 9, at 7–8.

\textsuperscript{371} See Families with Serv. Needs Advisory Bd., supra note 77, at 4.

\textsuperscript{372} See Quraishi et al., supra note 9, at 7–8.
Nevertheless, the initial expenditures necessary for the shelters’ success must be considered given current budgetary constraints and the current state of the overall economy.\(^{373}\) It is important to invest in early intervention programs so that these programs do not crumble under financial strain.\(^{374}\) As one scholar notes, “[i]t will come as no surprise that dollars buy programs.”\(^{375}\) With a stable budget, early intervention shelters can avoid the lack of resources problem that so often plagues state programs.\(^{376}\) In addition, adequate funding helps to ensure that troubled teens will not be turned away.\(^{377}\)

While providing an adequate budget is ideal, it is often difficult to realize.\(^{378}\) Florida recently struggled to find grant money for its shelter program, and the state’s children subsequently suffered.\(^{379}\) In fact, projections for 2009 noted that 2500 fewer children in Florida would be able to receive aid.\(^{380}\) Clearly, the current economic crisis can make it difficult for states to locate funds for any programs.\(^{381}\) But as noted earlier, after the initial investment, early intervention shelters are likely to save states money.\(^{382}\) As Congress did, Massachusetts legislation should create the office of Administrator to control grants to the shelters and to manage their financial stability.\(^{383}\)

In order to reduce costs and get these programs running as quickly as possible, Massachusetts should use a shelter that is already in place as a foundational model.\(^{384}\) The Bridge Over Troubled Waters shelter in Boston has helped runaway and homeless youth and young adults for decades.\(^{385}\) Bridge serves approximately 2433 individuals, ranging in age

\(^{373}\) See Eckholm, supra note 1.

\(^{374}\) See Mack, supra note 127.

\(^{375}\) See Maxson & Klein, supra note 11, at 24.

\(^{376}\) See Mack, supra note 125.

\(^{377}\) See Eckholm, supra note 1.

\(^{378}\) See id.

\(^{379}\) See id.

\(^{380}\) See id.

\(^{381}\) See Julie Bosman, Budget Cuts Imperil Guardian Program for Elderly and Disabled, N.Y. Times, Feb. 6, 2009, at A20 (describing the current budget deficit in New York City and the social service programs that stand to lose substantial funding, if not crumble entirely, as a result).

\(^{382}\) See Eckholm, supra note 1; Solomon Moore, Missouri System Treats Juvenile Offenders with Lighter Hand, N.Y. Times, Mar. 27, 2009, at A13 (noting that keeping youth in their communities is a “cheaper alternative” to long-term residential care); see also supra Part III(B)(3).


\(^{385}\) See id.
from fourteen to twenty-four, each year.\textsuperscript{386} Bridge remains the only program in the greater Boston area to provide “a continuum of age-appropriate services.”\textsuperscript{387} While Bridge does not focus primarily on providing early intervention to potential status offending youth, or even all types of status offenders, Bridge does remain a valuable example of how to respond to young people in a caring and thoughtful way.\textsuperscript{388}

**Conclusion**

Early intervention shelters bring a number of short and long-term benefits to youth and their families.\textsuperscript{389} They facilitate healing and promote self-improvement, as described by the treatment rationale and PYD theories.\textsuperscript{390} They also facilitate delinquency prevention, reduce the burden on the foster care system, and save money for states.\textsuperscript{391} Early intervention shelter programs in Florida and New York continue to prove themselves effective here in the United States, and the notion has appeared internationally as well.\textsuperscript{392} Given the assistance that early intervention shelters provide, Massachusetts should create early intervention shelters throughout the Commonwealth.\textsuperscript{393} This should occur through well-conceived legislation that maximizes effectiveness by focusing on at-risk youth and ensuring a sufficient start-up budget.\textsuperscript{394} In this way, Massachusetts will better serve its youth both in the present and in the future.\textsuperscript{395}

\begin{itemize}
\item \textsuperscript{386} See id.
\item \textsuperscript{387} See id.
\item \textsuperscript{388} See id.
\item \textsuperscript{389} See Eckholm, *supra* note 1.
\item \textsuperscript{390} See Butts et al., *supra* note 222, at 4; Maxson & Klein, *supra* note 11, at 39.
\item \textsuperscript{391} See Citizens for Juvenile Justice, *supra* note 48, at 3; Alexander, *supra* note 13, at 603.
\item \textsuperscript{393} See Blitzman, *supra* note 48, at 95; Eckholm, *supra* note 1.
\item \textsuperscript{394} See Maxson & Klein, *supra* note 11, at 118; Eckholm, *supra* note 1.
\item \textsuperscript{395} See Blitzman, *supra* note 48, at 95; Eckholm, *supra* note 1.
\end{itemize}
LEGITIMIZING THE ICC: SUPPORTING THE COURT’S PROSECUTION OF THOSE RESPONSIBLE IN DARFUR

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Abstract: The conflict in Darfur is one of the world’s worst humanitarian disasters. The fact that the Sudanese government, including its current sitting head of state, played a critical role in orchestrating the murder, rape, and displacement of hundreds of thousands of people in the region makes the violence perpetrated in this region particularly egregious. In an effort to address these problems, the U.N. Security Council referred the matter to the International Criminal Court (ICC). After its investigation, the ICC granted an arrest warrant for President Bashir, which charged him with crimes against humanity. Under the Rome Treaty, the U.N. Security Council can delay prosecution of President Bashir indefinitely, and certain sectors of the international community are pressuring it to do just that. Those that support the delay fear that allowing the prosecution to move forward will derail potential peace negotiations and result in more violence in the country. To support their contention, they cited threats made by the Sudanese government to escalate attacks. While the U.N. must address these threats, delaying prosecution is the wrong solution. This Note argues that allowing threats of violence to derail the pursuit of justice could irreparably damage the court’s international reputation and credibility. To bolster the legitimacy of the ICC, strengthen international criminal justice, and deter future leaders from following President Bashir’s destructive example, the U.N. and the rest of the international community must support the ICC in its apprehension of President Bashir and support the court in holding him accountable for his crimes.

INTRODUCTION

Since January 2008, more than 230,000 civilians [from Darfur] have been forced to flee violence, at a rate of nearly 1,000 per day. Many of them have fled to overcrowded camps near large towns or in some cases sought shelter in the desert until clashes subsided. As attacks on humanitarian agencies also

* Comment Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2009–2010).
continue] to climb, incidents of violence against aid workers in the first eight months of 2008 have already surpassed the total records in 2007.

—Report of United Nations Secretary General Ban Ki-moon

[Even in Darfur, you can say most of it is safe. There are no problems and life is very normal.

—Sudanese President Omar al Bashir

The conflict in Darfur has resulted in one of the most atrocious humanitarian disasters the international community has witnessed. Erupting in 2003, the armed conflict between the Sudanese government forces and local militia called “Janjaweed,” against rebel factions known as the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM), caused the destruction of hundreds of villages, tens of thousands of civilian deaths, the displacement of millions of people, and assaults of thousands of women and girls. Although the international community has been slow to respond to the crisis, the United Nations (U.N.) Security Council made history when it referred the conflict to the International Criminal Court (ICC) for investigation on March 31, 2005. The ICC is a treaty-based institution resulting from the Rome Statute enacted on July 17, 1998. This is the first time that the U.N. Security Council has referred a matter to the ICC. The three other referrals to the ICC since its inception were state initiated. As

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2 Channel 4 News: Sudan President: No Mass Rape (BBC Channel 4 television broadcast Oct. 9, 2008).


7 See Udombana, supra note 5, at 2.

8 Id. In December 2003, the situation concerning the Lord’s Resistance Army was referred to the ICC Prosecutor by Ugandan President, Yoweri Museveni. See id. In early 2004, the President of the Democratic Republic of Congo referred crimes committed in the
opposed to the cases where the state itself initiated a referral to the ICC, the Government of Sudan has continuously refused to cooperate with the ICC or even to fully acknowledge the extent of the problems.\(^9\)

The ICC made history when Prosecutor Luis Moreno-Ocampo requested a warrant for the arrest of Sudan’s President, Omar Bashir, on July 14, 2008.\(^{10}\) This is the first time that the court has pursued the arrest of a sitting head of state, as well as the first time that the court has sought an indictment for genocide, the most serious of all international crimes.\(^ {11}\) In response to the warrant request, the Sudanese government proclaimed threats of violence.\(^{12}\) Despite these threats, and after months of deliberation, the ICC formally ordered the arrest of President Bashir on March 4, 2009.\(^ {13}\) The President was charged with war crimes and crimes against humanity for his role in the atrocities in Darfur.\(^ {14}\) The court did not, however, charge the President with genocide as originally requested by Prosecutor Moreno-Ocampo.\(^ {15}\) In retaliation

\(^9\) See Channel 4 News, supra note 2 (noting Bashir’s denial of mass rape and his claim that the charges of genocide and crimes against humanity were fabricated); Letter from Justice for Darfur Campaign to the U.N. Security Council: Insist on Justice for Darfur, (May 29, 2008) (on file with Human Rights Watch) (noting the Sudanese government’s public refusal to cooperate with the court in surrendering two suspects with outstanding arrest warrants issued by the ICC for crimes in Darfur).


\(^ {11}\) See Sudan’s Leader Is Accused, supra note 10, at 55.


\(^ {14}\) See Simons & MacFarquhar, supra note 13.

\(^ {15}\) See id. The court found insufficient data to support a charge of genocide. See id.; Democracy Now!: HRW’s Richard Dicker and Scholar, Mediator Alex de Waal Debate International Criminal Court Indictment of Sudanese President for Mass Killings in Darfur (Democracy Now! radio and television broadcast Mar. 6, 2009) (on file with author) [hereinafter Democracy Now!]. The question of whether to include a charge of genocide was controversial, but the judges ultimately ruled 2 to 1 that Prosecutor Moreno-Ocampo “had not provided sufficient evidence of the president’s specific intent to ‘destroy, in whole or in part, a national, ethnical, racial or religious group,’ the most crucial issue in determining genocide.” Simons & MacFarquhar, supra note 13 (quoting the ICC’s decision on the warrant for Bashir). The prosecutor had argued that the killing and displacement of three ethnic groups—the Fur, Masalit, and Zaghawa groups—amounted to genocide and that this campaign continued in refugee camps through the assault of these ethnic women. See id.
to the issuance of the arrest warrant, Sudanese officials expelled many Western aid groups.\textsuperscript{16}

These threats of violence and retaliatory tactics by the Sudanese government against humanitarian agencies have instigated the familiar debate in international criminal justice between justice and peace.\textsuperscript{17} Those that support the ICC’s decision contend that allowing impunity for these horrific crimes will encourage other murderous regimes, while others argue that indicting a sitting Sudanese President will destroy all hope of fostering peace negotiations to end the violence.\textsuperscript{18}

term genocide was also used by former U.S. Secretary of State Colin Powell during a high profile testimony to the Senate Committee on Foreign Relations on September 9, 2004. See Gerard Prunier, Darfur: The Ambiguous Genocide 140, 157 (2005). Additionally, former President George W. Bush similarly stated: “Our conclusion is that a genocide is underway in Darfur.” See id. at 157. Despite this, Alex de Waal, a Harvard scholar and former advisor to the African Union mediation team for the Darfur conflict, noted that “about 150 people are being killed every month in Darfur. And that’s bad. . . . But that does not amount to an ongoing genocide.” Democracy Now!, supra. In response, Richard Dicker, Director of Human Rights Watch’s International Justice Program, contended that while Human Rights Watch also has not found genocide, “widespread or systematic murder, torture or rape doesn’t amount to a parking violation[. . . . These are the most serious crimes under [the] law. So I wouldn’t make too much of the fact while the prosecutor wanted genocide charges, the court has found crimes against humanity, which are, again, torture, murder, rape, on a widespread basis, committed as part of a plan.” Id. The charge for genocide could be reinstated, however, with more evidence. See Braced for the Aftershock, Economist, Mar. 5, 2009, at 66.

\textsuperscript{16} See Simons & MacFarquhar, supra note 13. Within hours after the ICC issued the arrest warrant, ten international agencies that provide humanitarian care for the people of Darfur received letters from the Sudanese government’s Humanitarian Aid Commission (HAC) informing them that their licenses to work in Sudan had been revoked. See Human Rights Watch, Sudan: Expelling Aid Agencies Harms Victims, HUM. RTS. WATCH NEWS, Mar. 5, 2009, http://www.hrw.org/en/news/2009/03/05/sudan-expelling-aid-agencies-harms-victims. The ten agencies include Oxfam, Medecins sans Frontieres, Save the Children, CARE, and the International Rescue Committee. Id. The same evening that these organizations received the letters, HAC officials began seizing property from these agencies’ offices in both Darfur and Khartoum, including phones and computers. Id. “Despite assurances from Sudanese authorities over recent months, including HAC, that they would continue to facilitate the work of humanitarian agencies, it appears the expulsions were planned well in advance of the warrant being issued.” Id. One aid official speaking anonymously stated: “It happened right after the announcement. The connection was clear.” Simons & MacFarquhar, supra note 13. The Sudanese government has often accused aid organizations of supporting the ICC by providing the court with data and testimony that has then been used to build a case against the government. Id.

\textsuperscript{17} See Kastner, supra note 3, at 146, 149; Sudan’s Leader Is Accused, supra note 10, at 55. As Alex de Waal put it, “Now, yes, we all support justice, but can justice be pursued at the expense of withdrawing essential humanitarian support that keep millions of people alive? . . . And so, my question is not should there be accountability, but should accountability, in its timing, in its process, be weighed against other considerations?” Democracy Now!, supra note 15.

\textsuperscript{18} See Sudan’s Leader Is Accused, supra note 10, at 55.
Regardless of the viewpoint taken, the ICC is finding itself in a position to drastically affect the outcome of an ongoing international conflict.\(^19\) Unlike the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), two other international judicial bodies charged with prosecuting war crimes, crimes against humanity, and genocide, the ICC has the potential to exact punishments in the midst of a crisis as opposed to being limited to imposing ex post facto justice only.\(^20\) Furthermore, even though domestic courts have been created by Sudan, these are criticized as ineffective and unjust, proving that the ICC is greatly needed to deal with the ongoing atrocities.\(^21\)

Due to the magnitude of the conflict and the historic precedent that this case presents, the legitimacy and power of the fledgling ICC is on the line.\(^22\) Following the warrant requests by Prosecutor Moreno-Ocampo, the U.N. Security Council faced pressure by some organizations to postpone the indictment of President Bashir.\(^23\) Under Article 16 of the Rome Treaty, the Security Council has the power to postpone an indictment for up to a year, with indefinite renewal, if there is a threat to international security.\(^24\) The decision that the United Nations Security Council makes has the potential to solidify the importance of the ICC as a deterrent factor for future leaders or to undermine the importance and power of the court.\(^25\)

\(^{19}\) See Kastner, supra note 3, at 146.

\(^{20}\) See id. at 146, 147, 152, 154 (arguing that “[b]oth tribunals, in particular the ICTY, have produced an important amount of case law, thus advancing international criminal law significantly. . . . [but] were, however, ineffective or else came too late to influence the conflict whilst the atrocities were being committed”).


\(^{22}\) See Sudan’s Leader Is Accused, supra note 10, at 55.

\(^{23}\) See id.

\(^{24}\) Rome Statute of the International Criminal Court art. 16, July 17, 1998, 2187 U.N.T.S. 90 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”); Sudan’s Leader Is Accused, supra note 10, at 55.

\(^{25}\) See Sudan’s Leader Is Accused, supra note 10, at 55.
By referring the case of Darfur to the ICC, the U.N. Security Council acknowledged the magnitude of the crisis in Darfur and sent the message that the international community will not allow such injustice to go unpunished. If the prosecution of President Bashir is delayed, the future effectiveness of the ICC, a potentially critical vehicle in the fight for international criminal justice, could be destroyed. While the states that have ratified the Rome Treaty must support the apprehension of President Bashir, as the referring party, the members of the U.N. need to join these states and support the prosecution of President Bashir.

Using Darfur as a case study, this Note argues that, while it is important to consider the potential problems that accompany the indictment and prosecution of a sitting leader, the U.N. Security Council should not delay the trial but rather should support the ICC and seek to facilitate justice. Part I of this Note gives a brief history of the conflict in Darfur, focusing on the role of the Sudanese government in the perpetration of crimes against humanity. Part II chronicles the formation of the ICC and its role in the conflict in Darfur thus far, and explains the reasons the court is both unique and vital to the advancement of international criminal justice. Part III discusses why the ICC is especially needed in Sudan given the failure of the Sudanese government to end the crisis or to create effective domestic courts. Part IV addresses arguments as to why the U.N. Security Council should invoke Article 16 and delay prosecution, and counters with reasons the U.N. should support immediate prosecution. Ultimately this Note surmises that the U.N. Security Council and all U.N. members must help enforce the arrest of President Bashir, in order to give credibility to the ICC, promote justice in Darfur, and deter future leaders from promulgating crimes against humanity.

I. THE CONFLICT IN DARFUR

The country of Sudan has been ravaged by civil war intermittently for several decades. The government has been fighting this conflict on two major fronts. The first divides the Arab Muslims, who control the North, the policymaking center of the Khartoum government, and

the African Christians and animists in the south, who have been largely ignored by the government. The second conflict has been in the Darfur region in the western part of the country.

The conflict in Darfur escalated in February 2003 when the JEM and the SLA began attacking government installations and accusing the Sudanese government of discriminating against African ethnic groups in the region. Up until this point, the Sudanese government viewed the formation of a peace agreement with the South as its main focus and had largely ignored the problems in Darfur. Using the turmoil of the government and mounting international pressure to end the North-South conflict to their advantage, the SLA and JEM were able to gain the upper hand in the initial phases of the conflict.

Once the Sudanese government realized that the rebel groups were beginning to organize themselves in a far more threatening way than before, it decided to arm an already existing Arab militia—the Janjaweed—to crush the rebel insurrection. Under the direction of government forces, the Janjaweed “unleashed a campaign of terror against civilians [in Darfur].” These attacks by the Sudanese government and Janjaweed forces have resulted in horrendous destruction

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28 See id. Racial differences between the Arabs and the Africans have played a large role in the conflict in Darfur. See Prunier, supra note 15, at 162–65. The Darfur region has been criticized as being poor and backward because it is “insufficiently Arabized.” Id. at 162. The famine of 1984 served to further highlight the dichotomy between a sedentary Arab community and the nomadic African groups, with the Arabs viewed as good and the lifestyle of the African groups seen as bad. See id. at 162.

29 See Lipscomb, supra note 27, at 188. Darfur in the 1990s was “an increasingly marginalized, violent and frustrated place.” Prunier, supra note 15, at 81. This marginalization of the area has occurred through successive governments since the British conquered the country in 1916. Agnes Van Ardenne-van der Hoeven et al., Explaining Darfur: Lectures on the Ongoing Genocide 10 (Vossiuspers Uva 2007). This marginalization was particularly criticized during the famine of 1984 during which 100,000 people died. See Prunier, supra note 15, at 56; Kastner, supra note 3, at 155–56.

30 See Dagne, supra note 26, at 2.

31 See Prunier, supra note 15, at 81. “[A] certain ‘acceptable’ level of violence in the Western province had been routine, and nobody was very worried by ‘normal’ killings.” Id. at 92.

32 See Dagne, supra note 26, at 2. Those providing support to the SLA include businessmen in Darfur and officers and soldiers in the Sudanese army. See id. The Sudanese government has also accused the Sudan People’s Liberation Movement/Army of providing support to the SLA. See id.

33 See Dagne, supra note 26, at CRS-3; Prunier, supra note 15, at 92, 97–98. The Janjaweed “had existed since the late 1980s in an underterminate zone half-way between bandits and government thugs.” Prunier, supra note 15, at 97.

34 See Dagne, supra note 26, at 3.
and violence. As of April 2008, approximately 2.5 million displaced people lived in refugee camps in Darfur and more than 200,000 people had sought refuge in neighboring Chad. The U.N. stated that the death toll may now have reached 300,000 in just five years.

While the battle was once a straightforward conflict between the Sudanese army and the Janjaweed, against the two main rebel groups, JEM and SLA, “the nature of the conflict in Darfur has mutated, making the violence more unpredictable and widespread and the task of getting a lasting peace deal that much harder.” This is a result of the Janjaweed militias breaking into smaller factions that have begun fighting amongst themselves and even sometimes against the Sudanese army, particularly in response to the government’s failure to pay them. The JEM and SLA rebel groups have also fragmented into about thirty groups of various sizes that have attacked those aid workers helping their own communities.

The violence in the region has severely hampered humanitarian efforts to aid the increasing problems in Darfur. On January 1, 2008, a hybrid force combining the U.N. and African Union, known as the African Union/U.N. Hybrid Operation in Darfur (UNAMID), formally took over peacekeeping authority. Due to obstructions set in place by

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35 See Human Rights Watch, supra note 4. Traditional attacks begin with air raids followed by the arrival of militiamen who loot the villages, rape the women, burn the houses, and shoot anyone who can not run away. See Prunier, supra note 15, at 99–100. These attacks have been viewed as a form of ethnic cleansing, pitting the Arab Janjaweed against the African civilians. See id. at 100; Human Rights Watch, supra note 4. The targets of the Sudanese military and militia forces were overwhelmingly those “sharing the ethnicity of or geographic proximity to the two main rebel movements.” See Human Rights Watch, Entrenching Impunity: Government Responsibility for International Crimes in Darfur 6–7 (2005), available at http://www.hrw.org/sites/default/files/reports/darfur1205webcover.pdf. Those ethnic groups were initially the Masalit, Fur, and Zaghawa, but has expanded to include other non-Arab tribes. See id. at 7.

36 Human Rights Watch, supra note 4. The camps for these refugees are full. See Darfur, Darfur Update 2 (2008), available at http://darfur.3cdn.net/46c257b8e3959746d5_tmm6bmav2.pdf. For example, there is an official capacity of 14,000 at the Al-Salam, a camp in South Darfur. Id. The numbers of those housed there steadily rose in the year 2007 from 3500 in January, to 13,300 in March, to 33,000 in early July. Id. By June 2008, the number had risen to 51,000. Id. Additionally, civilians and aid workers are regularly harassed and robbed by gunmen. Id.

37 See Save Darfur, supra note 36, at 1; Edith M. Lederer, UN Says Darfur Conflict Worsening, with Perhaps 300,000 Dead, Associated Press, Apr. 22, 2008.


39 See id. at 34.

40 See id.

41 See Save Darfur, supra note 36, at 3–4; Human Rights Watch, supra note 4.

42 See Human Rights Watch, supra note 4.
the Sudanese government, however, by April 2008 the force was “barely one third of its authorized strength.”\footnote{See id. Due to the ineffectiveness and shortage of the UNAMID troops and police, it is losing the respect of Darfurians. See \textit{A Gleam Among the Ruins}, supra note 38, at 34. “They had hoped that this force, unlike the previous pathetic outfit provided by the African Union, would finally give them protection from the marauding \textit{janjaweed} and bandits who kill and rape them. They were wrong.” \textit{Id}.} Furthermore, attacks against humanitarian aid workers have been on the rise since 2006.\footnote{\textsc{Save Darfur}, supra note 36, at 3–4. From June 2006 to June 2007, attacks against humanitarian workers increased 150\% and attacks increased again in the beginning of 2008. \textit{Id}. In the first nine months of 2008, 170 humanitarian workers were kidnapped or abducted and eleven were killed. \textsc{Save Darfur et al., Rhetoric v. Reality: The Situation in Darfur} 12 (2008), \textit{available at} http://www.savedarfur.org/newsroom/policypapers/rhetoric_vs_reality_the_situation_in_darfur/. Additionally, between January and October of 2008, 225 humanitarian vehicles were hijacked, while in 2007, the number of vehicles hijacked for the entire year had been only 137. \textit{Id}.}

Despite these atrocities, the Sudanese government has often refused to take responsibility for the crimes of murder, rape, and forced displacement that continue to be ongoing.\footnote{See generally \textsc{Human Rights Watch}, supra note 35, at 56–72 (highlighting the government of Sudan’s role in organizing and perpetuating the crimes against civilians committed in Darfur and offering recommendations to various organizations to end this cycle). The UNAMID took over after U.N. Resolution 1769 which called for “19,555 military personnel, including 360 military observers and liaison officers, and an appropriate civilian component including up to 3772 police personnel and 19 formed police units comprising up to 140 personnel each.” S.C. Res. 1769, ¶ 2, U.N. Doc. S/RES/1769 (July 31, 2007).} In a 2005 report, Human Rights Watch noted that “[i]nstead of acknowledging state responsibility for the scale and gravity of the crimes committed in Darfur, senior Sudanese officials continue to obfuscate, deny, and evade responsibility for the atrocities and scorched earth campaign against civilians in Darfur.”\footnote{See \textsc{Human Rights Watch}, supra note 35, at 2.} \footnote{See \textsc{id.}, at 5; \textit{infra} notes 79–89 and accompanying text.} Recent reports acknowledge that the Sudanese government has continued to participate in large-scale military attacks against civilians, to harass aid workers, and has failed to hold those responsible accountable.\footnote{See \textsc{id.} at 5; \textit{infra} notes 79–89 and accompanying text.} Furthermore, the government of Sudan has refused to cooperate with the ICC and instead has launched a campaign seeking to protect President Bashir from prosecution.\footnote{See \textsc{id.} at 5; \textit{infra} notes 79–89 and accompanying text.} In light of the horrific role the government of Sudan has played in the atrocities in Darfur, and its inability and refusal to handle the situation domestically, the international community must respond with a united front to end these crimes.\footnote{See \textsc{Human Rights Watch}, supra note 35, at 85.}
II. THE ROLE OF THE ICC

A. Formation and Purpose of the ICC Generally

Towards the end of the twentieth century and early twenty-first century, international criminal law rapidly developed. Not least among these advancements was the creation of the ICC. Understanding the history leading up to the creation of this Court is imperative in order to grasp its revolutionary role in the international legal community.

Following World War II, the international community demonstrated its commitment to establishing individual criminal responsibility for human rights violations through the creation of the Nuremburg and Tokyo tribunals. The decades immediately following these tru-
nals, however, witnessed a wavering in the initial attempts to create a place of permanent international jurisdiction.\textsuperscript{54} It was not until the establishment of the ICTY in 1993, followed a year later by the ICTR, that momentum was renewed for establishing jurisdiction for international criminal justice.\textsuperscript{55} These two tribunals were critical to the formation of the ICC in providing both legal precedent and a “reassuring model of what an international criminal court might look like.”\textsuperscript{56}

While the ICTY and the ICTR provided a strong foundation for the creation of a permanent international court, the ICC differs from these two tribunals in several respects.\textsuperscript{57} First, the ICC is a treaty-based

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5. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

6. The crimes hereinafter set out are punishable as crimes under international law:
   \begin{itemize}
   \item[(a)] crimes against peace
   \item[(b)] war crimes
   \item[(c)] crimes against humanity.
   \end{itemize}

7. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity, as set forth in principle VI is a crime under international law.

\textbf{Nuremberg Human Rights Ctr., supra note 51, at 3.} In fact, efforts to create an international criminal court can be traced back to the nineteenth century, in particular the proposal by Gustav-Moynier, one of the founders of the International Committee of the Red Cross, for a permanent court to hear crimes committed during the Franco-Prussian War. See Coal. for the Int’l Criminal Court, History of the ICC, http://www.iccnow.org/?mod=icchistory (last visited Nov. 9, 2009).

\textsuperscript{54} See Broomhall, \textit{supra} note 50, at 64. In particular, the Cold War epitomized an atmosphere of suspicion that left the enforcement of criminal punishment for war crimes to national legal systems which often proved ineffective. See \textit{id}. In 1948, the U.N. General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, and they called on the International Law Commission (ILC), a body of experts whose job it is to codify and develop international law, to look into the possibility of establishing an international court to handle the trials of those charged with genocide. See Schabas, \textit{supra} note 53, at 8; Coal. for the Int’l Criminal Court, \textit{supra} note 53. The ILC went so far as to draft such a statute in 1952, but the Cold War resulted in the General Assembly abandoning such efforts. See Schabas, \textit{supra} note 53, at 8–9; Coal. for the Int’l Criminal Court, \textit{supra} note 53.

\textsuperscript{55} See Broomhall, \textit{supra} note 50, at 65; Kastner, \textit{supra} note 3, at 147. Both of these courts were created by a Chapter VII Security Council Resolution. See Kastner, \textit{supra} note 3, at 147. The ICTY was established to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” Schabas, \textit{supra} note 53, at 11. Similarly, the ICTR was established to prosecute those who committed serious violations of international humanitarian law committed in Rwanda and surrounding countries. See \textit{id}. The statutes creating the courts are nearly identical, and they share a prosecutor. See \textit{id}. at 12.

\textsuperscript{56} Schabas, \textit{supra} note 53, at 13.

\textsuperscript{57} See Kastner, \textit{supra} note 3, at 153.
On July 17, 1998 the treaty establishing the ICC, the Rome Statute, was created. This statute required sixty states to ratify or accede before it would enter into force, which was accomplished on July 1, 2002. The choice to create the ICC by way of a treaty was strategic. In forcing the ICC’s creation to be negotiated and concluded among the states, the treaty was meant to enhance the viability and legitimacy of the new court and to make it as free as possible from political influence. To make this goal a reality, however, the drafters of the Rome Statute had to balance elements that would promote the court’s effectiveness with aspects that would appease the member states and encourage ratification.

Despite attempting to appease the state actors, the court remains independent and its judges are not subject to any external authority. The Security Council’s role in the ICC is two-fold: under Chapter VII of the Charter of the United Nations, it may request the prosecutor to initiate proceedings, but may not influence the results of those proceedings. Furthermore, it may delay a proceeding or prosecution of the court for a period of twelve months which is subject to renewal.

Due to the interest in keeping the ICC politically neutral, the creation of this latter deferral provision, under Article 16 of the Rome Statute, was strategic. The drafters wanted to enhance the viability and legitimacy of the new court and to make it as free as possible from political influence. To make this goal a reality, however, the drafters of the Rome Statute had to balance elements that would promote the court’s effectiveness with aspects that would appease the member states and encourage ratification.

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ute, was highly controversial.67 Those that opposed the provision saw it as weakening the impartiality and independence of the court.68 It was equally recognized, however, that there are times when the sensitivity of conflicts will require decisions about the wisdom of a criminal prosecution.69 This debate is at the forefront of the current controversy over the ICC’s role in Sudan.70

The ICC is also unique in that it has no official enforcement body.71 Therefore, the court must rely on the states that ratified the Rome Treaty for support in order to make the court effective.72 This further encourages dialogue among the participating states in support of the court’s goals.73

Ultimately, the ICC was established to end impunity for the most serious transgressions against human rights and to continue to work to prevent these crimes from occurring.74 With the cooperation of the member States, the court will have the potential to do just that.75 As stated by Bruce Broomhall:

The International Criminal Court must ultimately be the foundation stone of any claim that international criminal law is moving towards effective enforcement, that is, towards the rule of law. Only the ICC will have the jurisdictional reach as well as the potential resources and legitimacy to secure, with any regularity, a meaningful degree of accountability for the politically sensitive and politically motivated crimes that lie at the heart of the Rome Statute.76

67 See Schabas, supra note 53, at 82.
68 See id. Despite these objections, the final provision was an improvement from the original drafted provision initially suggested by the ILC. See id. at 82. The original provision would have allowed a single member state to halt prosecution. Id. This would have only be overridden by a resolution of the Council which itself is subject to veto power by one of the five permanent members. See id.
69 See Schabas, supra note 53, at 82.
70 See infra notes 116–119 and accompanying text.
71 See Kastner, supra note 3, at 153.
72 See Broomhall, supra note 50, at 151. Once a warrant for arrest has been issued, the state concerned is required to take immediate steps to arrest the person and surrender them to the court. See Schabas, supra note 53, at 132. One hundred and eight governments have ratified the Rome Treaty. See A Warrant for Bashir, Economist, May 7, 2009, at 20. Conspicuously absent from this list are the United States, Russia, and China. See id.
73 See Broomhall, supra note 50, at 151.
75 See id. at 224.
76 Broomhall, supra note 50, at 67.
B. ICC Involvement in Darfur

The ICC became involved in the situation in Darfur on March 31, 2005 when the U.N. Security Council referred the situation to the court through Resolution 1593. The ICC then issued its first two warrants in April 2007. The first warrant was for government minister Ahmad Harun and the second was for the Janjaweed leader Ali Kushayb. These two are accused of “individual responsibility for fifty-one counts of crimes against humanity and war crimes, including murder, forcible transfer of population, rape, persecution, torture, and outrages upon personal dignity, among others.” Neither suspect has been handed over by the Sudanese government. In a second affront to the ICC, the government announced that Harun was promoted to State Minister for Humanitarian Affairs and would co-chair a committee to adjudicate human rights violations in Darfur. Both of these men have yet to be arrested.

On July 14, 2008, ICC Prosecutor Luis Moreno-Ocampo issued a warrant request for Sudanese President Omar Bashir. This is the first time that the ICC has pursued a sitting head of state. President Bashir has been charged with ten counts of genocide, crimes against humanity,
and war crimes.\(^{86}\) This indictment also marks the first time that the court has sought an indictment for genocide.\(^{87}\) In response to the request for a warrant, the Sudanese government launched a campaign to postpone the indictment, coupled with threats of future violence if the warrant was issued.\(^{88}\) In a statement to the United Nations Security Council on December 3, 2008, Prosecutor Moreno-Ocampo noted these threats made by Sudanese government officials:

In response to the Application, Sudanese Presidential Advisor Bona Malwal said on 25 July: “We are telling the world that with the indictment of our president Al-Bashir we cannot be responsible for the well-being of foreign forces in Darfur”; Adam Hamid Musa, recent governor of South Darfur, threatened that there will be “more genocide like it has been not seen before by anyone”, if President Al Bashir is indicted; and President Al Bashir himself said that “we are not looking for problems, but if they come to us then we will teach them a lesson they won’t forget.”\(^{89}\)

In addition, in September 2008, the Sudanese government provided a progress report to the Commission of the African Union claiming that there had been improvements in Darfur and that the government would continue to strive for peace in the country.\(^{90}\) As the insecurity in Darfur and the government’s unwillingness to punish those responsible for these crimes continues, these claims have proven to be little more than propaganda.\(^{91}\)

Despite these threats, the ICC continued its mission of promoting justice and eliminating impunity by officially issuing an arrest warrant for President Bashir on March 4, 2009, charging him with war crimes and crimes against humanity.\(^{92}\) The Sudanese government continued its resistance of the Court by summoning several humanitarian organi-


\(^{87}\) Sudan’s Leader Is Accused, supra note 10, at 55. Until this point, only the United States has referred to the atrocities in Darfur directly as genocide. See id.

\(^{88}\) See Save Darfur et al., supra note 44, at 5.


\(^{90}\) See Save Darfur et al., supra note 44, at 5.

\(^{91}\) See id. at 5–6 (highlighting the differences between the claims that the Sudanese government makes regarding improvements in the country as compared with the reality of the situation).

\(^{92}\) See Simons & MacFarquhar, supra note 13.
zations to a meeting almost immediately after the warrant was announced and ordering them to leave the country or curb their work. The Sudanese ambassador to the U.N. declared that the government would no longer work with aid groups that it deemed hostile and rejected the ICC’s prosecution saying, “We strongly condemn this criminal move. . . . It amounts to an attempt at regime change. We are not going to be bound by it.”

The Sudanese government is seeking to convince the U.N. Security Council to invoke its power under Article 16 of the Rome Treaty to suspend any investigation or prosecution. This is the first time that the Security Council has faced this decision. Prior to the issuance of the arrest warrant, the five permanent members of the Security Council (Britain, China, France, Russia, and the United States) expressed a desire to wait and see if Sudan would change its course of action before making a decision about whether or not to delay prosecution. Now that the arrest warrant has been issued, however, there is speculation that France, Britain, or the United States would veto a decision to postpone prosecution.

So far, extreme threats of violence have not played out in the magnitude promised by the Sudanese government officials. Street demonstrations in support of President Bashir and the exile of needed humanitarian aid groups are the only manifestations of these threats thus far. The government continues to deny the charges brought against their leaders and have rebuffed the court.

93 See id.
94 Id. President Bashir has also denied all accusations. See Braced for the Aftershock, supra note 15, at 66. “He told his critics . . . to dissolve their accusations in water and drink them.” See id. Amidst these public claims of denouncing the court, however, the government has shown some acceptance of the fact that they are likely going to have to engage with the court and have hired the British law firm Eversheds LLP to examine the charges and help with his prosecution. See A Middle Way for Justice in Sudan, ECONOMIST, Dec. 13, 2008, at 68.
95 See Save Darfur et al., supra note 44, at 5; Sudan’s Leader Is Accused, supra note 10, at 55. The report claimed that the government had “cooperated without reservation with the AU, U.N. and International community in their collective efforts to achieve peace and stability in Darfur.” See Save Darfur et al., supra note 44, at 5.
96 See Sudan’s Leader Is Accused, supra note 10, at 55.
97 See id.
100 See id.
98 See id.
101 See id.
III. Need for the ICC in Darfur

The ICC is desperately needed in Darfur given the failure of the Sudanese government to prosecute those responsible for these crimes. One of the foundations of the Rome Statute is the idea of “complementarity.” This concept provides an opportunity for states to take on the responsibility of investigating and prosecuting crimes committed in their own borders, through the use of their domestic courts. According to this principle, the ICC will only assert jurisdiction over a case when it concludes that the national courts are “unwilling or unable to prosecute” on their own. While the application of complementarity in the case of a U.N. Security Council referral is somewhat vague, the idea behind the principle is that international criminal justice will be most successful when international prosecutions are avoided because of effectively functioning domestic courts.

Although it would be ideal to have the Sudanese government create fair and efficient domestic courts in order to avoid often cited pitfalls of purely international justice systems, the Sudanese government has shown that this has not, and likely will never, happen. The report from the government of Sudan to the African Union and U.N. on Sep-

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102 See Moreno-Ocampo, supra note 89, at 5; More Than 100 to Face Sham Courts in Sudan, supra note 21; Human Rights Watch, supra note 21.

103 See Broomhall, supra note 50, at 86; Moreno-Ocampo, supra note 89, at 5.

104 See Moreno-Ocampo, supra note 89, at 5.

105 See Lipscomb, supra note 27, at 199. The idea of complementarity was overwhelmingly supported at the creation of the Rome Statute. See Broomhall, supra note 50, at 86. This not only works to ensure that the ICC will not supersede national courts, but also “[b]ecause the Court has the power to make the final decisions on the admissibility of cases before it, States that wish to avoid the adverse attention, the diplomatic entanglements, the duty to cooperate and other consequences of ICC activity have a real incentive to take action against crimes under the Statute.” Id. at 86. While the ICC could agree to hand over the prosecution of President Bashir and others, it will only do this if the judges of the ICC are convinced that a special or hybrid court would be as strict and as fair in its application of justice, a very high hurdle for Sudan to overcome. See A Middle Way for Justice in Sudan, supra note 94, at 69.

106 See Lipscomb, supra note 27, at 200, 202–03. Sudan’s most prominent opposition politician, Sadiq al-Mahdi, has suggested creating independent hybrid courts that would have both Sudanese and international judges. See A Middle Way for Justice in Sudan, supra note 94, at 68. Such courts have been set up by the U.N. and also by those countries concerned with Sierra Leone and Cambodia. See id.

107 Moreno-Ocampo, supra note 89, at 5; Lipscomb, supra note 27, at 193, 202. Some of the problems that have been cited with purely international processes include failure to adequately promote local building capacity, difficulties in overcoming problems of perceived legitimacy, failure to promote reconciliation in the country where the crimes were committed, and inability to apprehend the major perpetrators. Lipscomb, supra note 27, at 193–94.
tember 17, 2008 stated that over the last five years, the Sudanese domestic court system has only tried and completed seven cases and these had no connection to crimes by Ahmad Harun, Ali Kushayb, or President Bashir.\(^\text{108}\) Furthermore, the courts that do exist have been criticized as being hastily created and inherently unfair.\(^\text{109}\) Georgette Gagnon, the Africa director at Human Rights Watch stated that, “The special courts set up by Sudan to try alleged rebels who attacked [Sudan’s capital] Khartoum are a charade. The special courts don’t meet even minimal fair trial standards, and yet they have the power to sentence people to death.”\(^\text{110}\)

The failure of Sudan’s justice system has caused Darfur to “become a byword for impunity, a wilderness of atrocity and crime, and probably the world’s worst humanitarian disaster.”\(^\text{111}\) For any chance to truly restore peace to the region, the perpetrators of these crimes must be brought to justice.\(^\text{112}\) “[T]he ICC appears to be the most credible institution to hear the Darfur story, given its ‘entirely international composition and a set of well-defined rules of procedure and evidence.’”\(^\text{113}\) Other options for dealing with the atrocities that do not involve the ICC, such as hybrid tribunals or a Special Court like the one created during Sierra Leone’s civil war, are not well suited to the current conflict in Darfur.\(^\text{114}\) As noted by Human Rights Watch:

> As a permanent international court with a mandate to prosecute genocide, war crimes, and crimes against humanity when national courts are unable or unwilling to do so, the ICC was created to address exactly the type of situation in Darfur. Although prosecuting widespread atrocities would present challenges for any international or internationalized criminal tri-

\(^{108}\) Moreno-Ocampo, supra note 89, at 5. The most severe of the crimes that were prosecuted was the case of a student killed during a demonstration. See id.

\(^{109}\) See Human Rights Watch, supra note 21.

\(^{110}\) See id.

\(^{111}\) See Udombana, supra note 5, at 5.

\(^{112}\) See id. at 19–20.

\(^{113}\) Id. at 20 (quoting International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 of 18 September 2004, ¶ 648 (Jan. 25, 2005)).

\(^{114}\) See id. at 10–11. Charles Taylor, Liberia’s former president who has been charged as responsible for grave crimes against humanity during Sierra Leone’s civil war is facing prosecution by a hybrid tribunal. See id. His case has been before the Special Court since 2003, but the court has yet to complete a single case or hand down a conviction. See id. at 11. The court is now facing financial problems due to the fact that it was not created under Chapter VII of the U.N. Charter making it a donor-driven institution as opposed to funded by the contributions of the member states. See id. at 10–11.
bunal, the ICC is preferable to other alternatives. National prosecutions are not viable. . . . [and a] new ad hoc international or national-international tribunal would take too long to establish.  

IV. Peace Versus Justice: Deciding Whether to Invoke Article 16

The debate over whether or not the U.N. Security Council should invoke its power under Article 16 of the Rome Statute has brought up the well-known debate in the international community between peace versus justice. Those advocating peace argue that arresting the sitting head of state will only cause more bloodshed and ruin any chance for peace negotiations. Conversely, others fear that giving in to the President’s blackmail will undermine the ICC’s credibility and crush any hope of deterring other tyrants. While there are certainly sensitive political issues to consider, by referring this case to the ICC, the U.N. showed its trust in the ability of the court to take appropriate steps, and they must now support the court in fulfilling that obligation.

A. Importance of the Referral to the ICC

The initial referral of the investigation of the humanitarian crisis in Darfur to the ICC was the first step in legitimizing the fledgling court and showed the world that the international community will no longer accept such atrocious crimes. The U.N. additionally acknowledged


116 See Sudan’s Leader Is Accused, supra note 10, at 55.

117 See id.

118 See id.

119 See A Warrant for Bashir, supra note 72, at 20.

120 See Udombana, supra note 5, at 21–22. The referral came under Resolution 1593; eleven countries voted for the Resolution, none voted against it, and four countries—Algeria, Brazil, China, and the United States—abstained. See Coal. for the Int’l Criminal Court, Res. 1593, http://www.iccnow.org/?mod=res1593 (last visited Nov. 9, 2009). It has been argued that with the Security Council’s referral, “the ICC made an important move from academic exercise to legal reality.” Corrina Heyder, The U.N. Security Council’s Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court’s Functions and Status, 24 BERKELEY J. INT’L L. 650, 650 (2006). Much has also been noted about the United States’ decision to abstain from voting. See id.; Udombana, supra note 5, at 9–11. The United States had argued that they did not believe that a referral to the ICC was the best step to take with the situation in Darfur. See Udombana, supra note 5, at 9. Despite this, the U.S. Representative to the U.N. noted that “it was important that the international community spoke with one voice in
the role that the ICC would play in promoting international justice and indicated that it was intended to complement the role of the Security Council.\textsuperscript{121} By allowing the referral to go through, the international community set forth that consistency and fairness will dominate the international community’s approach to such atrocities.\textsuperscript{122} Finally, in making the referral the U.N. Security Council placed its confidence and trust in the ICC, and recognized that in order to achieve peace, there must be justice.\textsuperscript{123} In fact, a failure to have referred the crisis to the ICC would have begged the question as to whether the Court would ever be able to exercise its jurisdiction over cases other than ones where states themselves had consented.\textsuperscript{124}

Especially in light of the importance of its decision to make a referral to the ICC, the U.N. Security Council must continue the support it has granted to the Court or else potentially hurt the credence it has given it up to this point.\textsuperscript{125}

\textbf{B. Fears of Promoting the Prosecution of President Bashir}

Discussions concerning the continued prosecution of President Bashir highlight two reoccurring fears regarding a decision not to defer the case.\textsuperscript{126} The first is the fear that there will be more bloodshed in the country, putting human rights workers even more at risk.\textsuperscript{127} The second fear is that once Bashir is arrested, the international community

\textsuperscript{121} See Udombana, \textit{supra} note 5, at 18. It is also important that the crimes committed in Darfur clearly fell within the mandate of the court. See Heyder, \textit{supra} note 120, at 653. “The global community faced horrific crimes against humanity and war crimes, that qualified as genocide according to the United States, while the state in whose territory the crimes were committed made no attempt to prosecute the perpetrators.” \textit{Id.}

\textsuperscript{122} See Udombana, \textit{supra} note 5, at 18.

\textsuperscript{123} See \textit{id.} at 19–20.

\textsuperscript{124} See Heyder, \textit{supra} note 120, at 652.

\textsuperscript{125} See \textit{Sudan’s Leader Is Accused, supra} note 10, at 55.


\textsuperscript{127} \textit{See Court Seeks Arrest of Sudan’s President, supra} note 126; Press Release, Derek Kilmer, \textit{supra} note 126; Press Release, Voice of America, \textit{supra} note 126.
will lose all bargaining power for further peace negotiations with Sudan. These fears, however, suggest that justice is somehow mutually exclusive from peace.

The fear of more bloodshed is not unfounded. The reaction of many in Sudan to the possibility of an arrest warrant for President Bashir certainly gave cause for concern. The ruling National Congress Party in Sudan called the case against the President “irresponsible cheap political blackmail” and further warned that there would be “more violence and blood” if the arrest warrant were actually issued. Outside of a meeting between President Bashir and his cabinet members soon after the possibility of an arrest warrant became public, hundreds of Sudanese congregated to protest any arrest of their President. In response to threats of future violence, Shereen Zorba, deputy UNAMID spokesperson, commented that this might require the temporary relocation of foreign staff working on humanitarian relief operations. She further lamented that “the people of Darfur have already suffered unimaginable suffering and should not be subjected to more tragedy,” which could be the result of disruption in humanitarian operations.

Some of these fears came to fruition when the court announced that it would indeed indict the President and issued a warrant for his arrest. Agencies estimated to be providing fifty to seventy percent of the total humanitarian assistance to Darfur—such as food, water, and medical care—have had their licenses to operate revoked and have been told to leave.

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128 See Court Seeks Arrest of Sudan’s President, supra note 126; Press Release, Derek Kilmer, supra note 126; Press Release, Voice of America, supra note 126.
129 See Court Seeks Arrest of Sudan’s President, supra note 126; Press Release, Derek Kilmer, supra note 126; Press Release, Voice of America, supra note 126.
130 See Court Seeks Arrest of Sudan’s President, supra note 126; Press Release, Derek Kilmer, supra note 126; Press Release, Voice of America, supra note 126.
132 See id. Members of Sudan’s ruling party have also decried the charges against the President as unfair and politically motivated. See Court Seeks Arrest of Sudan’s President, supra note 126. The head of Sudan’s Bar Association, Fathi Khalil commented that “The prosecutor of the International Criminal Court with his announcement demanding the arrest of President al-Bashir has proved that he is playing a political role, not a legal one.” Id.
133 See Sudan Indictment May Bring More Bloodshed, supra note 131.
134 See id.
135 See id.
136 See Simons & MacFarquhar, supra note 13.
137 See Human Rights Watch, supra note 16.
more than a million people in the region. This depravation of necessary aid by the government may in itself be a violation of international humanitarian law in the unlawful reprisal or collective punishment.

Despite these problems which must now be addressed, however, the violence in Darfur continues and remains a serious matter that needs not only attention and humanitarian aid, but action. Adding legitimacy to the decision to issue a warrant for the sitting President Bashir, the ICC Head Prosecutor has not taken this decision lightly. Prosecutor Moreno-Ocampo was public about the fact that he was investigating the activities of President Bashir in an effort to force him to cooperate. Additionally, the Prosecutor was equally as public about his request for an arrest warrant, when he could have applied for a sealed warrant. According to an editorial in The Economist, had President Bashir “reined in the attacks, cooperated better with peacekeepers and the court and tried peacemaking, he might have wriggled off the ICC hook. He didn’t bother.” With the credibility of the ICC on the line, and the failure of other efforts to thwart the humanitarian crisis going on in the country, no better option exists than the continued prosecution of President Bashir.

Concerns about the loss of peace negotiations are yet another component of the debate about the proper role of the ICC in Sudan. Some are concerned that an indictment will derail the peace negotiations of 2005 that addressed the long civil war between northern and

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138 Id.  
139 See id. According to international law, the government of Sudan is responsible for providing protection and assistance to those affected in Darfur. See id. If the government is unwilling or unable to provide such assistance, then it is legally obligated to provide unimpeded access to independent and impartial aid agencies. See id.  
140 See Sudan’s Leader Is Accused, supra note 10, at 55; Press Release, United Nations supra note 86.  
141 See Sudan’s Leader Is Accused, supra note 10, at 55. In an interview of Alex De Waal and Richard Dicker conducted by Democracy Now!, De Waal commented that Prosecutor Moreno-Ocampo was “rushing through this indictment . . . process.” See Democracy Now!, supra note 15. In response Dicker said that he took “strong exception to . . . [De Waal’s] use of the term ‘rush’.” Id. Dicker continued, “I think [De Waal]’s term ‘rush’ is ill-advised from the perspective of those who remain victims and have been victims.” Id.  
142 See Sudan’s Leader Is Accused, supra note 10, at 55.  
143 See id.  
144 A Warrant for Bashir, supra note 72, at 20.  
145 See Sudan’s Leader Is Accused, supra note 10, at 55.  
southern Sudan. Additionally, some worry that indicting President Bashir could end any hope of a peaceful negotiation in Darfur. In suggesting both potential problems, the Sudanese Ambassador Abdalmahmood Abdalhaleem stated, “We condemn this indictment against our head of state. This is an affront to the president and the whole nation. It will have bad, destabilizing and negative consequences for the peace process for Darfur and Sudan at large.”

The north-south peace process, while a step in the right direction for the country, has been fraught with the same stagnation and helplessness seen in Darfur. In the agreement, the two sides agreed to “share the wealth, integrate the two sides’ armies and settle the boundary between them.” While designed to create a unified, harmonious New Sudan, neither side has invested in promoting the attractiveness of this unification as the Comprehensive Peace Agreement demands. In fact, the agreement gives southerners the right to secede from Sudan in 2011 following a referendum, and many southerners are considering such an action. Given the condition of the agreement now, deferring the indictment of President Bashir will likely only continue the stalemate. Furthermore, in the case of two other heads of state taken to court—Liberia’s Charles Taylor and Yugoslavia’s Slobodan Milosevic—fears that prosecuting these leaders would dismantle peace efforts proved unfounded.

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147 See UN Fears over Warrant for Bashir, supra note 146; Press Release, United Nations, supra note 86.

148 See Betsy Pisik, UN Braces for Retaliation After Indictment, Wash. Times, July 15, 2008, at A19; Press Release, United Nations supra note 86. There has also been a discussion of the potential for a deal between the ICC and the government of Sudan where the Security Council would defer the prosecution in exchange for the two Sudanese officials with outstanding arrest warrants. See Press Release, United Nations, supra note 86. In response to this suggestion, however, Osman Hummaidi, a Sudanese human rights researchers and campaigner, noted that this “deal would be difficult, if not impossible, since it would have serious implications for other members of the Sudanese government who might themselves have been involved in war crimes.” See id.

149 See Pisik, supra note 148.

150 See A Gleam Among the Ruins, supra note 38, at 33.

151 Id.

152 See id.

153 See id.

154 See Arrest the President, supra note 13 (noting that many rounds of talks between Darfuri rebels and the Sudanese government have come to nothing before); see also A Gleam Among the Ruins, supra note 38, at 33–34 (noting that the government of Sudan has thus far not been working to create permanent unification of the north and south).

155 See Braced for the Aftershock, supra note 15, at 66. Charles Taylor is on trial before a Sierra Leone court, and Slobodan Milosevic died before he could be convicted. See id.
While amnesty has been used as a tool in peace negotiations, President Bashir has shown an unwillingness to cooperate with the ICC in any capacity.\footnote{See M. Cherif Bassiouni, \textit{Combating Impunity for International Crimes}, 71 U. COLO. L. REV. 409 (2000) (discussing the role of allowing impunity in cases of international criminal justice); Dwight G. Newman, \textit{The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem}, 20 AM. U. INT’L L. REV. 293 (2005) (discussing the role of amnesties in the Rome Statute and the problems that can arise from allowing them); \textit{Sudan’s Leader Is Accused}, supra note 10, at 55.} Given the response of President Bashir thus far, allowing him impunity for his actions at this point would be a “get out of jail free card.”\footnote{See Press Release, United Nations \textit{supra} note 86.} One Senior Security Council diplomat explained that President Bashir might have had the necessary votes to get the indictment against him deferred if he “had put as much effort into peace in Darfur as he is alleged to have put into directing atrocities.”\footnote{See \textit{Braced for the Aftershock}, supra note 15, at 66.} At one point, there was hope that “the stick of indictment and carrot of suspension” would entice President Bashir to mend his ways, but that did not happen.\footnote{See \textit{A Warrant for Bashir}, supra note 72, at 20.} At this point, there is a real fear that deferring the prosecution any longer will create a return to a “climate of impunity.”\footnote{See \textit{Braced for the Aftershock}, supra note 15, at 66.} Richard Dicker, the Director of the International Justice Program at Human Rights Watch aptly notes that:

[i]f the UN were to decide that it would allow a Government to bully it into silence in confining its own human rights reporting and what it did with that information, I think that would be a huge step back for the UN, its commitment to human rights, and its credibility.\footnote{Press Release, United Nations, \textit{supra} note 86.}

C. Reasons for Supporting the Indictment and Continued Prosecution

While there are certainly serious issues to consider in moving forward with the prosecution of President Bashir, ultimately, justice must be served.\footnote{See \textit{id.}} If this process does not move forward, the impunity of key perpetrators in Darfur will signal to the world that government sanctioned crimes against humanity in the context of genocide are tolerated by the international community.\footnote{See Human Rights Watch, \textit{supra} note 115.} Far from rushing through a decision of indictment, the Prosecutor and the ICC have taken the time

\footnotesize{\begin{itemize}
\item 157 See Press Release, United Nations \textit{supra} note 86.
\item 158 See \textit{Braced for the Aftershock}, supra note 15, at 66.
\item 159 See \textit{A Warrant for Bashir}, supra note 72, at 20.
\item 160 See \textit{Braced for the Aftershock}, supra note 15, at 66.
\item 161 Press Release, United Nations, \textit{supra} note 86.
\item 162 See \textit{id}.
\item 163 See Human Rights Watch, \textit{supra} note 115.
\end{itemize}}
to thoroughly investigate the conflict in Darfur before making a decision. The stakes for the fledgling ICC, and international justice as a whole, are very high. The prosecution of President Bashir is a crucial step in legitimizing the role of the ICC, providing deterrence for future world leaders, and honoring the victims of these atrocities.

The ICC has the capability not only to render justice in this specific case in Darfur, but also to heighten deterrence through the imposition of international criminal justice. Prosecutor Moreno-Ocampo noted that “one case in the court reverberates in the world. . . . This court is not just a system to punish, it establishes the law. So, one case in the court makes the reality in the world.” Unlike other temporary ad hoc tribunals, the permanent nature of the court makes it a lasting threat to those who perpetrate human rights abuses. “Because the ICC functions as a court of last resort and exercises a direct influence on national systems to act, it is realistic to believe that its mere presence will augment the number of national prosecutions in the future, and thus increase the long-term potential for global deterrence.”

However, while this potential deterrence is great, the court’s power to influence other leaders could be drastically undermined by a decision to defer prosecution of President Bashir in light of his threats and acts of retaliation. The legitimacy of an international criminal court

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164 See Simons & MacFarquhar, supra note 13 (noting that judges issued the arrest warrant only “after months of deliberation”); Democracy Now!, supra note 15 (commenting that the killings in Darfur have continued for six years and that the ICC took between eight and nine months to render a decision after the Prosecutor asked for arrest warrants in July 2008).

165 See Braced for the Aftershock, supra note 15, at 66.

166 See infra notes 167–191 and accompanying text.

167 See Kastner, supra note 3, at 154 (noting that “specific deterrence will probably be at least as important as deterring perpetrators of future armed conflicts, which has been an important goal of international criminal justice so far”).


169 See Kastner, supra note 3, at 154. In his article on the importance of the Rome Statute, Prosecutor Moreno-Ocampo recognized that “[t]he treaty creates a judicial actor on the international scene, and the mere existence of this independent judicial actor will provide incentives to the states’ parties to apply the law. If they do not apply the law, the court will. It is a new concept in the international arena: the law must be respected.” Moreno-Ocampo, supra note 74, at 220.

170 Kastner, supra note 3, at 154.

171 See Braced for the Aftershock, supra note 15 (noting that “[i]t would certainly be hugely damaging for the ICC, and for global peace and justice, if the council were seen simply to crumple at threats from the latest thug-in-a-high-place”); Saving the President, ECONOMIST, Sept. 25, 2008, at 63 (noting the argument that “a possibly permanent deferral of justice
is imperative in seeking to solve these humanitarian conflicts and the international community must uphold the law to preserve this.\textsuperscript{172}

While the court should consider the effect that retaliation by the government of Sudan could have on the victims of Darfur, failing to seek the prosecution of those responsible for the crimes will serve only to further demoralize these victims.\textsuperscript{173} Prosecutor Moreno-Ocampo has made it clear that his priority is to protect African victims.\textsuperscript{174} If the ICC and U.N. Security Council allow the government of Sudan “to use threats of additional violence and further crimes to defer or even dispel the possibility of justice, the victims of Darfur are ultimately betrayed.”\textsuperscript{175} The decision of the Sudanese government to expel aid workers is itself a violation of international law.\textsuperscript{176} This is certainly a devastating problem that the U.N. must work to reverse, but these cruel and inhumane tactics should not be a reason to delay prosecuting the man responsible for such atrocities.\textsuperscript{177} These victims certainly should not be made to suffer any more than they already have, but delaying prosecution is not the solution to that problem.\textsuperscript{178}

While the court has made it clear that they are ready to proceed with the prosecution of President Bashir, it will take the support of the entire international community, and in particular the U.N., in order to

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\textsuperscript{172} See Moreno-Ocampo, supra note 74, at 220. Moreno-Ocampo recognized that “[i]n the camps, people are dying slowly. 2.5 million people dying slowly; 5,000 people dying each month and the world is ignoring that. These people need to be recognized, the crimes have to be recognized, because right now, when you read the news, they talk about what happened in 2004, not what happens today. And the court is stopping the denial and saying, this happened today and the leader of the country is involved in the crimes.” International Criminal Court “Working to Protect African Victims,” supra note 168.

\textsuperscript{173} See International Criminal Court “Working to Protect African Victims,” supra note 168.

\textsuperscript{174} See id.


\textsuperscript{176} See Sudan: Expelling Aid Agencies Harms Victims, supra note 16; supra note 139 and accompanying text.


\textsuperscript{178} See Suliman & Darehshori, supra note 175.
\end{flushleft}
achieve this goal. The 108 governments that have ratified the Rome Treaty are obligated to try and bring President Bashir to justice. There are however, members of the Security Council that have not ratified the Rome Statute, including the United States, China, and Russia. While these countries have the power under Article 16 to postpone the prosecution, they have no legal obligation to seek his arrest. In order for the prosecution of President Bashir to be successful, there must be widespread support for the Court. This must include the powerful countries that are members of the U.N. but have not ratified the Rome Treaty. The U.N. first referred the matter to the ICC, and now must back the arrest warrant and continued prosecution of President Bashir.

Pursuing justice in Darfur through the immediate prosecution of those responsible, particularly President Bashir, is essential for ultimate peace in Sudan, and for the kind of permanent international justice the ICC represents. While the government’s expulsion of vital humanitarian aid workers is a potentially catastrophic backlash, President Bashir has had more than enough time to mend his ways and avoid a potential indictment. Allowing him to go free now would be a message to the world that the ICC can be bullied by tyrannical threats. The U.N. and the international community as a whole must work together to appre-

179 See A Warrant for Bashir, supra note 72, at 20; Suliman & Darehshori, supra note 175.
180 See A Warrant for Bashir, supra note 72.
181 See id. The tension between the United States and the ICC has been particularly dramatic. See id. Throughout the negotiations, the United States argued that its soldiers could potentially be the target of politically motivated or frivolous prosecution. See Africa, Q&A: International Criminal Court, BBC News, Mar. 4, 2009, http://news.bbc.co.uk/2/hi/afrika/3834237.stm. Once certain safeguards were put in place, however, Bill Clinton signed the treaty as one of his last acts as president. See id. The Bush administration, however, was extremely opposed to the treaty. See A Warrant for Bashir, supra note 72, at 20; Africa Q&A: International Criminal Court, supra. George W. Bush made a point of this by “unsigning” the Rome treaty and aggressively sought to exempt Americans from its proceedings. See A Warrant for Bashir, supra note 72, at 20. Despite this, the United States did recognize the need for justice in Darfur and therefore withheld a veto that could have prevented the court from investigating the situation there. See id. With President Obama now in office, however, there is a chance the United States will take a more favorable stance with the ICC in general. See A Gleam Among the Ruins, supra note 38, at 33; A Warrant for Bashir, supra note 72, at 20.
182 See A Warrant for Bashir, supra note 72, at 20.
183 See id.
184 See id.
185 See id.
186 See id.; Human Rights Watch, supra note 115.
187 See A Warrant for Bashir, supra note 72, at 20; Human Rights Watch, supra note 115.
188 See A Warrant for Bashir, supra note 72, at 20; Human Rights Watch, supra note 115.
hend President Bashir, and force him to face the ICC for the atrocities he orchestrated.\textsuperscript{189} While concerns about peace versus justice dominate the debate over what to do in Sudan, the reality is that there can be no enduring peace in the region until justice is done.\textsuperscript{190} The only way to ensure justice is for the international community to support the ICC in its pursuit of holding President Bashir accountable.\textsuperscript{191}

**Conclusion**

The crisis in Darfur is one of the most pressing concerns of the international community. The government of Sudan has supported and orchestrated years of mass murder, rape, and the displacement of hundreds of thousands of Darfurians. In particular, the sitting President Bashir has had direct involvement in these crimes.

Despite the ICC’s clear acknowledgment of the role President Bashir has played, the international community is now caught in a debate about whether or not to go forward with the prosecution. Some argue that the U.N. Security Council should invoke their power under Article 16 of the Rome Statute and delay an indictment in an effort to prevent a potentially violent retaliation on the part of the Sudanese government. While there is reason for concern over the threats of Sudan’s government and its decision to expel needed humanitarian aid organizations from the country, President Bashir must be held immediately accountable to ensure lasting peace in the country.

Furthermore, the creation of ICC is one of the most significant accomplishments in international criminal justice and its legitimacy and future power of deterrence rest on the prosecution of those responsible in Sudan. Delaying the prosecution sends the message to future tyrannical leaders that the court can be bullied into delaying an indictment through violence and threats. Sudan’s retaliation tactics should not be reason to grant President Bashir leeway, but rather should bolster the argument for seeking immediate justice.

In order to accomplish the justice that the victims of Darfur deserve, the U.N. Security Council must not delay the prosecution of President Bashir any longer, but must instead support the ICC in apprehending the sitting president. The entire international community and the future of international criminal justice depend on this decision.

\textsuperscript{189} See A Warrant for Bashir, supra note 72, at 20; Human Rights Watch, supra note 115.
\textsuperscript{190} See A Warrant for Bashir, supra note 72, at 20; Human Rights Watch, supra note 115.
\textsuperscript{191} See Kastner, supra note 3, at 146, 149; A Warrant for Bashir, supra note 72, at 20; Human Rights Watch, supra note 115.