ARTICLES

WOMEN AND CHILDREN LAST: THE PROSECUTION OF SEX TRAFFICKERS AS SEX OFFENDERS AND THE NEED FOR A SEX TRAFFICKER REGISTRY

Geneva Brown

[pages 1–40]

Abstract: Sex trafficking is a moral and legal tragedy that affects thousands in the United States and abroad. The U.S. State Department estimates that human traffickers bring between 14,500 and 17,500 persons annually into the United States for various avenues of exploitation, including involuntary servitude and forced prostitution. Human traffickers are highly organized into criminal syndicates that reap exponential profits exploiting vulnerable women and children. Individual states struggle to prosecute traffickers and must rely on federal prosecution of trafficking enterprises. International cooperation with local law enforcement is essential in combating trafficking, especially in the sex trade. This Article proposes that an international database be maintained to track the whereabouts of prosecuted traffickers, similar to the sex offender registry in the United States. Like the U.S. sex offender laws, which seek to dramatically decrease recidivism among sex offenders, an international registry could have a deterrent effect on trafficking. Limiting and monitoring the travel of convicted traffickers would be a new avenue that international law enforcement and governing bodies could use to contain the pernicious practice of trafficking.

THE RIGHT TO BE HEARD: VOICING THE DUE PROCESS RIGHT TO COUNSEL FOR UNACCOMPANIED ALIEN CHILDREN

Linda Kelly Hill

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Abstract: Every year, the Department of Homeland Security detains thousands of unaccompanied alien children who have crossed the border into the United States. The framework set out in Lassiter v. Department of Social Services and Gideon v. Wainwright for all civil litigants creates a stumbling block in recognizing a constitutional right to counsel in the immigration
context, but this Article argues that unaccompanied alien children do, in fact, have a constitutional right to counsel. Unaccompanied alien children are in unique circumstances and their right to counsel is three-fold. First, immigration law and procedure are complex and an unaccompanied child can effectively pursue claims for relief before the immigration courts only with the assistance of counsel. Second, pending the outcome of immigration proceedings, a child may have the right to reunification with family members in the United States. Third, the conditions in detention facilities are often horrendous and appointed counsel would ensure that a child is not subjected to inhumane treatment while his or her case is pending. This three-fold necessity, in addition to the unique circumstances of unaccompanied alien children, gives rise to a constitutional right to counsel.

Sinners or Saints: Child Soldiers and the Persecutor Bar to Asylum After Negusie v. Holder

Bryan Lonegan

[pages 71–100]

Abstract: There are an estimated 250,000 child soldiers—boys and girls under the age of eighteen—who are being compelled to serve in more than fifteen conflicts worldwide. Child soldiers are forcibly recruited or abducted and are used as combatants, messengers, porters, cooks, and to provide sexual services. International law now recognizes child soldiers as victims of war crimes, deserving of state compassion. The U.S. Department of Homeland Security, however, has opposed asylum for child soldiers on the grounds that their military service subjects them to the “persecutor bar.” Barring child soldiers from asylum protection penalizes them for having been the victims of a crime and undercuts all efforts to protect them. This Article argues that a per se bar of child soldiers from asylum contradicts the United States’ adherence to the international view that the use of child soldiers constitutes a violation of human rights, domestic laws declaring recruitment of child soldiers a crime, and active support of the eradication of the use of child soldiers. Instead, child soldiers should be able to argue that their conduct falls beyond the scope and intent of the persecutor bar. This Article concludes by offering an approach to determine when a child soldier should be subjected to the persecutor bar that balances the seriousness of the child soldier’s actions against the circumstances under which he or she was recruited.
NOTES

Disinheritance of Minor Children: A Proposal to Amend the Uniform Probate Code

Jacqueline Asadorian

[pages 101–128]

Abstract: With the single exception of Louisiana, the United States provides no legislative protection against the disinheritance of minor children by their parents. This position is distinct from most other countries in the world, which require parents to provide for their children at death. Freedom of testation, a distinctly American value, is at odds with another value Americans hold dear: support and protection of one’s family. This Note argues that the balance between these two discordant values has tipped too far in the direction of testamentary freedom, to the detriment of minor children. Non-custodial children are disproportionately affected by this lack of protection because they are the most likely group to be disinherited. Rather than rely on courts to inconsistently and arbitrarily protect children against disinheritance, this Note suggests that states should adopt forced heirship legislation to ensure that children are supported after the death of their parents.

The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Mechanisms to Address Noncompliance

Caitlin M. Bannon

[pages 129–162]

Abstract: International parental child abduction is a growing problem, the effects of which are devastating for both the children involved and the parents who are left behind. When a parent abducts a child across national borders, the Hague Convention on the Civil Aspects of International Child Abduction—an international treaty aimed at the expeditious return of the child to his or her country of habitual residence—provides the other parent’s primary legal recourse. This Note will examine the growing problem of international parental child abduction, including its prevalence and consequences, and the role of the Hague Convention in addressing this problem. Specifically, it will examine the issue of non-compliant Contracting States, the effects of that noncompliance, and the need for mechanisms to address noncompliance. Finally, this Note will examine two bills that have been proposed in the United States Congress that address the noncompliance issue and will argue that Congress should seriously consider one of these bills.
WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE: AN APPROACH FOR EVALUATING CREDIBILITY IN AMERICA’S MULTILINGUAL COURTROOMS

Daniel J. Procaccini

[pages 163–192]

Abstract: In the American justice system, the jury is the ultimate and exclusive finder of fact. In particular, credibility determinations are sacrosanct, and no witness is permitted to “invade the province of the jury” by testifying as to another party’s credibility. This rule is strictly enforced despite being thoroughly discredited by behavioral research on the ability of jurors to detect deception. In the modern multilingual courtroom, this rule places linguistic minorities at a distinct disadvantage. The communication gap between cultures is vast, and courtroom interpretation suffers from many well-documented inadequacies that can profoundly affect a fact-finder’s conclusions about a non-English speaker’s credibility. In other circumstances, when it is reliable and will assist the trier of fact, courts routinely admit expert testimony. This Note advocates for a similar solution: where non-English speaking parties or witnesses would otherwise suffer prejudice, courts should abandon the “province of the jury” rule and allow expert testimony regarding a witness’ credibility.


Jonah M. Temple

[pages 193–215]

Abstract: The United States’ policy of deporting noncitizen criminals to their countries of origin is fueling a proliferation of gang membership both in Central America and in the United States. Deportation does not deter gang activity but instead helps to facilitate the transnational movement of youth gangs. Rather than continue this failed approach, this Comment proposes that the United States work with Central American nations to develop an internationally cooperative model for regulating criminal gang activity. In order to strengthen its response, the United States must end its ineffective deportation policy. It must also impose sanctions and make the United States a more costly and less desirable place to conduct criminal activity. With insight from political economic theory, this Comment concludes that any new legislation must be part of an international crime control effort to combat the threat of gang transnationalization most efficiently.
WOMEN AND CHILDREN LAST: THE PROSECUTION OF SEX TRAFFICKERS AS SEX OFFENDERS AND THE NEED FOR A SEX TRAFFICKER REGISTRY

Geneva Brown*

Abstract: Sex trafficking is a moral and legal tragedy that affects thousands in the United States and abroad. The U.S. State Department estimates that human traffickers bring between 14,500 and 17,500 persons annually into the United States for various avenues of exploitation, including involuntary servitude and forced prostitution. Human traffickers are highly organized into criminal syndicates that reap exponential profits exploiting vulnerable women and children. Individual states struggle to prosecute traffickers and must rely on federal prosecution of trafficking enterprises. International cooperation with local law enforcement is essential in combating trafficking, especially in the sex trade. This Article proposes that an international database be maintained to track the whereabouts of prosecuted traffickers, similar to the sex offender registry in the United States. Like the U.S. sex offender laws, which seek to dramatically decrease recidivism among sex offenders, an international registry could have a deterrent effect on trafficking. Limiting and monitoring the travel of convicted traffickers would be a new avenue that international law enforcement and governing bodies could use to contain the pernicious practice of trafficking.

Introduction

Human sex trafficking is a moral and legal tragedy that affects thousands in the United States and abroad.1 The International Labour Organization estimates that 1.39 million domestic and transnational victims of forced labor are also victims of commercial sex servitude.2 As

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many as 17,500 people are trafficked into the United States every year. The difficulty in quantifying the number of trafficking victims is just one example of the complexity and mystery behind human trafficking. In addition, human traffickers are part of highly organized criminal syndicates that profit from the exploitation of vulnerable women and children. To date, law enforcement is unable to combat human trafficking effectively and is failing to keep pace with its growth. Many states struggle to prosecute traffickers and must rely on federal prosecution of trafficking enterprises. To better address hu-

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3 See Trafficking in Persons Report, supra note 1, at 23. The United States is one of the three largest markets for human sex trafficking. See Green, supra note 1, at 312; see also Susan Tiefenbrun, The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: the Victims of Trafficking and Violence Protection Act of 2000, 2002 Utah L. Rev. 107, 128 (“[T]he United States is one of the primary destination points for trafficked women . . . .”).


5 See Tiefenbrun, supra note 3, at 126 (“Statistics on trafficking are unreliable and difficult to verify because of the secrecy of the sex trafficking industry and the social stigma attached to the activity.”); Trafficking in Persons Report, supra note 1, at 23 (“Estimates of the number of trafficking victims found throughout the world are inherently difficult to produce. Trafficking in persons, like drug trafficking and arms smuggling, is a clandestine activity made even harder to quantify by its numerous forms.”).

6 See Trafficking in Persons Report, supra note 1, at 6, 14; see also Nidhi Kumar, Reinforcing Thirteenth and Fourteenth Amendment Principles in the Twenty-First Century: How to Punish Today’s Masters and Compensate Their Immigrant Slaves, 58 Rutgers L. Rev. 303, 304–07 (2005) (“The ‘trafficking industry has become . . . one of the . . . most lucrative and fastest growing criminal enterprises.’”) (quoting Baher Azmy, Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda, 71 Fordham L. Rev. 981, 992 (2002)); Louise Shelley, Trafficking in Women: The Business Model Approach, 10 Brown J. World Aff. 119, 121 (2003) (“Smuggling and trafficking are undeniably part of organized crime activities. The high profits, low risk of detection, and minor penalties involved have made the human trade attractive to crime groups . . . .”).

7 See Miko & Park, supra note 4, at 8; Kumar, supra note 6, at 305–06; Tiefenbrun, supra note 3, at 130.

8 See Moira Heiges, Note, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad, 94 Minn. L. Rev. 428, 439–42 (2009).
man sex trafficking, a greater level of cooperation among international, federal, and state enforcement agencies is needed. 9

In order to improve the international response to trafficking, it is necessary to devote additional attention to the plight of women and children being trafficked across borders for sexual exploitation. 10 With greater public awareness of the problematic nature of sex trafficking, the public will to prosecute offenders should coalesce with law enforcement efforts to combat trafficking. 11 U.S. sex offender laws provide a model for the creation of an international trafficking registry that would both increase public support for the prosecution of trafficking offenders and potentially deter sex trafficking on a global scale. U.S. sex offender laws seek to dramatically decrease recidivism of sex offenders and their application to sex traffickers could have the same deterrent effect. 12 The utility of sex offender laws is already evident in the United States, where sex offender registration requirements are extended to convicted sex traffickers. 13 Yet, the application of a sex offender registry alone is not sufficient. Although traffickers in the United States who specialize in the exploitation of children are being treated as sex offenders, it has not curtailed the trafficking of children. 14 It is evident that U.S. laws need to go further in treating sex traffickers as sex offenders and restrict civil liberties such as travel and occupation. In addition, an international registration requirement would help the international community track the whereabouts of sex traffickers.

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11 See id.


14 See Green, supra note 1, at 312 (noting that the United States must initiate exceptional measures to eradicate harm of child sex trafficking).

15 See 42 U.S.C. § 16921(b). The community notification provision requires that, immediately after a sex offender registers or updates a local registration, a local official must provide the information in the registry to the Attorney General; local law enforcement agencies; jurisdictions where the sex offender resides, works, or is a student; social services entities; volunteer organizations; and persons who request such notification pursuant to procedures established by the jurisdiction. Id.
traffickers and is a strong step towards treating human traffickers as sex offenders. A trafficking registry will liken traffickers to sex offenders and cause traffickers to suffer the same stigma that sex offenders do, which will garner much needed public awareness of the problem and help law enforcement agencies prevent and prosecute sex trafficking.\textsuperscript{16}

This Article will provide a review of the current, growing problem of human sex trafficking and survey the landscape of law enforcement responses. It will also explore U.S. sex offender laws and suggest that sex offender laws be applied to sex trafficking. This Article is divided into five sections. Part I provides an overview of human trafficking and its impact on women and children. Part II identifies the different perspectives that influence government responses. Part III provides an overview of international legal responses, focusing on Europe and Asia. Part IV looks at U.S. trafficking laws and problems that law enforcement agencies face in prosecuting traffickers. This section also reviews U.S. sex offender laws and the use of a national registry. Finally, Part V suggests that the creation of an international sex trafficker registry will aid the global response to human trafficking.

I. THE PROBLEM OF HUMAN TRAFFICKING

Various governmental and non-governmental entities have wrestled with the definition of human trafficking.\textsuperscript{17} The United Nations initially focused on prostitution when drafting the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.\textsuperscript{18} Although the 1949 Convention did not define trafficking, it included an agreement to punish any person who “procures, entices or leads away, for purposes of prostitution, another person.”\textsuperscript{19} The United Nations later provided a more detailed definition of human trafficking with the Convention Against Transnational Crimes in 2000. The 2000 Convention defined “trafficking in persons” as:

\textit{[T]he recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the}

\textsuperscript{16}See id.
\textsuperscript{18}Convention on the Suppression of the Traffic in Persons, \textit{supra} note 17, art. I.
\textsuperscript{19}Id.
abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs . . . .

Meanwhile, the U.S. government, in the Trafficking Victims Protection Act, defines “severe forms of trafficking in persons” as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” The Act also differentiates sex trafficking from human trafficking, defining sex trafficking as a commercial sex act induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained eighteen years of age.

The trafficking of women and children for prostitution is one of the fastest growing areas of international criminal activity. This growing phenomenon is a cause for alarm to the United States and the international community. More than 700,000 people are trafficked worldwide each year, with 50,000 people trafficked to the United States. Seventy percent of people trafficked across international borders are female and fifty percent are children. At least 100,000 female illegal immigrants work in the United States as prostitutes.

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22 Id.
23 Miko & Park, supra note 4, at 1.
24 See id.
25 Id.
26 Trafficking in Persons Report, supra note 1, at 15; see also Tiefenbrun, supra note 3, at 113–14 (discussing ways to eradicate sex trafficking in women, incorporating economic theory).
Women are most at risk for being trafficked.\textsuperscript{28} According to statistics compiled by the U.S. Department of Justice (DOJ), between January 1, 2007 and September 30, 2008, ninety-four percent of all human trafficking victims were female.\textsuperscript{29} More astoundingly, ninety-nine percent of all sex trafficking victims were female.\textsuperscript{30} Most women who are trafficked are done so as part of the sex trade.\textsuperscript{31} Sex trafficking accounted for eighty-three percent of all reported trafficking incidents, due in part to the fact that sex trafficking is the most lucrative type of human trafficking.\textsuperscript{32}

Trafficked women often have backgrounds of poverty, illiteracy, civil strife, and low social and political status.\textsuperscript{33} Traffickers exploit these conditions by luring women into traveling to unknown regions with the promise of high wages and civilized working conditions.\textsuperscript{34} Then, after arriving at their destination, women may be subjected to slave-like wages, inhumane working conditions, and debt bondage.\textsuperscript{35} Women who are trafficked for the sex industry fare worse than other trafficking victims.\textsuperscript{36}

\begin{thebibliography}{99}
\bibitem{Kyckelhahn} Tracey Kyckelhahn et al., U.S. Dep’t of Justice, Characteristics of Suspected Human Trafficking Incidents, 2007–08, at 8 (2009). The DOJ Human Trafficking Reporting System provides data on human trafficking incidents investigated between January 1, 2007 and September 30, 2008. \textit{Id.} Data in the report represents a snapshot of the investigations opened by thirty-eight federally funded human trafficking task forces. \textit{Id.}
\bibitem{Hyland} Kelly E. Hyland, Protecting Victims of Human Trafficking: An American Framework, 16 Berkeley Women’s L.J. 29, 35 (2001); \textit{see also} Miko & Park, \textit{supra} note 4, at 2 (noting that economic hardships following the collapse of Communism in the former Soviet Union and Eastern Europe hampered opportunities for a better life abroad and made “many women and girls especially vulnerable to entrapment by traffickers”).
\bibitem{Tiefenbrun} See Fara Gold, Comment, Redefining the Sex Trade: Current Trends in International Trafficking of Women, 11 U. Miami Int’l & Comp. L. Rev. 99, 110 (2003); \textit{see also} Tiefenbrun, \textit{supra} note 3, at 118. Tiefenbrun explains that trafficking is accomplished by various means, including enticement, kidnapping, selling a loved one, the illegal use of legitimate travel documents, the use of impostor passports, and entry without inspection. \textit{Id.} “They recruit women abroad through advertisements and employment, travel, model, or matchmaking agencies. Recruiters also target beauty contest winners and entice them with phony work offers.” \textit{Id.}
\bibitem{Farley} Posttraumatic stress disorder (PTSD) commonly occurs among prostituted women, and is indicative of their extreme emotional distress. PTSD is characterized by anxiety, depression, insomnia, irritability, flashbacks, emotional numbing, and hyperalertness. In nine countries, sixty-eight percent of those in prostitution met criteria for a diagnosis of PTSD, a prevalence that was
\end{thebibliography}
For example, the large smuggling fees associated with the sex trade keep trafficked women indebted to their traffickers. In the United States, for instance, Asian prostitutes are sold for as much as $20,000 each. Trafficked women are reluctant to seek help from law enforcement officials because they fear retaliation from their traffickers. Returning home is not a safe option for trafficked women either, as they may face retribution from organized crime groups or from their native country’s law enforcement.

Child sex trafficking, in particular, is a growing concern for law enforcement. First, the trafficking industry has a direct association with child pornography. Second, the sexual exploitation of children is a lucrative business that has ties to organized crime and local profiteers. Child traffickers can earn as much as $30,000 per trafficked child. Sex tourists travel globally to gain access to young girls and boys and are willing to pay premium prices for access to them. The thriving child sex industry is based on several factors including poverty and comparable to battered women seeking shelter, rape survivors seeking treatment, and survivors of state-sponsored torture. Across widely varying cultures on five continents, the traumatic consequences of prostitution were similar.

Id. at 116–17 (footnotes omitted).

37 Gold, supra note 34, at 119.
39 Hyland, supra note 33, at 45.
40 Id. at 43.

Thai victims in California feared returning home to Thailand after learning that their traffickers had been looking for them. Government authorities in the home country, instead of providing protection, may penalize returning victims with arrest and detention for having illegally migrated.

Returning victims also may face ostracism from family and friends. A trafficked woman’s husband or family may disown her upon her return if she engaged in prostitution.

Id. (footnotes omitted).

42 Id. at 431.

44 Estes & Weiner, supra note 43, at 8.
45 O’Briain et al., supra note 9, at 8–9.
the use of “runaway” and “throwaway” children.\textsuperscript{46} Like trafficked women, children trafficked into and out of the United States are financially beholden to their traffickers.\textsuperscript{47} Often, they are required to pay their traffickers for the services received such as transportation, shelter, employment, and false identity papers.\textsuperscript{48} Additionally, children in the sex industry suffer exposure to HIV/AIDS and other sexually transmitted diseases.\textsuperscript{49} Indeed, younger children are targeted and procured to protect clients from HIV exposure.\textsuperscript{50} Human Rights Watch reports that “[p]rostituted children can be raped, beaten, sodomized, emotionally abused, tortured, and even killed by pimps, brothel owners, and customers.”\textsuperscript{51} According to UNICEF, one million children enter the global sex trade each year.\textsuperscript{52}

II. Perspectives on Sex Trafficking

There is no uniform global approach to combating sex trafficking.\textsuperscript{53} The ideological paradigms of governments, non-governmental organizations (NGOs), and legal and human rights communities influence the choice of how to view and combat sex trafficking.\textsuperscript{54} Groups develop different strategies to reduce or eliminate sex trafficking enterprises that are aligned with their understanding of the issues and actors involved.\textsuperscript{55}

Regardless of how different nations approach the problem, it is important for all law enforcement agencies to recognize the growing presence of organized crime groups involved in human trafficking.\textsuperscript{56} High profits of sex trafficking, combined with inadequate law enforcement responses, are increasingly attracting organized enterprises to the sex trade.\textsuperscript{57} The vast profits of sex trafficking have attracted “crime groups that previously trafficked in other commodities and . . . new

\textsuperscript{46} Estes & Weiner, \textit{supra} note 43, at 4.
\textsuperscript{47} \textit{Id.} at 8.
\textsuperscript{48} \textit{Id.}
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 16.
\textsuperscript{54} \textit{See id.} at 14–16.
\textsuperscript{55} \textit{See id.}
\textsuperscript{56} \textit{See Shelley, supra} note 6, at 121.
\textsuperscript{57} \textit{See id.}
groups which have developed recently.”58 Behind the instances of human trafficking “lie intricate enterprises, each with business characteristics that influence the severity of the human rights violations.”59 Trafficking enterprises often operate “with the complicity of professionals in receiving countries that knowingly provide services to the human smugglers and traffickers.”60 Indeed, “[t]he vast profits of this business allow them to develop high-level expertise just as the drug trafficking organizations have done in recent decades.”61

Professor Louise Shelley stated, “The trade in human beings is not a uniform business and operates very differently in diverse cultural and political contexts.”62 Shelley has identified six different business models of trafficking.63 The first model is the “natural resources” model.64 For example, post-Soviet organized crime groups “sell women as if they were a readily available natural resource,” focusing their business on “the recruitment of women and their sale to intermediaries who deliver them to the markets where they will ‘serve clients.’”65 The second model is the “trade and development model” used by Chinese and Thai traffickers.66

58 See id.
59 Id. at 119; see also Luz Estella Nagle, Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude, 26 Wis. Int’l L.J. 131, 132 (2008) (exploring “how the reticence by some governments to balance economic development and integration with combating human trafficking impedes the international resolve to deter this phenomenon”).
60 Shelley, supra note 6, at 121. The business of human trafficking necessarily implicates the involvement of government actors in the trafficking trade. See Nagle, supra note 59, at 161. Trafficking enterprises could not exist without corrupt law enforcement, consular officials, and cooperative lawyers involved in the trade. See Shelley, supra note 6, at 129.
61 Shelley, supra note 6, at 121; see also Sheldon Zhang & Ko-Lin Chin, The Declining Significance of Triad Societies in Transnational Illegal Activities, 43 Brit J. Criminology 469, 469 (2003) (presenting a conceptual framework to argue that “triad’s entrenched culture and patterns of organization, which have served them well for centuries, are incompatible with conditions necessary for entering into present-day transnational criminal activities”).
62 Shelley, supra note 6, at 122.
63 See id. at 123. Shelley’s findings are based on research by scholars in Russia and Ukraine under the sponsorship of the Transnational Crime and Corruption Center and published in the volumes of Torgovye Liudmi [Trade in People]. This growing business of trafficking is fueled by “traffickers from poor and violence-ridden societies” and their “high-paid facilitators in the west.” Id. at 121. For instance, during the post-socialist transition in Eastern Europe and the former Soviet Union, where women were displayed as part of the worldwide feminization of poverty, crime groups largely targeted women for trafficking. See id. at 122.
64 See id. at 123.
65 Id.
66 See id. at 124 (“[Shelley’s] analysis of Chinese organized crime is based on a variety of law enforcement sources apart from the academic sources and the case materials of prosecuted cases,” including “[m]aterials of actual investigations of the business side of Chinese organized crime . . . .”).
In this model, traffickers organize and “control the smuggling at all stages—from recruitment through debt bondage and eventually to an assignment in a brothel,” which generates significant profits.”\(^\text{67}\) The third model is the “supermarket model,” based on a low cost and high volume model of human trafficking.\(^\text{68}\) This approach is seen in the trafficking trade between the United States and Mexico.\(^\text{69}\) There, “trade in women is part of a much larger trade that involves moving large numbers of people across the border at low cost.”\(^\text{70}\) The trade “may require multiple attempts” and “significant profit sharing with local Mexican border officials.”\(^\text{71}\) The fourth model is a “violent entrepreneur model” utilized by Balkan crime groups.\(^\text{72}\) This model “involves large numbers of women from the Balkans and those sold off to Balkan traders by crime groups from the former Soviet Union and Eastern Europe.”\(^\text{73}\) In addition, “Balkan groups take over existing markets in continental Europe and Great Britain by use of force against already established organized crime groups.”\(^\text{74}\) The fifth model combines “traditional slavery and modern technology” and is used by traffickers moving women out of Nigeria and West Africa.\(^\text{75}\) Women are trafficked as part of Nigerian organized crime groups, “in which the trade of women is only one part of their criminal activities,” and where “[c]hildren are abandoned in re-

\(67\) See Shelly, supra note 6, at 124; see also Louise I. Shelley, Post-Communist Transitions and the Illegal Movement of People: Chinese Smuggling and Russian Trafficking in Women, 14 Annals of Scholarship 71, 80 (2000).

\(68\) See Shelley, supra note 6, at 125.

\(69\) See id.; see also Joseph Nevins, The Remaking of the California-Mexico Boundary in the Age of NAFTA, in Wall Around the West: State Borders and Immigration Controls in North America and Europe 99, 99–107 (Peter Andreas & Timothy Snyder, eds. 2000).

\(70\) Shelley, supra note 6, at 125; see also Louise Shelley, Corruption and Organized Crime in Mexico in the Post-PRI Transition, 17 J. Contemp. Crim. Just. 213, 226 (2001).

\(71\) See Shelley, supra note 6, at 125.


cipient countries and women are pressured to work in . . . the lowest end of the prostitution market.”

The final business model applies to the host country rather than to a trafficking group.77 The “rational actor model” applies where prostitution is legalized and government-regulated, such as in the Netherlands, and “presumes that the brothel owner is a rational businessman and seeks to maximize his profits.”78 State regulations require certain conditions to be met for a brothel owner to continue operating, such as legal workers and decent conditions.79 In case of violations, “the license can be withdrawn, the brothel closes, and prosecution ensues,” which incentivizes compliance with state regulations.80

International, national, and local law enforcement must grasp the multi-tiered, cross-border complexity of sex trafficking and coordinate efforts to successfully prosecute traffickers.81 As Shelley notes, “High levels of human rights violations are associated with segmented businesses in which women are passed from one set of owners to another repeatedly.”82 Government efforts to combat the increasingly complex

An important spin-off of the policy is that it prevents human trafficking, which is characterized by exploitation, coercion and violence. The lifting of the ban on brothels makes prostitution a legitimate occupation and gives prostitutes the same rights and protections as other professionals. The labor laws offer the most effective protection against the exploitation, violence and coercion. The policy is based on the conviction that strengthening the position of women is the best way to combat sexual violence. Moreover, abuses are easier to detect when prostitutes operate publicly and legally rather than in a clandestine subculture.

The introduction of a municipal licensing system enables the police and other law enforcement agencies to conduct inspections of brothels, subject to the mayor’s consent. Through regular inspections to ensure that brothels conform to the licensing conditions, the police are in a position to pick up signs of human trafficking. They obtain invaluable information that can be used immediately to trace and prosecute offenders in both the regulated and unregulated sectors.

80 Id. at 128.
81 See id. at 129 (“The isolation and prosecution of the facilitators of trafficking both at home and abroad is as necessary as targeting the crime groups themselves.”).
problem of trafficking fall into one of two models.\textsuperscript{83} The models are determined by components such as whether the trafficking victims are seen as offenders in the sex trade or as duped victims.\textsuperscript{84} Although the dominant model treats trafficking victims as co-conspirators, a more nuanced approach to sex trafficking is emerging that focuses instead on a rights-based discourse in developing a law enforcement response.\textsuperscript{85}

A. The Migrant Model

The Migrant Model is a law and order approach that does not fully recognize trafficked persons as victims.\textsuperscript{86} Currently, government and NGO responses are “embedded in morality” and “marked by class, gender, ethnic, nationality concerns, and restrictive and punitive strategies that violate human rights.”\textsuperscript{87} For instance, the United Nations distinguishes between the voluntary smuggling of persons and the involuntary trafficking of persons across borders.\textsuperscript{88} This delineation between those who are trafficked and those who are smuggled, however, “masks the reality in which the experience of exploitation resides within a rather more complex range of coercion and choice.”\textsuperscript{89} Indeed, there exists an “overlap between irregular migration, smuggling, and trafficking.”\textsuperscript{90} Often, “migrants’ experiences actually involve a degree of de-


\textsuperscript{84} See Jordan, supra note 83, at 29–30; D’Cunha, supra note 83, at 5.

\textsuperscript{85} See Jordan, supra note 83, at 29–30; D’Cunha, supra note 83, at 5.

\textsuperscript{86} See Jordan, supra note 83, at 29–30.

\textsuperscript{87} D’Cunha, supra note 83, at 4; see also Jordan, supra note 83, at 28 (“A unique opportunity for non-governmental organizations (NGOs) and advocates to contribute to the development of a human rights-based response to the trafficking of human beings now exists. Many governments have signed a new international treaty on trafficking and are in the process of adopting domestic anti-trafficking laws.”). Such enforcement strategies are “largely reactive, focusing mostly on immediate post-trafficking assistance, and less on prevention.” D’Cunha, supra note 83, at 4; see also Mohamed Y. Mattar, Incorporating Five Basic Elements of Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention, 14 Tul. J. Int’l & Comp. L. 357, 360 (2006) (listing a number of nations that codified anti-trafficking in human beings).


\textsuperscript{90} Id. at 207.
ception, coercion, abuse of vulnerability, or exploitation . . . .”\(^{91}\) “Most typically, a person can initially consent to being assisted to migrate irregularly (or even to being smuggled), but become instead ‘trafficked’ if upon arrival to the country of destination, debt bondage, threats, or violence are used to coerce this person into forced labor . . . .”\(^{92}\)

The migrant model fails properly to address the role of trafficked people as victims of the sex trade.\(^{93}\) For example, the European Union has adopted two legal instruments to combat human trafficking.\(^{94}\) Article 5(3) of the Charter of Fundamental Rights of the European Union prohibits and criminalizes trafficking, but it does not address the plight of trafficking victims.\(^{95}\) The European Commission eventually addressed the problem by drafting the Directive on Short-Term Residency Permits for Trafficking Victims.\(^{96}\) The Directive attempts to protect victims of trafficking and smuggling by offering short-term residency in the destination country in exchange for cooperation with competent authorities.\(^{97}\) The granting of residence permits is subject to three considerations: (1) the necessity of having the victim present for investigation or judicial proceedings; (2) the victim’s clear intention to cooperate; and (3) the extent to which the victim has severed relations with suspected traffickers.\(^{98}\) Once the conditions are met, residence permits are granted and renewed based on the same three considerations.\(^{99}\)

\(^{91}\) Id. at 206–07.

\(^{92}\) Id. at 207.

\(^{93}\) See id.


\(^{95}\) See Charter of Fundamental Rights of the European Union, supra note 94, art. 5. Article 5 is the “Prohibition of Slavery and Forced Labor” and states: “1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour. 3. Trafficking in human beings is prohibited.” Id.

\(^{96}\) See Directive on Short-Term Residency Permits for Trafficking Victims, supra note 94, art. 2.


\(^{99}\) See id.
residence permit guarantees a minimum standard of living, including medical treatment and legal assistance.\textsuperscript{100} Nonetheless, requiring trafficked persons to meet these conditions of cooperation places a substantial burden upon them to prove that they are victims and not complicit members of the sex trade.\textsuperscript{101} Residence permits can be withdrawn or denied renewal depending upon the continued cooperation of the trafficking victim, leaving the victim in legally tenuous circumstances.\textsuperscript{102} This approach wrongly views sex trafficking victims as co-conspirators and illegal immigrants.\textsuperscript{103} Thus, trafficking victims face deportation unless they cooperate with law enforcement.\textsuperscript{104}

The residence permit may be withdrawn at any time if the conditions for the issue are no longer satisfied. In particular, the residence permit may be withdrawn in the following cases:

(a) if the holder has actively, voluntarily and in his/her own initiative renewed contacts with those suspected of committing the offences referred to in Article 2(b) and (c); or

(b) if the competent authority believes that the victim’s cooperation is fraudulent or that his/her complaint is fraudulent or wrongful; or

(c) for reasons relating to public policy and to the protection of national security; or

(d) when the victim ceases to cooperate; or

(e) when the competent authorities decide to discontinue the proceedings.

\textit{Id.} art. 14.

\textsuperscript{100} \textit{See id.} art. 7.

1. Member States shall ensure that the third-country nationals concerned who do not have sufficient resources are granted standards of living capable of ensuring their subsistence and access to emergency medical treatment. They shall attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, psychological assistance.

2. Member States shall take due account of the safety and protection needs of the third-country nationals concerned when applying this Directive, in accordance with national law.

3. Member States shall provide the third-country nationals concerned, where appropriate, with translation and interpreting services.

4. Member States may provide the third-country nationals concerned with free legal aid, if established and under the conditions set by national law.

\textit{Id.; see id.} art. 9.

\textsuperscript{101} \textit{See id.} art. 8.

\textsuperscript{102} \textit{Id.} art. 14.


\textsuperscript{104} \textit{See id.}
B. Gender and Rights Model

A gender and rights perspective on trafficking seeks to reconfigure the current dominant discourse on human sex trafficking, which is largely focused on a national security and law and order approach. The gender and rights approach acknowledges that women’s and children’s human rights are violated as a result of trafficking and focuses on protection and not criminalization. United Nations advisor Jean D’Cunha notes that the key elements of a gender and rights perspective on trafficking include: (1) universality of rights; (2) nondiscrimination, equality, and equity; (3) attention to vulnerable groups; (4) recognizing and guaranteeing new woman-specific rights and special rights for children; and (5) rights as empowering.

The final element underscores the relationship between rights and empowerment. Empowerment contains two different aspects. First, there is a structural dimension where legal, policy, and institutional environments generate a pervasive gender-and-rights-based culture.

105 D’Cunha, supra note 83, at 4.
106 Id. at 9.
107 Id. at 9–11. Jean D’Cunha defines the gender and rights perspective as distinguishing between concepts of sex and gender and their different social roles. Id. at 6. The gender and rights perspective recognizes that appropriate conduct for men and women is socially constructed and that the relationship status between men and women leaves women more disadvantaged. Id. She also notes that the prevailing gender stereotypes place less value on the social role of women and marginalize them from “ownership and control over the material (income, land) and non-material resources (time, political participation).” Id. Lastly, the gender and rights perspective holds that inequalities are socially conditioned and can be transformed in the direction of justice, equality, and fair participation between men and women. Id. at 6–7. “[A] gender and rights-based approach to development ensures fundamental human entitlements—social, economic and political—to expand choices, promote human well-being and empowerment in equitable and sustainable ways.” Id. at 30.
108 Id. at 11.
109 Id.
110 D’Cunha, supra note 83, at 11; see also Mattar, supra note 87, at 366. States are being held accountable through international instruments. Mattar, supra note 87, at 366. Mattar’s article outlines these international instruments, including:

The 1994 Inter-American Convention on International Traffic in Minors, which mandates that “[t]he States Parties undertake to adopt effective measures, under their domestic law, to prevent and severely punish the international traffic in minors defined in this Convention.” The Joint Action To Combat Trafficking in Human Beings and Sexual Exploitation of Children adopted by the European Council “mandates that Member States ‘review existing law and practice’ to classify trafficking as a criminal offense, provide the appropriate penalties for such offense and take the necessary measures that . . . ‘ensure . . . appropriate assistance for victims.’” The European Parliament, in a May 19, 2000, resolution, called for “legislative action against trafficking
This includes codifying the rights of trafficking victims and then developing appropriate enforcement strategies to give legal effect to those rights.\footnote{D’Cunha, supra note 83, at 11; see also Carole Angel, Immigration Relief for Human Trafficking Victims: Focusing the Lens on the Human Rights of Victims, 7 Md. L.J. Race, Religion, Gender & Class 23 (2007) (“To effectively address the trafficking phenomenon, policymakers must use a victim-centered approach that focuses on human rights, rather than ones that focus solely on narrowing of immigration laws or prosecution.”). Anti-trafficking laws promoting human rights would prevent violations and encourage anti-trafficking policies and programs. See Angel, supra, at 23–24. Once codified and defined, the rights would create a gender and rights-based culture which would then have the ability to hold states accountable. See id.} It also includes using international human rights law to hold states accountable for ensuring that such rights are realized through appropriate anti-trafficking laws and policies.\footnote{D’Cunha, supra note 83, at 11; see Kumar, supra note 6, at 317; Free the Slaves, Wash. D.C. & the Human Rights Ctr. of the Univ. of Cal. Berkeley, Hidden Slaves: Forced Labor in the United States, 23 Berkeley J. Int’l L. 47, 69 (2005) [hereinafter Hidden Slaves]; Theresa Barone, Note, The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution, 17 Temp. Int’l & Comp. L.J. 579, 583 (2003).} States would then be obliged to ensure that private persons and institutions respect, protect, and promote the practical realization of human rights.\footnote{See Hidden Slaves, supra note 112, at 69–70.} Second, there is an individual empowerment dimension, where knowledge and participation empower victims to “access remedies and claim rights” for themselves.\footnote{D’Cunha, supra note 83, at 11.} Ultimately, such a rights-based approach will ensure that appropriate actions are taken to punish violators of trafficking laws and in human beings, including common definition, incriminations and sanctions.” The Economic Community of West African States (ECOWAS) Declaration of December 2001 on the Fight Against Trafficking in Persons calls upon Member States to “Adopt, as quickly as possibly, such legislative and other measures . . . that are necessary to establish as criminal offences the trafficking in persons . . . .” The January 2002 South Asian Association for Regional Cooperation (SAARC) Convention on Prevention and Combating Trafficking in Women and Children for Prostitution mandates that “[t]he State Parties to the Convention shall take effective measures to ensure that trafficking in any form is an offence under their respective criminal law and shall make such an offence punishable by appropriate penalties which take into account its grave nature.” The European Council Framework Decision of July 19, 2002, mandates that member states must take the necessary measures, no later than August 1, 2004, to criminalize trafficking in persons and provide the appropriate penalties, in addition to assisting victims of trafficking. The Organization for Cooperation and Security in Europe (OSCE) Declaration on Trafficking in Human Beings of December 2002 states, “We will consider adopting legislative or other measures that permit victims of trafficking to remain in our territory, temporarily or permanently, in appropriate cases, and giving consideration to humanitarian and compassionate factors.”

\textit{Id.} at n.29 (citations omitted).

\footnote{See Hidden Slaves, supra note 112., at 69–70.}
to provide easily accessible remedies and reparations to trafficking victims.\textsuperscript{115}

III. INTERNATIONAL LEGAL RESPONSES TO SEX TRAFFICKING

The rise of globalization has led to an unanticipated boom in human trafficking that international governments are struggling to combat.\textsuperscript{116} The increase in cross-border trade, the demand for cheap, low-skilled labor, and an influx of mass-produced imports into developing countries is creating labor demands in foreign markets.\textsuperscript{117} Companies have taken advantage of this globalization by relocating or outsourcing operations to “low-wage economies” abroad.\textsuperscript{118} In turn, low-skilled laborers are traveling to foreign markets to fulfill the new labor demands.\textsuperscript{119} A major consequence of this labor migration is human trafficking.\textsuperscript{120} As Lorraine Corner has observed:

Economically marginalized people, particularly women, in developing countries are unable to realize their human right to a decent livelihood in their own country partly due to global inequities in trade. . . . The result is strong pressures in poor countries to migrate to industrialized economies in search of the means of livelihood [with people] often becoming victims of trafficking in the process.\textsuperscript{121}

Sex trafficking is on the rise as the labor demands for migrant women—who are less skilled and educated—leave them vulnerable to trafficking and the commercial sex trade.\textsuperscript{122} The growth of the commercial sex trade and sex tourism is increasing prevalence of sex traf-

\textsuperscript{115} Id. at 1.
\textsuperscript{116} Sally Cameron & Edward Newman, \textit{Trafficking in Humans: Structural Factors, in Trafficking in Humans: Social, Cultural and Political Dimensions} 21, 25 (2008); see Kumar, \textit{supra} note 6, at 304–05.
\textsuperscript{117} Cameron & Newman, \textit{supra} note 116, at 25.
\textsuperscript{118} Id. at 26.
\textsuperscript{119} Id. at 25.
\textsuperscript{120} Id. at 25–29.
\textsuperscript{121} Id. at 27–28 (quoting Lorraine Corner, \textit{A Gender Perspective to Combating Human Trafficking—An Integrated Approach to Livelihood Options for Women and Adolescent Girls} 13 (2002) (unpublished paper)).
ficking. In response, international governments have begun to enact statutes and create other instruments to combat the rising scourge of sex trafficking.

A. Europe

The European Union began to develop policies on human trafficking in 1996 when the European Commission acknowledged the pervasive problem of trafficking in women for sexual exploitation. Then, in 2002, the International Organization on Migrations, European Parliament, and the European Commission drafted the Brussels Declaration, detailing operations and mechanisms to curtail and prevent human trafficking. Two European Union law enforcement agencies, Europol and Eurojust, have had some success in combating trafficking. Europol handles criminal intelligence and supports member states as they combat human trafficking. Eurojust, meanwhile, establishes uniform immigration and asylum policy and combats trans-border crime by consolidating cooperation among authorities. As a whole, the European Union approach to human trafficking adopts the migration model that treats sex trafficking victims as illegal immigrants. Individual European nations, however, have adopted divergent approaches in their attempts to prevent and prosecute sex trafficking.

Sweden, for example, adheres to the gender and rights model of human trafficking. The Swedish code criminalizes traffickers, procurers, and purchasers of sex. Sweden recognizes prostitution as a

\[123\] Id. at 22.
\[124\] Id. at 23–24.
\[125\] Communication from the Commission to the Council and the European Parliament on Trafficking in Women for the Purpose of Sexual Exploitation, at 1, COM (96) 567 final (Nov. 20, 1996).
\[128\] Frequently Asked Questions, supra note 127.
\[129\] See The History of Eurojust, supra note 127.
\[130\] See Askola, supra note 89, at 212.
\[131\] See Ekberg, supra note 10, at 1189.
\[132\] See id.
\[133\] Brottsbalken [BrB] [Criminal Code] 6:8 (Swed.).
“form of male sexual violence against women and children.” It also recognizes that prostitution and human trafficking for sex purposes are harmful practices that are intrinsically linked and therefore should not be treated as separate entities. Sweden’s policy of prosecuting merchants and customers of prostitution, rather than the prostitutes, has reduced the number of women in prostitution by thirty to fifty percent and has shown a corresponding decreased in the number of men purchasing sex. As a result, Sweden is no longer an attractive market for sex traffickers.

Denmark also uses a gender and rights model. As part of a rights-based approach, the commercial sex trade operates legally in Denmark with restrictions on pimping, coercion into prostitution, soliciting a minor, and trafficking. There are between 5000 and 6000 prostitutes working in the country. Nearly half of the prostitutes are foreign nationals and potential trafficking victims, but Denmark assists sex trafficking victims instead of criminalizing their actions. The

A person who promotes or improperly financially exploits the casual sexual relations for payment of another person shall be sentenced for procuring to imprisonment for at most four years.

A person who, holding the right to the use of premises, grants the right to use them to another in the knowledge that the premises are wholly or to a substantial extent used for casual sexual relations for payment and omits to do what can reasonably be expected to terminate the granted right, he or she shall, if the activity continues or is resumed at the premises, be considered to have promoted the activity and shall be sentenced in accordance with the first paragraph.

Id.

134 Ekberg, supra note 10, at 1189.
135 Id.
136 Id. at 1193–94, 1210.
137 See id. at 1209. Another effective component of Sweden’s law enforcement response is the existence of extraterritorial laws that allow Swedes to be charged, prosecuted, and convicted under Swedish laws for crimes committed in another country. Id. at 1196–97. Thus, Swedes traveling abroad for sex tourism face the same penalty for purchasing sex abroad as they would if they purchased sex in their home country. Id.; see also Roger Boyes, Sweden-Denmark Link Boosts Red Light Trade, TIMES (London), June 21, 2008, available at http://www.timesonline.co.uk/tol/news/world/europe/article4183265.ece (detailing the aggressive methods of the Swedish law enforcement in combating the sex trade, including wire tapping and video surveillance, against Swedes who travel fifteen minutes to Denmark to purchase sex legally).
139 Id.
140 Id.
141 Id.
Dutch government helps trafficking victims return to their countries of origin and provides social, medical, and legal aid.\textsuperscript{142}

Despite the assistance and rights-based approach to trafficking victims, the trafficking of children persists in Denmark.\textsuperscript{143} In addition, Denmark is both a destination country and a transit point for women trafficked from the Baltic countries, Eastern Europe, Southeast Asia, West Africa, and Latin America.\textsuperscript{144} The Copenhagen police have documented instances of women being lured to migrate with the promise of higher wages and a better quality of life, only to be coerced into a life of prostitution.\textsuperscript{145} Indeed, Denmark did not recognize human trafficking as an offense until the European Council Framework decision on combating trafficking influenced Danish legislation as well.\textsuperscript{146} Now, the Denmark penal code establishes a maximum eight year sentence for trafficking offenses, but police prosecuted only twenty-three trafficking cases in 2007.\textsuperscript{147}

Germany, in contrast, focuses on criminal prosecutions.\textsuperscript{148} Though prostitution is legal in Germany, the government has an aggressive approach to combating trafficking and the German criminal code prohibits all forms of human trafficking.\textsuperscript{149} The largest number of sex trafficking victims are German nationals trafficked within the country.\textsuperscript{150} Germany is not a destination for child sex tourism.\textsuperscript{151}

German laws recognize that human traffickers are part of business enterprises and heavily penalize those involved in trafficking groups.\textsuperscript{152} Law enforcement uses an integrated approach that leads to a large number of investigations and convictions.\textsuperscript{153} In 2006, for example,

\textsuperscript{142} Id.
\textsuperscript{143} \textit{Trafficking in Children to Denmark, SAVE THE CHILDREN DENMARK}, 19 (2003), http://www.childcentre.info/projects/trafficking/denmark/dbaFile11026.pdf [hereinafter \textit{Trafficking in Children to Denmark}]. A 2003 study of the Denmark child sex trade found that young girls are trafficked into Denmark and kept under wraps by their foreign pimps. \textit{Id}. When Danish police encounter these minors, they are supplied with false identification. \textit{Id}. The study also found that children are procured for sex via cell phone or the internet. \textit{Id}.
\textsuperscript{144} \textit{Human Rights Report: Denmark}, supra note 138.
\textsuperscript{145} \textit{Id}.
\textsuperscript{146} \textit{Trafficking in Children to Denmark}, supra note 143, at 23–24.
\textsuperscript{147} \textit{Human Rights Report: Denmark}, supra note 138.
\textsuperscript{149} \textit{Id}.
\textsuperscript{150} \textit{Id}.
\textsuperscript{151} \textit{Id}.
\textsuperscript{152} \textit{Id}.
\textsuperscript{153} \textit{See Human Rights Report: Germany, supra note 148}.
Germany convicted 150 persons of trafficking.\textsuperscript{154} Traffickers face as many as ten years imprisonment and German courts have imprisoned nearly one third of those convicted of trafficking.\textsuperscript{155} The federal ministries coordinate anti-trafficking initiatives on the local, national, and international levels.\textsuperscript{156} In addition, federal states have cooperation agreements with law enforcement, state welfare agencies, and NGOs to assist trafficking victims.\textsuperscript{157} German law enforcement also shares intelligence information with Europol and Interpol.\textsuperscript{158}

B. Asia

Corruption, lenient law enforcement, and the lucrative nature of the sex trade comport to make Asia one of the most difficult regions in the world in which to combat sex trafficking.\textsuperscript{159} China and Thailand are two of the most egregious regions of sex trafficking.\textsuperscript{160} In China, criminal groups traffic thousands of Chinese women from their points of origin into the global sex trade market.\textsuperscript{161} Chinese criminal networks regularly transport women abroad and coerce them into prostitution.\textsuperscript{162} The U.S. State Department reports that Chinese criminal organizations traffic between 10,000 and 20,000 women and children annually.\textsuperscript{163} Although prostitution is illegal, it is estimated that between 1.7 and 6 million women are involved in the sex trade.\textsuperscript{164} Chinese gov-

\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Human Rights Report: Germany, supra note 148. Germany also assists victims with repatriation. Id.
\textsuperscript{160} See Human Rights Report: China, supra note 159; Human Rights Report: Thailand, supra note 159.
\textsuperscript{161} Human Rights Report: China, supra note 159.
\textsuperscript{162} See Shelley, supra note 6, at 124. Sex trafficking generates significant capital for Chinese organized crime because of the integrated business model. See id.
\textsuperscript{163} See Human Rights Report: China, supra note 159. The U.S. State Department has tracked Chinese women held captive and forced into prostitution in Ghana. See Trafficking in Persons Report, supra note 1, at 142.
\textsuperscript{164} See Human Rights Report: China, supra note 159.
ernment policies only exacerbate the tenuous plight of women. The one child policy, for instance, is zealously enforced by local government officials and belies a culture that does not value women. Discrimination, poverty, and violence contribute to the secondary status of women in Chinese society and lead to high rates of suicide. As a result, trafficking has become an extension of the diminished value of women in a society, where women are “bought, sold and murdered.”

Although China has enacted laws to curtail human trafficking, enforcement remains a serious problem. The U.S. State Department has placed China on its watch list because of the government’s inability to combat trafficking. China has failed to enforce trafficking laws that protect both Chinese and foreign trafficking victims and has failed to improve victim assistance programs.

Thailand is a global sex tourism destination. Although prostitution is illegal in Thailand, the commercial sex trade operates with little to no interference from law enforcement. In addition, the opportunity to engage in sex with underage girls is publicly advertised. Pros-

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165 See id. According to the World Bank and the World Health Organization, there are approximately five hundred female suicides per day. Id. The Beijing Psychological Crisis Study and Prevention Center reported that the suicide rate for females was three times higher than for males. Many observers believe that violence against women and girls, discrimination in education and employment, the traditional preference for male children, the country’s birth limitation policies, and other societal factors contribute to the high female suicide rate. Women in rural areas, where the suicide rate for women is three to four times higher than for men, are especially vulnerable. Id.


167 See id.

168 Id. at 732.

169 See id. at 743. China enacted the “Decision Relating to the Severe Punishment of Criminal Elements Who Abduct and Kidnap Women and Children,” providing that “the abduction and the sale of women and children [are] separate offenses.” Id. China further permits those who purchase women for sex to “be tried for the crime of rape under the Chinese Criminal Code.” Id. at 743–44. “Article 236 of the Chinese Criminal Code provides a three to ten year sentence for rape . . . .” Id. at 744. The “sexual exploitation of girls under the age of fourteen, however, can carry a sentence of life imprisonment or the death penalty.” Id.

170 Trafficking in Persons Report, supra note 1, at 105.

171 Id. China must “closely examine its policy of returning North Korean migrants and refugees to ensure that trafficking victims are protected rather than subjected to the harsh treatment migrants receive on their return to North Korea.” Id. at 92.


173 See id.

174 Id.
stitution is practiced openly with local officials complicit in its allowance.\textsuperscript{175} A Thailand government survey found that there are between 76,000 and 77,000 registered prostitutes in the country.\textsuperscript{176} NGOs, however, estimate the number to be between 200,000 and 300,000 prostitutes.\textsuperscript{177} Sex trafficking in children is especially pernicious, and in 2007 the Thai government as well as university researchers and NGOs “estimated that there were as many as 60,000 prostitutes under age 18.”\textsuperscript{178} Despite the prevalence of sex tourism, Thailand criminalizes prostitution, sex trafficking, and child sex trafficking.\textsuperscript{179} Thailand has also entered into memorandums of understanding with Laos and Cambodia to combat the tide of women and children crossing the border for sex trafficking, but enforcement remains questionable.\textsuperscript{180} Despite the efforts of the Thai government, sex tourism remains a significant portion of the economy.\textsuperscript{181} Thailand’s estimated income from prostitution in the last decade of the twentieth century was between twenty-two billion and twenty-seven billion dollars.\textsuperscript{182}

IV. U.S. LEGAL RESPONSES

The United States is one of the largest receiving markets for sex trafficking.\textsuperscript{183} Victims come from diverse areas of Asia, South America, and Eastern Europe.\textsuperscript{184} Mexico, however, is the primary source of U.S. sex trafficking victims.\textsuperscript{185} The United States has a complex interaction with Mexico regarding sex trafficking: American tourists travel to Mex-

\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Human Rights Report: Thailand, supra note 159.
\textsuperscript{178} Id.
\textsuperscript{179} See id.
\textsuperscript{181} Trafficking of Women and Children in East Asia and Beyond: A Review of U.S. Policy: Hearing Before the Subcomm. on E. Asian and Pac. Affairs of the S. Comm. on Foreign Relations, 108th Cong. 25 (2003) (testimony of Donna M. Hughes, Professor and Carlson Endowed Chair in Women’s Studies, University of Rhode Island).
\textsuperscript{182} See The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia 137 (Lin Lean Lim ed. 1998).
\textsuperscript{183} See Trafficking in Persons Report, supra note 1, at 57.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
ico to engage in child sex tourism; at the same time, organized criminal networks traffic Mexican women and girls into the United States for sexual exploitation. More than 20,000 children are victims of sex trafficking in Mexico, especially in tourist areas and border towns.

A. Current Approach

Similar to the European Union, the United States uses the migrant model in combating human trafficking. In 2000, Congress passed the Trafficking Victims Protection Act (TVPA) to combat the crisis of international trafficking of women to the United States. The TVPA acknowledges the pervasive problem of trafficking and focuses both on prosecuting traffickers and aiding victims. It also focuses on preventive measures and includes creative initiatives to educate women and girls on economic empowerment and the risks of human trafficking.

The TVPA mandates that trafficking victims are given assistance. It provides financial aid to local in-country NGOs for hotlines, protective shelters, and the creation of networks and databases to combat trafficking. Repatriations are also available to trafficking victims. U.S. victims of trafficking are eligible for benefits and services if they are victims of a severe form of trafficking. Victims who cooperate with law enforcement also garner benefits from the Department of Health and Human Services.

186 Id. at 206.
187 Id.
188 See Jordan, supra note 83, at 29, 30.
191 Id. § 7104.
192 Id. § 7105(b)(1).
193 Id. § 7105(a)(1)(A).
194 Id. § 7105(a)(1)(E).
195 22 U.S.C. § 7105(b)(1)(B). The term “victim of a severe form of trafficking in persons” is defined as a person who has been subjected to a commercial sex act induced by force, fraud, or coercion and who is either under eighteen years of age or the subject of a certification under section 7105(b)(1)(E). Id. §§ 7102(8), 7105(b)(1)(C).
196 Id. §§ 7102(8), 7105(b)(1)(C); see also Wyler & Siskin, supra note 27, at 35. Between 2001 and 2008, the Department of Health and Human Services certified 1696 people, 162 of whom were minors. Wyler & Siskin, supra note 27, at 35. The Office of Refugee Resettlement also funds and facilitates several programs “to help refugees’ economic
Individual victims of trafficking in other countries receive assistance as well.\textsuperscript{197} The TVPA provides financial support to NGOs that assist victims in other countries through social services and legal aid.\textsuperscript{198} It also entitles victims to receive assistance in repatriation or reintegration through treatment, education, and training.\textsuperscript{199}

Finally, the TVPA has a provision for the certification of trafficking victims who are in the country illegally and cooperate in the prosecution of traffickers.\textsuperscript{200} Trafficking victims who choose to testify and who are deemed “victim[s] of a severe form of trafficking in persons” are allowed to remain in the United States during the prosecution of the trafficker under a T-visa or upon the determination of the Department of Homeland Security.\textsuperscript{201}

Although the TVPA is a positive step for the United States in assisting trafficking victims, it fails to take a gender and rights approach to the problem.\textsuperscript{202} Instead, the legislation maintains the migrant model that requires that trafficking victims provide legal cooperation before being granted protection and assistance.\textsuperscript{203} A panoply of federally funded programs and services are available only after cooperation is established.\textsuperscript{204} The lure of receiving a T-visa and aid puts trafficked women in precarious and dangerous predicaments.\textsuperscript{205} Trafficked women who choose to cooperate with U.S. law enforcement risk violent reprisals.\textsuperscript{206}

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\textit{and social self-sufficiency in their new homes in the United States," including temporary housing, independent living skills, cultural orientation, transportation needs, education programs, and legal assistance to the certified trafficked persons. Id. (internal quotation marks omitted).}
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\textsuperscript{197} 22 U.S.C. § 7105(a)(1).
\textsuperscript{198} Id. § 7105(a)(1)(B)–(D).
\textsuperscript{199} Id. § 7105(a)(1)(E).
\textsuperscript{200} Id. § 7105(b)(1)(E)(i)(I).
\textsuperscript{201} Id. § 7105 (b)(1)(E)(i). T-visa certification entails cooperation in the investigation which includes: “(I) identification of a person or persons who have committed severe forms of trafficking in persons; (II) location and apprehension of such persons; (III) testimony at proceedings against such persons; or (IV) responding to and cooperating with requests for evidence and information.” Id. § 7105 (b)(1)(E)(iii). “Assistance to investigation” is clarified in section 7105 (b)(1)(E)(iv).
\textsuperscript{202} See 22 U.S.C. § 7105.
\textsuperscript{203} See id. § 7105 (b)(1)(E)(i).
\textsuperscript{204} See Wyler & Siskin, supra note 27, at 34–37. The Department of Justice provides aid to “precertification” trafficked victims with assistance for comprehensive services. Id. at 36. The vocational and legal needs of trafficking victims are addressed as well. Id. at 37. The Legal Services Corporation assists trafficking persons who have legal problems. Id. at 33.
\textsuperscript{205} See Tiefenbrun, supra note 3, at 161.
\textsuperscript{206} See id. at 161. The trafficked women who assist in prosecution are vulnerable to government manipulation and risk their lives. See id. Juveniles also are coerced into testifying against potential pimps and traffickers by use of material witness holds. See Geneva O.
women who do not cooperate face detention and deportation, regardless of whether or not they are convicted for working in the illegal sex trade.\textsuperscript{207} Once deported, they face a ten-year ban on reentering the United States.\textsuperscript{208} Even trafficked women who attempt to stay in the United States and cooperate with law enforcement may not be granted a T-visa.\textsuperscript{209} The number of T-visas granted by the U.S. government is limited: as of 2008, the Department of Homeland Security received 394 applications and only granted 247 T-visas.\textsuperscript{210} The Immigration and Customs Enforcement agency, meanwhile, may only issue up to 5000 special visas.\textsuperscript{211} In other words, very few trafficked women will ever be able to take advantage of the special immigrant visa or be able to “cooperate” with the Department of Homeland Security within the meaning of the TVPA.\textsuperscript{212} The harshness of this migrant model leaves trafficked women few choices: either face deportation or cooperate and risk retaliation, both of which frustrate prosecution efforts.\textsuperscript{213}

In contrast to other international migrant approaches that criminalize victims unless they cooperate, the United Nations takes a more progressive stance and recognizes trafficked women as victims and not criminal co-conspirators.\textsuperscript{214} The United Nations has acknowledged the plight of trafficked women by authoring principles and guidelines and

\begin{itemize}
\item \textsuperscript{208} See 8 U.S.C. § 1101 (2006); see also Daniel Kanstroom, \textit{Deportation Nation: Outsiders in American History} 10 (2007). Kanstroom notes, “Since 1997, more than 300,000 people have been deported from the United States because of post-entry criminal conduct . . . .” Kanstroom, \textit{supra}, at 10. See generally Michael O’Connor & Celia Rumann, \textit{The Death of Advocacy in Re-Entry After Deportation Cases}, CHAMPION MAG., Nov. 1999, http://www.criminaljustice.org/public.nsf/ChampionArticles/99nov03?OpenDocument (noting the changes in the law that force quick and problematic guilty pleas for immigrants who have a history of being deported from the United States, reenter the country, and face up to twenty year imprisonment penalties).  \\
\item \textsuperscript{210} See \textit{id.}  \\
\item \textsuperscript{211} See 8 U.S.C. §§ 1101(a)(15)(s)(i)(I), 1153(b)(4) (2006).  \\
\item \textsuperscript{212} See \textit{id.}  \\
\item \textsuperscript{213} See Kanstroom, \textit{supra} note 208, at 10.  \\
\end{itemize}
establishing a Special Rapporteur on the trafficking of women and children.215 These guidelines follow the gender and rights model, and emphasize the promotion and protection of the human rights of trafficked women.216 The principles include decriminalizing the illegal entry into countries as a trafficked person and banning the practice of confining trafficked women in detention facilities.217

The United Nations report additionally recommends that trafficked persons be protected from further exploitation and have access to adequate physical and psychological care.218 Rather than endorse the U.S response that seeks cooperation but does not initially provide a support apparatus, the United Nations recognizes that law enforcement can assist trafficked women by providing shelter, protection from traffickers, and travel assistance to home countries.219 In addition, the United Nations drafted the Optional Protocol to the Convention on the Rights of the Child in 2000 that addressed the sale of children, child prostitution, and child pornography.220 The Protocol requests that all state parties take all necessary steps to strengthen international cooperation for the prevention, detection, investigation, prosecution, and punishment of persons involved in those activities.221 For these reasons, the United Nations aims to shift policy away from the U.S. model

215 Id.
217 Id. at 3 (“Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”). Other principles include:

Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centers, other detention facilities or vagrant houses.

Id. at 10.
218 Id. at 10–11.
219 Id. at 9–10.
221 Id. at 222, 228–29.
that treats trafficked women and children as a “law and order problem” and penalizes victims with prostitution charges.\textsuperscript{222}

B. Problems with Prosecuting Traffickers

Global law enforcement numbers demonstrate that only a small percentage of traffickers are prosecuted.\textsuperscript{223} In the United States, prosecuting human trafficking has become a mandate for law enforcement agencies.\textsuperscript{224} Federal law enforcement has launched numerous trafficking initiatives to battle the mounting problem of human trafficking, with an emphasis on child sex trafficking.\textsuperscript{225} In June 2003, the FBI, the DOJ Child Exploitation and Obscenity Section (CEOS), and the National Center for Missing and Exploited Children (NCMEC) launched the Innocence Lost National Initiative.\textsuperscript{226} Innocence Lost addresses the domestic sex trafficking of children by coordinating state and federal law enforcement agencies, prosecutors, and social service providers.\textsuperscript{227} The initiative was responsible for the arrest of 356 individuals and the recovery of twenty-one children in 2008.\textsuperscript{228} In addition, U.S. Immigration and Customs Enforcement (ICE), the agency in charge of enforcing the TVPA, has the ability to arrest and hold traffickers under immi-

\textsuperscript{222} See Integration of Human Rights of Women and the Gender Perspective, supra note 214, at 6 (dismissing the sole use of the “law and order problem” in aiding sex-trafficking victims).

\textsuperscript{223} See UNICEF, supra note 52, at 16. UNICEF estimates that nearly one million children are bought and sold each year in the sex trafficking industry. See id. at 20. Yet, in 2008, states initiated only 5212 prosecutions and garnered only 2983 convictions. See Trafficking in Persons Report, supra note 1, at 47.

\textsuperscript{224} See Attorney General Report, supra note 209, at 1.

\textsuperscript{225} See id.

\textsuperscript{226} See id. at 36.

\textsuperscript{227} Id.

\textsuperscript{228} See id. The FBI also launched its own initiative, the Human Trafficking Initiative, in 2005 to further coordinate local law enforcement, NGO, and community group responses to human trafficking problems. Id. As part of the initiative, FBI field offices determine, via a threat assessment, the existence and scope of the trafficking problem in their region. Id. The field offices also participate in an anti-trafficking task force and establish and maintain relationships with local NGOs and community organizations. Id. The initiative focuses on conducting victim-centered investigations and reporting significant case developments. Id. In 2008, the FBI made 139 human trafficking arrests and garnered ninety-four convictions. Id.
The Need for a Sex Trafficker Registry

In 2008, ICE investigated 432 human trafficking claims and arrested 128 persons for sex exploitation.\(^\text{229}\) Though federal law enforcement has made strides in identifying and containing this problem, local law enforcement agencies play the primary role in combating human sex trafficking because the majority of arrests for human trafficking are made at the state level.\(^\text{230}\) Between 2007 and 2008, the DOJ noted that state law enforcement officials arrested sixty-eight percent of traffickers.\(^\text{231}\) Consequently, the training of local law enforcement is critical and is a central component of combating sex trafficking, both nationally and internationally.\(^\text{232}\) In recognition of this fact, the TVPA authorizes training for law enforcement to better identify victims of trafficking.\(^\text{233}\)

Forty-two states have laws combating human trafficking, yet no uniform approach to prosecution or victim assistance exists.\(^\text{234}\) Some states have no laws that identify human trafficking as a crime, whereas other states consider trafficking a felony and have dedicated trafficking task forces.\(^\text{235}\) Eleven states have enacted laws providing victim assistance and protection.\(^\text{236}\) Nine states provide mandatory restitution for trafficking victims.\(^\text{237}\) Five states require asset forfeiture.\(^\text{238}\) Even so, the ex-

\(^{229}\) See Attorney General Report, supra note 209, at 38. The goal of ICE is “to disrupt and dismantle domestic and international criminal organizations that engage in human trafficking by utilizing all ICE authorities and resources in a cohesive global enforcement response.” Id. at 37.

\(^{230}\) Id. The DOJ also focuses on prosecuting sex trafficking. In 2008, it investigated 183 trafficking cases, arrested eighty-two persons, and obtained seventy-seven convictions. Id. at 41–42. Fifty of the seventy-seven convictions were for sex trafficking. Id. at 42.

\(^{231}\) See Kyckelhahn et al., supra note 28, at 10.

\(^{232}\) See id. The majority of these arrests involved sex trafficking. Id.

\(^{233}\) See Mike Dottridge, Child Trafficking for Sexual Purposes, ECPAT Int’l, 22–23 (2008), http://www.ecpat.net/WorldCongressIII/PDF/Publications/Trafficking/Thematic_Paper_Trafficking_ENG.pdf. Internationally, education and training initiatives have increased the arrest and prosecution of sex traffickers. Id. at 22.


\(^{237}\) See id. at 7 (CA, CT, FL, ID, IL, IN, IA, MN, MO, NJ, and WA).

\(^{238}\) See id. at 12, 16, 30, 32, 34, 36, 56, 66, 82 (AZ, CA, ID, IL, IN, IA, MO, NJ, and PA).

\(^{239}\) See id. at 32, 52, 66, 82, 100 (IL, MN, NJ, PA, and WA).
istence of trafficking laws does not guarantee enforcement. States are reluctant to prosecute trafficking crimes because of the resources required to prove the legal requirements of force, fraud, or coercion. To prosecute traffickers effectively, there must be a more comprehensive and targeted approach that encompasses international, federal, and state legal apparatuses.

C. U.S. Sex Offender Laws

In addition to the TVPA, the United States uses sex offender laws to combat sex trafficking. U.S. sex offender laws seek to decrease recidivism dramatically among sex offenders. Though the sex offender category is rife with misunderstanding, the application of sex offender laws to sex trafficking could have a deterrent effect. Sex offender laws apply to individuals who commit sex crimes, including child molestation, incest, exhibitionism, rape, and voyeurism. Most state and fed-

240 See Heiges, supra note 8, at 437.

Existing law establishes the offenses of slavery and involuntary servitude. Existing law also makes it an offense to entice an unmarried female minor for purposes of prostitution, as specified, or to aid or assist with the same, or to procure by fraudulent means, any female to have illicit carnal connection with any man. Existing law also makes it a crime to take away any minor as specified, for purposes of prostitution. This bill would establish the crime of trafficking of a person for forced labor or services or for effecting or maintaining other specified felonies, and the crime of trafficking of a minor for those purposes, punishable by terms of imprisonment in the state prison for 3, 4, or 5 years, or 4, 6, or 8 years, respectively. The bill would permit a victim of trafficking to bring a civil action for actual damages, provide for restitution and punitive damages, and would establish a victim-caseworker privilege. By creating new crimes, this bill would impose a state-mandated local program.

Id.; see also Report Card on State Action to Combat International Trafficking, supra note 236, at 7. California leads the nation in trafficking law enforcement and victim assistance. See id. The Center for Women Policy Studies, which assesses state responses to trafficking, awarded California a grade of B in the area of “Victim Protection and Assistance.” Report Card on State Action to Combat International Trafficking, supra note 236, at 7. Three states received a grade of B (no A grades were achieved) for victim assistance and only seventeen states received a grade of B- or above in the category of “Criminalization Statutes.” Id.

244 See id. at 59–60.
245 See R. Karl Hanson & Kelly E. Morton-Bourgon, The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1154–55 (2005); Gina Robertiello & Karen J. Terry, Can We Profile Sex Offenders? A
eral laws outline multiple categories of sex offenders, and an offender’s punishment is dictated by the category of the crime.\footnote{246}

U.S. sex offender laws provide a model for the creation of an international trafficking registry that would both increase public support for the prosecution of trafficking offenders and potentially deter sex trafficking on a global scale.

1. Sex Offender Registration

Mandatory sex offender registration became a state and federal mandate in 1994 when Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Jacob Wetterling Act).\footnote{247} The Jacob Wetterling Act required states to create a sex offender registry.\footnote{248} Sex offenders who failed to register faced criminal penalties.\footnote{249} In 1996, Congress amended the Act to include a

\begin{quote}
\textit{Review of Sex Offender Typologies}, 12 Aggression \& Violent Behav. 508, 509 (2007). The definition of rape includes stranger and acquaintance rape. TK Logan et al., \textit{Differential Characteristics of Intimate Partner, Acquaintance, and Stranger Rape Survivors Examined by a Sexual Assault Nurse Examiner (SANE)}, 22 J. Interpersonal Violence 1066, 1067 (2007). Rape is also further defined to include date rape, marital rape, and power rape. \textit{Encyclopedia of Rape} 54, 123, 166 (Merril D. Smith ed., 2004).
\end{quote}

\footnote{246 See \textit{Encyclopedia of Rape}, supra note 245, at 509 (providing an overview and critique of U.S. federal and state sex offender laws that impose post-incarceration restrictions). For example, the state of New Jersey divides sex offenders into three risk assessment categories: (1) low risk of re-offense; (2) moderate risk of re-offense; and (3) high risk of re-offense. N.J. Stat. Ann. § 2C:7–8 (West 2007). If an offender is deemed a high-risk offender, the local prosecutor must notify law enforcement, community organizations, schools, and the public. \textit{Attorney General Guidelines}, supra note 242, at 23. High-risk sex offenders must also register on a publically accessible internet website. \textit{Id.} For moderate-risk sex offenders, the local prosecutor must notify local law enforcement, local educational institutions, licensed daycare centers, and licensed summer camps. \textit{Id.} at 22. The low-risk sex offenders must register with local law enforcement. \textit{Id.} See generally Chiraag Bains, \textit{Next Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions}, 42 Harv. C.R.-C.L. L. Rev. 483 (2007) (discussing constitutional challenges to sex offender laws).


\footnote{248 42 U.S.C. § 14071(a) (1)(A).

\footnote{249 Id. § 14071(d).}
public notification system commonly known as Megan’s Law.\textsuperscript{250} In 2005, Congress amended the Act again to include the Dru Sjodin National Sex Offender Public Website, a publicly accessible national sex offender registry.\textsuperscript{251} The national registry provides quicker and easier access to states’ individual sex offender registry websites.\textsuperscript{252}

Sex offender legislation changed again in 2006 with the passage of the Adam Walsh Act (AWA).\textsuperscript{253} The AWA comprehensively restructured sex offender laws.\textsuperscript{254} The AWA increased registration requirements and

\textsuperscript{250} See Emily White, Note, \textit{Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?}, 65 \textit{Wash. & Lee L. Rev.} 1783, 1788 (2008) (noting that Megan’s law “removed the requirement that states treat registry data as private information” and “mandated that state law enforcement agencies release sex offender registry information necessary to protect the public”). The amended Act also created a national FBI database of registered sex offenders that provided information to the public. \textit{Id.}


\textsuperscript{252} See Dru Sjodin National Sex Offender Public Website, U.S. DEPARTMENT OF JUSTICE, http://www.nsopw.gov/Core/Conditions.aspx (last visited Jan. 20, 2011). The Dru Sjodin National Sex Offender Public Website, coordinated by the U.S. Department of Justice, is a cooperative effort between the state agencies hosting public sexual offender registries and the federal government. \textit{Id.} This website is a search tool allowing a user to submit a single national query to obtain information about sex offenders through a number of search options. \textit{Id.}

\textsuperscript{253} 42 U.S.C. § 16901. After being kidnapped from a mall in 1981, Adam Walsh’s remains were found two weeks later. \textit{Adam Walsh Act Becomes Law, AMERICA’S MOST WANTED} (July 25, 2008), http://www.amw.com/features/feature_story_detail.cfm?id=1206. Adam’s father, John Walsh, became a television show host and advocate for tracking violent criminals. \textit{Id.} On the twenty-fifth anniversary of Adam’s disappearance, President Bush signed the Act into law. \textit{Id.}

\textsuperscript{254} Memorandum from Amy Baron-Evans & Sara Noonan, Nat’l Sentencing & Res. Counsel, to Defenders (Oct. 19, 2006), available at http://www.fd.org/pdf_lib/Adam%20Walsh%20MemoPt%201.pdf. Baron-Evans and Noonan summarized the major legislative changes:

[The AWA] established a complex . . . national sex offender registry law . . . and made significant changes to sexual abuse, exploitation and transportation crimes, including creating new substantive crimes, expanding federal jurisdiction over existing crimes, and increasing (often by a factor of two or greater) statutory minimum and/or maximum sentences. The Act did away with the statute of limitations for most sex crimes, placed . . . restrictions on discovery in child pornography cases, created new barriers to and strict conditions for pretrial release, added searches without probable cause as a discretionary condition of probation and supervised release for persons required to register as sex offenders, expanded the government’s authority to take DNA from persons not convicted of any crime, and added a new provision for civil
sex offender classifications.\textsuperscript{255} It places states under a federal mandate to register sex offenders and to maintain updated information on where the offender lives, works, or attends school.\textsuperscript{256} Title I of the AWA created the Sex Offender Registration and Notification Act (SORNA).\textsuperscript{257} SORNA established new sex offender registration and community notification standards.\textsuperscript{258} It allows the public to readily research local sex offenders on the federal database.\textsuperscript{259} SORNA’s community notification standards require jurisdictions to inform schools, community organizations, and other entities that work with minors on sex offenders’ whereabouts including their homes, schools, and workplaces.\textsuperscript{260} Knowingly failing to register or update under SORNA could lead to a fine or imprisonment of up to ten years.\textsuperscript{261}

AWA expanded the classification of a sex crime to include “a criminal offense that has an element involving a sex act or sexual contact with another.”\textsuperscript{262} The expansion requires juvenile sex offenders to register as sex offenders if the offense occurred when the offender was fourteen years old or older.\textsuperscript{263} It also creates a three-tier registration system where the registration length for offenders is dependent upon the seriousness of their offenses.\textsuperscript{264} Finally, the Act extended the sex offender definition to include sex crimes against children, including sex trafficking.\textsuperscript{265}

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commitment of “sexually dangerous persons.” It also enacted certain victim rights in state prisoner habeas proceedings and a right of sex crime victims to receive damages of $150,000 in civil actions.

\textit{Id.} at 1.

\textsuperscript{255} \textit{Id.} at 12.

\textsuperscript{256} 42 U.S.C. §§ 16912(a), 16913(a).

\textsuperscript{257} \textit{Id.} § 16901.

\textsuperscript{258} \textit{Id.} § 16918. SORNA requires publicly accessible sex offender information on the internet. \textit{Id.}

\textsuperscript{259} \textit{Id.}

\textsuperscript{260} \textit{Id.} § 16921. The community notification provision requires that, “immediately after a sex offender registers or updates a registration, an appropriate official . . . shall provide the information in the registry” to the Attorney General, local law enforcement agencies, jurisdictions where the sex offender resides, works, or is a student, social services entities, volunteer organizations, and persons who request such notification pursuant to procedures established by the jurisdiction. \textit{Id.} § 16921(b).


\textsuperscript{262} 42 U.S.C. § 16911 (5) (A) (1).

\textsuperscript{263} \textit{Id.} § 16911 (8).

\textsuperscript{264} \textit{Id.} § 16911 (including relevant definitions such as the Amie Zyla expansion of sex offender definition and expanded inclusion of child predators).

\textsuperscript{265} \textit{Id.} § 16911 (3) (A) (i).
2. Legal Challenges to Sex Offender Registries

Researchers and victims’ advocates question the efficacy of sex offender categorizations.266 Sex offender registration laws are most commonly challenged as ex post facto laws.267 If a statute is retroactive and makes actions criminal that were not criminal during the commission of the offense, it violates the Ex Post Facto Clause of the Constitution.268 Courts, though, have upheld sex offender registration laws that apply retroactively, holding that state control of future crimes is not a violation of a sex offender’s constitutional rights.269

For a registration law to violate the Ex Post Facto Clause, it must meet the two-part test enunciated by Justice Thurgood Marshall in *Weaver v. Graham*.270 First, the law “must be retrospective, that is, it must apply to events occurring before its enactment,” by altering the legal consequences of events.271 Second, the law must also disadvantage the offender.272 The new law must assign a more disadvantageous criminal or penal consequence to an act than did the law in place when the act occurred.273 In addition, to violate the Ex Post Facto Clause, the penalizing mechanism established by the law must be criminal and punitive in nature.274 In *Kennedy v. Mendoza-Martinez*, the U.S. Supreme Court delineated seven criteria in determining whether a statute is punitive and thus potentially unconstitutional.275

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267 See id. at 164.
268 U.S. Const. art. I, § 9, cl. 3; § 10, cl. 1.
271 Id.
272 Id.
273 Id. at 30 n.13.
274 United States v. Ward, 448 U.S. 242, 248–49 (1980). In *United States v. Ward*, the Supreme Court announced a two-part test to determine whether a claim is criminal or civil in nature. *Id.* at 248–49. The court must “determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” *Id.* at 248. Where Congress intended a civil remedy, the court must determine “whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.” *Id.* at 248–49.
275 Kennedy v. Mendoza-Martinez, 372 U.S. at 168. The Court reviewed the criteria for scrutinizing whether a statute is punitive in nature and therefore unconstitutional:
Courts look to the Mendoza-Martinez criteria when determining whether a sex offender registration law violates the offender’s constitutional rights. In Kansas v. Hendricks, the U.S. Supreme Court upheld a Kansas civil commitment law under a Mendoza-Martinez analysis, finding the law was not punitive in nature. In Hendricks, a sex offender who completed his prison sentence, but whom the Kansas courts then committed civilly, challenged the commitment. The Court concluded that the statutory purpose of the commitment law—to treat dangerous sex offenders and protect society—was civil and non-punitive in nature.

Alaska’s Sex Offender Registration Act withstood a similar constitutional challenge. The Alaska law required all sex offenders to register, including offenders whose crimes predated the act. The Alaska Department of Public Safety maintained the registry and offenders who failed to register faced criminal prosecution. In Smith v. Doe, the U.S. Supreme Court held that the purpose of the legislation was civil and not punitive. The Court further cited Hendricks in determining that the law had a legitimate, non-punitive governmental objective. The Court finally reviewed the Mendoza-Martinez factors and found that the law required no physical or affirmative restraints, that offenders were.

The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

See Smith, 538 U.S. at 86–87; Noble, 829 P.2d at 1221–24; Alva, 92 P.3d at 312–17; Castellanos, 982 P.2d at 218; see also Griffin & West, supra note 266, at 161 (discussing courts’ reliance on Mendoza-Martinez criteria).


Id. at 350.

Id. at 360.

See Griffin & West, supra note 266, at 161.

Smith, 538 U.S. at 105–06.

Id. at 90–91.

Id. at 92.

Id. at 93.
free to pursue jobs or change residences, and that the legislation’s deterrent effect did not make it punitive.285

Federal legislation has also been challenged under the Ex Post Facto Clause.286 Courts have determined that the AWA, and SORNA in particular, are not additional punishments inflicted upon sex offenders.287 Even though SORNA’s registration requirements apply to sex offenders whose offenses took place prior to its enactment, it does not violate the Ex Post Facto Clause because registration is not punitive: registration requirements are not historically regarded as punishment, they do “not ‘impose [...] an affirmative disability or restraint,’” and they do “not ‘promote[] traditional aims of punishments.’”288 Rather, courts note that registration “has a ‘rational connection to a nonpunitive purpose:’ and is not ‘excessive with respect to this [nonpunitive] purpose.’”289 Although SORNA requires detailed personal information and requires offenders to appear in person (so that the jurisdiction can take a personal photograph and verify information), SORNA is not a criminal punishment under ex post facto methodology.290

There has been one instance, however, where an individual provision of SORNA was found to be punitive.291 In Michigan, the Attorney General sought to prosecute an offender who failed to register or report his travel, actions that occurred before the enactment of the AWA.292 In the ensuing legal challenge, the Federal District Court for the Southern Division of Michigan held that the ten year penalty for failing to register for travel that fell outside the enforcement period violated the Ex Post Facto Clause.293

285 Id. at 100, 102.
286 See United States v. Comstock, 130 S.Ct. 1949, 1955 (2010). Although an extensive discussion of civil commitment under the AWA is beyond the scope of this article, the U.S. Supreme Court recently decided Comstock, in which prisoners challenged the federal authority to authorize civil commitments. Id. The Court held that Congress had the constitutional authority to enact 18 U.S.C. § 4248, which allows court-ordered civil commitment by the federal government of (1) “sexually dangerous” persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) “sexually dangerous” persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial. Id. at 1954.
287 United States v. Madera, 474 F. Supp. 2d 1257, 1265 (M.D. Fla. 2007), rev’d, 528 F.3d 852 (11th Cir. 2008).
288 Id. at 1263–64 (citing Smith, 538 U.S. at 97).
292 Id. at 848.
293 Id. at 853–54.
SORNA remains good law even as it continues to be constitutionally challenged. The legal challenges to sex offender registries demonstrate that state legislation and sweeping federal legislation such as the AWA must be crafted with a civil, non-punitive purpose and that enforcement must fall within the statutory guidelines.

V. THE NEED FOR AN INTERNATIONAL SEX TRAFFICKING REGISTRY

Applying sex offender laws to sex traffickers on an international scale will further the international cooperation critical to combating increasingly organized trafficking enterprises. The consequences of sex trafficking penetrate international borders and creating a trafficking registry database will help enforce trafficking laws and control the global flow of exploited women and children.

The use of sex offender registries in the United States has proved effective in deterring repeat offenders. As demonstrated, the registry requirements have withstood constitutional challenges. An international sex trafficker registry based on the U.S. model would be both


295 Smith, 538 U.S. at 92.

296 See 42 U.S.C. §§ 16920, 14071. See generally Ad Hoc Comm., supra note 20 (convention on the “protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children”); Miko & Park, supra note 4 (studying sex trafficking issues in the United States and international community); Green, supra note 1 (detailing how exceptional measures must be taken to eradicate harm of child sex trafficking); Annual Report 2000: Trafficking in Human Beings, supra note 76 (discussing Europol’s collaborations with member states in combating sex trafficking); New Global Treaty, supra note 27 (discussing ways the United Nations will combat sex trafficking); U.N. Conference Report, supra note 72 (discussing trafficking in persons and peacekeeping operations).

297 See New Global Treaty, supra note 27.

298 See No Easy Answers, supra note 12, at 4, 59–61.

There is no doubt that a sex trafficking registry would be part of the stronger and more unified international enforcement effort for which the United Nations is calling.301

The trafficking registry should contain pertinent information regarding known traffickers based on warrants issued by judicial bodies or on previous convictions.302 This information sharing will assist in the worldwide prosecution of traffickers and help states seeking extraterritorial avenues to enforce trafficking laws.303 Thus, a trafficking registry will provide additional information that will aid states attempting to prosecute actions that occur abroad, such as child sex tourism.304

A sex trafficking registry would be another weapon to assist Interpol and national and local agencies with the enforcement of international laws against sex trafficking and child sex tourism.305 Already, Interpol has placed an emphasis on information sharing between law enforcement agencies.

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300 See New Global Treaty, supra note 27.


302 See 42 U.S.C. § 16911 (2006); O’Briain et al., supra note 9, at 40; supra note 252 and accompanying text. Information provided for trafficking registries should meet an evidentiary standard or be reviewed by a judicial body. False allegations and incorrect information could be detrimental not only to the persons accused, but also to the integrity of the registry.

303 See O’Briain et al., supra note 9, at 35–36, 50.

304 Id. at 35–36 (footnotes omitted).

305 See 42 U.S.C. §§ 16920, 14071. See generally Ad Hoc Comm., supra note 20 (convention on the “protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children”); Miko & Park, supra note 4 (studying sex trafficking issues in the United States and international community); Green, supra note 1 (detailing how exceptional measures must be taken to eradicate harm of child sex trafficking); Annual Report 2000: Trafficking in Human Beings, supra note 76 (discussing Europol’s collaborations with member states in combating sex trafficking); New Global Treaty, supra note 27 (discussing ways the United Nations will combat sex trafficking); U.N. Conference Report, supra note 72 (discussing trafficking in persons and peacekeeping operations).
enforcement agencies on sex traffickers.\textsuperscript{306} Interpol works against child sex tourism by identifying and locating perpetrators of crimes against children in the international arena.\textsuperscript{307} With Project Childhood, Interpol addressed sex tourism by seeking partnerships with police authorities in the prosecution of child sex tourists and other abusers.\textsuperscript{308} By disseminating data through a notice and diffusion system, law enforcement agencies are able to exchange information regarding wanted criminals.\textsuperscript{309} This is the type of integrated legal response needed to combat sex trafficking more efficiently on a global scale.\textsuperscript{310}

\textbf{Conclusion}

The growing phenomenon of human sex trafficking is a global problem that requires international cooperation and innovation. Current law enforcement responses are disjointed and a more uniform understanding and approach to the issues that underlie sex trafficking is necessary. Criminal trafficking enterprises are increasingly organized and intricate business operations. International and national bodies must implement new ideas and actions that take into account both the presence of organized crime groups and the plight of trafficking victims.

Although some governments, such as Sweden, have embraced the gender and rights model in combating human sex trafficking, other governments, such as the United States, still follow an outdated migrant model that unfairly burdens victims of the sex trade. If implemented uniformly, a rights-based approach—as adopted by the United Nations—will simultaneously serve the needs of trafficking victims and the necessity of prosecuting trafficking offenders.

One important step in improving the international response to sex trafficking is to create public awareness of this pernicious problem. Such awareness should give greater momentum to enacting laws and policies that effectively address trafficking. Developing an international sex trafficker registry is one strategy that will both increase public awareness of the problem and serve as an effective apparatus for law enforcement agencies to prevent and prosecute sex trafficking. Requiring sex traffickers to register in an international database—similar to current U.S. sex offender databases—will help create a social stigma for

\textsuperscript{306} O’Brien et al., \textit{supra} note 9, at 40.
\textsuperscript{307} Id.
\textsuperscript{308} See \textit{Fact Sheet}, \textit{supra} note 9.
\textsuperscript{309} Id.
\textsuperscript{310} See O’Brien et al., \textit{supra} note 9, at 40, 50.
traffickers and trafficking crimes that will lead to increased public desire to combat trafficking. A sex trafficking registry would also be an additional strategy for law enforcement. Collecting trafficker information and creating a database that is accessible to law enforcement agencies internationally will assist in the prosecutions of traffickers everywhere.

International law enforcement must find innovative approaches in its struggle against human trafficking. The current landscape, where sex trafficking victims are forced to risk their lives in assisting prosecutors as they garner convictions, is insufficient. The onus must be on states to create a new apparatus to combat sex trafficking. A starting point would be the creation of an international sex offender registry.
THE RIGHT TO BE HEARD: VOICING THE DUE PROCESS RIGHT TO COUNSEL FOR UNACCOMPANIED ALIEN CHILDREN

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Abstract: Every year, the Department of Homeland Security detains thousands of unaccompanied alien children who have crossed the border into the United States. The framework set out in *Lassiter v. Department of Social Services* and *Gideon v. Wainwright* for all civil litigants creates a stumbling block in recognizing a constitutional right to counsel in the immigration context, but this Article argues that unaccompanied alien children do, in fact, have a constitutional right to counsel. Unaccompanied alien children are in unique circumstances and their right to counsel is three-fold. First, immigration law and procedure are complex and an unaccompanied child can effectively pursue claims for relief before the immigration courts only with the assistance of counsel. Second, pending the outcome of immigration proceedings, a child may have the right to reunification with family members in the United States. Third, the conditions in detention facilities are often horrendous and appointed counsel would ensure that a child is not subjected to inhumane treatment while his or her case is pending. This three-fold necessity, in addition to the unique circumstances of unaccompanied alien children, gives rise to a constitutional right to counsel.

Introduction

What am I doing here? And how can I get out? These are the two basic questions of children detained for days, months, and sometimes years by the federal government of the United States.¹ When the De-

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partment of Homeland Security (DHS) apprehends an unaccompa-
nied alien child inside the United States or at the border, he or she is
placed in the care and custody of the Department of Health and Hu-
man Services (HHS). The legal interests of an unaccompanied alien
child in federal custody are threefold, each as pressing as the next. First and most evident are the child’s legal needs as he or she is placed in removal proceedings and may pursue claims for relief before an im-

The Women’s Refugee Commission statistics reflect average stays between twelve and ninety-nine days for children in the various types of facilities. Women’s Refugee Comm’n, Statistics, supra. However, children are sometimes held in DUCS facilities for lengthier periods. See Linda Kelly Hill, The Right to Know Your Rights: Conflicts of Interest and the Assistance of Unaccompanied Alien Children, 14 U.C. DAVIS J. JUV. L. & POL’Y 263, 284–88 (2010). The author’s experience working with unaccompanied alien children is largely a result of the Indiana University Clinic’s work with the children detained at the Southwest Indiana Regional Youth Village (SIRYV) in Vincennes, Indiana. Id. at 265.

2 See Homeland Security Act of 2002, 6 U.S.C. § 279 (2006). An unaccompanied alien child is a minor child who has no lawful U.S. immigration status and has either no parent or legal guardian in the United States or no parent or legal guardian in the United States available to provide for his or her care and physical custody. See id. § 279(g) (2). Pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), the Department of Homeland Security (DHS) must notify the Department of Health and Human Services (HHS) within forty-eight hours if it has custody of an unaccompanied child and transfer the child to HHS within seventy-two hours. See Pub. L. No. 110-457, § 235(b)(2)–(3), 122 Stat. 5044, 5077 (codified as amended at 8 U.S.C.A. § 1232(b)(2)–(3) (West Supp. 2010)). The TVPRA also requires HHS, in consultation with DHS, to develop procedures allowing “prompt determinations” of an alien’s age with evidentiary guidelines. See 8 U.S.C.A. § 1232(b) (4). DHS retains its role in prosecuting an unaccompanied minor child for removal and returning any child to his home country if the United States Executive Office for Immigration Review (EOIR) orders removal. See OLGA BYRNE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW 17–19 (2008), available at http://www.vera.org/download?file=1775/UAC%2Bliterature%2Breview%2BFINAL.pdf. There are also numerous scholars who have written in detail and criticized the responsibilities of DHS regarding alien children prior to further amendments of the TVPRA. See, e.g., id. at 19; Christopher Nugent, Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children, 15 B.U. PUB. INT. L.J. 219, 229–31 (2006) (discussing DHS’s gatekeeper role); CHAD C. HADDAL, CONG. RESEARCH SERV., RL 33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 4–8, 25–27 (2007), available at http://assets.opencrs.com/rpts/RL33896_2007070301.pdf (discussing DHS’ interpretation of unaccompanied minor child, seventy-two hour standard transfer arrangement with the Office of Refugee Resettlement (ORR), and statistics and explanations for violations of the seventy-two hour rule for fiscal years 2005 and 2006); see also HALFWAY HOME, supra note 1, at 5–12 (discussing DHS’s gatekeeper role); Women’s Refugee Comm’n, Statistics, supra note 1 (reporting for calendar years 2005 and 2006 and through June, 2007 that 93.2%, 95.1%, and 85.7%, respectively, of unaccompa-
nied minors were transferred to ORR custody within seventy-two hours).

migration court. Second, pending the outcome of these proceedings, an unaccompanied alien child may have the right to be released to his or her family. Third and equally important is the requirement that detention conditions meet certain minimum standards. Thus, an attor-

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In addition to the two overarching provisos that children should be held in the least restrictive setting and treated with dignity, respect, and special concern for their vulnerability as minors, the *Flores* list of custodians includes: (1) a parent, legal guardian, or adult relative (sibling, aunt, uncle, or grandparent); (2) an adult individual designated by a parent or guardian; (3) a licensed care program; and (4) other adults or entities when there is no other likely alternative to long term detention and no reasonable possibility of family reunification. See *Flores Stipulated Settlement Agreement*, *supra*.

Government regulations more narrowly dictate the conditions for release. See 8 C.F.R. § 236.3(b) (2010). Pursuant to federal regulations, a child may be released, in order of preference, to: (1) a parent, legal guardian, or an adult relative (sibling, aunt, uncle, or grandparent) who is not in DHS detention; (2) a parent, legal guardian, or an adult relative in DHS detention if such adult and child could be released simultaneously; (3) a person designated by the parent or legal guardian via sworn affidavit when such parent or legal guardian is outside the country; or (4) in unusual and compelling circumstances, to another adult who agrees to care for the child and ensures his or her presence at all subsequent immigration proceedings. See id.

Compared to the federal regulations, *Flores* creates a larger group of possible custodians and omits the necessity of an unusual and compelling circumstance in order to have a child released to another adult not designated by the parent. See 507 U.S. at 292–93; 8 C.F.R. § 236.3(b). There has also been further scholarship into the interplay between *Flores*, the *Flores* Settlement, and federal administrative standards. See, e.g., *Flores Stipulated Settlement Agreement*, *supra*; Byrne, *supra* note 2, at 20–21; Lara Yoder Nafziger, *Protection or Persecution?: The Detention of Unaccompanied Immigrant Children in the United States*, 28 HAMLINE J. PUB. L. & POL’Y 357, 364–75, 379–85 (2006); Nugent, *supra* note 2, at 223–24.

6 See *Halfway Home*, *supra* note 1, at 58–59. DUCS facilities can largely be separated into three groups based upon the level of security provided: shelter, staff-secure, and secure. Shelter care is the least restrictive setting provided to children who cannot be released or placed in foster care but who do not need a higher level of supervision or services. *Id.* at 56–57. Staff-secure care is designated for children who require close supervision but who do not need placement in a secure facility. *Id.* at 57. Pursuant to the DUCS Manual, a secure placement is necessary for children who: (1) are charged with or convicted of a crime or adjudicated as delinquent; (2) have committed or threatened acts of crime or violence while in DUCS custody; (3) have engaged in unacceptably disruptive
ney's representation is not limited to removal proceedings, but also includes reunification and detention matters.

This Article argues that this threefold necessity, combined with an evaluation of existing conditions of care and custody, compels the recognition of a constitutional due process right to counsel for unaccompanied alien children. This guarantee should be applied on a class-wide basis to protect all unaccompanied alien children who have entered the United States and cannot otherwise secure representation during immigration proceedings. Arguing on behalf of unaccompanied alien children as a group rather than as individuals tests the framework that Lassiter v. Department of Social Services grafted upon Gideon v. Wainwright for all civil litigants. Yet, rather than pitting one group of aliens demanding public counsel against another, this Article evaluates the broad recognition of an unaccompanied alien child’s need for counsel, the failure of political efforts to secure such representation, and how protecting this right benefits not only unaccompanied alien children, but also the state. Part I provides an overview of the current conditions of care and custody provided to unaccompanied alien children and the political limits of efforts to secure them counsel. Part II reviews the Gideon landscape applicable to all civil litigants in search of counsel, and Part III argues for the recognition of a constitutional right to counsel for unaccompanied alien children.

acts; (4) are a flight risk; or (5) need extra security for their own protection. Id. Therapeutic and foster care settings are also provided. Id. While distinguishing “shelter” and “staff-secure” placement standards remains within the purview of DUCS, there are statutory standards for determining which children require placement in a secure facility. See 8 U.S.C.A. § 1232(c)(2) (“A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.”); Halfway Home, supra note 1, at 57.

Regardless of the level of security, all facilities must meet both state licensing and ORR requirements. Halfway Home, supra note 1, at 92 n.241. These standards set guidelines for matters such as physical care and maintenance, education, health services, socialization, recreation, and family contact. See Flores Stipulated Settlement Agreement, supra note 5 (referencing the Minimum Standards for Licensed Programs in Exhibit 1); Kelly Hill, supra note 1, at 275–80; see also Haddal, supra note 2, at 9 (identifying the nature of DHS and ORR detention facilities).

7 See generally Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18 (1981) (holding that the constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding); Gideon v. Wainwright, 372 U.S. 335 (1963) (finding that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed to him pursuant to the Sixth and Fourteenth Amendments).
I. THE CARE, CUSTODY AND REPRESENTATION OF UNACCOMPANIED ALIEN CHILDREN

Since 2003, the number of unaccompanied alien children in custody has increased 225%. This population growth coincided with the passage of the Homeland Security Act of 2002 (HSA) and its transfer of the responsibility for the care and custody of unaccompanied alien children from the Commissioner of the Immigration and Naturalization Service (INS) to the HHS Director of Office of Refugee Resettlement (ORR). This statutory mandate prompted ORR to create a new divi-

8 Halfway Home, supra note 1, at 84 n.9. In 2002, approximately 5000 children were subject to detention; by 2007, 8300 children were in ORR custody. Id. at 4. The last year unaccompanied children were in INS custody was 2002. See id. The rates of custody have grown since DUCS assumed responsibility. See id. In 2003, DUCS’s first operational year, DUCS detained approximately 5000 children; in 2004, 6200; in 2005, 7800; in 2006, 7750. See Haddal, supra note 2, at 23 (reporting statistics by fiscal year). The Women’s Commission provides comparable statistics. It reports that in calendar year 2005, 7332 unaccompanied minors were subject to ORR detention; in 2006, 7657; and for the first half of 2007, 3443. See Women’s Refugee Comm’n, Statistics, supra note 1.

Scholars Jacqueline Bhabha and Susan Schmidt have examined the increased migratory trends of unaccompanied (defined herein as “entirely alone”) and separated (defined herein as “in the company of non-parental adults”) minors to the United States and comparison to similar trends in other global regions. See Jacqueline Bhabha & Susan Schmidt, Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S., 1 J. Hist. Childhood & Youth 126, 129, 131–34 (2008). While Bhabha and Schmidt’s article focuses on unaccompanied children in ORR care and custody, the figures provided for all “unauthorized alien juveniles” (not specifically unaccompanied minors) who are apprehended by DHS are noteworthy. See id. at 129. For the fiscal years 2001–2006, DHS apprehended over 86,000 children every year. See Haddal, supra note 2, at 22. Approximately four out of every five of those apprehended in border sectors are nationals of Mexico. Id. at 21. The disparity between the number of children apprehended by DHS and children put in ORR detention is largely explained by children opting for immediate repatriation or being released to family in the United States. See id. at 30–32; see also Kelly Hill, supra note 1, at 268–69 n.13 (describing the repatriation policies uniquely applicable to Mexican and Canadian aliens).

It should also be recognized that children may be detained by DHS if detained with their family or otherwise considered “accompanied.” Halfway Home, supra note 1, at 4. While reporting on such children and DHS detention conditions, the Women’s Refugee Commission was unable to obtain complete information from DHS regarding the number or whereabouts of such children. Id.

9 See Homeland Security Act of 2002, 6 U.S.C. § 279(a) (2006). Among its other provisions, the Homeland Security Act created the Department of Homeland Security (DHS) and eliminated INS, thereby completely restructuring the executive branch’s immigration duties and lines of authority. Id. §§ 111(a), 542(a). The Act also consolidated other agencies responsible for homeland security, such as the Coast Guard, the Secret Service, the Federal Emergency Management Agency, the Transportation Security Administration, and the Customs Services, under DHS. Id. § 542(a); see also Thomas Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy 268–78 (6th ed. 2008) (discussing the Homeland Security Act and its amendments); Ira J. Kurzban, Immigration Law
sion, the Department of Unaccompanied Children’s Services (DUCS), which provides for the care and placement of unaccompanied alien children by contracting with private facilities. The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) clarifies any ambiguity regarding lines of authority by designating the responsibility for the care and custody of unaccompanied alien children to the Secretary of HHS.

These two factors—the growing number of detained children and the restructuring of federal immigration agencies—motivated the Women’s Refugee Commission of the non-profit International Rescue Commission (Women’s Commission) to study the developments. In February 2009, the Women’s Commission released a report entitled Halfway Home: Unaccompanied Children in Immigration Custody. The report is based primarily on visits by the Women’s Commission to thirty DUCS facilities and on interviews with more than two hundred children. In its findings and recommendations, the Women’s Commission acknowledges that HHS is the “federal entity best suited to maintain custody of children in immigration proceedings” and that children have “greatly benefitted” from the transfer of custody from INS to ORR.


10 Halfway Home, supra note 1, at 12–14. Created in March 2003, DUCS began with a budget of approximately thirty-five million dollars and seven staff members. Id. at 14. By fiscal year 2008, the program’s projected budget reportedly grew to $132.6 million, with eighteen employees at its headquarters and eleven others spread out across the country. Id. At the local level, DUCS field employees work with the private facilities to ensure care meets appropriate standards. See id. For a review of the quality of care provided and existing standards, see infra notes 12–25 and accompanying text.


12 Halfway Home, supra note 1, at 1. The study was conducted and authored by the Women’s Commission and the private law firm of Orrick, Herrington & Sutcliffe LLP. See id. at 3–4. In 2002, the Women’s Commission reported on the former treatment of unaccompanied children by INS. See generally Women’s Comm’n for Refugee Women & Children, Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children, Women’s Refugee Comm’n, 1–3 (2002), http://womensrefugeecommission.org/programs/detention/55-detention/81-unaccompanied-children-and-family-detention (reviewing a multi-state assessment of detention facilities used by the INS to detain children and concluding that there is a significant disregard for the rights and needs of children seeking asylum and other young newcomers).

13 See Halfway Home, supra note 1, at i.

14 Id. at 1. The Commission also visited three Border Patrol facilities and three ICE facilities where children may be detained, but were not able to interview children at all the DHS facilities. Id. The report is also based upon interviews and contact with individuals within all three relevant federal agencies, the staff of DUCS contracted facilities, and private counsel. Id. at 4, 40.

15 Id. at 38.
Nevertheless, the problems surrounding detention, reunification, and removal persist. The failure of DUCS to abandon the former INS model of “prosecutor and caretaker” contributes significantly to these problems.\textsuperscript{16} Additionally, by maintaining DUCS facilities in remote areas to ease the transfer of children from DHS, DUCS effectively prevents critical access to children by family and other necessary visitors such as doctors, lawyers, and teachers.\textsuperscript{17} DUCS also fails to regularly adhere to the “least restrictive setting” standard, over-relies on the more restrictive “staff-secure and secure facilities that are wholly inappropriate for most unaccompanied children,” and fails to regularly assess whether children can be “stepped down” to lower security facilities or released.\textsuperscript{18}

Furthermore, the Women’s Commission reports that the detention facilities contracting with DUCS do not consistently follow proper policies and procedures.\textsuperscript{19} Some facilities were “dreary, harsh, violated standards and/or were overly restrictive.”\textsuperscript{20} In two extreme cases, both of which occurred in Texas, facilities were closed due to incidents of sexual abuse and physical mistreatment of children by the facilities’ staff.\textsuperscript{21} At the Southwest Indiana Regional Youth Village (SIRYV) in Vincennes, Indiana, the facility’s staff subjected children to numerous, extreme forms of corporal punishment, including physically binding children and leaving them in isolation for days.\textsuperscript{22} These kinds of detention problems and abuses are exacerbated by the failure of DUCS to develop any type of effective, independent oversight.\textsuperscript{23} Children are further prevented from being properly released or reunified because

\textsuperscript{16} Id. at 14.
\textsuperscript{17} Id.
\textsuperscript{18} Halfway Home, supra note 1, at 18, 57.
\textsuperscript{19} Id. at 35–36.
\textsuperscript{20} Id. at 25.
\textsuperscript{21} Id. at 27–30. In 2007, DUCS terminated its contract with the Texas Sheltered Care Facility in Nixon, Texas (Nixon), due to repeated allegations of sexual, physical and emotional abuse and the conviction of a staff member in connection with such allegations. Id. DUCS also terminated its contract with the Abraxas Hector Garza Center (Hector Garza) located in San Antonio, Texas, after repeated reports of physical abuse. Id. at 28, 30.
\textsuperscript{22} See id. at 28. In 2010, SIRYV stopped serving as a DUCS facility. See Kelly Hill, supra note 1, at 281 n.55. The Indiana University Immigration Clinic is involved with the children at SIRYV and abuse incidents are reported by the Women’s Commission. See id. at 280–88.
\textsuperscript{23} See Halfway Home, supra note 1, at 14, 33, 38. In each of the most severe accounts of abuse at Nixon, Hector Garza, and SIRYV, communication failures between the facilities and ORR aggravated the problems at the facilities. See id. at 27–28, 30 (reporting on the communication failure between ORR and the facilities in all three cases); Kelly Hill, supra note 1, at 286 (reporting that ORR learned of the abuse through a report by the Indiana University Immigration Clinic).
DUCS and DHS continue to “inconsistently and, at times, incorrectly” interpret the definition of “unaccompanied.”

Frustrated and confused by the legal process and by prolonged, overly harsh detention conditions, children often accept the only alternative: deportation.

The unaccompanied child’s need for legal counsel is clear. Recognizing the conditions unaccompanied alien children face, the HSA requires ORR to assist children by ensuring “that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law.” This requirement is artfully crafted to avoid violating the Immigration and Naturalization Act, which prohibits the expenditure of government funds on providing public counsel for aliens in removal proceedings.

In 2005, ORR began the Unaccompanied Children Program in an effort to balance these competing policies. Through funding pro-

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24 See Halfway Home, supra note 1, at 8.
25 See id. at 23.
26 See id. Numerous sources recognize the acute need for legal representation of unaccompanied children. See, e.g., Byrne, supra note 2, at 34; Bhabha & Schmidt, supra note 8, at 128–31; Sharon Finkel, Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1105–07 (2001); Nugent, supra note 2, at 226–28; Raya Jarawan, Note, Young, Illegal, and Unaccompanied: One Step Short of Legal Protection, 14 WASH. & LEE J. CIV. RTS. & SOC. JUST. 125, 126 (2007); Nina Bernstein, Children Alone and Scared, Fighting Deportation, N.Y. TIMES, Mar. 28, 2004, at N1; Haddal, supra note 2, at 15–16. For further statutory emphasis on the unaccompanied child’s need for counsel under the TVPRA, see infra, note 45 and accompanying text.
28 See 8 U.S.C. § 1362 (2006) (“In any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”).
29 See Unaccompanied Children Program, VERA INST. OF JUST., http://www.vera.org/project/unaccompanied-children-program (last visited Jan. 20, 2011). In fiscal year 2007, additional government funding also allowed for a one-year pilot “Legal Orientation Program” (LOP), which enabled ORR to award four LOP contracts to agencies working with unaccompanied alien children. See Kelly Hill, supra note 1, at 273–74. The children’s LOP program was modeled on the LOP program for adults facing removal. Id. at 284–85. Begun in 2003, the adult LOP serves twenty-five detention facilities throughout the country. Id. at 277. The program offers the following:

four levels of service: group orientations (presentations conducted by attorneys or paralegals regarding the removal process and relief available); individual orientations (screenings by LOP attorneys or paralegals in order to review individual claims and answer questions confidentially); self-help workshops (small “how to” sessions to instruct individuals preparing for their hearings); and pro bono attorney referrals (provided for some detainees who are unable to proceed pro se or are otherwise identified as in particular need of counsel.
vided by Congress to the Executive Office for Immigration Review (EOIR), the Vera Institute operates pro bono legal programs for both adults and children. In each case, non-profit organizations contract with the Vera Institute and are responsible for finding pro bono attorneys for otherwise unrepresented individuals. While the children’s program was initially based at a limited number of detention sites around the country, Congress increased funding in 2008 to ensure that all facilities have a legal service organization to assist detained and unaccompanied alien children. Notably, in December 2009, the Catholic Legal Immigration Network, Inc. (CLINIC) launched the National Pro Bono Project for Children. The project coordinates a national effort to match released children with pro bono attorneys. Other agencies receiving non-federal funding are also involved in the effort to provide representation to unaccompanied alien children.

Despite the wide variety of pro bono projects, the Women’s Commission estimated that sixty percent of all children are unrepresented in immigration proceedings. Twenty-five percent of those who remain in DUCS custody continue to lack representation, along with sixty percent of those expected to be released and seventy percent of those actually

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31 See Kelly Hill, supra note 1, at 293–94. Pro bono representation arranged via such contractual arrangements can raise conflicts of interest and other potential problems. See id. at 293–308; infra note 155 and accompanying text.

32 See Halfway Home, supra note 1, at 22.


35 See Halfway Home, supra note 1, at 22. Two additional agencies are engaged in broad-based efforts to provide free legal representation to detained children. See id. The National Children’s Center, a program of the U.S. Committee for Refugees and Immigrants, has adopted a pro bono model and aspires to find representation for about thirty percent of children released to a non-parental sponsor. Id. In 2008, Kids in Need of Defense (KIND) began operations with sites in the Northeast corridor, Los Angeles, Houston, and Seattle. Id. Also based on the pro bono referral model, it hopes to develop offices throughout the country. Id.

36 Id. at 23. It should be noted that the Women’s Commission published this estimate before organizations such as CLINIC, KIND, and the National Children’s Center began providing detained children with representation. See id. at 22; Press Release, Catholic Legal Immigration Network, supra note 33.
released. Based on these findings, the report concludes that “there is no well-coordinated, well-funded program that is able to operate on a national level to cover all areas where children are detained or need representation.”

Recent funding of CLINIC’s national program may provide additional representation for released unaccompanied alien children, however the project’s explicit focus on released children will prevent it from providing critical assistance to detained children. Thus, as the Women’s Commission concludes, reliance on pro bono and pro se services “is not sufficient given the individualized needs of children and children’s developmental capacity and is not an effective mechanism for ensuring the representation of all children in custody.”

This conclusion is consistent with the TVPRA. The TVPRA corrects many of the insufficiencies brought to light by the Women’s Commission report. Among its most important provisions, the TVPRA codifies the “least restrictive setting” standard of detention, places further restrictions on the use of “secure” detention, and reiterates the earlier statutory definition of “unaccompanied minor child.” It also mandates that HHS “ensure, to the greatest extent practicable,” that unaccompanied minor children in custody have counsel

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37 See Halfway Home, supra note 1, at 22–23.
38 Id. at 22.
40 See Halfway Home, supra note 1, at 23. In 2008, the DUCS Pro Bono Project received a five million dollar increase to ensure unaccompanied children’s access to legal representation at every facility and upon their release. See id. at 22.
42 See id.
43 Id. § 1232(c)(2). With regard to safe and secure placements, this section provides the following:

[A]n unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight.

Id.
44 Id. Section 1232(c)(2) goes on to note:

A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.

Id.
45 Id. § 1232(g) (“The term ‘unaccompanied alien child’ has the meaning given such term in section 279(g) of [the Homeland Security Act of 2002].”).
to represent them.\textsuperscript{46} Other provisions require EOIR to provide familial custodians of released children with legal orientation programs\textsuperscript{47} and to seek the appointment of a guardian ad litem for particularly “vulnerable” unaccompanied alien children.\textsuperscript{48}

Although the TVPRA recognizes the urgent need for advocates to represent the interests of unaccompanied alien children, it fails to implement the recommendation of the Women’s Commission that counsel be provided by statute for all children unable to secure paid or pro bono counsel.\textsuperscript{49} This type of political plea on behalf of unaccompanied alien children is not new.\textsuperscript{50} Moreover, within the diverse immigrant population, unaccompanied alien children are not the only group in need of appointed counsel—lawful permanent residents facing removal and asylum seekers also require public legal assistance.\textsuperscript{51} Despite the

\textsuperscript{46} See 8 U.S.C.A. § 1232(c)(5).

The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A) [children of contiguous countries], have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.

\textsuperscript{47} Id. § 1232(c)(4). Custodians shall receive “legal orientation presentations . . . administered by the Executive Office for Immigration Review. At a minimum, such presentations shall address the custodian’s responsibility to attempt to ensure the child’s appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.” \textit{Id.}

\textsuperscript{48} Id. § 1232(c)(6) (“The Secretary of Health and Human Services is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children.”).

\textsuperscript{49} See \textit{Halfway Home}, \textit{supra} note 1, at 23. Most fundamentally, the Women’s Commission insisted that DUCS abandon the former INS structure in favor of a structure consistent with “the best interest principle and general child welfare practices.” \textit{See id.} at 38. Other recommendations included adhering to the “least restrictive setting” standard; expanding the use of less secure facilities (such as foster care and group home settings); expanding the use of therapeutic facilities; limiting the use of secure facilities to dangerous children; increasing the follow-up services to those released; ending information sharing between DUCS and DHS to maintain confidentiality; and moving DUCS facilities to more urban areas. \textit{See id.}

\textsuperscript{50} See, \textit{e.g.}, Jarawan, \textit{supra} note 26, at 135–36 (making a statutory argument for public counsel on behalf of immigrant children).

good intentions behind the pro bono model, its inadequacy is unsurprising. The limited nature of pro bono legal services for aliens is consistent with the overall paucity of pro bono legal offerings.\textsuperscript{52} Less than ten percent of lawyers accept pro bono cases and financial contributions from lawyers for pro bono services amount to less than fifty cents a day.\textsuperscript{53}

Given that the prospect of securing public counsel for unaccompanied alien children through political channels remains bleak, whether a constitutional right to counsel exists must be considered—or more accurately, reconsidered. Constitutional arguments on behalf of unaccompanied alien children have been raised both in the courts and in the academy.\textsuperscript{54} So-called “Civil Gideon” cries also come from other groups facing removal as well as numerous groups litigating in a variety of other civil contexts.\textsuperscript{55}

permanent residents facing deportation, non-frivolous asylum seekers, and unaccompanied minors are three immigrant groups deemed in greatest need of public counsel).\textsuperscript{52} See, e.g., Deborah Rhode, Access to Justice: Connecting Principles to Practice, 17 GEO. J. LEGAL ETHICS 369, 371 (2004); Taylor, supra note 51, at 1696.

\textsuperscript{53} See Rhode, supra note 52, at 378 n.13. The inability of pro bono attorneys to serve the needs of detained adults has also been recently reported. See City Bar Justice Ctr., NYC Know Your Rights Project: An Innovative Pro Bono Response to the Lack of Counsel for Indigent Immigrant Detainees, N.Y.C. BAR ASS’N 8–11, 15–16 (2009), http://www.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf (concluding that despite efforts by the many pro bono agencies in New York to provide pro bono representation to adult aliens detained at New York City’s Varick Street Detention Facility, representation remains inadequate and necessitates government funded, publicly appointed counsel); see also Peter L. Markowitz, Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study, 78 FORDHAM L. REV. 541, 541–46, 572 (2009) (examining how the lack of quality legal representation has a detrimental impact on the deportation system); Nina Bernstein, Immigrant Jail Tests U.S. View of Legal Access, N.Y. TIMES, Nov. 2, 2009, at A1 (noting that immigrant detainees with a legitimate claim to stay in the United States are often “held without legal representation and moved from state to state without notice”).

\textsuperscript{54} See, e.g., Perez-Funez v. Dist. Dir., INS, 619 F. Supp. 656, 659–60 (C.D. Cal. 1985); Beth J. Werlin, Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings, 20 B.C. THIRD WORLD L.J. 393, 394–95 (2000). In two key cases where public counsel arguments on behalf of unaccompanied alien children were potentially at issue, they were not squarely addressed. See Reno v. Flores, 507 U.S. 292, 315 (1993) (reviewed and remedied on issues of detention and release conditions); Perez-Funez, 619 F. Supp. at 659 (stating in dicta that there is no right to public counsel and limiting the legal challenge to the provision of a list of legal services and child’s understanding of voluntary departure). But see Finkel, supra note 26, at 1116–27 (providing an example of an academic argument in favor of a constitutional right to counsel for immigrant children).

\textsuperscript{55} See, e.g., Werlin, supra note 54, at 394–95. There is also a constitutional argument in favor of public counsel for aliens. See Aguilara-Enriquez v. INS, 516 F.2d 565, 571–72 (6th Cir. 1975) (DeMascio, J., dissenting) (finding an “unqualified right to the appointment of counsel” for lawful permanent residents facing removal); see also Werlin, supra note 54, at
II. CIVIL GIDEON AND UNACCOMPANIED ALIEN CHILDREN

Why argue that there is a right to counsel only for unaccompanied
alien children, and not for all unrepresented aliens? For individuals
throughout our civil litigation system, the need for counsel remains
largely unmet. In September 2009, the Legal Services Corporation
(LSC), the country’s largest provider of funding for civil legal services
for low-income individuals, issued a report in which it projected that
one million people—nearly half of those seeking LSC’s legal assis-
tance—would be turned away in the coming year because of insuffi-
cient resources. Despite efforts to increase access to justice through a
variety of measures, including increasing private and non-government
funding for civil attorneys and increasing the availability of pro se legal

395 (reviewing the right to public counsel arguments made on behalf of various immigrant
groups).

In other civil proceedings, Civil Gideon efforts are widespread. See, e.g., Deborah Gard-
nor, Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases, 37
U. BALT. L. REV. 59, 59–60 (2007) (discussing the right to public counsel for litigants in
adversarial cases involving basic human needs); Right to Counsel in Civil Cases, PUB. JUST.
20, 2011) (describing that a mainstay of the Public Justice Center’s mission is to achieve
Civil Gideon rights in all civil disputes involving fundamental interests and basic rights). See
generally Simran Bindra & Pedram Ben-Cohen, Public Civil Defenders: A Right to Counsel
for Indigent Civil Defendants, 10 GEO. J. ON POVERTY L. & POL’Y 1 (2003) (providing academic
discussions of Civil Gideon efforts in non-immigration contexts, such as the right to public
counsel for civil defendants); Catherine J. Ross, From Vulnerability to Voice: Appointing
Counsel for Children in Civil Litigation, 64 FORDHAM L. REV. 1571 (1996) (analyzing the right to
public counsel for children).

56 See Rhode, supra note 52, at 371. Immigration matters are traditionally treated as civ-
il matters. See Yafang Deng, Note, When Procedure Equals Justice: Facing the Pressing Constitu-
(2008) (describing issues arising from the civil-criminal dichotomy in immigration law); infra
note 102 (citing cases).

57 See Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-
Income Americans, LEGAL SERVS. CORP., 5 (2009), http://www.lsc.gov/pdfs/documenting
the_justice_gap_in_america_2009.pdf; see also John Schwartz, Cash Squeeze Said to Deny Legal
Aid to Poor, N.Y. TIMES, Sept. 30, 2009, at A22 (noting that due to a lack of sufficient financ-
ing, legal aid clinics must “turn away two people for each one they can help”); Press Re-
(Sept. 30, 2009), http://www.lsc.gov/press/pressrelease_detail_2009_T248_R27.php (reaf-
firming the conclusion reached in the 2005 report issued by Legal Services Corporation
(LSC) that nearly fifty percent of the organization’s potential clients seeking assistance
with civil legal problems would not be served due to insufficient resources). The 2005 and
2009 reports did not improve upon LSC’s 2001 finding that four-fifths of low-income indi-
viduals’ civil legal needs are unmet. See Rhode, supra note 52, at 377 n.12 (citing Annual
pdfs/LSC_2000-2001_Annual_Report.pdf (last visited Jan. 20, 2011)); Documenting the Jus-
services, “the poor, overall, have barely held their ground.”\textsuperscript{58} The substantial, unmet legal needs of the middle-class are also, in part, attributed to a lack of affordable counsel.\textsuperscript{59}

The reality of limited access to civil counsel is contrary to the public’s perceptions and ideals.\textsuperscript{60} While the right to counsel theoretically exists in the civil context, it bears little resemblance to the more familiar criminal guarantee.\textsuperscript{61} Since \textit{Gideon v. Wainwright} first trumpeted the Sixth Amendment right to counsel for indigent criminal defendants, the right has been extended to all individuals charged with criminal offenses that result in imprisonment.\textsuperscript{62} On the civil side, developments have been neither as rapid nor as foolproof. \textit{Mathews v. Eldridge} establishes the now well-known due process calculus that may create a Fifth Amendment right to counsel in some civil litigation circumstances.\textsuperscript{63}

\textit{Lassiter v. Department of Social Services} adds a layer of complexity to such due process claims.\textsuperscript{64} Under \textit{Lassiter}, the analysis begins with the negative presumption that no right to counsel exists unless physical confinement may result from losing the litigation.\textsuperscript{65} By raising the civil

\footnotesize
\textsuperscript{58} See Gardner, supra note 55, at 64–65. But see Rhode, supra note 52, at 392–421 (providing a counter argument in favor of continuing to find innovative means to improve access to justice).

\textsuperscript{59} See Rhode, supra note 52, at 397–98. Although finding the extent of the middle-class’s unmet legal needs “difficult to quantify,” Deborah Rhode reports in her 2004 article that two-thirds of middle-class Americans do not take their cases to a lawyer or the legal system. \textit{Id.}

\textsuperscript{60} See \textit{id.}, at 377–78. Eighty percent of the public favors taxpayer-funded lawyers in certain critical civil practices, such as domestic violence, child abuse, veteran’s benefits, and health care for seniors. \textit{See id.}, at 377. This finding is consistent with other surveys that find eighty percent of the public is reported to believe (albeit erroneously) that the constitutional guarantee of legal representation extends to civil as well as criminal matters. \textit{See id.} at 371.

\textsuperscript{61} See \textit{id.} at 375.


\textsuperscript{63} See \textit{Mathews v. Eldridge}, 424 U.S. 319, 335 (1976) (requiring due process assurances to be determined based upon balancing the private interests at stake against the possible value added by additional procedural safeguards and the cost the additional process would impose upon the government).

\textsuperscript{64} See \textit{Lassiter} v. \textit{Dep’t of Soc. Servs.}, 452 U.S. 18, 27 (1981).

\textsuperscript{65} \textit{Id.} at 25. Theoretically, failure to establish the possibility of loss of physical liberty does not preclude a successful appointed counsel argument. Instead, it shifts the burden to the party requesting counsel to “overcome the presumption against the right to appointed counsel” by making a strong showing on the \textit{Eldridge} factors. \textit{Id.} at 31. Evaluating
standard, “Lassiter all but shut the door to progress on achieving a broad civil right to counsel, at least for a time.” A case-by-case review of state appellate decisions citing Lassiter shows that requests for appointed counsel are usually denied. In short, Lassiter is “[t]he biggest stumbling block” for civil litigants in need of counsel. Generally speaking, the unique vulnerabilities of children in legal proceedings have been given little attention. The decision in In re Gault stands as a notable exception: where the potential of being institutionalized put a child’s physical liberty at stake, the juvenile successfully argued for the appointment of counsel during juvenile commitment proceedings.

the Eldridge factors in the context of a parental termination proceeding, the Court found the following:

If, in a given case, the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.

See id. Lassiter justifies adding the initial presumption measure to the Eldridge analysis in Fifth Amendment appointed counsel challenges in order to maintain consistency with the Sixth Amendment’s limited guarantee of counsel to criminal defendants facing analogous curtailments of physical liberty. See id. at 25.

The heightened protection provided by due process when personal liberty is at risk is criticized for presuming that personal liberty is always more important than property interests and for creating a false dichotomy between personal liberty and property. See, e.g., Bindra & Ben-Cohen, supra note 55, at 11–13; Gardner, supra note 55, at 73.

66 Gardner, supra note 55, at 64.
67 Id.
68 See Taylor, supra note 51, at 1663. There are, however, strong criticisms of Lassiter’s negative presumption. See Bindra & Ben-Cohen, supra note 55, at 2 (“[Lassiter’s] presumption has proved nearly impossible to overcome, and led to the widespread notion that appointment of counsel in a civil case is ‘a privilege and not a right.’” (quoting United States v. Madden, 352 F.2d 792, 793 (9th Cir. 1965))); Gardner, supra note 55, at 64 (recognizing a virtually insurmountable hurdle created by Lassiter).
69 See Ross, supra note 55, at 1579. Ross also outlines additional considerations of an unaccompanied child’s age and capacity in arguing for a right to appointed counsel and points out that children have unique vulnerabilities that entitle them to counsel in a broad array of civil suits. See id. at 1598–99.
70 In re Gault, 387 U.S. 1, 41 (1967). In this case the Court stated:

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect to proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

Id.
III. The Constitutional Argument for the Right to Counsel for Unaccompanied Alien Children

Against this backdrop, what constitutional headway can be made for unaccompanied alien children? As an initial matter, aliens apprehended inside of the United States, regardless of how they entered, possess the same due process rights as American citizens. Although no alien has ever been provided public counsel during removal proceedings, the analysis for deciding whether to provide counsel is identical to that employed in other civil contexts. Thus, even though Lassiter is a “stumbling block” for unaccompanied alien children, the standard is no higher than that faced by other individuals. However, Lassiter also warns that the due process mandate of “fundamental fairness” requires evaluating each “particular situation.” Consequently, notwithstanding the formidable test, the conditions of care and custody faced by unaccompanied alien children, combined with their minor

71 See Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (first recognizing the procedural due process rights of aliens who have entered the United States). Later cases have continued to recognize the rights of aliens who have entered the United States as well as certain lawful permanent residents who have left the United States. See, e.g., Landon v. Plascencia, 459 U.S. 21, 36–37 (1982) (extending procedural due process protection to a returning lawful permanent resident with a brief departure); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [Fifth and Fourteenth Amendment] protection.”); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (analogizing status of returning lawful permanent resident to continuously present alien, thus entitling him to same procedural rights).

72 See Finkel, supra note 26, at 1121–22; Taylor, supra note 51, at 1663; Werlin, supra note 54, at 402; Jarawan, supra note 26, at 141. In Aguilera-Enriquez v. INS, the Sixth Circuit denied a request for public counsel because “[c]ounsel could have obtained no different administrative result.” 516 F.2d 565, 569 (6th Cir. 1975). The court articulated the applicable standard: “The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness the touchstone of due process.’” Id. at 568 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

73 See Taylor, supra note 51, at 1663.

age and lack of capacity, make for a compelling constitutional argument.\textsuperscript{75}

\textbf{A. The Initial Presumption: The Deprivation of Physical Liberty}

At first blush, an unaccompanied alien child may seem stymied by \textit{Lassiter}’s first requirement of showing a loss to physical liberty as a consequence of losing the underlying litigation.\textsuperscript{76} As the Attorney General’s reading of \textit{Lassiter} asserts, while an alien may be detained during his removal proceedings, he does not “lose his physical liberty” based on the proceeding’s outcome.\textsuperscript{77} “[T]he point of the proceeding is not to determine or provide the basis for incarceration or an equivalent deprivation of physical liberty, but rather to determine whether the alien is entitled to live freely in the United States or must be released elsewhere.”\textsuperscript{78} Such an interpretation of \textit{Lassiter} fails in several important respects and does not truly account for the representational needs of an unaccompanied alien.\textsuperscript{79}

As an initial matter, an alien in removal proceedings does not always confront a decision between living freely in the United States or being released elsewhere.\textsuperscript{80} Certain aliens with a final order of removal who cannot be physically removed or safely released in the United States may be subject to prolonged detention.\textsuperscript{81} But more importantly, an application of \textit{Lassiter} to unaccompanied alien children must recognize that they have a threefold need for counsel.\textsuperscript{82} Certainly, an unaccompanied alien child’s most evident need is representation in the course of removal proceedings.\textsuperscript{83} Representation is also critical to assure a child’s right to release during proceedings and his or her right to minimal conditions of detention.\textsuperscript{84}

\begin{itemize}
  \item \textsuperscript{75} See id.; Bernstein, \textit{supra} note 26.
  \item \textsuperscript{76} See \textit{Lassiter}, 452 U.S. at 26–27.
  \item \textsuperscript{78} \textit{Id.}
  \item \textsuperscript{79} See \textit{Lassiter}, 452 U.S. at 26–27; \textit{Compean}, 24 I. \& N. Dec. at 718.
  \item \textsuperscript{80} See \textit{Zadvydas v. Davis}, 533 U.S. 678, 699 (2001) (upholding 8 U.S.C. \textsection 1231(a)(6), which includes conditions for allowing aliens who have been ordered to be removed to be detained beyond the removal period, provided there is a regular administrative review of release matters).
  \item \textsuperscript{81} See \textit{id.} at 701.
  \item \textsuperscript{82} See \textit{Lassiter}, 452 U.S. at 26–27; Gordon, \textit{supra} note 3, at 641–42, 657.
  \item \textsuperscript{83} See Gordon, \textit{supra} note 3, at 657.
  \item \textsuperscript{84} See \textit{id.} at 658; \textit{supra} notes 3–6 and accompanying text (discussing the threefold need for counsel).
\end{itemize}
Arguably, the Supreme Court has otherwise qualified a child’s physical liberty interests and thereby undercut efforts to claim a right to counsel on those grounds. In both the immigration and non-immigration settings, a child held in “preventive custody” by the government is not detained, but rather in a custodial situation analogous to a child in his parent’s care. Current conditions surrounding the care and custody of unaccompanied minors, however, fail to satisfy even this broad standard of liberty.

In *Reno v. Flores*, the Court held that a child’s liberty is not at risk “[w]here a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane.” The Women’s Commission report challenges the assertion that ORR creates such an environment for detained unaccompanied alien children. Reports of abuse in detention facilities are not merely “isolated instances” of conduct and are emblematic of the institutional ambivalence of HHS regarding its role as prosecutor and caretaker. This ambivalence creates a coercive environment incompatible with “parental care.” In particular, this atmosphere discourages the provision of legal representation. Similarly, the overuse of staff-secure and secure facilities creates a clear risk to a child’s liberty because such facilities are based on a correctional model, not a child welfare model, which is “wholly inappropriate for most unaccompanied alien children.”

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86 See *Flores*, 507 U.S. at 302; *Schall*, 467 U.S. at 265. In both cases, select justices soundly dismissed this analogy. See *Flores*, 507 U.S. at 316 (O’Connor, J., concurring) (noting that the Court “rejected” the assertion that a child has a right “not to liberty but to custody” (quoting *In re Gault*, 387 U.S. 1, 17 (1967))); *Schall*, 476 U.S. at 289 (Marshall, J., dissenting) (stating that the majority’s characterization of preventive detention as merely a transfer of custody from parent to state was “difficult to take seriously”).
87 See *Gordon*, *supra* note 3, at 641–42.
88 *Flores*, 507 U.S. at 303.
89 See *Halfway Home*, *supra* note 1, at 14.
90 See *Perez-Funez v. Dist. Dir.*, INS, 619 F. Supp. 656, 668–69 (C.D. Cal. 1985) (dismissing charges that INS abuses were more than “isolated instances,” but finding that underlying policies and procedures contained inherent due process defects which were “constitutionally infirm”); *Halfway Home*, *supra* note 1, at 14.
91 See *Schall*, 476 U.S. at 289 (Marshall, J., dissenting).
92 See *Halfway Home*, *supra* note 1, at 14. As the Women’s Commission reports, ORR “confuses the role of prosecutor and caretaker. This has affected the location of facilities; encouraged institutionalization, making the facilities more impersonal and prison-like; led to the sharing of children’s information between agencies; discouraged the provision of legal representation; and contributed to the absence of an effective oversight process.” *Id.*
93 See *id.* at 18.
The failure of administrators to assess children regularly for the appropriateness of their transfer to other sites jeopardizes a child’s liberty.\textsuperscript{94} While “stepping down” determinations may be less constitutionally significant, such “conditional liberty” restrictions should nevertheless be considered in any assessment of a detained, unaccompanied child’s physical liberty.\textsuperscript{95} Finally, but no less significantly, \textit{Lassiter’s} presumption against a right to counsel can be overcome without evidence of a potential loss of physical liberty.\textsuperscript{96} Returning to \textit{Eldridge}, \textit{Lassiter} warrants a right to counsel for unaccompanied alien children when a child’s interests are at “their strongest,” the State’s interest are at “their weakest,” and “the risks of error [are] at their peak.”\textsuperscript{97}

**B. The Weight of the Individual Liberty Interest**

How do the \textit{Eldridge} factors compute for unaccompanied alien children? In key respects, liberty is effectively denied when unaccompanied alien children are forced to go forward in removal proceedings without counsel.\textsuperscript{98} Children may be eligible for various forms of relief, which include: asylum; the Special Immigrant Juvenile Visa for abused or abandoned children (“SIJ status”); criminal victim visas (“U visas”); trafficking visas (“T visas”); cancellation of removal; petitions for residency based upon family (including Violence Against Women Act petitions); and voluntary departure.\textsuperscript{99} Although many children will not qualify for any relief, a “grave mistake” is made when an eligible child’s claims are not even heard.\textsuperscript{100} As the Supreme Court acknowledges, a removal hearing “involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.”\textsuperscript{101} And when debating about whether expulsion can be regarded as punishment, unrepresented children represent the strongest evidence that it is nothing less: an unaccompanied alien child

\textsuperscript{94} See \textit{id.} at 18, 57.
\textsuperscript{95} See \textit{Lassiter}, 452 U.S. at 26. \textit{Lassiter} recognizes that similar “conditional liberty” deprivations can be assessed on a case-by-case basis. \textit{Id.} (discussing Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (denying appointed counsel in a parole revocation hearing)).
\textsuperscript{96} See \textit{id.} at 31.
\textsuperscript{97} See \textit{id.}; Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
\textsuperscript{98} See \textit{Eldridge}, 424 U.S. at 335; \textit{Halfway Home, supra} note 1, at 14.
\textsuperscript{99} See Janet M. Heppard & Anne Chandler, \textit{Immigrant Issues Affecting Children in Foster Care}, State Bar of Texas, 32nd Annual Advanced Family Law Course, at 2–8 (August 14–17, 2006) (on file with author); see also Nafziger, \textit{supra} note 5, at 360 (discussing the particular rights and forms of relief available for unaccompanied minors in removal proceedings).
\textsuperscript{100} See \textit{Perez-Funez}, 619 F. Supp. at 660.
\textsuperscript{101} See Wong Yang Sun v. McGrath, 339 U.S. 33, 50 (1950).
may spend all of his formative years in the United States, be unable to speak his native language, and have no memory of his family’s whereabouts.\textsuperscript{102} Indeed, “‘if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.’”\textsuperscript{103} Without an attorney to identify viable avenues for relief and to pursue them by marshalling the facts, gathering the documentation, finding the witnesses, and presenting the necessary petitions and evidence to the court, relief like SIJ status or cancellation of removal may never be considered, much less granted.\textsuperscript{104} The liberty of the child is imperiled when he or she is denied representation.\textsuperscript{105}

\textsuperscript{102} See Perez-Funez, 619 F. Supp. at 660. Deportation is not viewed as a criminal punishment but rather as a civil sanction. See Wong Wing v. United States, 163 U.S. 228, 237 (1896) (allowing individuals to be deported but prohibiting such measures to be accompanied by the “infamous punishment at hard labor” or confiscation of property); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for a crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions [of his authorized stay].”).

Despite the civil designation of removal proceedings, the punitive nature of expulsion has also been recognized since the first case of deportation. See Fong Yue Ting, 149 U.S. at 740 (Brewer, J., dissenting) (“[D]eportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment and that oftentimes most severe and cruel.”). Some scholars have also openly recognized deportation as punishment. See, e.g., Nancy Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, 73 N.Y.U. L. Rev. 97, 102 (1998) (“I suggest that now is the time to wipe the slate clean and admit to the long evident reality that deportation is punishment.”) (quoting Scheidemann v. INS, 83 F.3d 1517, 1531 (3d Cir. 1996) (Sarokin, J., concurring))).

\textsuperscript{103} Fong Yue Ting, 149 U.S. at 741 (Brewer, J., dissenting) (quoting 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 555 (Jonathan Elliot ed., 2d rev. ed. 1891)).

\textsuperscript{104} See Ross, supra note 55, at 1599. While arguing that child defendants should always be appointed counsel in civil litigation, Ross observes the following:

The very characteristics that are frequently held to diminish children’s legal rights indicate that children cannot present their own court cases and therefore ought to have a special claim to appointed counsel. These characteristics establish that, in most instances, minors lack the ability to gather facts and deal with issues, handle their cases, understand legal issues, or conduct cross-examination without guidance from an attorney.

\textsuperscript{105} See id. at 1571, 1588.
C. The Value of Additional Safeguards

Because unaccompanied alien children lack legal capacity, the risk that they will be denied their due process rights intensifies.\(^\text{106}\) There is a longstanding notion that children in any type of legal proceeding are uniquely situated.\(^\text{107}\) In certain instances, such as decisions regarding early childhood education, a minor’s constitutional rights are diluted in light of the protection offered by his or her parents.\(^\text{108}\) Under other circumstances, however, a child’s interests are not subordinate.\(^\text{109}\) Detained, unaccompanied alien children constitute one group of children with a “peculiar vulnerability” requiring additional legal protections.\(^\text{110}\)

An unaccompanied child, by definition, lacks the parental presence necessary to protect his or her interests.\(^\text{111}\) When communication with a child’s parents is possible, the child may be poorly served by his parents.\(^\text{112}\) In some cases, an unaccompanied child’s interests are directly opposed to those of his parents.\(^\text{113}\) For example, an unaccompa-

\(^{106}\) See id. at 1604.

\(^{107}\) Id. at 1571 n.1 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *452). The vulnerability of children has been recognized by the legal system. See Finkel, supra note 26, at 1129–30; Ross, supra note 55, at 1590–95; Jarawan, supra note 26, at 134–35.

\(^{108}\) See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972) (holding that parents had a constitutional right to direct the education of their children); Pierce v. Soc’y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that parents had a constitutional right to direct the education of their children); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that parents had a constitutional right to engage teachers in their children’s education); see also Parham v. J.R., 442 U.S. 584, 621 (1979) (Stewart, J., concurring) (“For centuries it has been a canon of the common law that parents speak for their minor children.”).

\(^{109}\) See Ross, supra note 55, at 1584–86. Ross outlines four categories in which children’s interests cannot be presumed to be protected by their parents: (1) when the interests of parents and children are not necessarily the same and the child’s interests are legitimate; (2) when parents may not be motivated by the child’s best interests; (3) when parents may not understand the child’s interests or be able to communicate them; and (4) when proceedings are between child and the state and the state is the child’s custodian. See id.

\(^{110}\) See Bellotti v. Baird, 443 U.S. 622, 634–637 (1979) (recognizing three reasons to distinguish the constitutional rights of children from those of adults: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing”). Ross argues that unaccompanied alien children merit appointed counsel because they are being held in state custody. See Ross, supra note 55, at 1585–86. However, an unaccompanied child whose interests are in opposition to those of his parents or who has limited communication with distant parents may also play a part in the child’s need for counsel. See id. at 1591–92.


\(^{112}\) See Ross, supra note 55, at 1588.

\(^{113}\) See id. (arguing that deference to parents “unjustifiably deprives children of their own voice in the courtroom”).
nied child may qualify for certain forms of immigration relief such as asylum, relief pursuant to the Violence Against Women Act, or SIJ status because of parental abuse.\footnote{114}{See Emily Rose Gonzalez, Note, Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status, 8 Seattle J. Soc. Just. 409, 426–27 (2009).}

While pro se children may theoretically petition for any and all forms of immigration relief, realistically they are unable to do so.\footnote{115}{See Ross, supra note 55, at 1600.} Unaccompanied alien children, like all unrepresented individuals, are severely handicapped by the complexity of immigration law.\footnote{116}{See Lassiter, 452 U.S. at 31 ("[T]he complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent’s rights insupportably high."); Ross, supra note 55, at 1595–99.} As many courts have suggested, the “labyrinth” design of U.S. immigration law is so complicated that only an attorney can navigate it.\footnote{117}{See Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (noting that the Immigration and Nationality Act bears a “striking resemblance . . . [to] King Minos’s labyrinth in ancient Crete”); see also Castro-O’Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987) (“A lawyer is often the only person who could thread the labyrinth [of immigration laws].”); Perez-Funez, 619 F. Supp. at 662 n.11 (relying on Lok’s “oft-quoted line” about the complexity of immigration law).} When a litigant appears pro se, an immigration judge bears the responsibility of developing the case in addition to serving as fact-finder and adjudicator.\footnote{118}{See Giday v. Gonzales, 434 F.3d 543, 549 (7th Cir. 2006); see also Linda Kelly Hill, Holding the Due Process Line for Asylum, 36 Hofstra L. Rev. 85, 100–01 (2007) (discussing the dual role of an immigration judge).} The challenge of effectively serving not only as an advocate, but also as a neutral arbitrator, is obvious.\footnote{119}{See Kelly Hill, supra note 118, at 100–01.} Overworked immigration judges simply do not have the time to develop the complicated cases of the aliens before them.\footnote{120}{See id. For example, in fiscal year 2008, approximately 339,000 cases were decided. See Office of Planning, Analysis & Tech., FY 2008 Statistical Year Book, U.S. Dep’t of Just., Executive Office for Immigr. Rev., at B2 (March 2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf. Two hundred and seventy-seven languages were spoken by the aliens; fifteen percent spoke English and sixty-seven percent spoke Spanish. Id. at F1. More than half of the applicants lacked counsel. Id. at G1.} More importantly, the law limits the ability of immigration judges to serve as zealous advocates.\footnote{121}{As of October 2010 there were 224 immigration judges, listed by court. EOIR Immigration Court Listing, U.S. DEPARTMENT OF JUST., http://www.justice.gov/eoir/sibpages/ICadr.htm (last visited Jan. 20, 2011). Immigration courts are faced with an overwhelming workload. See Sydenham B. Alexander III, A Political Response to Crisis in the Immigration Courts, 21 Geo. Immigr. L.J. 1, 19–20 (2006); Kelly Hill, supra note 118, at 105; Jarawan, supra note 26, at 141–44. In addition to staggering workloads, immigration courts have been widely criticized for both intemperate and incompetent behavior. See Kelly Hill, supra note 118, at 85–94, 101–09. In response, the Department of Justice is augmenting its internal review and training prac-}
Congressional acts, EOIR standards, and DHS regulations already provide various special accommodations for unaccompanied alien children.\textsuperscript{122} Notably, the EOIR guidelines for cases involving unaccompanied alien children are specifically intended to “foster a child-friendly environment.”\textsuperscript{123} These guidelines encourage immigration judges to employ “child sensitive procedures” in order to take account of factors like a child’s “age, development, experience and self-determination.”\textsuperscript{124} Judges are instructed on developing practical skills, such as how to form simple, active voice questions; evaluate a child’s credibility; develop the necessary rapport between the child and courtroom personnel; and otherwise accommodate a child’s physical and mental capacities.\textsuperscript{125} In


\textsuperscript{123} See Press Release, Unaccompanied Alien Children in Immigration Proceedings, supra note 122.

\textsuperscript{124} See Memorandum on Guidelines for Cases Involving Unaccompanied Alien Children, supra note 122, at 2.

\textsuperscript{125} Id. at 5–8.
numerous jurisdictions, special dockets have been created to segregate detained and non-detained juvenile cases from those of adults.\textsuperscript{126}

In spite of these accommodations, the atmosphere in an immigration court remains adversarial and formal.\textsuperscript{127} In all outward respects, an immigration hearing functions like a criminal proceeding.\textsuperscript{128} The immigration judge appears in a black robe and is seated behind a large, elevated dais.\textsuperscript{129} The DHS trial attorney prosecuting the removal is seated before the immigration judge at one table, and the unrepresented child is seated alone at another.\textsuperscript{130} For detained children, other court personnel may also be present.\textsuperscript{131} During the hearing, the child is questioned by both the immigration judge and the DHS attorney.\textsuperscript{132}

\textsuperscript{126} E-mail from Sarah Bronstein, Training and Legal Support Attorney, Catholic Legal Immigration Network, to author (Dec. 15, 2009, 3:01 PM) (on file with author). Based on a recent survey of child immigrant advocates, sixteen dockets have been established nationally for detained children and nine for non-detained children. \textit{Id}. The sixteen courts with separate juvenile dockets for detained children are Miami; New York; Seattle; San Francisco; Los Angeles; San Diego; Phoenix; El Paso; San Antonio; Harlingen; Houston; Chicago; Arlington, Virginia; Portland, Oregon; Newark; and Detroit. \textit{Id}. The nine dockets for non-detained children are Miami, New York, Cleveland, Atlanta, Baltimore, Newark, Houston, Detroit, and Orlando. \textit{Id}; see also Wendy Young, \textit{Helping Immigrant Kids: Baltimore’s ‘Children’s Docket’ Is a Step Toward Making Immigration Court More Humane}, \textit{Balt. Sun}, Jan. 28, 2010, at 15A (discussing the recent opening of a non-detained docket in Baltimore).

\textsuperscript{127} See \textit{Press Release, Unaccompanied Alien Children in Immigration Proceedings, supra note 122, at 3}. In 2006, the Women’s Commission released an instructional video for children, available in English, Creole, French, Fuchow, and Spanish, regarding immigration court and the various forms of legal relief most common to child applicants. See DVD: What Happens When I Go to Immigration Court? (Women’s Commission for Refugee Women and Children 2006), available at http://www.hklaw.com/id207/; see also Lasitter, 452 U.S. at 31 (evaluating the nature of the court proceedings in Fifth Amendment appointed counsel challenges); Taylor, \textit{supra note 51}, at 1666–67 (recognizing the heightened need for counsel in immigration proceedings due to their adversarial and complex nature).

\textsuperscript{128} See \textit{Legomsky & Rodriguez, supra note 9}, at 654–57 (giving a detailed account of the nature of immigration court proceedings).

\textsuperscript{129} See \textit{Memorandum on Guidelines for Cases Involving Unaccompanied Alien Children, supra note 122, at 6}. While immigration court guidelines generally require an immigration judge to wear a black robe, the guidelines with respect to children allow a judge to remove the robe if it is discomforting for a child. \textit{Id}.

\textsuperscript{130} See \textit{id}. at 5. EOIR guidelines permit a child to have an adult companion sit at the table and do not require a child to testify from the witness stand so that the companion may continue sitting beside the child. \textit{Id}. Nonetheless, an unaccompanied child is still likely to appear alone. See \textit{Haddal, supra note 1}, at 15. For children detained in remote facilities, family or friends may not be financially capable of traveling to such a hearing. See \textit{Halfway Home, supra note 1}, at 4. Fear also prevents undocumented family and friends from attending. See \textit{id}. at 7 n.40.

\textsuperscript{131} See DVD: What Happens When I Go to Immigration Court?, \textit{supra note 127} (noting that other necessary personnel such as an interpreter and clerk may also be present in the immigration courtroom)

\textsuperscript{132} See \textit{id}.
Such a “gross disparity in power” can easily intimidate a child and prevent him from adequately conveying his story.133

Statistical analyses confirm that an unrepresented child cannot overcome the complexities of immigration law and the demands of the courtroom: a child represented by counsel is four times more likely to win asylum.134 Moreover, because violations of detention and reunification standards are beyond the jurisdiction of immigration courts, an unrepresented child’s chances of mounting a successful challenge to violations of these standards are bleak.135 Without counsel or access to family, the child is left to his own devices and expected to single-handedly research the relevant federal or state authorities empowered to check abuses by HHS or independent contractors operating detention facilities.136

The promotion of pro bono programs for unaccompanied alien children by the DOJ, HHS, and Congress reflect the federal government’s keen awareness of the risks faced by unrepresented children.137 After years of effort and optimism, however, pro bono services remain in short supply.138 Both the Director of DUCS and EOIR’s Pro Bono Coordinator support the conclusion of the Women’s Commission that pro bono representation is insufficient.139 Although the recent effort to fund CLINIC’s national pro bono program may improve the coordination of counsel for released children, it will not address the shortage of counsel for children detained by the federal government.140

133 See Lassiter, 452 U.S. at 44 (Blackmun, J., dissenting). In his dissent in Lassiter, Justice Blackmun recognized the proceedings would remain “adversarial, formal, and quintessentially legal. [The provision of counsel], however, would diminish the prospect of an erroneous termination, a prospect that is inherently substantial, given the gross disparity in power and resources between the State and the uncounseled indigent parent.” Id.


135 See id.

136 See Halfway Home, supra note 1, at 29–34 (criticizing DUCS’s limited internal grievance process and children’s inability to use it).

137 See generally id. (discussing the findings of the Women’s Commission on the representation of unaccompanied children).

138 See Nugent, supra note 134, at 1–4.

139 See Halfway Home, supra note 1, at 23.

140 See Press Release, Catholic Legal Immigration Network, supra note 33 (providing further discussion of CLINIC’s recently announced national project).
D. The Cost of Providing Representation

What government advantage outweighs “the grievous loss” endured by a pro se, unaccompanied child erroneously deported by a complex adversarial legal proceeding in which his interests were not fairly represented? What public interest is served by a detained, pro se child who is abused by his custodian and unable to find help? What benefit accrues through the prolonged detention of a pro se child who cannot articulate his legal right to be reunited with his family?

As the Supreme Court instructed in Bounds v. Smith, “the cost of protecting a constitutional right cannot justify its total denial.” Right to representation by counsel, particularly for children, is not simply a “formality” or “grudging gesture to a ritualistic requirement” but rather reflects “the essence of justice.” The government and unaccompanied alien children share a common interest. Serving justice, not removal at all costs, is a government “win.” Forcing children to venture alone through a morass of legal proceedings damages, rather than protects, the system’s integrity. Furthermore, when legal advocates provide an independent check on the potential abuses of system administrators, the system itself gains credibility. Given the adversarial nature of immigration court proceedings, the provision of counsel to unaccompanied alien children does not exact the potentially high cost of requiring counsel in more informal, non-adversarial settings or subvert a court’s therapeutic aims.

142 See Bounds v. Smith, 430 U.S. 817, 825 (1977); Ross, supra note 55, at 1608.
143 See Kent v. United States, 383 U.S. 541, 561 (1966) (prior to Gault, holding that children who may be transferred from juvenile to criminal court proceedings and subject to felony prosecution have a right to counsel); Ross, supra note 55, at 1579. See generally Catherine J. Ross, Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System, 36 B.C. L. Rev. 1037 (1995) (discussing the effects of Gault and Kent on the juvenile justice system).
144 See Lassiter, 452 U.S. at 27 (majority opinion). These are not the only circumstances where the government and children share an interest. See id. (“Since the State has an urgent interest in the welfare of the child, it shares the parent’s interest in an accurate and just decision.”).
145 See supra note 26, at 1132.
146 See id.
147 See, e.g., Gault, 387 U.S. at 38–39 n.65 (“Fears also have been expressed that the formality lawyers would bring into juvenile court would defeat the therapeutic aims of the court.”) (quoting President’s Comm’n on Law Enforcement & Admin. of Justice, The Challenge of Crime in a Free Society 86 (1967)).
Appointed counsel may also yield concrete cost savings. Having had the opportunity to meet privately with counsel, review potential claims, and rely upon sound legal advice, children who pursue their cases will focus only on viable claims. If there are no workable alternatives, a child may more readily concede removability. Such a serious concession should only come after receiving the benefit of legal advice. Consequently, the assistance of counsel will create more orderly hearings, thereby enhancing courtroom efficiency. As Justice Stevens argued in his *Lassiter* dissent, counsel will reduce the “difficulty and exasperation” evident in trials where litigants appear pro se. In light of the recognized intemperance of many immigration judges, such benefits afforded by counsel are particularly valuable. Representation may also expedite family reunification determinations and allow more oversight of detention conditions. Accordingly, providing unaccompanied alien children with representation will reduce the unwarranted detentions and improve care overall.

“Checks on efficiency” arguments must also be recognized in a due process analysis. Flanked by an appointed attorney throughout the proceedings, each child will continually have the opportunity to meet

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149 See id.


152 See id.

153 See *Lassiter*, 452 U.S. at 56 (Blackmun, J., dissenting).

154 See Kelly Hill, *supra* note 118, at 93.


156 See Kelly Hill, *supra* note 1, at 271. In the pro bono setting, the government efficiency rationale creates a conflict of interest for pro bono agencies that both seek federal monies and allow program or case efficiency to limit zealous representation of individuals. *Id.* By preventing the competitive aspect of the existing contractual system, conflicts will not arise in a system that guarantees appointed counsel for all children. See id. at 274–75; Taylor, *supra* note 51, at 1707–10.
with his or her counsel, review his or her counsel’s advice, and decide how to proceed. Inevitably, some proceedings will become more protracted as more detailed pleadings, arguments, and appeals necessarily prolong the process. It is conceivable that “at some point” the benefits of appointed counsel for unaccompanied alien children “may be outweighed by the cost.” These costs, however, can be contained. The procedural protection of counsel afforded by the due process clause is limited to children apprehended inside the United States. From a pragmatic point of view, the government may limit its exposure to constitutional demands for counsel by continuing to fund pro bono projects that more efficiently secure counsel for detained children. Therefore, the government has an additional incentive to manage the costs of counsel.

E. The Right to Counsel as a Group Right

As a final matter, recognizing that unaccompanied alien children possess a broad right to counsel as a class—compared to the current process of individualized, case-by-case determinations—is judicially sound and efficient. Procedural guarantees are traditionally awarded to groups, not individuals. Instead of ensuring fairness, the ad hoc approach adds unnecessary judicial costs, turning courts into “super-

157 See Finkel, supra note 26, at 1132; Taylor, supra note 51, at 1667.
158 See Taylor, supra note 51, at 1709.
159 See Eldridge, 424 U.S. at 348.
160 See Finkel, supra note 26, at 1132–37.
161 See id. (discussing the Supreme Court’s delineation of due process rights for aliens based upon apprehension).
162 See id. at 1132; Taylor, supra note 51, at 1667. Importantly, such pro bono projects will also continue to serve unaccompanied children who have not “entered” the United States and are without constitutional rights to counsel. See, e.g., Halfway Home, supra note 1, at 22. Many cases also discuss the limited breadth of constitutional protection and its dependency on “entry.” See, e.g., Landon, 459 U.S. at 32; Kwong Hai Chew, 344 U.S. at 596 n.5; Yamataya, 189 U.S. at 100–01.
163 See Ross, supra note 55, at 1572–74. The fear that providing counsel for unaccompanied children will inevitably lead to constitutional arguments on behalf of adults facing removal is easily allayed by pointing to the “unique vulnerabilities” that are the crux of a child’s right to counsel. See, e.g., Bellotti, 443 U.S. at 634–37.
164 See Finkel, supra note 26, at 1132–37.
165 See Lassiter, 452 U.S. at 49 (Blackmun, J., dissenting). “The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking contexts, not of different litigants within a given context.” Id. (citing Goldberg, 397 U.S. at 264 (emphasis added)). The outcome in Lassiter is an exception. See id. at 34 (Burger, J., concurring) (recognizing that the majority’s holding was very narrow).
legal-aid bureau[s].”"166 Moreover, courts reviewing whether counsel should have been provided necessarily assess the circumstances with the benefit of hindsight, and courts cannot effectively evaluate the benefits counsel could have provided.167 As Justice Blackmun warned, “The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant . . . . Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case.”168

### Conclusion

While the *Lassiter* test stands as a “stumbling block” between unaccompanied alien children and their right to counsel, a child’s legal needs combined with the conditions of his or her detention can overcome this formidable obstacle. Unaccompanied alien children are uniquely and dangerously poised when forced to navigate the complex waters of the legal system without the aid of an attorney. Relief in an immigration court, the enforcement of detention standards, and reunification with family all hinge on effective legal representation. The efforts of the DOJ, DHS, and HHS to improve the treatment of children are no substitute for the critical role played by independent counsel. Despite repeated calls for statutory reform and the dramatic increase in the number of unaccompanied alien children in federal custody, Congress has taken no action. A child’s right to be heard calls upon the voice of the Constitution.

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166 *Id.* at 52 (Blackmun, J., dissenting) (quoting *Uveges v. Pennsylvania*, 335 U.S. 437, 450 (1948) (Frankfurter, J., dissenting)).

167 *See id.* at 51.

168 *Id.; see also* Gardner, *supra* note 55, at 74 (recognizing the inefficiency of *Lassiter’s* case-by-case public counsel analysis).
**SINNERS OR SAINTS: CHILD SOLDIERS AND THE PERSECUTOR BAR TO ASYLUM AFTER NEGUSIE v. HOLDER**

**BRYAN LONEGAN***

**Abstract:** There are an estimated 250,000 child soldiers—boys and girls under the age of eighteen—who are being compelled to serve in more than fifteen conflicts worldwide. Child soldiers are forcibly recruited or abducted and are used as combatants, messengers, porters, cooks, and to provide sexual services. International law now recognizes child soldiers as victims of war crimes, deserving of state compassion. The U.S. Department of Homeland Security, however, has opposed asylum for child soldiers on the grounds that their military service subjects them to the “persecutor bar.” Barring child soldiers from asylum protection penalizes them for having been the victims of a crime and undercuts all efforts to protect them. This Article argues that a per se bar of child soldiers from asylum contradicts the United States’ adherence to the international view that the use of child soldiers constitutes a violation of human rights, domestic laws declaring recruitment of child soldiers a crime, and active support of the eradication of the use of child soldiers. Instead, child soldiers should be able to argue that their conduct falls beyond the scope and intent of the persecutor bar. This Article concludes by offering an approach to determine when a child soldier should be subjected to the persecutor bar that balances the seriousness of the child soldier’s actions against the circumstances under which he or she was recruited.

**Introduction**

In 2004, Salifou Yankene was fifteen years old when armed forces from the Mouvement Patriotique de Côte d’Ivoire raided the refugee camp where Salifou, his mother, and his siblings had lived since Salifou’s father and sister were gunned down outside their home three years be-

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fore.\(^1\) When the soldiers grabbed Salifou and his younger brother Abdul, their mother grabbed hold of Abdul’s arm.\(^2\) Because of their mother’s resistance, the soldiers cut off Abdul’s hand in full view of Salifou.\(^3\)

For the next two years, Salifou lived and fought with the rebel forces.\(^4\) On pain of death, he participated in raids where he looted, fired upon people, abducted new child soldier recruits, and hit and kicked people without mercy.\(^5\) Through bribery and stealth, Salifou’s mother arranged for his escape from the rebel group and his flight to the United States, where he sought asylum.\(^6\)

An immigration judge found Salifou’s claim of forced conscription to be credible and granted his asylum application.\(^7\) The Department of Homeland Security (DHS), however, appealed the ruling.\(^8\) DHS argued that, by virtue of his actions as a child soldier, Salifou was a “persecutor” and thus statutorily barred from receiving the protection of the United States.\(^9\) This argument is, at best, problematic.

Under international law, the term “child soldier” applies to any person under age eighteen who either “take[s] a direct part in hostilities” as a member of governmental armed forces; has been “compulsorily recruited into [governmental] armed forces;” has been “recruit[ed] or use[d] in hostilities” by armed forces distinct from the armed forces of a state; or is under sixteen and voluntarily recruited into armed service.\(^{10}\) In 2007, child soldiers actively fought in more

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\(^1\) Nina Bernstein, *Taking the War Out of a Child Soldier*, N.Y. Times, May 13, 2007, at M29. The Mouvement Patriotique de Côte d’Ivoire was a rebel group that fought in the civil war raging in Côte d’Ivoire. See id.

\(^2\) Id.

\(^3\) Id.

\(^4\) Id.

\(^5\) Id.

\(^6\) Bernstein, supra note 1.


\(^8\) See U.S. Campaign to Stop the Use of Child Soldiers, supra note 7, at 10.

\(^9\) See id. The author is counsel to Yankene in these proceedings.

than fifteen different countries around the world.\textsuperscript{11} The United Nations Children’s Fund (UNICEF) estimates that up to 250,000 child soldiers currently participate in armed conflict.\textsuperscript{12}

The international community recognizes child soldiers as victims that deserve state compassion and care.\textsuperscript{13} To the narrow extent that the international community has recognized the limited culpability of children for acts carried out as combatants, it does so with a priority placed on rehabilitation and reintegration into society, not punishment.\textsuperscript{14} Over 150 countries have ratified treaties prohibiting the recruitment or use of children under the age of fifteen as soldiers; these treaties firmly and unambiguously identify such recruitment as a war crime and a crime against humanity.\textsuperscript{15}

The United States, through Congress’s ratification of these international treaties, has fully embraced the notion that the recruitment of child soldiers is a war crime.\textsuperscript{16} In addition, Congress has made the recruitment of child soldiers a violation of domestic law as well as

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\textsuperscript{14} See \textit{id.} at 70–72. See \textit{generally} CRC, \textit{supra} note 10, art. 38 (outlining the legal rights and protections to which children who are affected by armed conflict are entitled).


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grounds for deportation. Moreover, the United States has been a leading donor to the effort to rehabilitate child soldiers.

Given the adherence of the United States to the international view that the use of child soldiers constitutes a violation of human rights, the U.S. domestic laws declaring child soldier recruitment a crime, and the nation’s active support for eradicating the use of child soldiers, DHS’s position that child soldiers are persecutors is paradoxical. Barring child soldiers from asylum protection penalizes them for having been the victims of a crime and undercuts all of the United States’ efforts to protect them. Therefore, asylum is an important weapon in the fight against the exploitation of child soldiers.

Domestic law allows the attorney general to grant asylum to anyone who falls within the definition of a “refugee.” The definition of refugee, however, does not apply to anyone who “incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” In applying this “persecutor bar,” the Board of Immigration Appeals (BIA or “Board”) and federal circuit courts have relied on *Fedorenko v. United States*, which held that the post-World War II legislation known as the Displaced Persons Act did not create a voluntariness exception to the persecutor bar. Reliance on *Fedorenko* as a guide for interpreting the persecutor bar caused conflicting results. On March 3, 2009, however, the Supreme Court held in *Negusie v. Holder* that the Board’s reliance on *Fedorenko* was misplaced; *Fedorenko*, the

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19 See Child Soldiers Accountability Act of 2008 § 2; U.S. Report on the Optional Protocol, supra note 18, ¶ 34; Happold, supra note 13, at 64; supra notes 8–9, 16–18 and accompanying text.

20 See 8 U.S.C. § 1158(b)(1)(A) (2006); see also id. § 1101(a)(42)(A) (defining a refugee as a person who is unable or unwilling to return to his home country on account of a well-founded fear of persecution due to the person’s race, religion, nationality, membership in a social group, or political opinion).


23 See infra Part II.
Court found, concerned a different statutory construction. Applying the first step of *Chevron* deference, the Court held that the persecutor statute was ambiguous and it remanded the case to the Board to reconsider under the current statutory framework.

This Article argues that special provisions must be made to address the application of the persecutor bar to child soldiers. Even if the Board decides that there is no voluntariness defense to the persecutor bar, the development of both international customary and U.S. domestic laws regarding the use of child soldiers, the fact that child soldiers are recognized as victims worthy of protection, and traditional notions of the diminished responsibility of juveniles all support this conclusion. Part I briefly discusses the problems related to establishing a claim to asylum for a child soldier. Part II discusses the persecutor bar in general and its applicability to the circumstances of child soldiers. Lastly, Part III offers a simple approach for applying the persecutor bar to child soldiers applying for asylum in the United States.

I. The Eligibility of Child Soldiers for Asylum

Before reaching the issue of whether a child soldier is precluded from asylum as a persecutor, it is worth briefly exploring on what grounds a child soldier would be eligible for asylum in the first place. To prevail on an asylum claim, the applicant must show either actual persecution in the past on account of a protected ground or a well-founded fear of persecution in the future on account of a protected ground. Thus, child soldiers are confronted with two threshold issues: First, establishing that someone has persecuted or likely will persecute them; and second, proving that the persecution was or would be based on a protected ground.

Persecution has been defined as “threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom.” General upheaval resulting from civil strife or war is insufficient to establish persecution. Further, required ser-

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24 See *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163, 1165 (2009). Prior to the decision of the U.S. Supreme Court, the case was called *Negusie* v. *Mukasey*. The name changed when, after Michael Mukasey, Eric H. Holder, Jr. became the Attorney General of the United States.

25 See id. at 1164, 1167.


27 See, e.g., *Chen*, 20 I. & N. Dec. at 17.

28 Lin v. INS, 238 F.3d 239, 243–44 (3d Cir. 2001) (quoting Chang v. INS, 119 F.3d 1055, 1066 (3d Cir. 1997)).

vice in a nation’s military generally does not constitute persecution.\textsuperscript{30} Similarly, fear of forced conscription into a guerilla organization by itself is not persecution.\textsuperscript{31} A person who fears punishment for desertion, however, may qualify for asylum if they can establish that they would have been compelled to perform an act that was illegal under international law.\textsuperscript{32} Thus, a former child soldier could establish persecution by showing that he or she deserted because others compelled him or her to commit atrocities.\textsuperscript{33} But requiring child soldiers to prove that they committed atrocities, or would have been required to commit atrocities if they remained, misses the point: International law establishes that it is intrinsically wrong and detrimental to children’s well-being to compel them to fight regardless of whether the fighting involves committing bad acts.\textsuperscript{34}

The next conundrum faced by child soldiers seeking asylum is that U.S. courts have declined to find that they were persecuted on account of a protected characteristic despite universal acknowledgement that they are victims of human rights abuses.\textsuperscript{35} The BIA has defined “a particular social group”—the pertinent protected characteristic here—as “a group of persons [who] share a common, immutable characteristic” such as sex, color, kinship, or a shared past experience like “former military leadership or land ownership.”\textsuperscript{36} Consequently, some courts have held that age cannot form the basis for defining a social group because “unlike innate characteristics, such as sex or color, age changes over time, possibly lessening its role in personal identity.”\textsuperscript{37}

\textsuperscript{32} See, e.g., A-G-, 19 I. & N. Dec. at 506.
\textsuperscript{33} See, e.g., id.
\textsuperscript{34} See infra Part II.A.
\textsuperscript{35} See Lukwago v. Ashcroft, 329 F.3d 157, 183 (3d Cir. 2003); see also supra note 15 and accompanying text.
\textsuperscript{36} In re Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part by In re Mogharabi, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) (holding that to establish a social group, an applicant for asylum must show that: (1) he possesses a characteristic which the persecutor seeks to overcome in others; (2) the persecutor knows of the characteristic or could become aware of it; (3) the persecutor has the power to punish the characteristic; and (4) the persecutor has the inclination to punish the characteristic).
\textsuperscript{37} Lukwago, 329 F.3d at 171. The Lukwago court declined to find that “children from Northern Uganda who are abducted and enslaved . . . and oppose their involuntary servitude” were a particular social group. Id. at 167. The court also rejected the argument that forced recruitment could be the basis for finding a social group because “a ‘particular social group’ must exist independently of the persecution suffered by the applicant for asylum.” Id. at 172. In a subsequent decision regarding a victim of trafficking, the Third
This reasoning is flawed because it fails to acknowledge that at the
time of the past persecution, the child’s age was immutable. Although
each child will ultimately age out of the condition that makes them exploitable, “[a] child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution . . . .” The U.S. courts’ myopic view of age is also a consequence of federal regulations regarding the likelihood of future persecution. The relevant regulations state that past persecution creates a presumption of future persecution, but that the government can overcome this presumption by showing that circumstances have changed such that an applicant who has suffered past persecution has no basis to fear future harm. Arguably, these “future persecution” regulations, which make granting asylum more difficult, are inapplicable: The statute expressly establishing “past persecution” as a basis for asylum makes no reference to risk of future harm. For example, there are several forms of harm, such as forced sterilization and female genital mutilation, that may form the basis of an asylum claim even though the harm cannot be repeated.

Circuit explained, “This is a matter of logic: motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution.” Sarkisian v. Attorney Gen. of the U.S., 322 F. App’x 136, 141 (3d Cir. 2009); see also Cruz-Diaz v. INS, 86 F.3d 330, 331–32 (4th Cir. 1996) (sustaining the immigration judge’s determination that the forced conscription of the applicant by a rebel group when he was less than fifteen years old and his fear of arrest by the government was not based upon a protected ground). But see In re S-E-G-, 24 I. & N. Dec. 579, 583–84 (B.I.A. 2008). In S-E-G-, the Board stated,

We agree with the Immigration Judge that “youth” is not an entirely immutable characteristic but is, instead, by its very nature, a temporary state that changes over time. . . . [H]owever, . . . the mutability of age is not within one’s control, and . . . if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable.

Id.

39 Id.
41 See id.
42 See Deborah E. Anker, Law of Asylum in the United States 44 (Paul T. Lufkin ed., 3d ed. 1999) (arguing that “an applicant who has suffered past persecution can still be denied asylum based on considerations of future harm” may impose requirements beyond what is required by statute).
thermore, federal regulations permit granting asylum on purely humanitarian grounds regardless of the possibility of future persecution if the past persecution was particularly egregious.\textsuperscript{44}

Despite these difficulties, child soldiers may still establish that they are members of a social group if they can show that they would be subject to persecution based upon their veteran status because that status is not subject to change.\textsuperscript{45} For example, “membership in the group of former child soldiers who have escaped [Lord’s Resistance Army] captivity fits precisely within the BIA’s own recognition that a shared past experience may be enough to link members of a ‘particular social group.’”\textsuperscript{46} This possible solution, however, leads to the following question: Are former child soldiers subject to exclusion from refugee protection because of their conduct as child soldiers?

II. Child Soldiers and the Persecutor Bar

In the Refugee Act of 1980, Congress carved out an exception for those who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{47} This seemingly clear language, however, is dangerously deceptive; at least one court has commented that the statute “has a smooth surface beneath which lie[s] a series of rocks.”\textsuperscript{48}

Until recently, courts interpreted the statute in light of the Supreme Court’s decision in \textit{Fedorenko v. United States}, which upheld the denaturalization of Feodor Fedorenko, who had originally entered the United States as a refugee pursuant to the Displaced Persons Act (DPA) of 1948.\textsuperscript{49} In both his application under the DPA and subsequent natu-
ralization application, Fedorenko willfully failed to disclose that he had served as a guard in the Treblinka concentration camp, which would have barred his entry into the United States under the DPA.\textsuperscript{50} For his part, Fedorenko—who was initially a Russian prisoner of war but later served the Germans—admitted serving as a guard, but claimed that the Germans forced him to do so and denied any involvement in the atrocities committed at the camp.\textsuperscript{51}

The Court refused to read a voluntariness exception into the DPA.\textsuperscript{52} Nevertheless, the Court noted that, without a voluntariness exception, the DPA would bar “every Jewish prisoner who survived Treblinka because each one of them assisted the SS in the operation of the camp.”\textsuperscript{53} Specifically, the “working prisoners [who] led arriving prisoners to the lazaret where they were murdered, cut the hair of the women who were to be executed, or played in the orchestra at the gate to the camp as part of the Germans’ ruse to persuade new arrivals that the camp was other than what it was.”\textsuperscript{54} In a critical footnote, the Court stated that the solution lies, not in “interpreting” the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the \textit{persecution} of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby vil-

\textsuperscript{50} Fedorenko, 449 U.S. at 500.
\textsuperscript{51} See id.
\textsuperscript{52} Id. at 512–14. In denying Fedorenko’s involuntariness defense, the Court took notice of the difference between the two statutory preclusions for eligibility under the DPA. See id. at 512. Whereas section 2(a) precluded those who “assisted the enemy in persecuting civil[ians],” section 2(b) precluded those who “\textit{voluntarily} assisted the enemy forces . . . in their operations . . . .” See id. at 509–10, 512 (alteration in original) (quoting IRO Constitution, supra note 49, Annex I, Part II, § 2(a)–(b)) (internal quotation marks omitted). The Court held that the omission of the word “voluntarily” from section 2(a) meant that all persons who assisted the enemy in persecution were ineligible, regardless of voluntariness. See id.
\textsuperscript{53} See id. at 511 n.33 (quoting United States v. Fedorenko, 455 F. Supp. 893, 913 (S.D. Fla. 1978), rev’d, 597 F.2d 946 (5th Cir. 1979), aff’d, 449 U.S. 490 (1981)).
\textsuperscript{54} Id.
lage, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.\textsuperscript{55}

While \textit{Fedorenko} seemingly requires a straightforward line-drawing analysis where the court need only determine whether an individual’s conduct advanced the group’s persecutory goals, courts have struggled to find the boundary “between the extremes of the death camp barber and the weapon wielding guard.”\textsuperscript{56} One view holds that \textit{Fedorenko} requires that “in assessing the character of the individual’s conduct, we look not to the voluntariness of the person’s actions, but to his behavior as a whole. Where the conduct was active and had direct consequences for the victims, we conclude that it was ‘assistance in persecution.’”\textsuperscript{57} Under this approach, it is purely the objective effect on the victim that counts. For example, the Fifth Circuit held in \textit{Bah v. Ashcroft} that where the alien admitted to killing a prisoner and chopping off the hands of civilians, his personal motivation was not relevant even though he was forced to join a rebel group after the group had murdered his father and sister and threatened him with death.\textsuperscript{58}

\textsuperscript{55} \textit{Fedorenko}, 449 U.S. at 512 n.34. Following Fedorenko’s denaturalization, the government brought a second action to deport him under the Holtzman Amendment to the Immigration and Naturalization Act (INA) as one who had assisted the Nazis in the persecution of others. See 8 U.S.C. § 1227(a)(4)(D) (2006); \textit{In re Fedorenko}, 19 I. & N. Dec. 57, 59–60 (B.I.A. 1984). Although Fedorenko argued that the statutory issue present in his denaturalization under the DPA was not present in his deportation under the INA, the Board held that his motivation was irrelevant to his deportation. \textit{See Fedorenko}, 19 I. & N. Dec. at 69.

\textsuperscript{56} \textit{United States v. Sprogis}, 763 F.2d 115, 121 (2d Cir. 1985) (holding that a Latvian police officer who performed various ministerial duties for the Nazis was not a persecutor); \textit{cf. Maikovskis v. INS}, 773 F.2d 435, 447–48 (2d Cir. 1985) (finding that a Latvian police chief who ordered arrests at the direction of the Nazis was a persecutor).

\textsuperscript{57} \textit{Xie v. INS}, 434 F.3d 136, 142–43 (2d Cir. 2006) (finding that a driver for the Chinese health department was a persecutor where one of his duties was to drive pregnant women to hospitals for forced abortions). Mere membership in an organization that persecutes others on account of a protected ground, however, is insufficient to bar relief unless “one’s actions or inaction furthers that persecution in some way.” \textit{In re Rodriguez-Majano}, 19 I. & N. Dec. 811, 814–15 (B.I.A. 1988). Nevertheless, one does not have to actually pull the trigger to further the group’s persecutory intent. \textit{See In re A-H-}, 23 I. & N. Dec. 774, 784–85 (B.I.A. 2005) (finding that a political movement’s leader-in-exile may have “incited,” “assisted,” or “participated in” acts of persecution in the home country by an armed group connected to that political movement). At the very least, the person has to know that his conduct furthers persecution. \textit{See Castaneda-Castillo}, 488 F.3d at 22 (holding that the persecutor bar would presumptively not apply to a former army officer who testified—and whose testimony was believed—that he was unaware of a civilian massacre during a military operation in which he was ordered to block escape routes from the village).

\textsuperscript{58} \textit{See Bah v. Ashcroft}, 341 F.3d 348, 351 (5th Cir. 2003).
Alternatively, the Eighth Circuit has held that Fedorenko requires “a particularized evaluation in order to determine whether an individual’s behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution.”\(^{59}\) In Hernandez v. Reno, the court found that even when an asylum applicant, who had been forcibly conscripted into a rebel group, participated in a firing squad that killed one hundred villagers suspected of supporting the government, he may have not persecuted others.\(^{60}\) In reaching this conclusion, the court contrasted the circumstances of Hernandez’s conduct with Fedorenko’s conduct.\(^{61}\) The court noted that Fedorenko was at times free to leave Treblinka and never tried to escape, served over one year, was paid and rewarded, outnumbered the Germans (with the other Ukrainian guards), and lied about his service to U.S. authorities.\(^{62}\)

On the contrary, Hernandez was never granted leave, escaped at the earliest opportunity, received no pay, risked his life in opposing the group’s tactics and refusing orders, was isolated, and fully revealed his involvement to U.S. officials.\(^{63}\)

No reported cases, however, have directly dealt with the proper application of the Fedorenko analysis to child soldiers. To the limited extent that the Board has considered the issue, it has done so in non-precedential, unpublished decisions that cleave toward Hernandez.\(^{64}\)

One Board member opined that in considering the claim of a child soldier, factors relevant in determining his culpability include “his age at the time of the events in question, the threats and coercion he faced from adult superiors, his fear of being killed should he have refused to act as ordered, and his candid and honest testimony about his involvement in the deaths of . . . civilians.”\(^{65}\) Another Board member has found that,

because the respondent was a boy between the ages of 11 and 13 during the relevant period, we are not persuaded that he

\(^{59}\) Hernandez v. Reno, 258 F.3d 806, 813 (8th Cir. 2001).

\(^{60}\) See id. at 815 (remanding to the BIA with instructions to apply the Fedorenko analysis to determine whether the asylum applicant had assisted in the persecution of others).

\(^{61}\) See id. at 814.

\(^{62}\) See id.

\(^{63}\) See id.


\(^{65}\) Kebede, 26 Immig. Rptr. at B1-178.
had the requisite personal culpability for ordering, inciting, assisting, or otherwise participating in the persecution of others on account of a protected ground as a former child soldier in the [Lord’s Resistance Army].

In another decision, the Board held that a child soldier was not a persecutor simply because of duress. For its part, DHS has conceded that child soldiers present a different scenario from that of adults, albeit one requiring resolution by Congress.

In March 2009, the Supreme Court finally clarified that Fedorenko was not controlling with respect to the persecutor bar because it involved a completely different statutory scheme. In Negusie v. Holder, the Court held that the Immigration and Nationality Act’s persecutor bar was ambiguous with respect to “whether coercion or duress is relevant in determining if an alien assisted or otherwise participated in persecution,” and that Chevron deference required that the agency address the issue in the first instance. Concurring in the judgment, Justice Scalia noted that the agency could retain a rule precluding a voluntariness defense. Justice Stevens dissented, finding that a duress exception was necessary for the United States to comply with the U.N. High Commissioner for Refugees’ (UNHCR) interpretation of the U.N. Convention Relating to the Status of Refugees.

So the question remains: Can a child soldier be guilty of persecuting others? Negusie presents the BIA with a clean slate on which it may draft an answer. Even if the Board follows Justice Scalia’s observation that it may be reasonable to interpret the term “persecution” so as to

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66 E-O-, slip op. at 1.
67 See Sackie, 270 F. Supp. 2d at 600 (discussing BIA decision).
69 See Negusie, 129 S. Ct. at 1166.
70 Id. at 1164.
71 See id. at 1169–70 (Scalia, J., concurring). Justice Scalia offered three reasons for doing so: First, “[t]he culpability of one who harms another under coercion is, and has always been, a subject of intense debate, raising profound questions of moral philosophy and individual responsibility” and duress is not a defense to intentional killings in common law or for soldiers following military orders they know are unlawful. Id. at 1169. Second, “in the context of immigration law, ‘culpability’ as a relevant factor in determining admissibility is only one facet of a more general consideration: desirability. And there may well be reasons to think that those who persecuted others, even under duress, would be relatively undesirable as immigrants.” Id. Finally, “a bright-line rule excluding all persecutors—whether acting under coercion or not—might still be the best way for the agency to effectuate the statutory scheme.” Id.
72 See id. at 1175 (Stevens, J., dissenting).
73 See id. at 1167 (majority opinion).
exclude a voluntariness exception, as a general matter, child soldiers present a unique case where a per se bar would contradict both interpretations of international law by the United States as well as domestic legislation.\footnote{See Negusie, 129 S. Ct. at 1168–69 (Scalia, J., concurring); see also Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, § 2, 122 Stat. 3735, 3735 (codified as amended at 18 U.S.C.A. § 2442 (West Supp. 2010)); U.S. Report on the Optional Protocol, supra note 18, ¶ 34; Happold, supra note 13, at 64; supra notes 16–18 and accompanying text.}

A. A Per Se Bar to Asylum for Child Soldiers Would Contradict the United States’ Adherence to the International View That Child Soldiers Are Victims of Human Rights Abuse

Since 1924, international law has recognized the vulnerability of children and has afforded them special rights and protections during times of armed conflict.\footnote{See Mark Ensalaco, The Rights of the Child to Development, in CHILDREN’S HUMAN RIGHTS: PROGRESS AND CHALLENGES FOR CHILDREN WORLDWIDE 9, 10 (Mark Ensalaco & Linda C. Majka eds., 2005); Geraldine Van Bueren, The International Legal Protection of Children in Armed Conflicts, 43 INT’L & COMP. L.Q. 809, 810–11 (1994). To the extent that protection was afforded to children, it was as a vulnerable segment of society and not as participants in war. See Ensalaco, supra, at 10; Van Bueren, supra, at 810–11. For example, the Geneva Convention of 1949 contains several specific provisions granting children certain privileges by reason of age in times of armed conflict. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 51, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (excluding persons under eighteen from enlistment or forced labor by occupying power); see also Alison Dundes Renteln, The Child Soldier: The Challenge of Enforcing International Standards, 21 WHITTIER L. REV. 191, 193 (1999).} It was not until the two 1977 Additional Protocols to the Geneva Conventions, however, that international law specifically addressed children as combatants.\footnote{See Renteln, supra note 75, at 193.} Protocol I established that “[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault” and prohibited the involvement of children in international conflicts.\footnote{Geneva Protocol I, supra note 10, art. 77(1)–(3). Protocol I is now considered to reflect customary international law. See Renteln, supra note 75, at 194.} Protocol II extended this principle to non-international armed conflict such as civil wars, and states, “Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.”\footnote{Geneva Protocol II, supra note 15, art. 4(3) (c); see Renteln, supra note 75, at 193–94. Many states, however, deny the applicability of Protocol I to their internal conflicts by arguing that they are mere domestic disturbances. See ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 60 (1994); Renteln, supra note 75, at 194.}


76 See Renteln, supra note 75, at 193.

77 See Renteln, supra note 75, at 194.

78 Geneva Protocol II, supra note 15, art. 4(3) (c); see Renteln, supra note 75, at 193–94. Many states, however, deny the applicability of Protocol I to their internal conflicts by arguing that they are mere domestic disturbances. See ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 60 (1994); Renteln, supra note 75, at 194.}
The Convention on the Rights of the Child (CRC) also sets the minimum age for acceptable recruitment into the armed forces at fifteen.\textsuperscript{79} Similarly, the Rome Statute of the International Criminal Court (ICC) declares that “[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” constitutes a “war crime.”\textsuperscript{80} Further, the International Labour Organization Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor defines the worst forms of child labor to include “[a]ll forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.”\textsuperscript{81} Finally, in 2000, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict required that “States Parties . . . take all feasible measures” to prevent soldiers under eighteen years old from taking part in combat.\textsuperscript{82} The Optional Protocol also prohibits compulsory service in government forces by persons under eighteen and raises the minimum age for voluntary recruitment “from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child,” which is fifteen.\textsuperscript{83} Thus, the Optional Protocol “raises the minimum age of recruitment [into government forces] to sixteen, if in a rather opaque manner.”\textsuperscript{84} Non-government armed groups are barred from recruiting those under eighteen under any circumstance.\textsuperscript{85} Finally, the Optional Protocol also

\textsuperscript{79} See CRC, \textit{supra} note 10, art. 38. While fifteen years is the minimum age for recruitment into the armed forces, states are urged to give priority to the oldest individuals. \textit{See id.}


\textsuperscript{81} Worst Forms of Child Labour Convention, \textit{supra} note 15, art. 3(a). Although not directed specifically toward child soldiers, treaties aimed at the eradication of slavery and human trafficking encompass the child soldier phenomenon, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention Against Transnational Organized Crime; and the Protocol to Prevent, Suppress, and Punish Trafficking in Persons. \textit{See} Tiefenbrun, \textit{supra} note 11, at 449–56; \textit{see also} P.W. Singer, \textit{Talk Is Cheap: Getting Serious About Preventing Child Soldiers}, 37 \textit{Cornell Int’l L.J.} 561, 568–70 (2004).

\textsuperscript{82} Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, \textit{supra} note 10, Annex I, art. 1.

\textsuperscript{83} \textit{Id.} Annex I, arts. 2, 3(1).

\textsuperscript{84} Happold, \textit{supra} note 13, at 66.

\textsuperscript{85} \textit{See} Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, \textit{supra} note 10, Annex I, art. 4(1).
obliges States Parties to cooperate in the “rehabilitation and social reintegration” of persons recruited in a manner contrary to the protocol.\textsuperscript{86}

While not a party to the 1977 Additional Protocols to the Geneva Conventions, the United States has indicated that it considers their provisions relating to children in armed conflict to reflect customary international law.\textsuperscript{87} More importantly, the United States has ratified both the Optional Protocol and Worst Forms of Child Labour Conventions—the two primary treaties prohibiting the forced recruitment of child soldiers.\textsuperscript{88} Thus, the United States recognizes child soldiers as victims of human rights abuses and crimes as a matter of domestic law.\textsuperscript{89}

Further, in October 2008, Congress enacted the Child Soldiers Accountability Act which amends the Immigration and Nationality Act to declare any alien who has engaged in the recruitment or use of child soldiers removable.\textsuperscript{90} Significantly, when introducing the Act, Senator Richard Durbin stated:

\begin{footnotesize}
\begin{enumerate}
\item \footnotesize\textsuperscript{86} Id. Annex I, art. 7(1). The international community’s efforts to outlaw the exploitation of child soldiers finally obtained some level of credibility on January 29, 2007, when the International Criminal Court (ICC) initiated its first war crime trial based on the forced recruitment of children against Congolese warlord Thomas Lubanga Dyilo. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 9–11 (Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf. The Special Court for Sierra Leone’s conviction of three former commanders of the Armed Forces Revolutionary Council for the illegal recruitment and abuse of child soldiers represented another milestone. See Prosecutor v. Alex Tamba Brima, Case No. SCSL-2004-16-A, Judgment, ¶ 14(iii) (Feb. 22, 2008), http://www.scl.org/cases/ProsecutorBrimaKamaraandKanuAFRCCase/AppealJudgment/tabid/216/default.aspx. The Special Court for Sierra Leone was established pursuant to U.N. Security Council resolution. See U.N. Secretary-General, The Establishment of a Special Court for Sierra Leone: Rep. of the Secretary-General, ¶ 1, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter Sierra Leone Special Court Report].
\item \footnotesize\textsuperscript{89} See Happold, supra note 13, at 63–64; see also Press Release, Int’l Labour Org., supra note 88; Press Release, U.S. Dep’t of State, supra note 16.
\end{enumerate}
\end{footnotesize}
Recognizing that perpetrators often use drugs, threats, violence or other means to pressure child soldiers into committing serious human rights violations, including the recruitment of other children, this legislation seeks to hold adults accountable for their actions and is not intended to make inadmissible or deportable child soldiers who participated in the recruitment of other children. This legislation should not be interpreted as placing new restrictions on or altering the legal status of former child soldiers who are seeking admission to or are already present in the United States.\(^91\)

The Act also criminalizes the recruitment of children under the age of fifteen and allows the United States to prosecute individuals in the United States who have recruited children, even if the recruitment took place in other countries.\(^92\)

Similarly, because “[c]hild soldiers are children who are trafficked into exploitative and dangerous forms of work performed under slave-like conditions,” former child soldiers trafficked into the United States would be protected under the Trafficking Victims Protection Act (TVPA).\(^93\) The TVPA defines trafficking victims as persons who are held against their will “for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”\(^94\) Moreover, state anti-human trafficking laws, such as that of New York, specifically exclude trafficking victims from prosecution as accomplices.\(^95\) This creates a potential conflict of laws.\(^96\) It is well established that “[w]here the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose accomplice liability upon such a per-

\(^93\) See Tiefenbrun, supra note 11, at 449.
\(^94\) 22 U.S.C. § 7102(8)(B) (2006); see Tiefenbrun, supra note 11, at 452.
\(^95\) See, e.g., N.Y. Penal Law § 135.36 (McKinney 2009) (“In a prosecution for labor trafficking, a person who has been compelled or induced or recruited, enticed, harbored or transported to engage in labor shall not be deemed to be an accomplice.”).
\(^96\) Compare Child Soldiers Accountability Act of 2008 § 2 (imposing liability on persons who attempt or conspire to recruit child soldiers), with Tiefenbrun, supra note 11, at 449 (noting that the TVPA protects victims of trafficking), and Penal § 135.36 (excluding victims of trafficking from liability as accomplices).
son.” This evidence overwhelmingly suggests that Congress has recognized child soldiers as a protected class.

B. A Per Se Bar to Asylum for Child Soldiers Does Not Conform with the Refugee Protocol

The principles of refugee protection that underlie the Refugee Convention and Protocol are subject to limited exceptions contained in Article 1F of the Convention. These exceptions aim to exclude from refugee protection those persons who have committed offenses so grave that they are considered undeserving of safe harbor. Article 1F provides, in pertinent part:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity . . . ;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

97 WAYNE R. LAFAVE, CRIMINAL LAW 693 (4th ed. 2003). Thus, a woman willingly transported across state lines for the purpose of prostitution cannot be charged as an accomplice in violation of the Mann Act. See Gebardi v. United States, 287 U.S. 112, 118–20, 123 (1932). Nor can a victim of statutory rape be an accomplice to that crime. See In re Meagan R., 49 Cal. Rptr. 2d 325, 330 (Cal. Ct. App. 1996). Similarly, it is well established within the civil context that “if conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action.” Doe v. Oberweis Dairy, 456 F.3d 704, 713 (7th Cir. 2006) (quoting RESTATEMENT (SECOND) OF TORTS § 892C (1986)).


99 See id.; see also UNHCR Guidelines, supra note 38, ¶ 58; Advisory Opinion from Eduardo Arboleda, Deputy Regional Representative, U.N. High Commissioner for Refugees 5–6 (Sept. 12, 2005) [hereinafter Advisory Opinion] (on file with author).

100 Convention Relating to the Status of Refugees, supra note 98, art. 1F. The grounds for exclusion enumerated in article 1F are exhaustive, meaning that they cannot be augmented by additional grounds for exclusion in the absence of an international convention to that effect. See UNHCR Guidelines, supra note 38, ¶ 58. Moreover, the language of article 1F suggests that states lack the discretion to grant protection to persons to whom the preclusion applies. See Convention Relating to the Status of Refugees, supra note 98, art. 1F; see also Happold, supra note 13, at 85 (discussing the discrepancies in the treatment of child soldiers in international and domestic law).
According to the interpretation of the UNHCR, the third exception for acts contrary to the purposes of the United Nations applies only to persons in high positions of authority representing a state or state-like entity. The exclusion for “serious non-political crimes” is also inapplicable to child soldiers, unless the crime was linked to the armed conflict itself. Therefore, the exclusion for war crimes and crimes against humanity under Article 1F(a) is the most relevant in determining whether a child soldier committed an excludable act during an armed conflict.

War crimes, referred to as “grave breaches,” are serious violations of the laws and customs of war as provided under the Geneva Conventions of 1949. They include willful killing and torture, willfully causing great suffering or serious injury to body or health, hostage taking, wanton destruction of civilian settlements, launching indiscriminate attacks on civilians, forced transfer of populations, and rape. Crimes against humanity include murder, extermination, enslavement, deportation or forcible transfer, imprisonment, torture, rape and other forms of sexual violence, persecution, enforced disappearance, and apartheid. War crimes and crimes against humanity do not require proof of specific intent, merely the knowledge of the existence of particular circumstances. Thus, to obtain a conviction for war crimes, prosecutors need only show that the defendant engaged in the proscribed conduct with knowledge that he or she did so within the context of an armed conflict. Crimes against humanity require knowledge that the prohibited conduct was part of an ongoing, systematic attack against civilian populations.

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101 See Advisory Opinion, supra note 99, at 7. Some commentators have argued that a child soldier simply cannot form the intent necessary to commit genocide or to wage a war of aggression. See Happold, supra note 13, at 72; Chen Reis, Trying the Future, Avenging the Past: The Implications of Prosecuting Children For Participating in Internal Armed Conflict, 28 Colum. Hum. Rts. L. Rev. 629, 644–45 (1997).


103 See id. at 6.

104 See Fourth Geneva Convention, supra note 75, art. 147.

105 See Geneva Protocol II, supra note 15, art. 4(2); Geneva Protocol I, supra note 10, art. 85(3); Fourth Geneva Convention, supra note 75, art. 147.


107 See Happold, supra note 13, at 72.


109 See Rome Statute, supra note 80, art. 7(1); see also de Than & Shorts, supra note 108, at 115.
The sad reality is that child soldiers commit atrocious acts with disturbing regularity. Normally, these acts would unquestionably be deemed war crimes and crimes against humanity and thus grounds for exclusion if committed by adults. But should child soldiers be held accountable for war crimes or crimes against humanity and therefore be subject to the exclusion provisions of Article 1F(a)?

Although the international community has clearly and vigorously condemned the use of child soldiers, its approach to the treatment of child soldiers in light of their conduct remains ambiguous. While international law clearly establishes that the forced recruitment of a child soldier violates that child’s rights, it is largely silent as to the culpability of a child soldier for his violation of international laws during the period in which his rights were violated. Understandably, the victims of the brutality of child soldiers are less ambiguous in their view of how child soldiers should be treated. Child soldiers have been tried in the domestic courts of several nations and even executed for crimes in violation of national laws committed during armed conflicts. Popular opinion in Rwanda maintained that “if a child was able to kill, if a child was able to discriminate between two ethnic groups, to decide who was a Hutu moderate and who wasn’t, and was able to carry out

110 See Michael Wessells, Child Soldiers: From Violence to Protection 2–3 (2006); Tiefenbrun, supra note 11, at 433–34.
111 See Convention Relating to the Status of Refugees, supra note 98, art. 1F; Charter of the International Military Tribunal, supra note 106, art. 6(b)–(c).
113 See Happold, supra note 13, at 67. There is no internationally recognized minimum age of criminal responsibility, much less one for the violation of international law. See id. at 78–79. Rather, the CRC requires member states to establish their own minimum age for criminal responsibility. See CRC, supra note 10, art. 40(3)(a); Happold, supra note 13, at 73. While the ICC does not have jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of the offense, this is merely a jurisdictional provision; it does not preclude prosecution in a national court. See Happold, supra note 13, at 78–79. The statutes for the international criminal tribunals for the former Yugoslavia and Rwanda were both silent as to a minimum age of criminal responsibility, though neither tribunal prosecuted anyone under eighteen. See id. Further, while the CRC requires states parties to establish a minimum age of criminal responsibility, it does not set an age itself—each state is left to establish its own threshold age for criminal responsibility. See CRC, supra note 10, art. 40(3)(a).
114 See Wessells, supra note 110, at 218–19; Reis, supra note 101, at 634–35.
115 See Happold, supra note 13, at 71. The government of the Democratic Republic of Congo executed a fourteen-year-old child soldier in 2000 and sentenced four others between the ages of fourteen and sixteen to death in 2001. Id. In 2002, the Ugandan government charged two child soldiers from the Lord’s Resistance Army with treason but withdrew the charges under international pressure. See id.
murder in that way, why should that child be considered differently from an adult?”

Dr. Matthew Happold has argued, however, that because Protocol II sets fifteen as the cut off age for military service, a fifteen-year-old should not be held accountable for his actions. After all,

The right held by children under fifteen, not to be recruited into an armed force or group, is a welfare right based on the premise that military service, even if voluntary, is always contrary to their best interests. In consequence, the interests the right serves trump any autonomy interests that might be served by permitting children under fifteen the choice whether or not to volunteer.

Dr. Happold concedes, however, that the problem with this premise is that Protocol II makes no mention of a child soldier’s criminal responsibility and the drafters of Protocol II specifically decided not to include such a provision.

Nonetheless, this idea that children under fifteen lack the mental capacity to decide to serve, and thus cannot form the mental state required to commit international crimes, seems to have influenced the formation of the Special Court for Sierra Leone, which has no jurisdiction over anyone who was under fifteen years of age at the time of the commission of an offense. Those between fifteen and eighteen were to be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

The Special Court’s prosecutor quickly announced, however, that he would not indict persons who committed crimes as children.

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116 Reis, supra note 101, at 634–35. In Rwanda, over one thousand children were detained by national authorities and accused of participating in the genocide. See id. at 629.
117 See Happold, supra note 13, at 69.
118 Id.
119 See id. at 73–74.
120 See Sierra Leone Special Court Report, supra note 86, ¶¶ 32–38.
121 Statute of the Special Court for Sierra Leone art. 7(1), Jan. 16, 2002, 2178 U.N.T.S. 145.
In sum, although it is theoretically possible for a child soldier to be found guilty of committing crimes that would subject him to exclusion under Article 1F(a), it does not occur in practice. Even if evidence indicated that a child soldier committed war crimes, the UNHCR has warned that any refugee status determination related to child soldiers must “take into account not only general exclusion principles but also the rules and principles that address the special status, rights, and protection afforded to children under international and national law at all stages of the asylum procedure.” These include, most notably, principles relating to “the mental capacity of children and their ability to understand and consent to the acts that they are requested or ordered to undertake.” For fifteen- to eighteen-year-old child soldiers, the UNHCR notes that questions of immaturity, involuntary intoxication, duress, and self-defense arise in assessing culpability.

Finally, even if it was determined that a child soldier had committed an excludable act and that he or she bore individual responsibility for that act, the UNHCR requires the tribunal to determine whether the consequences of exclusion from refugee protection are proportional to the seriousness of the excludable acts. The proportionality determination requires consideration of any mitigating or aggravating factors including age, treatment by military personnel, or circumstances of service.
C. A Per Se Bar to Asylum for Child Soldiers Ignores Traditional Notions of Infancy and Duress as a Basis for Finding Diminished Responsibility for Children Who Commit Bad Acts

Recent studies demonstrate that “critical areas in the brain’s [frontal lobes] used for making judgments and comprehending complex concepts like safety and freedom are not fully developed” until people are in their twenties.\textsuperscript{129} These studies confirm “a long-held, common sense view: teenagers are not the same as adults in a variety of key areas such as the ability to make sound judgments when confronted by complex situations, the capacity to control impulses, and the ability to plan effectively.”\textsuperscript{130} Ahead of this scientific curve, the Supreme Court has long recognized that “[o]ur history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.”\textsuperscript{131} In particular, the Court has noted the “lack of maturity and an underdeveloped sense of responsibility” in youth, that the young are “more vulnerable or susceptible to negative influences and outside pressures,” and that “the character of a juvenile is not as well formed as that of an adult.”\textsuperscript{132} Such considerations lead to the conclusion that “[t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”\textsuperscript{133}

The idea that children should also be held to a lesser degree of responsibility than adults is reflected in the various sections of the Immigration and Nationality Act (INA) that exempt children from otherwise generally applicable provisions.\textsuperscript{134} For example, the totalitarian party membership ground of inadmissibility has an age-based excep-

\textsuperscript{129} See Don Vereen, Research Shows Consequences of Drug Abuse on the Teenage Brain, 14 CHALLENGE, No. 3, 2007, at 1, http://www.thechallenge.org/challenge_14_3.pdf; see also Catherine Sebastian, The Second Decade: What Can We Do About the Adolescent Brain?, 2 OPTICON 1826, at 2 (2007), http://www.ucl.ac.uk/opticon1826/archive/issue2/VIPLIFE_Teenagers.pdf (reporting that “the most profound differences between adults and adolescents occur at the decision-making, or executive, levels of processing” and that adolescents are more likely than adults to engage in risky behavior).


\textsuperscript{132} Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

\textsuperscript{133} Id. at 570.

tion. Further, the Attorney General has interpreted various sections of otherwise general provisions of the INA such that those sections do not apply to children under eighteen years of age. For example, the Board has held that juvenile delinquency determinations do not fall within criminal grounds of removal, even though no such exemption exists in the statute. In the asylum context, the one year filing deadline for asylum applications makes no exception for children, but the regulations excuse unaccompanied minors.

In addition to their underdeveloped brains and lack of maturity, child soldiers present the mitigating factor of extreme, life threatening duress. Almost every U.S. jurisdiction recognizes duress as a defense to criminal culpability. The common law also excuses criminal acts performed under threat of “imminent death or serious bodily injury.” To establish the defense of duress, a defendant must show that:

1. he “was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;”
2. he “had not recklessly or negligently placed [him]self in a

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135 See id. § 1182(a)(3)(D)(ii) (providing for exception where alien was under sixteen years of age or where membership was for purposes of obtaining employment, food, or other essentials for living). Admittedly, that Congress created an age-based exception in this provision and not in the persecutor bar indicates that Congress was aware of age considerations and chose to omit them. Compare id., with id. § 1101(a)(42)(A) (excluding from refugee protection those found to have persecuted others regardless of the age of the applicant).


137 See id. at 1365–66.


139 See UNHCR Guidelines, supra note 38, ¶¶ 1–5; see also Happold, supra note 13, at 85.


141 See, e.g., LaFave, supra note 97, at 491; 1 Charles E. Torcia, Wharton’s Criminal Law 240 (14th ed. 1978).
situation in which it was probable that [he] would be forced to perform the criminal conduct;” (3) he “had no reasonable, legal alternative to violating the law;” and (4) there was “a direct causal relationship . . . between the criminal act and the avoidance of the threatened harm.”

The plight of child soldiers easily satisfies these elements.

In her landmark comprehensive study of the impact of armed conflict on children, Graça Machel reported that children are valued as soldiers because they are “more obedient, do not question orders and are easier to manipulate than adult soldiers.”

Machel further reported, “Child soldiers are recruited in many different ways. Some are conscripted, others are press-ganged or kidnapped and still others are forced to join armed groups to defend their families.”

Though many children “present themselves for service[, i]t is misleading, however, to consider this voluntary.” Children may volunteer because it may be the only way to assure food, shelter, and protection. Another commentator has noted, “Children who grow up in war zones might not see any positive place for themselves in society; in their situations they are oppressed, have little or no access to education, feel powerless and alienated, and have been denied positive life options.” Others are caught up in a cycle of violence spurred on by “revenge [because of the murder of a relative], the conviction to continue the struggles of lost loved ones, the need to substitute an annihilated family or social structure, and the desire to take control over events that shape one’s cir-

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142 Dixon v. United States, 548 U.S. 1, 4 n.2 (2006).
144 Machel Report, supra note 143, ¶ 36. Forced recruitment usually involves “the threat or actual violation of the physical integrity of the youth or someone close to him or her, [which] is practised by both armed opposition groups and national armed forces.” Cohn & Goodwin-Gill, supra note 78, at 24. Children in refugee camps are at particularly high risk for recruitment. See Wessells, supra note 110, at 25, 37–38.
145 See id., ¶ 39.
146 Wessells, supra note 110, at 3.
cumstances.”

Ideology and susceptibility to propaganda may also provide a hard-to-resist incentive. During the Iran-Iraq war, for example, thousands of children died in combat after being told that participating in a holy war guaranteed access to heaven.

Once recruited, however, child soldiers are subjected to brutal induction ceremonies in which attempts are made to harden children emotionally by punishing those who offer help or display feelings for others subjected to abuse. Children are often beaten up and continuously exposed to scenes of violence so that they do not question the authority of the adults in the group; sometimes they are even forced to kill captives or their own family members. Typically, armed groups use a child’s participation in killing as a method of control and to “cut child recruits off from their former lives, rupturing their bonds with family and community.” Forced participation in killing is also utilized to condition the children to violence, so that they experience “as normal what most people would regard as abnormal.” Armed groups often use “cannibalistic practices such as forcing children to drink the blood of those who had been killed” to condition and reduce the fear of children in combat. Additionally, many armed groups require drug use, whereby the children’s “‘crazy’ behavior becomes a combat

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149 See Machel Report, supra note 143, ¶ 49.

150 See Maryam Elahi, The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier, 19 COLUM. HUM. RTS. L. REV. 259, 278 (1988). The force of ideology and propaganda cannot be understated. See, e.g., id. In 2007, the Nobel Prize-winning author Günter Grass surprised the world when he confessed to having served in the Waffen S.S. during World War II, albeit for a brief period in which he never fired a shot. See Günter Grass, How I Spent the War, NEW YORKER, June 4, 2007, at 68. According to Grass: “What I did cannot be put down to youthful folly. No pressure from above.” Id. Yet, he relayed a tragicomic story of how he had been compelled to serve in the largely youth-based home defense Luftwaffe Auxiliary at age fifteen; he stated, “Rabidly pubescent, we considered ourselves the mainstays of the home front.” Id. There, he was “a pushover for the prettified black-and-white ‘truth’ served up by the newsreels. Id. at 70. When he was finally called up for duty at the front at age seventeen and assigned to the Waffen S.S., he stated, “There is nothing carved into the onion skin of my memory that can be read as a sign of shock, let alone horror.” Id. at 74. He continued, “I most likely viewed the Waffen S.S. as an elite unit that was sent into action whenever a breach in the front line had to be stopped up.” Id.

151 See WESSELLS, supra note 110, at 59–71; see also Machel Report, supra note 143, ¶ 44.

152 See WESSELLS, supra note 110, at 64–75; see also Machel Report, supra note 143, ¶ 44.

153 WESSELLS, supra note 110, at 59.

154 Id. at 57.

155 Id. at 75.
ritual through which [they] demonstrate their machismo in a deadly mixture of fearlessness and uncontrolled violence.”

Needless to say, serving as a child soldier “affects all aspects of child development—physical, mental, and emotional.” But as Dr. Michael Wessells has noted, it would be a mistake to believe that such an experience has damaged the child beyond repair. He states:

One of the most prevalent images is that child soldiers are damaged goods. One sees images of a lost generation, of teenagers who not only lost their childhood and opportunity for education, but also their chance for proper moral development. These images portray youth as not just perpetrators but hardened killers who can never go home. The evidence now available, although it is not highly systematic, indicates the contrary. The majority of former child soldiers are resilient, not damaged, and able to reintegrate into civilian life with varying degrees of success. It is a disservice to these young people to suggest otherwise. Although there are dysfunctions that must be addressed, their resilience far outweighs any dysfunction.

Carefully designed Disarmament, Demobilization, and Reintegration (DDR) programs that have made special provisions for child soldiers involving counseling, health screening, transition planning, and family reunification have been able to successfully reintegrate former combatants back into their communities. To that end, the United States has contributed over ten million dollars through the Agency for International Development “to international programs aimed at preventing the recruitment of children and reintegrating child ex-combatants into society.”

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156 Id. at 76–77.
157 See Machel Report, supra note 143, ¶ 166.
159 Id.
160 See id. at 518–25. Machel noted that in many instances, reunification with community and family is simply impossible. See Machel Report, supra note 143, ¶ 52. This is particularly true for girls who served as child soldiers and who, during their service, were raped or had children by their comrades. See id. ¶ 51. For these young victims, reacceptance into the community is particularly hard because they are no longer suitable for marriage under traditional norms. See id.
III. A Method for Applying the Persecutor Bar to Child Soldiers

During the Negusie oral argument, Justice Alito asked “[h]ow would the balancing be struck” to determine when a lack of personal culpability would excuse the application of the persecutor bar.\footnote{Transcript of Oral Argument at 9, Negusie v. Holder, 129 S. Ct. 1159 (2009) (No. 07-499).} Immigration judges regularly make such determinations based on a case-by-case evaluation of a person’s moral fiber and worthiness to remain in the United States.\footnote{See, e.g., In re Marin, 16 I. & N. Dec. 581, 583 (B.I.A. 1978).} In the context of removal based on criminal convictions for example, the BIA has established a workable system of balancing the seriousness of the alien’s criminal misconduct against the equities presented in the individual’s case.\footnote{See id. at 584–85.} There is no reason to think that immigration judges would be any less capable of making similar determinations in the context of child soldiers.

In light of a number of a factors, including: (1) the prohibition against recruitment of those under fifteen contained in the CRC; (2) the ICC’s codification of the recruitment of those under fifteen as a war crime; and (3) the Optional Protocol’s bar to recruitment of fifteen-year-olds, if a person’s conduct occurred when the before he or she turned fifteen, then he or she cannot be held morally accountable for his or her actions.\footnote{See Rome Statute, supra note 80, art. 8(2)(b)(xxvi); CRC, supra note 10, art. 38(2); Geneva Protocol I, supra note 10, art. 77(2).} This conclusion is just as strong today as it was during the formation of the Special Court of Sierra Leone.\footnote{See Sierra Leone Special Court Report, supra note 86, ¶ 15(c).} Thus, the persecutor bar should not apply to those under sixteen.\footnote{See id.; see also Rome Statute, supra note 80, art. 8(2)(b)(xxvi); CRC, supra note 10, art. 38(2); Geneva Protocol I, supra note 10, art. 77(2).} For those who served at age sixteen or seventeen, the burden remains on the government to show that the child soldier’s conduct rose to the level of persecution.\footnote{See 8 C.F.R. § 1240.8(d) (2010) (“If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.”).}

Next, any analysis must account for the fact that child soldiers perform many non-combat functions. These include “laying mines and explosives; scouting, spying, acting as decoys, couriers or guards; training, drill or other preparations; logistics and support functions, portering,
cooking and domestic labour . . . [and] sexual slavery.”169 These are not acts of persecution. Drawing on the Fedorenko Court’s observation that the Jewish prisoners in Treblinka who were assigned tasks that formed a part of the daily workings at the death camp could not be considered to have assisted in the persecution of others, the test for the application of the persecutor bar to child soldiers must consider that child soldiers assigned to non-combat tasks forming part of the daily routine of a military organization did not engage in persecution of others.170

Where a child soldier who, at age sixteen or seventeen, engaged in conduct that would be deemed persecution, the Board should take heed of the Hernandez analysis and, in a manner consistent with Article 1F of the Refugee Convention, require immigration judges to weigh factors such as whether the child soldier was conscripted or volunteered; adopted the persecutory goals of the group; received any benefits, reward, or promotion for service; length of service; rank; opportunities to escape; and whether the he or she was forthcoming with information.171

Two Canadian cases illustrate this analysis.172 First, in Ramirez v. Canada, the court upheld the application of the exclusion clause to an asylum applicant who had served in the Salvadoran army for two and a half years starting at age seventeen and then deserted.173 Ramirez had enlisted voluntarily, re-enlisted after two years, rose to the rank of sergeant, fought in excess of one hundred engagements, and witnessed the torture and killing of many prisoners.174 Despite Ramirez’s assertion that he deserted the army after an ideological conversion, the court held:

[Ramirez] could never be classed as a simple on-looker, but was on all occasions a participating and knowing member of a military force, one of whose common objectives was the torture of prisoners to extract information. This was one of the things his army did, regularly and repeatedly, as he admitted. He was a part of the operation, even if he personally was in no

171 See id. at 814.
174 See id.
sense a “cheering section.” In other words, his presence at this number of incidents of persecution, coupled with his sharing in the common purpose of the military forces, clearly constitutes complicity.175

By way of contrast, in Moreno v. Canada, the court held that the exclusion clause should not apply where the applicant had been forcibly conscripted into the Salvadoran army at sixteen years old, served only four months, participated in only five armed conflicts in which civilians were killed, stood guard outside a locked cell where a prisoner was tortured, and deserted as soon as his family was able to raise the money for his escape.176 According to the court, “A person forcibly conscripted into the military and who on one occasion witnessed the torture of a prisoner while on assigned guard duty cannot be considered at law to have committed a crime against humanity.”177

Conclusion

It is now well established that by enacting the Refugee Act of 1980, Congress intended to bring U.S. law into conformity with the 1967 United Nations Refugee Protocol and aligned the United States with the international approach to the treatment of refugees.178 The imposition of a per se bar to child soldiers seeking asylum contravenes the international and domestic efforts to protect child soldiers. Worse, it effectively cuts off an important avenue of escape for child soldiers, emboldens the warlords that enslave them with the knowledge that the children have nowhere to turn for protection, and unduly stigmatizes the children at a time when they most need help for recovery and rehabilitation. Given the circumstances under which they are held and compelled to serve, as well as the wide recognition of the diminished culpability of youth, child soldiers should be able to argue that their conduct falls beyond the scope and intent of the persecutor bar.

175 Id. at 187–88.
177 Id. at 425.
DISINHERITANCE OF MINOR CHILDREN: A PROPOSAL TO AMEND THE UNIFORM PROBATE CODE

JACQUELINE ASADORIAN

Abstract: With the single exception of Louisiana, the United States provides no legislative protection against the disinher tance of minor children by their parents. This position is distinct from most other countries in the world, which require parents to provide for their children at death. Freedom of testation, a distinctly American value, is at odds with another value Americans hold dear: support and protection of one’s family. This Note argues that the balance between these two discordant values has tipped too far in the direction of testamentary freedom, to the detriment of minor children. Non-custodial children are disproportionately affected by this lack of protection because they are the most likely group to be disinherited. Rather than rely on courts to inconsistently and arbitrarily protect children against disinheritance, this Note suggests that states should adopt forced heirship legislation to ensure that children are supported after the death of their parents.

Introduction

God Planted in Men a strong desire . . . of propagating their Kind, and continuing themselves in their Posterity, and this gives Children a Title, to share in the Property of their Parents, and a Right to Inherit their Possessions. Men are not Proprietors of what they have merely for themselves, their Children have a Title to part of it . . . .

—John Locke

Despite John Locke’s view, which is codified in some form in most countries, the United States fails to protect minor children from disinheritance.
heritance by their parents. While most other modern countries require parents to provide for their children after death, the United States values freedom of testation over the moral obligation to provide for children at death.

In the United States, laws of testation are enacted at the state level, and only one state—Louisiana—has enacted laws protecting children from parental disinheritance. The failure of virtually all American states to protect minor children from disinheritance when a parent dies testate (with a will) stands in contrast to intestacy statutes, which dictate how a decedent’s property will be distributed when he or she dies in the absence of a valid will, and usually provide for spouses and children.

The lack of protection for disinherited minors in the United States is also incongruous with the protections afforded to spouses. Many American jurisdictions provide spouses with an elective share of the decedent’s estate if they are written out of the testator’s will. Many of

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3 See Ralph C. Brashier, Protecting the Child from Disinheritance: Must Louisiana Stand Alone?, 57 LA. L. REV. 1, 1 (1996); Brennan, supra note 2, at 134. Among the countries that protect children from disinheritance are Argentina, Austria, Belgium, Bolivia, Brazil, Bulgaria, Chile, Columbia, Costa Rica, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, India, Ireland, Italy, Japan, Republic of Korea, Lebanon, Liechtenstein, Malta, Mexico, Mongolia, Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Scotland, Spain, Sweden, Switzerland, Turkey, Ukraine, Uruguay, Venezuela, England, Malaysia, New Zealand, Northern Ireland, Singapore, and parts of Australia and Canada, and commonwealth colonies such as Hong Kong. Brashier, supra, at 1 n.3. Freedom of testation is defined as the largely unrestricted ability of a person to choose the disposition of his or her property upon death. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003) (“The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.”).

4 See Brashier, supra note 3, at 1; infra Part I.

5 Deborah A. Batts, I Didn’t Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance, 41 HASTINGS L.J. 1197, 1198 (1990). Intestacy statutes are designed to carry out the likely intent of the average intestate decedent and preserve the economic health of the family after a death. See DUKEMINIER ET AL., supra note 1, at 75–76.

6 See Batts, supra note 5, at 1198–99.

7 Id. Professor Batts notes that:

When the surviving spouse has been written out of the deceased spouse’s will, or has been devised inadequate assets, many American jurisdictions provide the surviving spouse with a remedy known as the elective share. In the major-
the same justifications for overriding the intent of the testator to provide for an omitted spouse apply equally well to minor children who are disinherited by their parents.\(^8\)

In general in the United States, protection and support of one’s family is highly valued.\(^9\) In fact, every state requires parents to support their minor children during life, and states impose civil and criminal penalties when these support obligations go unfulfilled.\(^10\) The importance of parental support of minor children has both moral and economic dimensions.\(^11\) Morally, the support of children is stitched into the fabric of society, and states have an interest in providing for minor children.\(^12\) This obligation has an important economic effect as well because when a parent is unwilling or unable to provide for a child, the state must step in and provide support.\(^13\) These moral and economic arguments imply that parents should be obligated to provide for their dependent and minor children at death, as in life.\(^14\) Yet this inclination of jurisdictions that have this remedy, the surviving spouse may receive as much as one-third or one-half of the estate.

\(\text{id.}\) This Note focuses on intentional disinheri- tance of minor children. See infra Part I.A. Many states have pretermitted heir and spouse statutes that correct testators’ wills in the case of unintentional disinheritance. See Dukeminier et al., supra note 1, at 527, 533; Ronald Chester, Disinheritance and the American Child: An Alternative from British Columbia, 1998 Utah L. Rev. 1, 28 (“[P]retermitted heir statutes and concepts like undue influence do indirectly provide American children some disinheritance protection.”). The Uniform Probate Code (UPC) provides that if a testator fails to provide for his or her children born or adopted after the execution of the will, the omitted children receive a share in the estate. Unif. Probate Code § 2-302 (amended 1993). Because pretermitted heir statutes largely solve the problem of unintentional disinheritance, this Note focuses on intentional disinheritance and whether it should continue to be tolerated in the United States. See Dukeminier et al., supra note 1, at 527.

\(^8\) See Batts, supra note 5, at 1199 (noting that the “overriding state concern that the surviving spouse does not become a ward of the state” applies equally to children who may become wards of the state if they are disinherited).

\(^9\) See id. at 1197 (“The sanctity and inviolability of the parent-child bond is a fundamental concept imbedded in America’s social and legal structure.”).

\(^10\) See Brasheir, supra note 3, at 5–7.

\(^11\) See id. at 4–5.

\(^12\) See id. (“Our collective moral sense informs us that each parent has an obligation to nurture his children until they reach adulthood.”).

\(^13\) See id.

\(^14\) See id. The existence of legal support obligations during a parent’s life provides further support for the proposition that these obligations should not terminate upon the death of a parent. See id. at 5–6 (discussing state statutes that require parents to fulfill their support obligations, whenever financially possible).
is inherently in tension with another distinctly American value—freedom of testation.\textsuperscript{15}

The American system that places paramount importance on testamentary freedom causes particular problems for non-custodial children who are left out of their natural parents’ wills.\textsuperscript{16} These children are disproportionately affected by the United States’ failure to require their parents to provide for them at death.\textsuperscript{17}

This Note explores the balance the United States has struck between freedom of testation and support for minor children and argues that the scale has tipped too far in the direction of testamentary freedom. Part I examines the current status of the laws of testation in the United States and discusses the flaws in the system that allow parents to disinherit their minor children without cause. Part II explores the ways in which American courts have attempted to “get around” testamentary plans that fail to provide for children through doctrines such as undue influence, fraud, and mental capacity. Part III posits that the current American system, which in effect allows courts to alter testamentary plans in order to provide for disinherited children, is costly, taxes judicial resources, and fails to provide consistent results. Part III argues that these inadequacies disproportionately affect non-custodial minor children. Finally, Part IV proposes that the Uniform Probate Code (UPC) should be amended to include a requirement that parents provide for their minor children at death.

I. BACKGROUND ON THE CURRENT STATUS OF AMERICAN LAWS OF TESTATION AS THEY RELATE TO THE DISINHERITANCE OF CHILDREN

The American ideal of testamentary freedom is not a foregone conclusion—countries all over the world protect children from disinheri-

\textsuperscript{15} Tamara York, Protecting Minor Children from Parental Disinheritance: A Proposal for Awarding a Compulsory Share of the Parental Estate, 1997 Det. C. L. Rev. 861, 871.

\textsuperscript{16} See Brashier, supra note 3, at 3 (noting that non-custodial parents are “unlikely to provide for those minor children by will when disinheritance is perfectly permissible” and finding that the societal burden is likely to increase in our current era of “fractured families and multiple marriages”). For the purposes of this Note, “non-custodial children” refers to those children who do not physically reside with the parent at issue. See id.

\textsuperscript{17} See Brashier, supra note 3, at 3.

\textsuperscript{18} See Adam Dayan, Note, The Kids Ain’t Alright: An Examination of Some of the Flaws in American Law Regarding Child Disinheritance, the Reasons That Children Should Be Protected, and a Recommendation for the United States to Learn from the Australian Model That Protects Children Against Disinheritance, 17 Cardozo J. Int’l & Comp. L. 375, 380–82 (2009). The British
stone noted that descent to the children of the deceased was established by long and persisting custom. However established these customs were throughout the rest of the world, testamentary freedom overshadowed the moral obligation of providing for one’s children at death in the United States.

Until the 1980s, it was “generally accepted that the right to transmit or inherit property at death was neither a natural right nor was it constitutionally protected.” In the landmark case of *Hodel v. Irving*, however, the U.S. Supreme Court held that the ability to transmit property at death was a constitutionally protected property right akin to the right to exclude. While *Hodel* essentially afforded constitutional concept of *legitim* provided “the forced share of a decedent’s estate from which the deceased cannot disinherit his children without justification,” a concept that was not adopted by the United States. *Id.* at 381 n.33.

2. William Blackstone, Commentaries *11–12 (“A man’s children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length, in process of time, this frequent usage ripened into general law.”). Blackstone also notes, however:

While property continued only for life, testaments were useless and unknown; and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one’s property, or a part of it, by testament . . . .

*Id.* at *12.

20. See Brashier, *supra* note 3, at 1 n.3; Dayan, *supra* note 18, at 382.

21. See Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) (“Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance.”); Dukeminier et al., *supra* note 1, at 3.

22. See Hodel v. Irving, 481 U.S. 704, 716 (1987); Dukeminier et al., *supra* note 1, at 10. At issue in *Hodel* was the Indian Land Consolidation Act of 1983, which provided that parcels of land below a certain size and value would escheat to the tribe at the death of the owner. 481 U.S. at 709. Thus, the property owner was unable to pass on his land at death. *Id.* at 716. The Court unanimously held that the Act totally abrogated the right to pass on property, which amounted to a taking under the Fifth Amendment. *Id.* at 717. The statute was unconstitutional because it failed to provide compensation for this taking. *See id.* at 717–18. One commentator argues: “It should be understood that the Supreme Court’s constitutional protection of the right of disposition in *Hodel v. Irving* is akin to declaring ‘dead hand control’ of property a natural right. Thus, *Irving* is potentially revolutionary.” Ronald Chester, Essay: Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving, 24 Sw. U. L. Rev. 1195, 1199 (1995). “Dead hand control” refers to the ability of a person to use wealth to influence others’ behavior after death. See Dukeminier et al., *supra* note 1, at 27.
protection to the right to pass on property at death, it did not prescribe any details as to what the right to devise or inherit entails.\textsuperscript{23}

While the right to pass on property at death (either through intestate succession or by the use of a will) is constitutionally protected, it is clear that there is no right to inherit.\textsuperscript{24} The case of \textit{Shapira v. Union National Bank} demonstrates that courts are willing to uphold restrictive provisions in wills because a child has no right to inherit.\textsuperscript{25} In \textit{Shapira}, the testator’s will contained a provision that stipulated that his son could receive his inheritance only if he married a Jewish girl within seven years of testator’s death.\textsuperscript{26} The testator’s son brought suit, arguing that the will provision at issue violated his constitutional right to marry and was against public policy.\textsuperscript{27} Finding against the son, the court upheld the will and held that there is no natural or constitutionally protected right to inherit.\textsuperscript{28} Thus, \textit{Shapira} adds an important wrinkle to the constitutionally protected right to transmit property at death guaranteed by \textit{Hodel}— there is no parallel constitutionally protected right to inherit.\textsuperscript{29}

\textbf{A. Why Is Freedom of Testation So Important in the United States?}

The lack of legislative protection against disinheritance in the United States is a salient indicator of the value America places on testamentary freedom.\textsuperscript{30} While states will not allow a surviving spouse to be completely disinherited, a surviving child may be disinherited in every state except Louisiana.\textsuperscript{31} An examination of the various reasons parents disinherit their children sheds light upon whether freedom of testation can be defended in this context in light of the limits placed upon testamentary freedom in the context of spousal support.\textsuperscript{32}

One of the most persuasive arguments for maintaining the American system of testamentary freedom is that parents typically do fulfill their moral and financial obligations to their children (and to the

\textsuperscript{23} See \textit{Hodel}, 481 U.S. at 717–18.
\textsuperscript{25} See \textit{Shapira}, 315 N.E.2d at 828.
\textsuperscript{26} See \textit{id.} at 826. The will further stipulated that the Jewish girl must have two Jewish parents. See \textit{id.}
\textsuperscript{27} See \textit{id.} at 827, 829.
\textsuperscript{28} See \textit{id.} at 828 (holding that “the right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or protected by . . . the United States constitution.”).
\textsuperscript{29} See \textit{Hodel}, 481 U.S. at 717–18; \textit{Shapira}, 315 N.E.2d at 828.
\textsuperscript{30} See Brashier, \textit{supra} note 3, at 1; Brennan, \textit{supra} note 2, at 134.
\textsuperscript{31} See Batts, \textit{supra} note 5, at 1198–99; Brashier, \textit{supra} note 3, at 1.
\textsuperscript{32} See Batts, \textit{supra} note 5, at 1199; Brashier, \textit{supra} note 3, at 7.
Thus, some might argue that there is no need to enact legislation protecting children from disinheritance.\footnote{33 See Brashier, supra note 3, at 7.}

Notwithstanding the fact that most parents do in fact provide for their minor children, there are a number of acceptable reasons they may intentionally disinherit their children.\footnote{34 See id.} In some circumstances, parents choose to disinherit their children, not out of lack of love or concern, but because they believe disinheritance is in the best interest of the child.\footnote{35 See id.} Additionally, many testators (particularly older testators with moderate estates) want to devise their entire estate to a surviving spouse.\footnote{36 See id. (“Some parents hold an altruistic belief that total disinheritance of one’s child forces that child to become a more fully self-actualized individual and contributing member of society.”). Wealthy testators frequently espouse this rationale when they are faced with the decision of whether to provide for their adult children. See id. at 7–8. In these instances, “these testator parents are convinced that both their child and society will be better off if the child is not allowed to ride the coattails of inherited wealth.” Id. at 8. See Dukeminier et al., supra note 1, at 76 (“Studies of estates with minor children show [leaving the entire estate to the surviving spouse to the exclusion of the children] to be the usual practice of those leaving wills.”). The UPC intestacy statute also follows this common practice. See Unif. Probate Code § 2-102(1) (amended 1993) (providing that, if all the decedent’s children are also children of the surviving spouse, the surviving spouse takes the entire estate to the exclusion of the decedent’s children); see also Brennan, supra note 2, at 131. The protection afforded to minor children is limited in its effect when a testator leaves his or her entire estate to the surviving spouse because it “requires both a surviving spouse and a nuclear family. In instances where the parents are not married, or when there is only one parent surviving, that ‘fall back’ protection is gone.” Id. See Brashier, supra note 3, at 8 (“With life expectancies and costs of elder care increasing, the testator spouse may feel that most, if not all, of his estate should be devised to the surviving spouse.”).}

In the case where a couple has minor children, the testator may leave his or her entire estate to the surviving spouse with the expectation that the surviving spouse will care for the surviving minor children, thus providing indirect support for the minor children.\footnote{37 See id. at 7–9 (discussing reasons why a testator might disinherit his or her children and explaining why these reasons are more readily applicable to the disinheritance of adult children).} In the case of an older testator with adult children, the decedent may feel that the surviving spouse has a greater need for financial support.\footnote{38 See id. (“[S]ome parents hold an altruistic belief that total disinheritance of one’s child forces that child to become a more fully self-actualized individual and contributing member of society.”). Wealthy testators frequently espouse this rationale when they are faced with the decision of whether to provide for their adult children. See id. at 7–8. In these instances, “these testator parents are convinced that both their child and society will be better off if the child is not allowed to ride the coattails of inherited wealth.” Id. at 8. See Dukeminier et al., supra note 1, at 76 (“Studies of estates with minor children show [leaving the entire estate to the surviving spouse to the exclusion of the children] to be the usual practice of those leaving wills.”). The UPC intestacy statute also follows this common practice. See Unif. Probate Code § 2-102(1) (amended 1993) (providing that, if all the decedent’s children are also children of the surviving spouse, the surviving spouse takes the entire estate to the exclusion of the decedent’s children); see also Brennan, supra note 2, at 131. The protection afforded to minor children is limited in its effect when a testator leaves his or her entire estate to the surviving spouse because it “requires both a surviving spouse and a nuclear family. In instances where the parents are not married, or when there is only one parent surviving, that ‘fall back’ protection is gone.” Id. See Brashier, supra note 3, at 8 (“With life expectancies and costs of elder care increasing, the testator spouse may feel that most, if not all, of his estate should be devised to the surviving spouse.”).}

While these justifications for disinheritance are not unreasonable or without merit, their underlying rationale is most applicable to the disinheritance of adult children. Minor children, who are unable to
care for themselves, often do not warrant intentional disinheritance and are thus in need of protection against arbitrary disinheritance.\textsuperscript{41}

Moreover, some parents may intentionally disinherit their children for reasons that many would find morally reprehensible.\textsuperscript{42} In the increasingly common case of non-nuclear families, parents may feel detached from their biological children, particularly when they have created new families.\textsuperscript{43} In addition, parents may disinherit their children out of anger or spite for the custodial parent or child.\textsuperscript{44}

In order to contextualize the United States’ adherence to the ideal of testamentary freedom, it is useful to explore some alternate systems that require parents to provide for their children at death.\textsuperscript{45}

**B. Alternatives to the United States’ Allowance of Disinheritance:**

**Forced Heirship and Family Maintenance Statutes**

1. Forced Heirship

Forced heirship provisions are typically found in the Scandinavian countries, in many civil law countries, and in Louisiana.\textsuperscript{46} Forced heirship involves an allocation of a portion or percentage of the decedent’s estate, dictated by statute, to the decedent’s children.\textsuperscript{47} Louisiana, the sole U.S. state to require parents to provide for their children at death, has adopted a forced heirship approach.\textsuperscript{48} The Louisiana forced share (legitime) is derived from French law, and protects

\begin{itemize}
\item \textsuperscript{41} See id. at 8 (“[D]isinheritance of one’s adult children is much less objectionable than disinheritance of one’s minor children who are as yet incompetent to provide for themselves.”).
\item \textsuperscript{42} See id. at 9.
\item \textsuperscript{43} See id. at 9–10.
\item \textsuperscript{44} See Brashier, \textit{supra} note 3, at 9–10.
\item \textsuperscript{45} See Batts, \textit{supra} note 5, at 1211, 1213 (discussing forced heirship provisions and family maintenance statutes).
\item \textsuperscript{46} Id. at 1211. Countries that employ the forced heirship approach include Belgium, Brazil, Denmark, Finland, France, Germany, Greece, Hungary, Lebanon, Mexico, the Netherlands, Norway, Poland, Saudi Arabia, Scotland, Sweden, Switzerland, Turkey, Ukraine, Venezuela, and Uruguay. York, \textit{supra} note 15, at 865 n.17.
\item \textsuperscript{47} Batts, \textit{supra} note 5, at 1211.
\item \textsuperscript{48} See \textit{La. Civ. Code Ann.} art. 1493(A) (2008). The statute provides:

Forced heirs are descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent.

\textit{Id.}; Brashier, \textit{supra} note 3, at 1.
\end{itemize}
against the disinheriting of children under twenty-three years of age as well as the mentally and physically disabled, regardless of age.\textsuperscript{49} The Louisiana forced share is not without its limitations—a child may be disinherited for “just cause.”\textsuperscript{50} This “just cause” provision allows parents to disinherit children who have acted in a way so as not to “deserve” their inheritance.\textsuperscript{51}

There are many benefits to forced heirship provisions.\textsuperscript{52} Most importantly, they guarantee that the needs of children (particularly minor children) are met, whenever possible, by their parents rather than by the state.\textsuperscript{53} Forced heirship statutes, like child support statutes, require that parents provide for their children at death as in life.\textsuperscript{54} Thus, the state’s interest in ensuring that children do not needlessly become wards of the state is furthered by forced heirship provisions.\textsuperscript{55} More generally, the statutes reflect a societal feeling that it is natural for chil-

\textsuperscript{49} \textit{La. Civ. Code Ann.} art. 1493; \textit{Dukeminier et al., supra} note 1, at 521. Prior to 1989, the Louisiana forced share extended to all children, regardless of age or need. Batts, \textit{supra} note 5, at 1211.

\textsuperscript{50} \textit{La. Civ. Code Ann.} art. 1621(A). The statute provides:

A parent has just cause to disinherit a child if:

(1) The child has raised his hand to strike a parent, or has actually struck a parent; but a mere threat is not sufficient.

(2) The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury.

(3) The child has attempted to take the life of a parent.

(4) The child, without any reasonable basis, has accused a parent of committing a crime for which the law provides that the punishment could be life imprisonment or death.

(5) The child has used any act of violence or coercion to hinder a parent from making a testament.

(6) The child, being a minor, has married without the consent of the parent.

(7) The child has been convicted of a crime for which the law provides that the punishment could be life imprisonment or death.

(8) The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years, unless the child was on active duty in any of the military forces of the United States at the time.

\textit{Id.}

\textsuperscript{51} \textit{See id.}

\textsuperscript{52} \textit{See Batts, supra} note 5, at 1223–25.

\textsuperscript{53} \textit{See id.} at 1223 (noting that providing for children’s needs not only closely relates to the “moral” obligation of a living parent to ‘support, maintain, educate, and provide for the future of his children’ but is also a compelling interest of the state (quoting Cynthia A. Samuel et al., \textit{Successions and Donations}, 45 \textit{La. L. Rev.} 575, 594 (1984))).

\textsuperscript{54} \textit{See id.} at 1211; Brashier, \textit{supra} note 3, at 5–7.

\textsuperscript{55} \textit{See Batts, supra} note 5, at 1211; Brashier, \textit{supra} note 3, at 5–7.
dren to expect an inheritance from their parents.\textsuperscript{56} Many commentators posit that forced heirship promotes family bonding, cohesiveness, stability, responsibility, identity, and belonging, which are attributes that any rational society would seek to encourage.\textsuperscript{57}

Finally, the procedural simplicity of forced heirship is an important benefit of the system.\textsuperscript{58} Because the application of the statute is automatic, judicial resources are not expended as they are in a family maintenance system.\textsuperscript{59} The ease of application is also beneficial for estate planning purposes.\textsuperscript{60} Because parents are aware of the statutory forced share, they can create testamentary plans that are less likely to be struck down by courts using judicial doctrines in order to provide for disinherited children.\textsuperscript{61}

The most compelling drawback of forced heirship is the rigidity required in its application.\textsuperscript{62} Forced heirship statutes are typically applied without regard for the size of the estate or the age, level of need, or independence of the children.\textsuperscript{63} Additionally, forced heirship provisions essentially pit the rights of the surviving spouse against the rights of the surviving children, and may depart from what the average testator would desire.\textsuperscript{64} Finally, some commentators argue that guaranteed inheritance, which is the result of forced heirship, might cause heirs to

\textsuperscript{56} See Batts, supra note 5, at 1224 (pointing out that the natural expectation of an inheritance is “entrenched in our laws of intestacy, yet totally discarded when in tension with testamentary freedom”).

\textsuperscript{57} See id. at 1222, 1225.

\textsuperscript{58} See id. at 1225; infra Part I.B.2.

\textsuperscript{59} See Batts, supra note 5, at 1213–14; 1225; infra Part I.B.2.

\textsuperscript{60} See Batts, supra note 5, at 1227.

\textsuperscript{61} See Dukeminier et al., supra note 1, at 520; Batts, supra note 5, at 1225, 1227 (“[E]state planners could take advantage of the known quantity aspect of forced heirship in planning the estate.”); Ray D. Madoff, Unmasking Undue Influence, 81 Minn. L. Rev. 571, 577 (1997).

\textsuperscript{62} See Batts, supra note 5, at 1226.

\textsuperscript{63} See id. (“Forced heirship formalizes the ancient familial distribution of the decedent’s estate to the decedent’s kin; the emphasis is on family, not individual need.”).

\textsuperscript{64} See Dukeminier et al., supra note 1, at 75 (“[W]hen there are no children from a prior marriage, most persons want everything to go to the surviving spouse, thus excluding parents and siblings—and children. This preference is particularly strong among persons with moderate estates . . . .”); Batts, supra note 5, at 1226 (“Most of those interviewed would leave most, if not all, of small estates to the surviving spouse only, contrary to the property distribution of most intestacy laws between surviving spouse and children. This preference did not continue when there were remarriages, adult children, or children of prior marriages.”) (footnote omitted). It is in these fractured families where protection against disinheritance is needed most. See Brashier, supra note 3, at 3.
become lazy and unmotivated because they know they will ultimately inherit from their parents.\textsuperscript{65}

2. Family Maintenance Statutes

Another common international practice that protects children’s inheritance is the family maintenance system, which is present in many common law countries.\textsuperscript{66} Under this system, children who are omitted from a parent’s will may seek discretionary judicial intervention in order to obtain a portion of the deceased parent’s estate.\textsuperscript{67} Thus, unlike forced heirship provisions, family maintenance systems “allow[] flexibility in providing for the needs of heirs.”\textsuperscript{68}

The primary benefit of the family maintenance system lies in its elasticity, which allows judges to examine the age, need, and independence of children in order to determine the appropriate level of inheritance.\textsuperscript{69} The Australian case of \textit{Lambeff v. Farmers Co-operative Executors and Trustees Ltd.} provides an excellent example of this flexibility.\textsuperscript{70} There, the court provided for the adult daughter of the testator, whom he disinherited by devising his entire estate in equal parts to his two

\textsuperscript{65} See Batts, \textit{supra} note 5, at 1221 (explaining that a perceived disadvantage of guaranteed inheritance is that it may “cause heirs to cease to work and so reduce . . . the total wealth of the country”).

\textsuperscript{66} See \textit{id.} at 1211. Countries that have adopted family maintenance systems include England, Wales, New Zealand, Australia, and some parts of Canada. Joshua C. Tate, \textit{Caregiving and the Case for Testamentary Freedom}, 42 U.C. Davis L. Rev. 129, 140 (2008).

\textsuperscript{67} See Batts, \textit{supra} note 5, at 1213–14.

\textsuperscript{68} See York, \textit{supra} note 15, at 870. New Zealand has adopted a quintessential example of a family maintenance statute. See Batts, \textit{supra} note 5, at 1214. The New Zealand Family Protection Act allows any child of the deceased (in addition to other categories of protected claimants) to petition the court for intervention to provide for his or her needs. See \textit{id}. The statute provides:

\texttt{If any person (referred to in this Act as the deceased) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion on application so made, order that any provision the Court thinks fit be made out of the deceased’s estate for all or any of those persons.}

Family Protection Act 1955 No 88 (N.Z.).

\textsuperscript{69} See Frances H. Foster, \textit{Linking Support and Inheritance: A New Model from China}, 1999 Wis. L. Rev. 1199, 1213–14 (“Proponents laud the model’s flexibility, which allows estate distribution to be ‘tailored to individual need’ and ‘evolving lifestyles.’”) (footnote omitted).

\textsuperscript{70} See \textit{Lambeff v. Farmers Coop. Ex’rs & Trs. Ltd.} (1991) 56 SASR 323, 324–26 (Austl.).
adult sons.\textsuperscript{71} In determining the appropriate division of the estate, the court considered the relative job security, salary, property ownership, and family situation of the three children of the deceased.\textsuperscript{72} Ultimately, although the plaintiff was in a better financial situation than her half-brothers, the court found that she was deserving of a portion of her father’s estate.\textsuperscript{73}

The flexibility inherent in the family maintenance system speaks to the natural desire to protect children in need while allowing for some degree of testamentary freedom.\textsuperscript{74} Thus, proponents of the family maintenance model praise its protection of family members, particularly children, with the least possible interference with testamentary freedom.\textsuperscript{75}

The unfortunate drawback of the family maintenance system is that, because of the discretionary nature of the system, there is the distinct possibility of inconsistent results.\textsuperscript{76} Additionally, its flexibility can only be achieved by expending substantial resources.\textsuperscript{77} Because each

\textsuperscript{71} See id. at 324, 328.
\textsuperscript{72} See id. at 324–26.
\textsuperscript{73} See id. at 324–26, 328. The court held:

The plaintiff was abandoned by the deceased at the age of 10, and had no support from him thereafter. She later made efforts to befriend her father. She has done nothing to disentitle herself. It is true that she has acquitted herself reasonably well in life without her father’s support, but I think she would have done better with proper support for her advancement in life. I think her claim succeeds, but in all the circumstances the provision should be modest. I order that the defendants pay her a legacy of $20,000 out of the estate. Id. at 328.

\textsuperscript{74} See Batts, supra note 5, at 1215. Professor Batts explains that the New Zealand Family Protection Act elevates “certain aspects of the parent-child bond over certain aspects of testamentary freedom. When there is need on the part of a dependent, that need is addressed, testamentary wishes notwithstanding; when there is no need, testamentary wishes are followed.” Id.

\textsuperscript{75} See id.; Foster, supra note 69, at 1214 (noting that proponents appreciate that “[u]nlike the alternative foreign and U.S. entitlement-based systems[,] . . . the family maintenance scheme ‘does not apply automatically’ but rather comes into play only upon petition by qualifying ‘aggrieved claimants’”) (footnote omitted).

\textsuperscript{76} See Foster, supra note 69, at 1215. Critics argue that “the family maintenance model would introduce such complexity and unpredictability into the U.S. probate process that it would undermine estate planning and obstruct simple, orderly transfer of property rights.” Id. But see Joseph Dainow, Restricted Testation in New Zealand, Australia and Canada, 36 Mich. L. Rev. 1107, 1111 (1938) (noting that, in the application of New Zealand’s family maintenance statute, “the general principles of construction have been consistent, and despite the extreme latitude of the court’s discretion, the decisions have not been conflicting”) (footnote omitted).

\textsuperscript{77} See Foster, supra note 69, at 1215 (explaining that critics of family maintenance systems find that “the costs of a discretionary redistribution system are . . . unacceptable”).
claim is decided on a case-by-case basis, the judicial system is heavily taxed. Finally, because a lawsuit must be initiated in order to amend the testator’s plan of disposition, family maintenance systems present the possibility of increased litigation and familial discord. As some commentators have noted, the American propensity toward litigation may make the family maintenance system too burdensome and unworkable in the United States.

II. INDIRECT JUDICIAL PROTECTIONS AGAINST THE DISINHERITANCE OF CHILDREN

Although there is no formal protection against disinheritance in forty-nine American states, courts have made use of a number of doctrines in order to “remedy” testamentary plans that fail to provide for children. Some of the doctrines that have been used to amend wills in order to provide for disinherited children include undue influence, mental capacity, and fraud. These doctrines are widely and flexibly

78 See Batts, supra note 5, at 1216; Foster, supra note 69, at 1215.
79 See Batts, supra note 5, at 1216; Foster, supra note 70, at 1215 (noting concerns that a family maintenance system in the United States would “promote litigation,” increase “information and administrative costs,” and ‘deplete estates.”) (footnotes omitted).
80 See, e.g., Batts, supra note 5, at 1216 (“The fortune of New Zealand and England in avoiding a deluge of litigation from the family maintenance system may not repeat here, of course, where litigation may be the ‘American way.’”); Foster, supra note 69, at 1215 (noting that the U.S. probate system is “comprised of multiple, local probate courts, staffed often by lay judges chosen on the basis of politics rather than merit,” and making it unsuitable to place such power in the hands of these courts) (footnotes omitted).
81 See Dukeminier et al., supra note 1, at 520; Madoff, supra note 61, at 611. Professor Madoff argues that:

[T]he undue influence doctrine dictates that unless the family has done something to “deserve” disinheritance, the bulk of a person’s property should be left to his or her spouse and blood relatives. . . . If the bequest fails to meet the proscribed norms, the will is set aside and the property passes under the laws of intestacy. . . . Thus, the impact of the undue influence doctrine is to act as a form of forced heirship.

Madoff, supra note 61, at 611.
82 See Dukeminier et al., supra note 1, at 520. In order to be competent to make a will:

[T]he testator must be an adult . . . and “must be capable of knowing and understanding in a general way [1] the nature and extent of his or her property, [2] the natural objects of his or her bounty, and [3] the disposition that he or she is making of that property, and must also be capable of [4] relating these elements to one another and forming an orderly desire regarding the disposition of the property.”
used to amend testamentary plans that disinherit children. Thus, it appears that while the laws in the United States favor testamentary freedom, many courts unofficially attempt to implement “natural” plans of disposition (i.e. plans that provide for blood relatives) against the stated intent of the testator by employing these remedial doctrines.

A. The Undue Influence Doctrine

Although judicial opinions consistently state that the court’s primary purpose is to effectuate testator intent, courts apply doctrines such as undue influence in a manner that is contrary to this stated pur-

*Id.* at 159 (quoting Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.1(b) (2003)). In order for there to be undue influence in the eyes of the law, there must be coercion: “It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.” *Id.* at 180. In the absence of direct evidence of undue influence, courts will often allow circumstantial evidence to prove that: “(1) the donor was susceptible to undue influence, (2) the alleged wrongdoer had an opportunity to exert undue influence, (3) the alleged wrongdoer had a disposition to exert undue influence, and (4) there was a result appearing to be the effect of the undue influence.” *Id.* at 181–82. Fraud occurs “where the testator is deceived by a deliberate misrepresentation and does that which he would not have done had the misrepresentation not been made.” *Id.* at 207. The Restatement (Third) of Property defines undue influence in the following way: “A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor’s free will and caused the donor to make a donative transfer that the donor would not otherwise have made.” Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.3(b) (2003).

83 *See Dukeminier et al., supra* note 1, at 520. The authors note:

A will disinheriting a child virtually invites a will contest. . . . “[T]estamentary capacity,” “undue influence,” and “fraud” are subtle and elastic concepts that judges and juries can use to rewrite the testator’s distribute plan in order to “do justice.” In contests by disinherited children, judges and juries are frequently influenced by their sympathies for the children.

*Id.*

84 *See Melanie B. Leslie, The Myth of Testamentary Freedom, 38 Ariz. L. Rev. 235, 236 (1996).* Professor Leslie notes:

Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent. Those courts impose upon testators a duty to provide for those to whom the court views as having a superior moral claim to the testator’s assets, usually a financially dependent spouse or persons related by blood to the testator. Wills that fail to provide for those individuals typically are upheld only if the will’s proponent can convince the fact-finder that the testator’s deviation from normative values is morally justifiable.

*Id.* (footnote omitted).
Thus, the theoretical importance of testamentary freedom is perhaps disingenuous upon careful study of judicial opinions.

Professor Melanie Leslie conducted a study that examined all cases that considered undue influence in their review over a randomly chosen five-year period. Her study showed that many courts, when “confronted with wills that disinherited family members in favor of non-family members,” upheld findings of undue influence, even in the absence of substantial evidence. Professor Leslie found that these court opinions rely heavily on the unnatural nature of a bequest to a non-family member, particularly when the testator did nothing to explain the disinheritance. Professor Leslie’s study provides strong evidence that courts favor “natural” dispositions to family members over dispositions to non-family members, even in the face of a testator’s clear intent to disinherit.

B. Undue Influence at Work: Case Studies

_Gaines v. Frawley_ provides an excellent example of a court finding undue influence in the face of an “unnatural” disposition despite the testator’s clear intent. There, Lois Frawley left her entire estate to her live-in boyfriend, Edward Gaines, to the exclusion of her two adult sons. The court found that Frawley’s boyfriend exerted undue influence, even though there were “few of the traditional indicia of undue

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85 See id. at 243–44. Professor Leslie studied all reported cases that applied the undue influence doctrine within a five-year period and found that courts “were much more likely to honor testamentary intent when the will provided for family members as opposed to non-relatives.” Id.

86 See id. at 236.

87 See id. at 243. Professor Leslie reviewed a total of 160 cases, which she located by utilizing the Westlaw topic and key numbers, for the period between December 31, 1984 and January 1, 1990. See id. & n.41.

88 See id. at 245 (“[C]ourts implicitly relieved the contestant of the burden of proof, shifting the burden to the will’s beneficiary.”).

89 See Leslie, supra note 84, at 245. Specifically, Professor Leslie illustrates that, when faced with a will contest in which the testator disinherited a family member in favor of a non-family member, courts will “implicitly break the rule placing the burden of proof on contestants . . . .” Id. at 246. Additionally, Leslie notes that courts consider the “moral worthiness” of the family members, and are more likely to find undue influence when the disinherited family member has done nothing to “deserve” disinheritance. See id.

90 See id. at 246 (“[T]he court often substituted its judgment for the judgment of the testator; the issue became not whether the document represented the testator’s intent, but whether the testator’s intentions offended the courts’ sense of justice or morality.”).

91 See Gaines v. Frawley, 739 S.W.2d 950, 955 (Tex. App. 1987).

92 Id. at 951–52.
influence.”

As evidence of her susceptibility to influence, the court relied on the fact that Frawley had emphysema and cancer, even though neither illness provided evidence of weakened mental capacity. The court then turned to the question of whether Gaines’ influence was undue, and relied on evidence that the couple drank heavily and had a tempestuous and illicit relationship—Gaines was still married to his seventh wife when he moved in with Frawley. Finally, the court turned to the relationship between Frawley and her sons, finding that the sons had a good relationship with their mother and visited her often. This positive relationship between Frawley and her sons was used as evidence of the unnatural nature and unjust result of her testamentary disposition. The court ultimately found that Frawley’s boyfriend had unduly influenced her, despite the lack of evidence that Gaines had “actively sought to influence” Frawley’s will.

Gaines provides a quintessential example of how courts will often loosen their evidentiary standards and shift burdens of proof in order to remedy what they feel are unjust, unnatural dispositions that disinherit family members. The application of doctrines such as undue influence and fraud is justified overtly as an attempt to protect a testator’s right to dispose of his or her property as he or she sees fit.

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93 See id. at 955; Leslie, supra note 84, at 250. Additionally, the Restatement (Third) of Property provides a nonexhaustive list of suspicious circumstances that may lead to an inference of undue influence, few of which were found in Gaines. See 739 S.W.2d at 953–55; Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.3 cmt. h (2003).

94 See Gaines, 739 S.W.2d at 953; Leslie, supra note 84, at 250 (noting that “[t]here was no evidence . . . of weakened mental capacity or incoherence. . . .” in Gaines).

95 See Gaines, 739 S.W.2d at 951–54; Leslie, supra note 84, at 251 (“[T]he court emphasized the illicit nature of the relationship between testator and beneficiary and the seemingly repulsive personality of the beneficiary.”).

96 See Gaines, 739 S.W.2d at 954–55.

97 See id. at 955; Leslie, supra note 84, at 252 (“[T]he court stressed what it viewed as the injustice of the will provisions, emphasizing that the sons had gotten along well with their mother and had been frequent visitors to her home.”).

98 See Gaines, 739 S.W.2d at 955; Leslie, supra note 84, at 251. Despite the lack of concrete evidence that would prove that Frawley was susceptible to influence or that her boyfriend in fact did seek to influence the provisions of Frawley’s will, the court stated:

The above circumstances considered with evidence of Mrs. Frawley being weakened and impaired, in addition to testimony showing her fear of appellant, is sufficient to justify a jury in determining her will was unnatural in its terms. The necessary elements of undue influence by appellant over testatrix are supported by tangible evidence.

See Gaines, 739 S.W.2d at 955.

99 See Gaines, 739 S.W.2d at 955; Leslie, supra note 84, at 245–46.

100 See Madoff, supra note 61, at 576. Professor Madoff provides the following example: “[I]f an aged testator leaves everything to his nurse of one month, disinheriting his family,
such as *Gaines* demonstrate, however, that, rather than furthering testamentary freedom, doctrines such as undue influence are actually used to impose testamentary norms, even in the face of unambiguous testamentary intent.\(^{101}\) In fact, because the doctrine of undue influence is often used to impose testamentary norms (which are in turn susceptible to societal norms), the application of the doctrine may not take into account “alternative” lifestyles, and cases applying the doctrine may become outdated as social norms evolve.\(^{102}\) Thus, the doctrine is somewhat unstable and should not be relied upon to protect disinherited children.\(^{103}\)

...
To highlight the inadequacy of reliance on the undue influence doctrine to protect minor children against disinheritance, it is useful to explore a case where a court did not apply the doctrine despite the clear presence of traditional indicia of undue influence. In Lipper v. Weslow, Sophie Block left a will devising the entirety of her estate to two of her children, consequently disinheriting her three grandchildren (the children of Block’s deceased first child). The will in question was prepared by one of the beneficiaries of the will (Block’s son), and contained a lengthy explanation as to why Block was disinheriting her grandchildren. The court focused on the written intention of the testator, overlooking a number of factors in finding that there was no undue influence: Block was eighty-one years of age when she executed the will, there was evidence that the testator’s son who prepared the will bore malice toward the deceased son and was in a position to influence the testator, and there was evidence that the stated reasons for disinheriting Block’s grandchildren were untrue. Despite the existence of an aberration, a misapplication of the undue influence doctrine, is to miss the more significant lesson that this case offers. What is notable about the Kaufmann decision is that it rests on firm ground under the standard doctrinal undue influence analysis. Changing mores have given us the opportunity to see this doctrine for what it is: an imposition of societal norms as to appropriate testamentary behavior.

Madoff, supra note 61, at 598 (footnote omitted); see also In re Estate of Sarabia, 270 Cal. Rptr. 560, 566 (Ct. App. 1990) (upholding a jury finding of no undue influence). The facts of Sarabia are substantially similar to those in Kaufmann—the similarities of the facts coupled with the disparate findings of undue influence highlight the inconsistent application of the doctrine. See Sarabia, 270 Cal. Rptr. at 561–62, 564–65; Kaufmann, 247 N.Y.S.2d at 485–86.

104 See Lipper v. Weslow, 369 S.W.2d 698, 701, 703 (Tex. App. 1963); Chester, supra note 7, at 28.

105 See id. at 699.

106 See id. at 699, 700–01. The will explained that Block was disinheriting her grandchildren because they had “shown a most unfriendly and distant attitude towards [her].” See id. at 700. She further stated that she had not seen her grandchildren in several years, and that her daughter-in-law (the wife of her deceased son) had contacted Block very infrequently after her son’s death (flowers on Christmas and a few greeting cards). Id. at 700–01.

107 See id. at 701. The Court noted:

There is evidence that defendant Lipper bore malice against his dead half brother. He lived next door to testatrix, and had a key to her house. The will was not read to testatrix prior to the time she signed same, and she had no discussion with anyone at the time she executed it. There is evidence that the recitations in the will that Bernice Weslow [testator’s daughter-in-law] and her children were unfriendly, and never came about testatrix, were untrue. There is also evidence that the Weslows sent testatrix greeting cards and flowers from 1946 through 1954, more times than stated in the will.
confidential relationship between Block and her children and the suspicious circumstances, the court placed the burden on the will contestants to prove undue influence and ultimately found against them.\textsuperscript{108}

The many doctrines courts use to amend wills often militate against the disinheritance of children in the United States.\textsuperscript{109} As the above cases demonstrate, however, this remedy is imperfect, because the application of these judicial doctrines may be inconsistent and cannot be relied upon.\textsuperscript{110} In order to protect minor children from disinheritance and conserve state resources, the judicial inclination that deceased parents should provide for their children should be codified in order to ensure consistent results.\textsuperscript{111} While the reasoning of courts in utilizing doctrines such as undue influence to remedy disinheritance is sound, the prevalence of these doctrines indicates that legislatures should be attending to the underlying issue rather than allowing courts to decide each case on an ad hoc basis.\textsuperscript{112}

\textbf{III. Legislation As the Best Means to Protect Minor Children from Disinheritance}

The common judicial practice of reforming wills in order to provide for disinherited family members, while not codified, is practically similar to the family maintenance system because both allow for the flexible allocation of resources to disinherited children.\textsuperscript{113} The use of judicial doctrines to amend testamentary plans, however, is an inadequate substitute for a law that guarantees a forced share for children, or

\textit{Id.}

\textsuperscript{108} See \textit{id.} at 703.

\textsuperscript{109} See Madoff, \textit{supra} note 61, at 577 (“[F]amily protectionism is built into the very fabric of the undue influence doctrine. . . . The doctrine does not act to protect the intent of the testator, but rather to protect the testator’s biological family from disinheritance.”).

\textsuperscript{110} See Kaufmann, 247 N.Y.S.2d at 685–86; Gaines, 739 S.W.2d at 955; Lipper, 369 S.W.2d at 703; Chester, \textit{supra} note 7, at 28 (arguing that the protection afforded by judicial doctrines give some protection to children in the United States, but that the protection is “indirect, haphazard, and finally unsatisfactory”).

\textsuperscript{111} See Brashier, \textit{supra} note 3, at 7; Chester, \textit{supra} note 7, at 28; Madoff, \textit{supra} note 61, at 598.

\textsuperscript{112} See Chester, \textit{supra} note 7, at 28; Madoff, \textit{supra} note 61, at 598.

\textsuperscript{113} See Dukeminier et al., \textit{supra} note 1, at 520 (discussing the wide and flexible use of doctrines such as undue influence to amend testamentary plans); Foster, \textit{supra} note 69, at 1213–14 (discussing the flexibility of family maintenance systems that allow courts to amend testamentary dispositions on a case-by-case basis). Family maintenance statutes and judicial doctrines such as undue influence have in common that they give the judiciary the flexibility and discretion to amend testamentary plans. See Dukeminier et al., \textit{supra} note 1, at 520; Foster, \textit{supra} note 69, at 1213–14.
for one that expressly gives courts the power to amend wills. In the absence of legislation, judicial decisions utilizing doctrines such as undue influence to amend wills run the risk of being arbitrary and inconsistent. The use of the undue influence doctrine provides a prime example of this inconsistency because the stated purpose of the doctrine deviates significantly from the ways in which courts utilize the doctrine. In short, indirect judicial protections against the disinheri-
tance of minor children embody the same problems as family maintenance statutes—the application of the doctrine is too discri-
tionary and too inconsistent.

While most testators provide for their minor children either directly through a testamentary bequest or indirectly by leaving the entirety of their estate to the surviving spouse, who is often the parent of the minor, the problem of the intentional disinheri-
tance of minor children is nevertheless important.

114 See Dukeminier et al., supra note 1, at 510; Chester, supra note 7, at 28; Foster, supra note 69, at 1213–14.
115 See Chester, supra note 7, at 28; supra Part II.B.
116 See Madoff, supra note 61, at 575–76 (explaining that the undue influence doctrine is understood as an attempt to protect testator’s right to freedom of testation, but in fact, the judiciary uses the doctrine to impose the testamentary norm that people should provide for their families); supra Part II.B.
117 See Batts, supra note 5, at 1216; Chester, supra note 7, at 28; Foster, supra note 69, at 1215.
118 See Dukeminier et al., supra note 1, at 76; Jeffrey P. Rosenfeld, Will Contests: Legacies of Social Change, in Inheritance and Wealth in America 173, 174 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (explaining that disinheri-
tance only occurs in fewer than three percent of probated estates). Rosenfeld warns, however, that “[w]ill contests are socially and economically significant events . . . . They can rupture and realign the social fabric of families, and keep millions of dollars tied up in litigation for years. . . . [They] often involve large estates, and can create decades of ill-will in families.” Rosenfeld, supra; see also Paul G. Haskell, Restraints Upon the Disinheritance of Family Members, in Death, Taxes and Family Property: Essays and American Assembly Report 105, 114–15 (Edward C. Halbach, Jr. ed., 1977). Professor Haskell cautions:

There is no explanation for the failure to protect minor children from disinheri-
tance . . . other than that such disinheritance rarely occurs. This is un-
doubtedly true, but the same can be said for all kinds of aberrational conduct which the law prohibits or punishes. Every moral obligation needs to have its legal counterpart. Moral obligations in the family support area do have legal counterparts in many respects, but the one inexplicable exception is the absence of any legal obligation to assure support for minor children in some manner after death.

Id.
As non-traditional families are becoming more common, disinherittance of non-custodial minor children is likely to increase as well.\textsuperscript{119} Disinheritance will likely predominantly affect those children whose parents are divorced, those born out of wedlock, and particularly those children with a non-custodial parent who has started a new family.\textsuperscript{120} In these situations, money left to the surviving spouse is not money that is, in essence, indirectly left to the minor children.\textsuperscript{121} Additionally, these are the children who are more likely to be intentionally disinherited by their non-custodial parents.\textsuperscript{122} The law should not implicitly sanction this disproportionate treatment of children who, through no fault of their own, do not reside with both of their biological parents.\textsuperscript{123}

Perhaps the most compelling argument for requiring parents to provide for their children at death is a moral one—parents are morally

\textsuperscript{119} See Brashier, supra note 3, at 9 (“[N]oncustodial parents appear particularly likely to disinherit their minor children.”); Ronald Chester, Should American Children Be Protected Against Disinheritance?, 32 REAL PROP. PROB. & TR. J. 405, 410 (1997) (“Increasingly, disinheritance involves families reconstituted after divorce and remarriage.”); see also Rosenfeld, supra note 118, at 177. Rosenfeld interviewed twenty-eight estate litigators and found that changes in family structure and the impact of divorce and remarriage accounted for 74.9% of the recent will contests in these attorneys’ caseloads. See Rosenfeld, supra note 118, at 176, 177.

\textsuperscript{120} See Brashier, supra note 3, at 9–10. The court in Kujawinski v. Kujawinski stated the problem as follows:

\textsuperscript{376} N.E.2d 1382, 1390–91 (Ill. 1978) (citation omitted); see also Batts, supra note 5, at 1200 (“[T]he substantial fifty percent divorce rate and the frequent incidence of remarriage . . . often attenuates the child’s bond with one parent and leads to the increased possibility of disinheritance of children.”) (footnote omitted); Rosenfeld, supra note 118, at 179 (“[A]n estimated 1,300 stepfamilies are being formed every day . . . . More than 6 million children live with the biological mother and a stepfather; 740,000 live with the biological father and a stepmother.”).

\textsuperscript{121} See Brennan, supra note 2, at 131.

\textsuperscript{122} See Batts, supra note 5, at 1201 (“The possible alienation and disaffection of the noncustodial parent toward the child might result in disinheritance of the child who that parent never really knew.”).

\textsuperscript{123} See Brashier, supra note 3, at 9–10, 11 (“Children of divorce and nonmarital children are particularly likely to bear the brunt of disinheritance.”).
obligated to support their own children.\textsuperscript{124} This moral obligation to support one’s children is codified by law in child support statutes, but it also runs deeply through the veins of American society.\textsuperscript{125} While parents are legally obligated to support their minor children during life, there exists no requirement that parents provide for their children at death, an incongruity that seems arbitrary and illogical.\textsuperscript{126} In fact, it may make more sense to require parents to provide for their children at death because a decedent has no use for money after death.\textsuperscript{127}

Interestingly, child support is one of the few financial obligations that appears to disappear at death.\textsuperscript{128} For example, a testator’s creditors may make claims against his estate, demonstrating that all the testator’s financial responsibilities do not die along with him.\textsuperscript{129} This begs the question: why should a testator have a greater responsibility to his creditors than he does toward his minor children?\textsuperscript{130} Both types of “debt” were entered into voluntarily, and both creditors and minor children can be said to have a right to a testator’s money after he or she dies.\textsuperscript{131}

In addition to the moral arguments in favor of requiring parents to support their minor children, there are serious economic consequences for failing to do so.\textsuperscript{132} As previously mentioned, surviving

\textsuperscript{124} See 1 Blackstone, supra note 19, at *435 (noting that natural law provides the source of the duty of parents to support their children); Brashier, supra note 3, at 4.

\textsuperscript{125} See Brashier, supra note 3, at 4–6. Indeed, Blackstone reminds us of the aspect of choice that leads to the existence of a child:

The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved.

See 1 Blackstone, supra note 19, at *435.

\textsuperscript{126} See Brashier, supra note 3, at 5–6 & n.21 (discussing various state support statutes that require able parents to support their children while living). Brashier further notes, “When a minor child’s parent dies, the child’s need does not suddenly disappear.” Id. at 7; see also Knowles v. Thompson, 697 A.2d 335, 336–40 (Vt. 1997) (discussing the importance of continued child support after divorce and after the death of a parent).

\textsuperscript{127} See Brashier, supra note 3, at 19 (“If anything, the parent will be more concerned about restrictions that affect him during his lifetime. At his death, wealth is irrelevant to his decaying corpse.”).

\textsuperscript{128} See id. at 5 n.21.

\textsuperscript{129} See id.

\textsuperscript{130} See id.

\textsuperscript{131} See 1 Blackstone, supra note 19, at *425.

\textsuperscript{132} See Batts, supra note 5, at 1199.
spouses are entitled to a statutory share of the decedent’s estate based in part on the justification that surviving spouses should not become wards of the state. This justification is as compelling, if not more so, when applied to the disinherition of minor children who are, in almost all circumstances, unable to provide for themselves.

When a parent cannot or will not support his or her minor children, the state has a responsibility to step in and provide for them. In the case of children whose parents cannot support them for financial, physical, or other reasons, the use of state money to provide for these children is necessary and commonly accepted. Parents who voluntarily choose not to provide for their children in their testamentary plans, however, are a different story. These parents pass a financial burden to others—typically either to the surviving custodial parent or the state. Thus, in addition to the moral arguments that should induce

133 See id.
134 See id. at 1999–1200. Professor Batts notes:

The surviving spouse might have assets independent of the deceased, or may be able to establish another financially supportive relationship through remarriage or cohabitation with a significant other. None of these options is available to the minor child, who did not voluntarily or knowingly establish the family relationship with the testator. If public policy has seen fit to protect spouses from disinherittance, the same statutory protections should be provided for children.

Id. at 1200; see also Jan Ellen Rein, A More Rational System for the Protection of Family Members Against Disinheritance: A Critique of Washington’s Pretermitted Child Statute and Other Matters, 15 Gonz. L. Rev. 11, 47 (1979). Professor Rein explains:

While few would gainsay the moral right of the spouse to protection against disinherittance, a decedent’s dependent children would seem to have an even higher moral claim to such protection. Spouses, after all, enter into the husband-wife relationship voluntarily at an age when they can protect their interests while children do not volunteer to be brought into the parent-child relationship thrust upon them at birth.

Rein, supra, at 47.

135 See Brashier, supra note 3, at 5.
136 See id. at 5 (noting that in instances where parents are unable to support their children, “society steps in to assist the incapable parent, recognizing that it is in society’s best interest to ensure that all of its young are provided with the opportunity to become contributing members”).

137 See id. (“[S]ociety must require by law that the capable parent support his children despite his abnegation of moral responsibility.”).

138 See Batts, supra note 5, at 1229 (“[A]lthough the parental support obligation is applicable to both parents, in many instances the surviving parent may not have sufficient independent resources to provide for the child.”).
the states to enact legislation to protect minor children from disinheritance, there are compelling economic reasons as well.  

Our current system and the family maintenance system, which rely on ad hoc judicial correction to provide for disinherited children, are both burdensome, inconsistent, and costly. Because courts are already using doctrines to “correct” disinheritance of children, we could improve upon this judicial inclination by adopting legislation that would protect minors against disinheritance with greater consistency and less judicial discretion. Protectionist legislation would expressly ensure that American courts are not bogged down by time-consuming and costly will contests that could be avoided with a statutory share for minor children.

In addition to taxing the judicial system, will contests are financially undesirable for families (both the named beneficiaries and the contesting parties) because much of the decedent’s estate can be depleted during the course of the litigation. In fact, as a result of the high cost of litigation, it is likely that most disinherited children are dissuaded from contesting a parent’s will. Thus, there may be disinherited heirs who do not even receive the benefit of judicial doctrines such as undue influence.

Enacting legislation that would prevent the disinheritance of minor children would likely be met with little resistance, since Americans generally believe that parents should not be able to disinherit minor children. In one study, 860 residents of Nebraska were asked whether parents should be legally allowed to will property outside the family and

139 See id. (explaining that, when a parent disinherits a minor child, “the state must step in and support the child while the deceased parent is free to leave estate assets to strangers at the expense of both the children and the state”).

140 See Dukeminier et al., supra note 1, at 520 (discussing the wide and flexible use of doctrines such as undue influence to amend testamentary plans); Foster, supra note 69, at 1213–14 (discussing the flexibility of family maintenance systems that allow courts to amend testamentary dispositions on a case-by-case basis); supra Part II.B.


142 See Kaufmann, 247 N.Y.S.2d at 685–86; Gaines, 739 S.W.2d at 955; Lipper, 369 S.W.2d at 703; Batts, supra note 5, at 1222–25; Chester, supra note 7.

143 See Rosenfeld, supra note 118, at 187 (“Between one-fourth and one-third of an estate can be eaten up by legal costs when parties contest a will.”).

144 See id. at 188 (“[The] time, energy, and expense of litigation do dissuade most people from raising legal objections. Those who are not dissuaded by the expense are often prevented by social pressures from family and kin.”).

145 See Dukeminier et al., supra note 1, at 520.

146 See Batts, supra note 5, at 1232–33.
leave nothing to the children. Approximately ninety-three percent of those interviewed believed that parents should not be allowed to disinheritor children under twenty-one years of age. In fact, 63.4% of respondents believed that parents should not be able to disinhibit children over twenty-one years of age. This study, along with many like it, indicates that, in general, Americans would be amenable to laws that would specifically outlaw the disinherittance of minor children.

Ultimately, minor children are in need of legislative protection against disinherittance. Children, unlike adults, lack the political power to fight for their needs; thus, the legislature must step in and demand that children’s support needs are met.

IV. The Solution: Amend the Uniform Probate Code to Include a Forced Heirship Provision Similar to Louisiana’s

In order to protect minor children from disinherittance by their parents, the UPC should adopt a forced heirship provision akin to that of Louisiana. As a model code, the UPC sets the tone for many state laws, and many states have adopted statutes that are substantially similar to those in the UPC. Forced heirship would be preferable to a family maintenance system in the United States because the American propensity toward litigation likely would make the family maintenance model too burdensome on American courts. Additionally, the outcome certainty that would result from a forced share system would ensure the support of minor children and would aid in parents’ estate planning. Forced heirship would protect both minor non-custodial

148 See id.
149 See id.
150 See id.; Batts, supra note 5, at 1230 n.173 (listing empirical studies of people’s knowledge of and attitudes toward the laws of inheritance in the United States).
151 See Brashier, supra note 3, at 22.
152 See id.
154 See Andrew Stimmel, Note, Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code, 18 Ohio St. J. on Disp. Resol. 197, 214 (2002) (noting that eighteen states have enacted the UPC, either in whole or in substantial part, and that “most other states have enacted portions of it”). Stimmel further notes that the UPC is very influential: “Because of the participants and the drafting process, a uniform code carries significant persuasive weight on state legislators when contemplating reform in their own statutory codes.” Id. at 215.
155 See Batts, supra note 5, at 1216; Foster, supra note 69, at 1215; supra note 80.
156 See Batts, supra note 5, at 1225, 1227; Brashier, supra note 3, at 7.
children, who are most likely to be disinherited by their non-custodial parent, as well as the states by ensuring that the children do not needlessly become wards of the state.\textsuperscript{157}

Amending the UPC in this way should not be problematic.\textsuperscript{158} First, as mentioned above, studies show that Americans generally do not believe parents should be able to disinherit their minor children.\textsuperscript{159} Thus, there is likely to be little backlash against a law prohibiting this behavior.\textsuperscript{160} Additionally, judicial use of curative doctrines in cases of disinher- itance demonstrates that the testamentary freedom that Americans value is more of a fiction than a reality.\textsuperscript{161}

Moreover, true testamentary freedom is further curtailed by the familial, financial, and estate administration obligations that must be satisfied before the final distribution of property under the will is accomplished.\textsuperscript{162} Many states have family allowances, homestead laws, and exempt property set-asides that allow the surviving spouse and minor children to claim certain assets.\textsuperscript{163} Additionally, creditors must be paid out of the estate before (and can even make claims after) other distributions are made.\textsuperscript{164} Finally, almost all states have some form of spousal elective share.\textsuperscript{165} Thus, the notion of complete testamentary freedom is in some respects illusory, and a forced share for minor children is sim-

\begin{thebibliography}{9}
\bibitem{157} See Batts, \textit{supra} note 5, at 1225; Brashier, \textit{supra} note 3, at 3, 5.
\bibitem{158} See \textit{Cohen et al.}, \textit{supra} note 147, at 23, 77; Batts, \textit{supra} note 5, at 1230 n.173, 1232–33 (listing empirical studies of people’s knowledge of and attitudes toward the laws of inheritance in the United States).
\bibitem{159} See \textit{Cohen et al.}, \textit{supra} note 147, at 23, 77; Batts, \textit{supra} note 5, at 1230 n.173, 1232–33.
\bibitem{160} See \textit{Cohen et al.}, \textit{supra} note 147, at 23, 77; Batts, \textit{supra} note 5, at 1230 n.173, 1232–33.
\bibitem{161} See Leslie, \textit{supra} note 84, at 238 (“[O]ur law is no stranger to the concept of testamentary familial duty, and often imposes such a duty overtly. In fact, the urge to restrict testamentary freedom in favor of the family is almost universal; most legal systems expressly protect family members from disinheritance.”); Dayan, \textit{supra} note 18, at 384–85.
\bibitem{162} See Batts, \textit{supra} note 5, at 1243.
\bibitem{163} See \textit{id.} Every state has a family allowance statute that authorizes the probate court to set aside an allowance for the maintenance and support of the surviving spouse, and usually the minor children. See \textit{Dukeminier et al.}, \textit{supra} note 1, at 475. This allowance, however, is limited to a fixed period. See \textit{id.} Homestead laws vary by state, but they are designed to protect the family home for the use of the surviving spouse and minor children, “free from the claims of the decedent’s creditors.” See \textit{id.} at 474. The personal property set-aside is the right of the surviving spouse (and often minor children) to receive certain “tangible personal property of the decedent up to a certain value,” often including household furniture and clothing. See \textit{id.}
\bibitem{164} See Batts, \textit{supra} note 5, at 1245.
\bibitem{165} See \textit{Dukeminier et al.}, \textit{supra} note 1, at 476 n.2 (“Georgia is the only separate property state without an elective share statute, though it does mandate at least one year of support for the spouse.”).
\end{thebibliography}
ply another obligation that must be met before the testator’s testamentary plan can be carried out.\textsuperscript{166}

**Conclusion**

As American family demographics change, so too must the laws designed to protect minor children. The disinheritance of minors poses a problem for American children as well as for the states because children who do not receive support from their deceased parents are more likely to become wards of the state. Today, with an unprecedented number of divorces and re-constituted families, the number of non-custodial children is on the rise, and this group has an increased risk of disinheritance. In order to ameliorate the disproportionate burden on non-custodial children, states should adopt legislation that would require parents to provide for their minor children at death. Studies show that such laws would likely be popular with the American public. By adopting a provision akin to Louisiana’s forced share statute, the UPC will provide the necessary inspiration for states to adopt similar legislation of their own.

\textsuperscript{166} See Batts, supra note 5, at 1243–45.
THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: THE NEED FOR MECHANISMS TO ADDRESS NONCOMPLIANCE

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Abstract: International parental child abduction is a growing problem, the effects of which are devastating for both the children involved and the parents who are left behind. When a parent abducts a child across national borders, the Hague Convention on the Civil Aspects of International Child Abduction—an international treaty aimed at the expeditious return of the child to his or her country of habitual residence—provides the other parent’s primary legal recourse. This Note will examine the growing problem of international parental child abduction, including its prevalence and consequences, and the role of the Hague Convention in addressing this problem. Specifically, it will examine the issue of noncompliant Contracting States, the effects of that noncompliance, and the need for mechanisms to address noncompliance. Finally, this Note will examine two bills that have been proposed in the United States Congress that address the noncompliance issue and will argue that Congress should seriously consider one of these bills.

Introduction

So now after four years of trying desperately to be with my son, I find myself sitting in a hotel room in São Paulo since September 7th, hoping and praying to be reunited with my son, ready to bring him home and resume our life as father and son. We have much healing to do. I have never lost hope the day would come for us to be together again. I will never give up, but I need help.

—David Goldman

On June 16, 2004, David Goldman’s life changed forever when he became one of countless parents who have fallen victim to interna-

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tional parental child abduction (IPCA). In an instant, his life, which had seemed to him and his friends to be the American dream, took an unforeseen and sudden turn.

David, a New Jersey native, met Bruna Bianchi in Italy in 1997 and quickly fell in love with this twenty-three-year-old fashion student from Rio de Janeiro, Brazil. Not long after, in December of 1999, David and Bruna were wed and began their married life in New Jersey. On May 25, 2000, their son, Sean, was born and the young family was happy as could be—life was “like a fairy tale,” as one friend described it. Over the next four years, David fell in love with his son and changed his work schedule to stay at home with Sean; the two developed a “special bond” and became inseparable. Their closeness only made their later forced separation more painful.

On June 16, 2004, David drove Bruna, four-year-old Sean, and Bruna’s parents to Newark airport for what was supposed to be a two-week vacation in Bruna’s native country. Once Bruna arrived in Brazil, however, she called David and announced that she was never returning to the United States, that their marriage was over, and that she was keeping Sean in Brazil. Even worse, she demanded that David sign away full custody of Sean to her and that David never seek criminal charges against her. Of course, David was devastated, but matters grew worse as Bruna continued to call David and make demands and threats. Eventually David began receiving death threats over the phone from an unknown man who stated that he knew where David lived and that David should prepare to die. So quickly, David’s fairy tale had become a
nightmare. Once the shock subsided, David realized that Bruna was never going to return and that his own wife had kidnapped their beloved son. David hired an attorney and his legal battle began, though he never could have anticipated that it would be nearly five years before Sean would finally come home.

Unfortunately, David is not alone in his experience. Rather, IPCA is a growing problem that affects children and families throughout the world. Though it is difficult to know for certain just how many American children are currently living abroad as the result of IPCA, a 2006 estimate placed the number at 11,000. Another estimate placed the total national and international child abductions at 200,000 per year.

These numbers are great and the pain they represent is even greater.

To address the problem of IPCA, the Hague Conference on Private International Law established the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) in 1980 to provide a mechanism for protecting abducted children and ensuring their quick return to their state of habitual residence. By providing a civil mechanism by which parents can secure the return of their abducted children, the Convention has successfully reunited many parents and children.

Nevertheless, the Convention has presented a number of problems, including the issue of noncompliant Contracting

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14 See id.
15 See id.
16 See id.
19 Walsh & Savard, supra note 17, at 29.
23 Report on Compliance with the Hague Convention, supra note 21, at 10–11.
States that fail to fulfill their obligations under the Convention.24 The results can be devastating, and in many cases the ultimate result is that the children are not returned.25

This Note examines the issue of IPCA, the protections and processes provided by the Convention, and the problem of noncompliance. It argues that there is a serious need for greater mechanisms for ensuring compliance with the Convention and focuses specifically on one legislative solution. Part I describes IPCA, its prevalence, and the detrimental effects that it has on children and parents. Part II examines the Convention, its goals and obligations, and how it operates among Contracting States. Part III briefly examines some of the problems presented by the Convention while focusing on the issue of Contracting States that fail to fulfill their obligations under the Convention. It explores the Goldman case in greater detail as an example of the detrimental effects of noncompliance. Finally, Part IV offers possible solutions for addressing noncompliance. In particular, it analyzes two bills that have been proposed in the U.S. House of Representatives that seek to provide mechanisms for ensuring compliance, and it argues that Congress should seriously consider one of these bills.

I. INTERNATIONAL PARENTAL CHILD ABDUCTION: AN OVERVIEW OF THE ISSUE

International parental child abduction is the wrongful removal or retention of a child, effected by a parent, outside the country of the child’s “habitual residence” and in violation of the other parent’s “rights of custody” under the law of the country of habitual residence.26 The number of annual IPCA cases has increased significantly over the past two decades, largely because of the increased opportunities for international travel and international communication.27 As the Honor-
able Dennis DeConcini stated before the U.S. House of Representatives, “As the globe shrinks and international travel becomes more commonplace, more and more [child abduction] cases involve the transportation of a child across a national border.”

Moreover, marriages and divorces between binational couples have increased. Such marriages inherently possess “cultural, ethnic, and religious differences” which are often a significant factor in IPCA. This factor, combined with the increasing divorce rate globally and the fact that children of such binational marriages often maintain dual citizenship and possess two passports, is largely responsible for the increase in IPCA.

In the past, parental child abductions were thought to be committed primarily by fathers who were dissatisfied with their access to and control of their children following a divorce; however, more recent studies indicate that IPCA is committed more often by mothers than by fathers. Very often, IPCA occurs after the mother has moved abroad with the father and then later wishes to return to her native country. Thus, IPCA usually occurs when the taking parent (TP) takes the child away from his or her country of habitual residence or when the child is permitted to go abroad to visit the TP and then not permitted to return.

\[\text{RAW TEXT HERE}\]
There is a wide range of motivations and self-justifications that leads TPs to abduct their children.\textsuperscript{35} For example, some TPs take their children away from the left-behind parent (LBP) because he or she finds “fault with the other parent for nonsensical transgressions.”\textsuperscript{36} Some TPs abduct their children for revenge after the relationship with the LBP has become contentious or has ended.\textsuperscript{37} Others take their children because they believe it to be in the best interests of the child, either to remove the child from a dangerous environment or to ensure that the child is brought up in a more “‘suitable’ society or environment.”\textsuperscript{38} Even more simply, a TP may no longer wish to remain in a relationship with the other parent and may wish to return to his or her native country, and so take the child and leave.\textsuperscript{39}

Though many TPs feel that they are acting in the best interests of the child, or at least justify their actions that way, IPCA is very rarely in the best interests of the child; rather, it can have extremely negative short- and long-term effects.\textsuperscript{40} Abducted children are “often taken from a familiar environment and suddenly isolated from their extended families, friends, classmates, and community.”\textsuperscript{41} In some cases, the child is even separated from siblings.\textsuperscript{42} Efforts to avoid law enforcement often result in repeated relocations that interfere with school attendance and the development of relationships with new friends.\textsuperscript{43} As a result, an abducted child often suffers from long periods without schooling and is prevented from making new close friends.\textsuperscript{44} In addition, TPs sometimes change children’s names and appearance.\textsuperscript{45} Moreover, an abducted child is forced to deal with the separation from the LBP, and in

\textsuperscript{35} Beaumont & McElevy, \textit{supra} note 27, at 11; Rigler & Wieder, \textit{supra} note 27.
\textsuperscript{36} Rigler & Wieder, \textit{supra} note 27.
\textsuperscript{37} Beaumont & McElevy, \textit{supra} note 27, at 11; Rigler & Wieder, \textit{supra} note 27.
\textsuperscript{38} Beaumont & McElevy, \textit{supra} note 27, at 11; Rigler & Wieder, \textit{supra} note 27.
\textsuperscript{39} Beaumont & McElevy, \textit{supra} note 27, at 11.
\textsuperscript{40} Trevor Buck, \textit{International Child Law} 131 (2005); \textit{Report on Compliance with the Hague Convention}, \textit{supra} note 21, at 7 (“Parental child abduction is a tragedy because it affects some of society’s most vulnerable individuals.”); Rigler & Wieder, \textit{supra} note 27.
\textsuperscript{41} \textit{Report on Compliance with the Hague Convention}, \textit{supra} note 21, at 7; see Buck, \textit{supra} note 40, at 131.
\textsuperscript{42} \textit{Report on Compliance with the Hague Convention}, \textit{supra} note 21, at 7; see Buck, \textit{supra} note 40, at 131.
\textsuperscript{43} \textit{Report on Compliance with the Hague Convention}, \textit{supra} note 21, at 7; see Buck, \textit{supra} note 40, at 131.
\textsuperscript{44} \textit{Report on Compliance with the Hague Convention}, \textit{supra} note 21, at 7; see Buck, \textit{supra} note 40, at 131.
\textsuperscript{45} \textit{Report on Compliance with the Hague Convention}, \textit{supra} note 21, at 7.
some cases is told that “their other parent is dead, does not want them, or has not tried to get them back.”\textsuperscript{46}

IPCA can result in “serious emotional and psychological problems.”\textsuperscript{47} As reported by the Office of Children’s Issues (OCI) within the U.S. Department of State, “Research shows that recovered children often experience a range of problems including anxiety, eating problems, nightmares, mood swings, sleep disturbances, aggressive behavior, resentment, guilt, and fearfulness.”\textsuperscript{48} These psychological and emotional problems, in many cases, result in additional issues during adulthood, including struggling “with identity issues, personal relationships, and possibly [experiencing] problems in parenting their own children.”\textsuperscript{49}

IPCA detrimentally affects LBPs as well.\textsuperscript{50} Emotionally and psychologically, the LBP suffers substantially, experiencing a range of emotions including sadness over the loss of the child (and in some cases, a spouse), depression, betrayal, and anger towards the other parent.\textsuperscript{51} On top of these emotional and psychological effects is the helplessness that an LBP often experiences when attempting to recover his or her child.\textsuperscript{52} The LBP often does not know where to begin and is overwhelmed by the complexities of foreign legal systems that may be characterized by cultural differences and foreign languages.\textsuperscript{53}

LBPs may also face significant financial hardship as a result of IPCA.\textsuperscript{54} Travel costs to visit abducted children (if permitted by the TP) can be substantial or even unaffordable.\textsuperscript{55} Some LBPs cannot afford the considerable expense of hiring an attorney who is familiar with IPCA issues, and for those who can afford it, the costs can be great.\textsuperscript{56}

\begin{thebibliography}{9}
\bibitem{46} Id.
\bibitem{47} Id.
\bibitem{48} Id.
\bibitem{49} Id.
\bibitem{50} Report on Compliance with the Hague Convention, supra note 21, at 8.
\bibitem{51} Id.
\bibitem{52} Id.
\bibitem{53} Id.
\bibitem{54} Id.
\bibitem{55} Report on Compliance with the Hague Convention, supra note 21, at 8.
\bibitem{56} Id.
\end{thebibliography}

David Goldman is acutely aware of the financial hardship imposed by IPCA. See Donations, Bring Sean Home Found., http://bringseanhome.org/wordpress/donations/ (last visited Jan. 20, 2011) [hereinafter Donations, Bring Sean Home Found.]. In the first twelve months after Sean’s abduction, Goldman spent nearly $95,000 on legal fees. Dorrit Harazim, A Father in a Foreign Land, Piauí Mag., Nov. 2008, available at http://bringseanhome.org/wordpress/goldman-case/newspaper-magazine-articles/a-father-in-a-foreign-land/. By the end of the five-year battle to bring Sean home, Goldman had spent over $400,000 on his efforts, including a team of both American and Brazilian lawyers and multiple trips to Brazil. Dateline: Bring Sean Home, supra note 3; Donations, Bring Sean Home Found., supra. A middle-
Similarly, efforts to recover an abducted child often require hiring translators and interpreters, which can also be costly.57

Finally, reunification after abduction can be a difficult experience for both abducted children and LBPs.58 The relationship between the LBP and the child may have deteriorated, and they may no longer share a common language.59 In cases in which the child was removed at a young age and the reunion occurs years later, the child may not even remember the LBP.60 In many instances, the child will have difficulty trusting the LBP and “question why that parent did not try harder to get them back.”61 Seeing a child go through this can be very difficult for the LBP despite the concurrent happiness over the fact that they have been reunited.62 David Goldman experienced such difficulties following Sean’s return to New Jersey in December 2009.63 In an interview just days after Sean’s return, David was asked whether he got “the feeling that at one moment [Sean] has a warmth toward you and then the next . . . he sees you as the enemy?”64 David responded, “[Sean] pulls away. Well, [his stepfather and Brazilian relatives] told him I’m the enemy for so long, that I’m the bad guy. And I can see he . . . does struggle with that.”65 David went on to reflect on Sean’s lack of tears in the days since leaving Brazil:

It would be natural for him to be crying. It would be normal for him to be crying. And he’s . . . closed it all in right now. There’s got to be pain hidden in there. I hope he can, in a very short time, open up to me. And will open up to me in a short time. But I’ll be patient.66

class American, Goldman has been open about the financial strain that he has endured. Harrazim, supra; Donations, Bring Sean Home Found., supra. In fact, he has set up a website about his story, and that site includes a page through which the public can make donations to “defray expenses relating to Sean Goldman’s abduction and repatriation to the United States.” Donations, Bring Sean Home Found., supra.

57 Report on Compliance with the Hague Convention, supra note 21, at 8.
58 Id. at 7.
59 Id.
60 Id.
61 Id.
62 See Dateline: Bring Sean Home, supra note 3.
63 Id.
64 Id.
65 Id.
66 Id.
Despite the undeniable negative consequences, IPCA continues to increase in frequency.\textsuperscript{67} In the 2008 fiscal year, OCI was notified of 1082 IPCA cases involving 1615 children removed from the United States.\textsuperscript{68} This was an approximately sixty-nine percent increase over the 2006 fiscal year, in which 642 cases were reported.\textsuperscript{69} Similarly, OCI was notified of 344 cases involving 484 children who were abducted to the United States from other countries.\textsuperscript{70}

II. \textbf{The Hague Convention on the Civil Aspects of International Child Abduction}

Recognizing the need to protect children and families from IPCA, the Hague Conference on Private International Law (the Conference) adopted the Convention on the Civil Aspects of International Child Abduction in October 1980.\textsuperscript{71} The Convention addresses the unique legal challenges that LBPs face by virtue of the international nature of IPCA.\textsuperscript{72} Specifically, it establishes standard procedures and obligations

\begin{itemize}
\item \textsuperscript{67} Report on Compliance with the Hague Convention, \textit{supra} note 21, at 6.
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} International Child Abduction Convention, \textit{supra} note 22. The Conference is “a global inter-governmental organisation” that, as a “melting pot of different legal traditions . . . develops and services multilateral legal instruments, which respond to global needs.” \textit{Overview, Hague Conf. on Private Int’l L.}, \url{http://www.hcch.net/index_en.php?act=text.display&tid=26} (last visited Jan. 20, 2011). With nearly seventy countries as members, the Conference seeks to address the problems that arise when citizens and businesses of one country are affected by and attempt to operate within the legal system of another country. \textit{Id.} It does so by adopting “special rules known as ‘private international law’ rules.” \textit{Id.} In doing so, the Conference aims to meet its statutory mission: “to work for the ‘progressive unification’ of these rules” by “finding internationally-agreed [upon] approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.” \textit{Id.} Thus, the “ultimate goal of the [Conference] is to work for a world in which, despite the differences between legal systems, persons—individuals as well as companies—can enjoy a high degree of legal security.” \textit{Id.} Since its first meeting in 1893, the Conference has established Conventions between nations to reach this goal. \textit{Id.} There are currently thirty-nine international Conventions in effect. \textit{Conventions Listing, Hague Conf. on Private Int’l L.}, \url{http://www.hcch.net/index_en.php?act=conventions.listing} (last visited Jan 20, 2011).
\item \textsuperscript{72} See Anne-Marie Hutchinson & Henry Setright, \textit{International Parental Child Abduction} 3 (1998). Hutchinson and Setright commented on the inherent difficulties of IPCA:

Inevitably, when a child has been abducted internationally, the rights of the person from whom the child has been abducted cannot usually be effectively enforced in his or her home State. Any effective remedy must be pursued in the country in which the child is physically present. It is the diversity of laws
for the governments of Contracting States to follow when dealing with IPCA cases. By providing a civil mechanism by which to ensure the safe and prompt return of abducted children, the Convention provides much-needed legal recourse to LBPs.

A. The Underlying Policy Goals and Objectives

The Conference adopted the Convention because it recognized “the paramount importance” of the interests of abducted children in custody matters. Moreover, it recognized the importance of protecting LBPs’ rights of custody and rights of access. Thus, the primary goal of the Convention is not to resolve custody issues, but rather to provide a civil mechanism by which LBPs, whose rights of access or custody have been violated, can “secure the prompt return of children wrongfully removed to or retained in any Contracting State.” This important distinction is reflected and emphasized throughout the provisions of the Convention—rather than requiring or permitting countries to assess the merits of the custody issue (that is, address the best and legal systems that such a situation produces that has given an impetus to the formulation of international conventions in child abduction.

Id. Additionally, the Convention itself recognizes this inherent difficulty that is attendant to the international nature of IPCA; one of the two objects of the Convention is “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.” International Child Abduction Convention, supra note 22, art. 1.

International Child Abduction Convention, supra note 22, arts. 6–20. The term Contracting State is used in the Convention to refer to those nations that have agreed to be bound by the Convention either through ratification or accession. See id. arts. 37–38.

73 See id. pmbl.
74 Id. The preamble to the Convention states:

The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, Have resolved to conclude a Convention to this effect . . . .

Id.

75 Id.
76 Id. pmbl., art. 1; supra note 72. The Convention’s intention is that abducted children be returned promptly or, more specifically, within six weeks of the Convention application. Id. art. 11; Report on Compliance with the Hague Convention, supra note 21, at 22.
interests of the child), the Convention requires that countries act as expeditiously as possible to return the child.\footnote{International Child Abduction Convention, supra note 22, arts. 10–11, 16–17, 19 (“A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.”).}

By emphasizing and securing the prompt return of the child to his or her country of habitual residence, the Convention aims to protect the interests of abducted children and reduce the harmful effects that abduction often has on children.\footnote{Buck, supra note 40, at 134; Convention Outline, supra note 27, at 1.} Moreover, returning the child to his or her country of habitual residence protects the interests and rights of LBPs by restoring the status quo which existed prior to the abduction, thereby providing an opportunity for custody issues to be appropriately resolved.\footnote{Id. at 1.} Restoration of the status quo is often particularly important because it strips the TP of any potential jurisdictional advantage gained by the abduction with respect to the adjudication of the custody issues.\footnote{Id.} Finally, a central aim of the Convention is to deter abductions and thereby protect the best interests of children and the rights of parents.\footnote{Buck, supra note 40, at 134; Convention Outline, supra note 27, at 1.}

The Convention also recognizes the importance of acting quickly in IPCA cases because delay results in greater harm to abducted children and to LBPs’ relationships with their children.\footnote{International Child Abduction Convention, supra note 22, arts. 1–3, 11; Buck, supra note 40, at 134.} Thus, a core objective of the Convention is to establish the most “expeditious” procedures possible by which LBPs can secure the return of their children.\footnote{Id. arts. 3, 7–20.}

**B. The Convention in Action: Scope, Obligations, and Procedures**

Under the terms of the Convention, Contracting States are obligated to follow certain procedures and standards to effect the return of a child who has been the subject of “wrongful removal or retention.”\footnote{Id. arts. 2, 11.}

The Convention defines a removal or retention of a child as wrongful when:

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the State in which the child was habitually resident immediately before the removal or retention; and

\[78\] International Child Abduction Convention, supra note 22, arts. 10–11, 16–17, 19 (“A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.”).
\[79\] Buck, supra note 40, at 134; Convention Outline, supra note 27, at 1.
\[80\] Convention Outline, supra note 27, at 1.
\[81\] Id.
\[82\] Buck, supra note 40, at 134; Convention Outline, supra note 27, at 1.
\[83\] International Child Abduction Convention, supra note 22, arts. 1–3, 11; Buck, supra note 40, at 134.
\[84\] International Child Abduction Convention, supra note 22, arts. 2, 11.
\[85\] Id. arts. 3, 7–20.
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The scope of the Convention extends to “any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights” and it applies until the child reaches sixteen years of age.3

The Convention mandates that each Contracting State establish a “Central Authority” to be responsible for discharging the “duties imposed by the Convention.” The primary purpose of the Central Authorities is to “co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.” Their responsibilities include, among other things, to take “all appropriate measures” to find abducted children, to prevent further harm, to secure the voluntary return of such children, and to “initiate or facilitate” judicial or administrative proceedings aimed at returning the child to his or her country of habitual residence. Additionally, the Central Authorities are responsible for providing information about the child and about the law of their countries, as necessary, to assist in securing the child’s return.

Under the Convention, an LBP can apply to either the Central Authority in the country of the child’s habitual residence or to the Central Authority of any other Contracting State. Once an application is filed, additional measures can be taken to facilitate the child’s return.

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86 Id. art. 3. The Convention defines “rights of custody” as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” Id. art. 5. The Convention defines “rights of access” as “the right to take a child for a limited period of time to a place other than the child’s habitual residence.” Id.

87 Id. art. 4. Thus, the Convention applies in cases in which a child under the age of sixteen has been removed from his or her country of habitual residence in breach of rights of custody or rights of access of another person (such as the LBP) that were being exercised or attempted to be exercised. Id. arts. 3–4.


89 International Child Abduction Convention, supra note 22, art. 7.

90 Id.

91 Id.

92 Id. art. 8. An applying LBP is required to provide specific information about the child, the child’s suspected whereabouts, and the basis of the LBP’s claim. Id. The LBP may also include any relevant documents, including copies of judicial decisions or agreements regarding rights of custody or access. Id.
the Central Authorities involved are required to seek to obtain the voluntary return of the child.93 Because such efforts are often unsuccessful, the Convention also requires that the Central Authorities “initiate or facilitate” judicial or administrative proceedings in an effort to secure the child’s return.94

Once such judicial or administrative proceedings have been initiated, the judicial or administrative authority in the “requested state” must determine whether or not the removal was wrongful under the terms of the Convention.95 In making this determination, the authority can consider a number of factors, including the laws and decisions of the country of habitual residence, any determinations made by the country of habitual residence regarding the wrongfulness of the removal or retention, and any determinations about custody issued either by the country of habitual residence or by the country to which the child was abducted.96 However, prior custody decisions may be considered only for the limited purpose of “tak[ing] account of the reasons for that decision.”97 The Convention clearly states, “The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested state shall not be a ground for refusing to return a child.”98 Similarly, and quite significantly, the Convention proscribes the administrative or judicial authority from making any determination on the merits of custody rights.99

If the authority determines that the removal or retention was wrongful, the authority must automatically order the return of the child, unless the TP has provided a sufficient defense.100 The Conven-
tion provides five defenses against automatic return of a wrongfully retained or removed child.¹⁰¹

The first defense addresses the time elapsed between the wrongful removal or retention and the commencement of the judicial or administrative proceedings.¹⁰² If, at the date of the commencement of the judicial or administrative proceedings, it has been less than one year since the wrongful removal or retention, the authority must order the return of the child.¹⁰³ If, however, more than a year has elapsed, the authority is not required to return the child if the TP establishes that “the child is now settled in its new environment.”¹⁰⁴

The second defense addresses the non-exercise of rights by the LBP.¹⁰⁵ If the TP can prove that the LBP “was not actually exercising the custody rights at the time of removal or retention” the requested state is not required to order the child’s return.¹⁰⁶ Similarly, the third defense permits the denial of a return order if the TP demonstrates that the LBP “had consented to or subsequently acquiesced to the removal or retention.”¹⁰⁷

¹⁰¹ See id.
¹⁰² See id.
¹⁰³ Id.
¹⁰⁴ International Child Abduction Convention, supra note 22, art. 12. The defense imposes a two-prong test that requires satisfaction of both prongs—more than a year has elapsed and the child is well settled in his or her new environment. See id.; James D. Garbolino, International Child Custody Cases: Handling Hague Convention Cases in U.S. Courts 153 (3d ed. 2000). For example, in a 1991 case in New York, fourteen months elapsed before the application was made by the LBP; nonetheless, the court denied the delay defense because the second prong of the test had not been satisfied. In re David S. v. Zamira S., 574 N.Y.S.2d 429, 433 (Fam. Ct. 1991). The TP failed to provide adequate evidence that the children were well settled, so the court looked to the young age of the children—three years old and eighteen months old—to determine that the children were not well settled. Id. Because they were so young, the court concluded that the children were not yet old enough to have established significant community or social ties such as “meaningful friendships” or “school, extra-curricular, community, religious or social activities.” Id. Thus, despite the fact that more than a year had elapsed between the wrongful removal and the filing of the Convention application, the court denied the delay defense. Id.
¹⁰⁵ International Child Abduction Convention, supra note 22, art. 13. Under U.S. case law, this is a very narrow exception. See Friedrich v. Friedrich, 78 F.3d 1060, 1066 (6th Cir. 1996); see also Garbolino, supra note 104, at 168–69. In Friedrich, the court held: “if a person has valid custody rights to a child under the law of the country of the child’s habitual residence, that person cannot fail to ‘exercise’ those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.” 78 F.3d at 1066.
¹⁰⁶ International Child Abduction Convention, supra note 22, art. 13.
¹⁰⁷ Id. In Friedrich, the Sixth Circuit laid out a stringent test for determining whether an LBP has consented or acquiesced to the removal or retention, stating “we believe that acquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of...
The fourth defense removes the automatic return obligation if the TP can demonstrate that “there is a grave risk that the [child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

Finally, the fifth exception allows the judicial or administrative authority to “refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”

Thus, if the administrative or judicial authority determines that removal or retention was wrongful and that none of the five defenses apply, the Convention requires that the child be promptly ordered back to his or her country of habitual residence.

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108 International Child Abduction Convention, supra note 22, art. 13. U.S. courts have been restrictive in their interpretation of this defense and have generally permitted it in two types of situations: (1) where there is “evidence that deals with the inappropriateness of the general environment to which the child will be returned”; and (2) where there is “evidence that bears on specific dangers which might pose a grave risk to the child.” Garbolino, supra note 104, at 171. For example, U.S. courts have held that the “grave risk” must relate not to the “specific home” that the child would be returned to but rather to the “general environment in the country” where the child would live. Id. TPs have asserted a range of “specific dangers” that could pose a “grave risk” in attempting to establish this defense, including domestic violence, neglect or abuse, psychological harm, and exposure to a zone of war or disease. Id. at 172–78, 184–85.

109 International Child Abduction Convention, supra note 22, art. 13. This defense was included in the Convention only after significant debate and was included, at least in part, because of the Conference’s recognition that “forcible repatriation of those just below the age of 16 would have a detrimental effect on the Convention.” Lowe et al., supra note 93, at 352–53. Just the same, there was significant concern that such a provision would “make the child the ultimate judge of the abduction’s success or failure” and that such discretion would unavoidably lead to consideration of the merits of custody, which is inconsistent with the Convention’s goals. Id. Additionally, there were concerns that the provision would impose far too great a responsibility on young children who are simply incapable of handling such a great psychological burden, particularly in light of the fact that TPs or other family members would very likely exert pressure and control over the child. Id. The Convention addresses these concerns by leaving the ultimate decision to return the child within the court’s discretion; objection by the child is not determinative. Id. Indeed, part of the judge’s consideration must include a determination of whether or not the child has reached an age and level of maturity to enable the child to understand the situation and formulate his or her own preferences and objections. Id. at 360–61. Though the Conference declined to choose a minimum age, records from the drafting sessions indicate that those involved generally thought that children under the age of twelve would not normally be considered to have reached a sufficient age and level of maturity. Id. Nevertheless, there have been cases in which children as young as six and seven have been found to be mature enough to have their objections considered. Id. at 361.

C. Contracting States and Reciprocity: The Process of Ratification, Accession, and Acceptance

Reciprocity is a central characteristic of the Convention’s operation. Because the Convention is private law, it is binding only on those countries that agree to be bound by it—the Contracting States. For the Convention to apply in a particular case, both the country of habitual residence and the country to which the child has been taken must be Contracting States; if one is not, the LBP does not have the benefit of the Convention. Moreover, in some situations the Convention is not in force between countries even though both are Contracting States.

Countries agree to be bound by the Convention either by ratification or accession. Under the terms of the Convention, all countries that were members of the Conference at the time the Convention was originally signed in 1980 are permitted to ratify the Convention. By ratifying the Convention, a country agrees to be bound by the Convention. Member countries that were not members of the Conference at the time the Convention was originally signed are permitted to accede to the Convention and thus be legally bound by it.

The important distinction between ratification and accession is that ratification automatically puts the Convention into force between the ratifying country and all other Contracting States; acceptance does

111 See id. art. 38; Garbolino, supra note 104, at 21.
112 Garbolino, supra note 104, at 21; see also International Child Abduction Convention, supra note 22, arts. 37–38; Lowe et al., supra note 93, at 210.
113 Garbolino, supra note 104, at 21; see also International Child Abduction Convention, supra note 22, arts. 37–38; Lowe et al., supra note 93, at 210.
114 See International Child Abduction Convention, supra note 22, arts. 37–38; Garbolino, supra note 104, at 23–24; Lowe et al., supra note 93, at 210; infra notes 119–26 and accompanying text.
116 International Child Abduction Convention, supra note 22, art. 37; Garbolino, supra note 104, at 23–24; Lowe et al., supra note 93, at 211.
117 International Child Abduction Convention, supra note 22, art. 37; Garbolino, supra note 104, at 23–24; Lowe et al., supra note 93, at 210–11; Hague Conference FAQ, supra note 115.
118 International Child Abduction Convention, supra note 22, arts. 37–38; Garbolino, supra note 104, at 23–24; Lowe et al., supra note 93, at 210–11; see also Hague Conference FAQ, supra note 115.
not play a role in ratification. When a country accedes to the Convention, however, the Convention does not automatically enter into force between the acceding country and the other Contracting States; rather, the accession is subject to acceptance by the other Contracting States. The other Contracting States are permitted to either accept or not accept that country’s accession. If the Contracting State expressly accepts the acceding country, the Convention enters into force between those two countries. If the Contracting State chooses not to accept the acceding country, the Convention does not enter into force between those two countries.

The decision whether or not to accept an acceding country is based primarily on the Contracting State’s perception of the acceding country’s ability to implement the provisions and fulfill the obligations of the Convention. The central concern is, of course, the ability of the acceding country to meet its obligations of reciprocity. If a Contracting State believes the acceding country is unlikely to adequately implement and comply with the Convention, the Contracting State will likely choose not to accept the acceding country, thereby avoiding the obligations that come with reciprocity.

When the Convention was originally signed in 1980, only four countries immediately signed. By 1990, still only twelve countries had ratified and two countries had acceded. Since then, there has been significant increase in participation in the Convention. Today, there are more than eighty Contracting States, prompting the Conference to

119 Garbolino, supra note 104, at 23–24; Lowe et al., supra note 93, at 210–11.
120 Garbolino, supra note 104, at 23–24; Lowe et al., supra note 93, at 210–11; Hague Conference FAQ, supra note 115; see also International Child Abduction Convention, supra note 22, art. 38.
121 Garbolino, supra note 104, at 23–24; Lowe et al., supra note 93, at 210–11; Hague Conference FAQ, supra note 115; see also International Child Abduction Convention, supra note 22, art. 38.
122 Garbolino, supra note 104, at 23–24; Lowe et al., supra note 93, at 210–11; Hague Conference FAQ, supra note 115; see also International Child Abduction Convention, supra note 22, art. 38.
123 Garbolino, supra note 104, at 23–24; Lowe et al., supra note 93, at 210–11; Hague Conference FAQ, supra note 115; see also International Child Abduction Convention, supra note 22, art. 38.
124 See Garbolino, supra note 104, at 25; Walsh & Savard, supra note 17, at 31.
125 See Garbolino, supra note 104, at 25; Walsh & Savard, supra note 17, at 31.
126 See Garbolino, supra note 104, at 25; Walsh & Savard, supra note 17, at 31.
127 Beaumont & McEleavy, supra note 27, at 23.
128 Lowe et al., supra note 93, at 211.
129 See id.; Convention Outline, supra note 27, at 3.
tout it as “one of the most successful family law instruments to be completed under the auspices of the [Conference].”

The United States signed the Convention on December 23, 1981 and ratified it on November 10, 1986. The Convention went into force for the United States on July 1, 1988. In order to implement the Convention, Congress adopted the International Child Abduction Remedies Act (ICARA), which provides the necessary legislative provisions to ensure that the Convention is properly implemented and that its obligations are fulfilled in the United States.

III. THE PROBLEM OF NONCOMPLIANT CONTRACTING STATES

A. The Critical Role of Noncompliance in the Goldman Case

David Goldman’s son was taken to Brazil on June 16, 2004. Sean did not return to New Jersey until December 31, 2009—more than five years later. During those five long years, David fought for his son

130 Convention Outline, supra note 27, at 3. The Conference website provides the most up-to-date list of Contracting States as well as detailed information about their ratification, accession and acceptance statuses. See Contracting States Chart, HAGUE CONF. ON PRIVATE INT’L L., http://www.hcch.net/upload/abductoverview_e.pdf (last visited Jan. 20, 2011). Additionally, it is important to note that while there has been significant success in securing ratification of and accession to the Convention, increased membership is still an important goal because abductions involving non-party countries “account for nearly half of parental child abductions and result in the fewest returns.” McCue, supra note 24, at 106–07; see also Laura C. Clemens, Note, International Parental Child Abduction: Time for the United States to Take a Stand, 30 SYRACUSE J. INT’L L. & COM. 151, 166–68 (2005); Report on Compliance with the Hague Convention, supra note 21, at 37. In particular, Japan has become the target of increasing criticism and pressure in light of its failure to sign the Convention. See, e.g., Press Release, Ambassadors of Australia, Canada, France, Italy, New Zealand, Spain, the United Kingdom, and the United States, Joint Statement on International Child Abduction (Oct. 16, 2009), http://tokyo.usembassy.gov/e/p/tp-20091016-78.html [hereinafter Joint Statement] (“Japan is the only G-7 nation that has not signed the Convention. The [LBP’s] of children abducted to or from Japan have little realistic hope of having their children returned . . . .”); Malcolm Foster, U.S. Warns Japan Child Custody Laws Could Harm Ties, ABC NEWS, Feb. 2, 2010, http://abcnews.go.com/International/wireStory?id=9723888; Michael Inbar, Dad in Japan Custody Case: I’m Dead to My Kids, TODAYSHOW.COM (Nov. 9, 2009), http://today.msnbc.msn.com/id/33788543. In addition to growing media attention in response to the many cases of IPCA to Japan, Japan has become the target of increasing political pressure. See Joint Statement, supra; Foster, supra; Inbar, supra.

131 International Child Abduction Convention, supra note 22, presidential proclamation.

132 Id.


134 Dateline: Bring Sean Home, supra note 3; Larry King Live: Tug of War Over 8-Year-Old, supra note 9.

135 See Dateline: Bring Sean Home, supra note 3.
every day, enduring a difficult and exhausting legal battle.\textsuperscript{136} As soon as it had become clear that his wife would not voluntarily return Sean, David retained a lawyer in the United States.\textsuperscript{137} When presented with the facts of the case, the lawyer was confident that it would be an “open and shut” case and that Sean “would be immediately returned” because Brazil was a Contracting State.\textsuperscript{138} It ended up being not nearly that simple.\textsuperscript{139}

On August 26, 2004, a New Jersey court held that Sean’s removal was wrongful under the Convention and that the United States was Sean’s country of habitual residence.\textsuperscript{140} The New Jersey court issued an order that Sean immediately be returned to New Jersey.\textsuperscript{141} Bruna Goldman ignored the order.\textsuperscript{142} On September 3, 2004, David reported the removal to the U.S. State Department (the U.S. Central Authority) thereby initiating Hague proceedings.\textsuperscript{143} In October 2004, David, growing anxious to expedite the process, hired Brazilian attorneys and, on November 16, 2004, initiated Hague proceedings in the federal courts in Rio de Janeiro.\textsuperscript{144} Without regard to the Hague mandate that judicial authorities proceed as expeditiously as possible, the federal court in Brazil acted with significant delay.\textsuperscript{145} By May 2005, the case was still pending, and Bruna successfully delayed the proceedings further by filing a motion to contest the competence of the Brazilian federal court, effectively “paralyzing” the federal court.\textsuperscript{146} This paralysis continued until September 21, 2005, when the competence of the federal court was confirmed.\textsuperscript{147}

\textsuperscript{136} See id.; Larry King Live: Tug of War Over 8-Year-Old, supra note 9.

\textsuperscript{137} See Dateline: Bring Sean Home, supra note 3; Larry King Live: Tug of War Over 8-Year-Old, supra note 9.

\textsuperscript{138} Larry King Live: Tug of War Over 8-Year-Old, supra note 9.


\textsuperscript{141} Id.


\textsuperscript{143} Id.

\textsuperscript{144} Id.

\textsuperscript{145} Id.; see also International Child Abduction Convention, supra note 22, art. 11.

\textsuperscript{146} Letter from Ricardo Zamariola Jr., supra note 142.

\textsuperscript{147} Id.
Subsequently, the Hague proceedings continued, and on October 13, 2005, a decision was finally rendered.\textsuperscript{148} Devastatingly, the court determined that, indeed, Sean had been wrongfully removed from the United States under the terms of the Convention, but the court, in violation of the Convention, refused to order Sean’s return on the ground that too much time had passed and Sean was settled with his mother.\textsuperscript{149} The federal court’s refusal to return Sean was in direct noncompliance with the requirements of the Convention.\textsuperscript{150} Under Article 12 of the Convention, if proceedings before a judicial authority are commenced within one year of a wrongful removal, the judicial authority “shall order the return of the child.”\textsuperscript{151} Whether or not to return the child simply was not a determination within the court’s discretion.\textsuperscript{152} The Brazilian court, however, disregarded this obligation; instead, it acted in accordance with the Brazilian judiciary’s tendency to favor mothers over fathers in custody proceedings, and it did so despite the fact that Hague proceedings are not supposed to be treated as custody matters.\textsuperscript{153}

David immediately appealed the decision, but his nightmare only grew in the months and years that followed.\textsuperscript{154} As he navigated through the appeals process to the Superior Court of Justice and later to the Brazilian Federal Supreme Court, the Goldman case took many twists and turns, most of which were for the worse.\textsuperscript{155} The appeals process

\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.; see also International Child Abduction Convention, supra note 22, arts. 11–12.
\textsuperscript{151} International Child Abduction Convention, supra note 22, art. 12; supra note 104 and accompanying text.
\textsuperscript{152} See International Child Abduction Convention, supra note 22, art. 12; supra note 104 and accompanying text.
\textsuperscript{153} See International Child Abduction Convention, supra note 22, arts. 11–12, 16; Report on Compliance with the Hague Convention, supra note 21, at 17; Letter from Ricardo Zamariola Jr., supra note 142.
\textsuperscript{154} Letter from Ricardo Zamariola Jr., supra note 142; see also Dateline: Bring Sean Home, supra note 3; Larry King Live: Tug of War Over 8-Year-Old, supra note 9.
\textsuperscript{155} See Letter from Ricardo Zamariola Jr., supra note 142; see also Dateline: Bring Sean Home, supra note 3; Larry King Live: Tug of War Over 8-Year-Old, supra note 9. Specifically, Bruna was awarded custody by a Brazilian court, she obtained a divorce from David in Brazil without his knowledge or presence, and she married Joao Paulo Bagueira Leal Lins e Silva, a Brazilian attorney who specializes in IPCA. Letter from Ricardo Zamariola Jr., supra note 142; Dateline: Bring Sean Home, supra note 3; David’s Story, supra note 1. Then in August 2008, Bruna died giving birth to a child with her new husband. David’s Story, supra note 1. Instead of being awarded immediate custody in light of the fact he was Sean’s only remaining biological parent, Goldman was forced into a legal battle with Bruna’s widower. See Letter from Ricardo Zamariola Jr., supra note 142. In the wake of Bruna’s death, Lins e Silva launched a relentless battle to keep Sean with him in Brazil and took arguably uncon-
finally ended on December 22, 2009, when the Brazilian Supreme Court ordered that Sean be returned to his father.\textsuperscript{156} This successful outcome, however, did not come without great effort and political pressure.\textsuperscript{157} During the course of his legal battle, Goldman made fifteen trips to Brazil.\textsuperscript{158} He hired a legal team of American and Brazilian attorneys.\textsuperscript{159} He incurred costs of more than $400,000.\textsuperscript{160} He started a website and gathered a group of supporters.\textsuperscript{161} He received significant public assistance and support from the American media, U.S. Secretary of State Hillary Clinton, and President Barack Obama.\textsuperscript{162} He worked directly with U.S. Representative Chris Smith for nearly all of 2009, and Representative Smith accompanied David to Brazil and garnered support for the Goldman case in the U.S. Congress.\textsuperscript{163} At Representative Smith’s urging, both the House and the Senate passed resolutions in 2009 calling for Brazil to comply with the Hague Convention and return Sean to the United States.\textsuperscript{164} An incredible amount of effort from countless people was necessary to secure Sean’s return to the United States.\textsuperscript{165} Certainly, this was not what the drafters of the Convention envisioned; needless to say, much went very wrong.\textsuperscript{166}
Unfortunately for David, Sean was abducted to one of seven countries that the U.S. Department of State has noted for demonstrating “patterns of non-compliance” with the Convention.\textsuperscript{167} The legal battle that Goldman endured was the result of the Brazilian government’s failure to comply with the mandates of the Convention.\textsuperscript{168}

\textbf{B. Countries That Fail to Comply: Rates, Ways, and Consequences}

Pursuant to § 11611 of ICARA, the Department of State is required to provide an annual report on Contracting States that fail to comply with the Convention.\textsuperscript{169} This annual report provides information about “countries in which implementation of the Convention is incomplete or in which a particular country’s executive, judicial, or law enforcement authorities do not properly apply the Convention’s requirements.”\textsuperscript{170} In making its assessments, the Department considers “systemic patterns” in Contracting States, and it bases its analysis primarily on the standards and practices in the \textit{Guide to Good Practice} issued by the Permanent Bureau of the Hague Conference on Private International Law.\textsuperscript{171} Additionally, the Department’s analysis focuses on three compliance areas: (1) Central Authority performance; (2) judicial performance; and (3) law enforcement performance.\textsuperscript{172} Based on this analysis, the Department places the appropriate countries in one of two categories: “Countries Not Compliant with the Convention” and “Countries Demonstrating Patterns of Noncompliance” with the Convention.\textsuperscript{173} For a country to be “not compliant,” it must be failing in all three performance ar-

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\textsuperscript{167} See \textit{Report on Compliance with the Hague Convention}, supra note 21, at 13.  \\
\textsuperscript{168} See \textit{id.} at 16–17.  \\
\textsuperscript{169} ICARA, 42 U.S.C. § 11611 (2006).  \\
\textsuperscript{170} \textit{Report on Compliance with the Hague Convention}, supra note 21, at 12.  \\
\textsuperscript{171} Id.  \\
\textsuperscript{172} Id. The Central Authority analysis assesses issues such as speed of application process, “the existence of and adherence to procedures for assisting LBPs in locating knowledgeable, affordable legal assistance,” and “responsiveness to inquiries made by [the U.S. Central Authority] and LBPs.” Id. It also includes an assessment of the programs and resources for judicial education about the Convention. Id. The “judicial performance” analysis addresses the issues of timeliness and expeditiousness of the country’s court system in processing Convention applications and appeals, how well the courts apply the Convention’s legal mandates, and the efforts made by the court system to enforce return or access decisions. Id. Finally, the “law enforcement performance” analysis addresses how successful law enforcement in the country is at quickly locating abducted children as well as how successful it is at enforcing court orders. Id.  \\
\textsuperscript{173} Id.
\end{flushleft}
For a country to be “demonstrating patterns of noncompliance” it must be failing in one or two of the performance areas.\(^\text{174}\)

The Department’s 2008 report indicates that Honduras is the only nation in the “not compliant” category, and that seven other countries demonstrate “patterns of noncompliance:” Brazil, Chile, Greece, Mexico, Slovakia, Switzerland, and Venezuela.\(^\text{176}\) There are many ways in which these countries fail to comply with the Convention, and there is often overlap among the countries.\(^\text{177}\) For example, five of the seven countries frequently treat Convention cases as custody cases.\(^\text{178}\) Despite the fact that the Convention clearly states that custody issues are not to be determined in Convention proceedings, these countries continue to make such determinations based on “best interests” types of analysis.\(^\text{179}\)

Similarly, all but one of the seven countries were found to have court systems that have unacceptable delays in Convention proceedings.\(^\text{180}\) This is particularly problematic because such delays often have detrimental effects on the LBP’s ability to secure the child’s return.\(^\text{181}\)

For example, the Chilean court system fails to handle Convention applications in the expeditious manner mandated by the Convention; consequently, Chile has a notable trend for refusing to return children because they are “settled” in the new country.\(^\text{182}\) Such determinations could be avoided if the cases were dealt with in the prompt manner required by the Convention because children would not have the time necessary to “settle.”\(^\text{183}\)

\(^{174}\) Id.

\(^{175}\) Report on Compliance with the Hague Convention, supra note 21, at 12.

\(^{176}\) Id. at 13.

\(^{177}\) Id. at 15–25.

\(^{178}\) Id. at 17–18, 21, 23, 25.

\(^{179}\) Id.; see also International Child Abduction Convention, supra note 22, art. 16.

\(^{180}\) Report on Compliance with the Hague Convention, supra note 21, at 15–23.

\(^{181}\) Id. at 18, 21–22 (“[W]hen a lengthy court process enables a court to deny a child’s return to his country of habitual residence, the principles of the Convention are not satisfied.”).

\(^{182}\) Id. at 18.

\(^{183}\) See id. Another example of the detrimental effect of delays is provided by a case in which a child was wrongfully removed to Slovakia. Id. at 22. There, the initial hearing was not conducted until eight months after the removal. Id. The court ordered the return of the child, and the TP appealed twice. Id. The first appeal, in which the original decision was affirmed, was not heard until nine months after the original decision. Id. The second appeal was not heard until eight months after the first appellate decision and, as a consequence of the delay, resulted in the original decision being overturned. Id. In the second appeal, the court determined that it would consider the child’s preferences because he had reached sufficient “age and degree of maturity” as required by the Convention. Id. Had the delays not occurred, this would not have happened. Id. at 12.
In addition to treating Convention cases as custody cases and imposing prohibited delays, several of the seven countries have displayed trends of biases.\textsuperscript{184} Such biases include favoring native TPs over the foreign LBP and favoring mothers over fathers.\textsuperscript{185} In fact, the highest court in Switzerland, in upholding a lower court’s refusal to return a child to the United States, justified its decision by noting the “special relationship” between children and their mothers.\textsuperscript{186} The Department of State disapproved of this justification in its annual compliance report.\textsuperscript{187}

Other forms of noncompliance cited by the Department include failure by law enforcement to enforce return or visitation orders promptly and effectively; lack of Central Authority assistance to LBPs; lack of communication between foreign Central Authorities and the U.S. Central Authority; and inadequate resources allocated to locating abducted children.\textsuperscript{188}

In Brazil, the trends of noncompliance are significant and had a direct impact on the Goldman case.\textsuperscript{189} The U.S. Department of State categorized Brazil as demonstrating patterns of noncompliance because of failures in both judicial performance and Central Authority performance.\textsuperscript{190} Specifically, Brazil has a serious backlog of cases because of the Central Authority’s failure to allocate adequate public prosecutors to assist with LBPs’ applications.\textsuperscript{191} Consequently, the Brazilian Central Authority advises LBPs to hire private attorneys, but once they do so, the Brazilian Central Authority discontinues its involvement in and monitoring of the case.\textsuperscript{192} This leaves the LBPs without the support and assistance that the Convention intends Central Authorities to provide.\textsuperscript{193} Additionally, the Brazilian courts have demonstrated a trend of treating Convention cases as custody cases and, as a result, often refuse to issue return orders because the child has adapted to Brazilian culture.\textsuperscript{194} The court system also has displayed notable delays in processing cases, and the courts “exhibit widespread patterns of bias to-

\begin{footnotes}
\item 184 Id. at 17–18, 23.
\item 185 Report on Compliance with the Hague Convention, supra note 21, at 17–18, 23.
\item 186 Id. at 23.
\item 187 Id.
\item 188 Id. at 16, 21, 23, 25.
\item 189 See id. at 16–17, 44; see also Aronson, supra note 9; Smith, supra note 139; Dateline: Bring Sean Home, supra note 3; Larry King Live: Tug of War Over 8-Year-Old, supra note 9.
\item 190 Report on Compliance with the Hague Convention, supra note 21, at 16.
\item 191 Id.
\item 192 Id.
\item 193 See id.; see also International Child Abduction Convention, supra note 22, art. 7.
\item 194 Report on Compliance with the Hague Convention, supra note 21, at 16–17.
\end{footnotes}
wards Brazilian mothers.” Indeed, the Goldman case was affected by most, if not all, of these patterns of noncompliance.

IV. THE NEED FOR A MECHANISM FOR ADDRESSING NONCOMPLIANCE AND A POSSIBLE SOLUTION

A. The Convention’s Major Shortcoming: The Lack of a Mechanism for Addressing Noncompliance

With the existence and extent of noncompliance understood, the logical next question is “Why is this allowed to happen?” The answer is simple: the Convention does not provide a mechanism for ensuring that Contracting States fulfill their obligations or for dealing with those Contracting States that fail to do so. Professors Paul Beaumont and Peter McEleavy summed it up well: “Faced with sustained non-compliance there is little Contracting States can do; certainly there is no mechanism proscribed within the text of the Convention. . . . Ultimately, in the absence of any sanction the operation of the Convention depends upon the goodwill of the signatory States.” Thus, noncompliance occurs with few ramifications for noncompliant countries.

The very existence of the Department of State’s annual noncompliance report demonstrates that noncompliance is an important issue that demands attention. In fact, U.S. Assistant Secretary of State for Consular Affairs Janice L. Jacobs highlighted this in the report’s introductory letter:

Compliance with the Convention is an ongoing challenge; continuing evaluation of treaty implementation in partner countries and in the United States is vital for its success. Very few options exist for parents and children who are victims of parental child abduction. As the U.S. Central Authority for this

195 Id.
196 See id. at 16–17, 44; see also Aronson, supra note 9; Smith, supra note 139; Dateline: Bring Sean Home, supra note 3; Larry King Live: Tug of War Over 8-Year-Old, supra note 9.
197 See Report on Compliance with the Hague Convention, supra note 21, at 16–25; see also Aronson, supra note 9; Smith, supra note 139; Dateline: Bring Sean Home, supra note 3; Larry King Live: Tug of War Over 8-Year-Old, supra note 9.
198 Beaumont & McEleavy, supra note 27, at 242. See generally International Child Abduction Convention, supra note 22 (not including a provision for enforcement or addressing noncompliance).
200 See id.; Report on Compliance with the Hague Convention, supra note 21, at 16–25, 42–63; Smith, supra note 139.
201 See Report on Compliance with the Hague Convention, supra note 21, at 2.
important Convention, the Office of Children’s Issues ... will continue to work with each of our Convention partners to resolve abduction cases promptly and to improve understanding and full and complete implementation of the Convention.

In that spirit, the U.S. Department of State has taken some action to help strengthen the implementation of the Convention in Contracting States. For example, the Department worked with the U.S. Embassy in Mexico City to persuade the Mexican government to increase its efforts to locate abducted children. Similarly, the Department participated in meetings between Latin American Contracting States and the Conference to help strengthen the operation of the Convention in Central and South America. These efforts included taking part in conferences in Buenos Aires which were “aimed at training judges, drawing up model implementing legislation, and developing programs to improve Convention performance.” More generally, the Department stays actively abreast of the improvement measures being taken in countries that have demonstrated patterns of noncompliance, and the Department pursues coordination and communication with the Central Authorities of those countries.

These relatively gentle measures, however, simply are not enough to address the extreme noncompliance that exists. Rather, stronger, more assertive action must be taken. U.S. Representative Chris Smith made this observation in the context of the Goldman case, in which he played a critical role in ensuring Sean’s return. Representative Smith made the following statement not only about Brazil’s noncompliance but also about Convention noncompliance more generally:

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202 Id.
203 Id. at 2, 16–25, 37–38.
204 Id. at 21.
205 Id. at 37.
206 Report on Compliance with the Hague Convention, supra note 21, at 37.
207 See id. at 16–25.
208 See id. at 16–25, 37–38; see also Aronson, supra note 9; Smith, supra note 139; Christopher H. Smith, Excerpt from International Child Abduction Hearing Before the Tom Lantos Human Rights Commission, Chris Smith, 1 (Dec. 2, 2009), http://chrissmith.house.gov/Uploaded Files/CHS_Testimony_on_Goldman_Hearing.pdf (“[IPCA] trends show no sign of abatement or reversal until serious, aggressive, robust and sustained actions are implemented.”).
209 See Smith, supra note 139; Smith, supra note 208, at 1–4; see also Aronson, supra note 9.
From my work as author of numerous human rights laws, . . . I have learned that offending countries are far likelier to take human rights abuse seriously if a predictable, hefty penalty awaits indifference or noncompliance. Moral suasion occasionally succeeds but far too often is ignored. The bottom line is that the [Brazilian] government and some other governments are ignoring their commitments under the Hague Convention. Many American families are being severely hurt, and the State Department and Congress need to urgently turn our attention to the matter, and address it head-on.  

In response to the Goldman case, Representative Smith introduced two significant bills aimed at addressing Convention noncompliance. The first, House Bill 2702 (HB 2702), was introduced during the Goldman litigation and is aimed at pressuring Brazil to comply with the Convention. The second bill, House Bill 3240 (HB 3240) was also introduced during the Goldman litigation, but it is aimed more broadly at addressing international child abduction generally, including Convention noncompliance. Both bills provide the type of “predictable, hefty penalty” that is necessary to resolve the noncompliance issue and HB 3240, in particular, provides a real promise of hope for the future.

B. United States House Bill 2702

Representative Smith introduced HB 2702 in the House on June 4, 2009, with the dual goals of resolving the Goldman case and securing the return of “all children to the United States who are being held wrongfully in Brazil in contravention of the Hague Convention.” The bill imposes sanctions on Brazil by “suspend[ing] the application of the Generalized System of Preferences for Brazil” until Brazil’s Central Authority, judicial system, and law enforcement system comply with the Convention in all IPCA cases that involve children from the United States. 

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211 Smith, supra note 139.
212 See id. See generally H.R. 3240; H.R. 2702.
213 See generally H.R. 2702.
214 See generally H.R. 3240.
215 See Smith, supra note 139; Smith, supra note 208, at 1. See generally H.R. 3240; H.R. 2702.
216 See H.R. 2702 § 2.
217 See id. § 3. The Generalized System of Preferences (GSP) is a program administered by the United States Trade Representative (USTR), and its purpose is to “promote economic growth in developing countries and countries in transition by stimulating their ex-
Representative Smith provided support for this bill by stating, “Our country has extended these duty-free benefits to help Brazil economically. But if Brazil does not live up to its treaty obligations—at least 65 American children remain abducted in Brazil—something more than diplomatic chatter should underscore our resolve.”  

Suspending the benefits of the Generalized System of Preferences (GSP) has proven to be an effective way of incentivizing changes in behavior and policy in developing countries; thus, HB 2702 has the potential to incentivize the Brazilian government to take its Convention obligations more seriously and to take the steps necessary to come into full compliance with the Convention. Suspension can have an incentivizing effect because GSP benefits provide important, immediate eco-


218 Smith, supra note 139.

219 See H.R. 2702; Smith, supra note 139.

220 See Cooper, supra note 217, at 3 (“[T]he threat of losing benefits sometimes persuades beneficiary countries to change objectionable policies or practices.”); Lance Compa & Jeffrey S. Vogt, Labor Rights in the Generalized System of Preferences: A 20-Year Review, 22 COMP. LAB. L. & POL’Y J. 199, 209 (2001); USTR Reinstates Generalized System of Preferences Benefits for Ukraine, Office of the U.S. Trade Representative, http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preferences-gsp/gsp-documents-4 (last visited Jan. 20, 2011) [hereinafter Ukraine Reinstatement]. For example, in 2001, the USTR suspended Ukraine’s GSP benefits and shortly thereafter imposed 100% tariff sanctions on Ukraine because Ukraine was the greatest producer and exporter of pirated DVDs and CDs. Ukraine Reinstatement, supra. These sanctions were imposed in an effort to pressure Ukraine to address this issue. See id. After the Ukrainian government successfully passed legislation aimed at addressing the piracy issues, the tariff sanctions were lifted in 2005 but the GSP suspension continued in effect. Id. Ukraine continued to take steps at monitoring the piracy issues and enforcing the laws aimed at curbing piracy. Id. In light of Ukraine’s improvements in “the enforcement and protection of intellectual property rights,” the USTR reinstated Ukraine’s GSP benefits in 2009. Id. This demonstrates the incentivizing potential of suspension of GSP benefits. See id. Suspension of GSP benefits has played a similar role in improving the labor policy and labor rights in developing countries. Compa & Vogt, supra, at 209. In 1984, Congress passed legislation that linked a developing country’s eligibility for GSP benefits to whether the country was “taking steps to afford internationally recognized worker rights.” 19 U.S.C. § 2462(b)(2)(G) (2006). As a result, within seventeen years, thirteen countries had been suspended from the GSP program, prompting several to take the necessary steps to reform their labor policy to meet the new GSP requirements and successfully regain GSP benefits. Compa & Vogt, supra, at 209. Again, this demonstrates the incentivizing power of suspending the economic benefits of GSP. See id.
onomic support by increasing export potential and thus providing for economic growth. Perhaps even more significantly, a developing country’s eligibility for GSP benefits sends important signals about the country to members of the U.S. market with whom private companies in developing countries seek to do business. Put simply, “[l]oss of GSP beneficiary status sends . . . a strong signal that a country is potentially bad business.” Consequently, removing that status can provide a significant incentive to take the actions necessary to get the status reinstated.

That HB 2702 was originally directed, in large part, at the now-resolved Goldman case does not render the bill ineffective. Rather, the bill would impose GSP suspension regardless, and would reinstate GSP benefits only when Brazil’s Central Authority, judicial system and law enforcement system are “complying with [their] obligations under the Hague Convention with respect to international child abduction cases involving children from the United States”—not just with respect to Sean Goldman.

Just the same, noncompliance is not just a Brazilian problem; rather, six other countries have demonstrated patterns of noncompliance and one country has been deemed entirely noncompliant. HB 2702 would not address this larger problem. As a result, Congress’ efforts would be put to better use in giving serious consideration to the more comprehensive HB 3240, which is aimed at addressing all Convention noncompliance, regardless of the country, as well as making improvements to how IPCA is addressed more generally.

C. United States House Bill 3240

Unlike HB 2702, HB 3240 takes a comprehensive approach to improving how international child abductions (ICA) are addressed in the United States and around the world; thus, while its goals include ad-

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221 See Cooper, supra note 217, at 1, 3; Compa & Vogt, supra note 220, at 204, 209.
222 Compa & Vogt, supra note 220, at 204.
223 Id.
224 See Cooper, supra note 217, at 3; Compa & Vogt, supra note 220, at 204, 209; Ukraine Reinstatement, supra note 220.
225 See Suspend Brazil GSP Act, H.R. 2702, 111th Cong. §§ 2(b), 3(c) (2009).
226 See H.R. 2702 §§ 2(b), 3(c).
227 Report on Compliance with the Hague Convention, supra note 21, at 13.
228 See generally H.R. 2702.
dressing Convention noncompliance, they are also much broader.\footnote{See H.R. 3240 § 2(c).} The purposes of the bill include protecting the rights of children; assisting parents and providing them with the tools necessary to resolve ICA cases; promoting an international consensus that custody issues should be resolved in a child’s country of habitual residence; and “facilitat[ing] the creation and effective implementation of international mechanisms, particularly the [Convention], to protect children from the harmful effects of their wrongful removal or retention.”\footnote{Id.} Because HB 3240 provides a realistic and aggressive approach to addressing the growing problem of IPCA, Congress should seriously consider this important legislation.\footnote{See H.R. 3240; Smith, supra note 208, at 1.}

House Bill 3240 would do two major things: (1) establish an Office on International Child Abductions (OICA), headed by an Ambassador at Large for International Child Abductions (AAL), within the Department of State, and (2) provide an integral role for the President, along with the Department of State, to designate countries as “engaged in a pattern of noncooperation” with respect to ICA and to impose punitive actions and sanctions on those countries.\footnote{H.R. 3240 §§ 101(a)–(b), 201(a)(2).}

The AAL, as head of OICA, would be completely dedicated to addressing ICA.\footnote{Id. § 101.} The AAL would have a range of responsibilities including advocating for abducted children, assisting LBPs, promoting measures aimed at preventing ICA, and seeking to “advance mechanisms to prevent and resolve cases of [ICA] abroad.”\footnote{Id. § 101(a)–(c)(1).} Additionally, the AAL would be a principal advisor to the President and the Secretary of State regarding ICA and would make recommendations regarding how best to address ICA.\footnote{Id. § 101(c)(2).} The AAL would also play an important diplomatic role in improving how ICA is addressed in other countries and in securing the resolution of specific ICA cases.\footnote{Id. § 101(c)(3). Additional responsibilities would include establishing a case file management system so as to maintain complete information on all ICA cases about which the OICA is notified; making legal advice available to the Central Authority of the United States to assist with “country-specific legal issues,” establishing “user-friendly resources” including a toll-free number to the OICA that that includes a “language line” for non-English speaking LBPs; and producing and issuing training courses about the Convention for federal and state judges in the United States. Id. § 101(c)(5), (8)–(10).}
The AAL, in conjunction with the Secretary of State, would be responsible for producing an Annual Report on International Child Abduction ("the Annual Report") which would ultimately replace the current report on noncompliance that is produced by OCI. This report would provide much more information than the current annual noncompliance report does. Instead of providing information about ICA cases only in those countries that are Contracting States of the Convention, the Annual Report would provide information about all relevant countries (those that are involved in ICA cases), designating them as "Hague Convention Signatory Countries," "MOU Countries," or "Nonsignatory Countries." The annual report would require a list of all pending cases in all countries and specific details about the cases, including what is being done to resolve each case. For MOU countries, it would provide not only a description about the elements of the MOU but also information about whether the MOU country is moving toward accession to the Convention. Similarly, for nonsignatory countries, it would provide "[i]nformation on efforts by the Department of State to encourage each such nonsignatory country to become a Hague Convention signatory country or MOU country." The report would also include additional information aimed at identifying the nature of the ICA problem, including information about the number of military families affected, information about the use of airlines in ICA and recommendations for best airline practices, and information about steps taken by the United States to train domestic and foreign judges on the application of the Convention. Thus, unlike the current noncompliance report, the Annual Report would be broader in focus and targeted not

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238 See id. § 102.


240 H.R. 3240 § 102(a). “MOU Country” refers to “a country or entity with which the United States has entered into a memorandum of understanding to resolve cases of international child abduction” as opposed to being in a reciprocal Convention relationship. See id. § 3(9). “Nonsignatory Country” refers to “a country which is neither a Hague Convention signatory nor a MOU country to which a United States child has been abducted or in which a United States child remains wrongfully retained.” Id. § 3(10).

241 Id. § 102(a).

242 See id. § 102(a)(2).

243 Id. § 102(a)(3)(B).

244 Id. § 102(c).
only at noncompliance issues but also at ICA and IPCA more generally.\textsuperscript{245}

The other major component of HB 3240 is the power and responsibility that it affords the President in addressing not only countries that fail to comply with the Convention but also those MOU and Nonsignatory Countries that fail to cooperate in resolving ICA cases.\textsuperscript{246} Specifically, the bill would require the President to make an annual review of the unresolved ICA cases in each foreign country and from that review designate countries as demonstrating “patterns of noncooperation.”\textsuperscript{247} This categorization would apply to those countries that have demonstrated a “systemic failure” with respect to resolving ICA cases, including but not limited to countries that are Contracting States.\textsuperscript{248}

Then, in consultation with each noncooperative country, the LBPs, and any other interested U.S. parties, the President would determine the appropriate action to address the noncooperation.\textsuperscript{249} Ideally, the President would attempt to resolve the pattern of noncooperation through “noneconomic policy options,” but once those have been exhausted, it would be the President’s responsibility to take any of the eighteen listed actions, or other commensurate action as substituted by the President, to address the noncooperation.\textsuperscript{250} These actions range from “private demarche” and “public condemnation” to serious economic sanctions including suspension of GSP benefits, limitations on export licenses, and prohibition from accessing loans and financial credit opportunities from U.S. financial institutions.\textsuperscript{251} Such presidential actions would remain in effect until waived by the President once the President has determined that the sanctioned country “has satisfactorily resolved the unresolved cases giving rise to the application of such actions” and the country has addressed its pattern of noncooperation to ensure it will effectively address ICA cases in the future.\textsuperscript{252} Thus, HB 2702 has the potential to incentivize Convention compliance, but

\textsuperscript{245} Compare ICARA, 42 U.S.C. § 11611(2006) (listing the information required to be included in the Central Authority’s annual report on noncompliance), with H.R. 3240 (listing the information that would be required in the Annual Report on International Child Abduction).

\textsuperscript{246} See H.R. 3240 §§ 201–202.

\textsuperscript{247} Id. § 20(b)(1)(A).

\textsuperscript{248} See id. § 5(12).

\textsuperscript{249} See id. §§ 202(c)–(d), 204(a).

\textsuperscript{250} See id. §§ 202(c), 203(5), 204(a)–(b).

\textsuperscript{251} H.R. 3240 § 204(a) (listing eighteen possible actions).

\textsuperscript{252} Id. § 206(a) (listing specific requirements for Hague Convention Signatory Countries, MOU Countries, and Nonsignatory Countries).
HB 3240 has the potential to incentivize compliance while also improving IPCA resolutions in Nonsignatory and MOU countries.253 This is the precise type of pressure that is necessary to ensure that IPCA cases are properly resolved.254

Thus, HB 3240 has the potential to provide the mechanism for ensuring compliance that the Convention currently lacks.255 It also has the potential to further address the growing problem of IPCA.256 The latest major action taken on HB 3240, however, was assignment to a subcommittee on September 14, 2009.257 It currently sits in five House committees and two subcommittees.258 It is essential that this bill, and the hope that it provides, not be lost to the legislative process.259 It must not meet the fate of most bills introduced in Congress: it must not die in committee.260 Rather, the committees to which this bill has been assigned must push it through the legislative process and give it the consideration it deserves.261 They must make it the best piece of legislation possible and see it through to the White House.262 In doing so, Congress will improve Convention compliance and implementation around the world.263

253 See id. §§ 204(a), 206(a); Smith, supra note 139; supra notes 219–223 and accompanying text.
254 See H.R. 3240 §§ 204(a), 206(a); Smith, supra note 139; supra notes 219–223 and accompanying text.
255 See H.R. 3240 §§ 204(a), 206(a); Smith, supra note 139; supra notes 219–223 and accompanying text.
256 See supra notes 229–231 and accompanying text. See generally H.R. 3240 (aimed at addressing international child abduction generally while also addressing Convention non-compliance).
258 Id.
259 See H.R. 3240 §§ 204(a), 206(a); Smith, supra note 139; supra notes 219–223 and accompanying text.
260 See H.R. 3240 §§ 204(a), 206(a); Smith, supra note 139; Legislative Process, CQ—ROLL CALL GROUP, http://corporate.cq.com/wmspage.cfm?parm1=231 (last visited Jan. 20, 2011) [hereinafter Legislative Process] (“Most bills simply die in committee.”); supra notes 219–223 and accompanying text. For example, of the more than 9000 bills and joint resolutions introduced in the 107th Congress (2001–2003), only 377 were enacted into law. Legislative Process, supra.
261 See H.R. 3240 §§ 204(a), 206(a); Smith, supra note 139; Legislative Process, supra note 260; supra notes 219–223 and accompanying text.
262 See H.R. 3240 §§ 204(a), 206(a); Smith, supra note 139; Legislative Process, supra note 260; supra notes 219–223 and accompanying text.
263 See H.R. 3240 §§ 204(a), 206(a); Smith, supra note 139; supra notes 219–223 and accompanying text.
Conclusion

On December 31, 2009—more than five years after being taken to Brazil—Sean Goldman returned home to New Jersey with his father. Though it was a moment for celebration after a long-fought legal battle, Sean’s return highlighted the damage that the abduction had done to his relationship with his father and the repair that would have to take place going forward. Yet, despite their lost time together and the work ahead, Sean and David are lucky: they, unlike so many families affected by IPCA in noncompliant countries, defied the odds. International parental child abduction is a devastating and tragic phenomenon, but what is more tragic are the cases that remain unresolved due to Convention noncompliance. The value of the Convention is great, but that value is severely undermined in noncompliant countries, and the LBPs and abducted children are forced to pay the price. The time has come for addressing noncompliance so that the Convention can provide the legal recourse and protection of children and families that it was intended to provide. House Bill 3240 provides a comprehensive and appropriate response that would provide this missing element of the Convention. For the sake of all families like the Goldmans, this bill warrants Congress’ serious consideration.
WHAT WE HAVE HERE IS A FAILURE TO COMMUNICATE: AN APPROACH FOR EVALUATING CREDIBILITY IN AMERICA’S MULTILINGUAL COURTROOMS

DANIEL J. PROCACCINI*

Abstract: In the American justice system, the jury is the ultimate and exclusive finder of fact. In particular, credibility determinations are sacrosanct, and no witness is permitted to “invade the province of the jury” by testifying as to another party’s credibility. This rule is strictly enforced despite being thoroughly discredited by behavioral research on the ability of jurors to detect deception. In the modern multilingual courtroom, this rule places linguistic minorities at a distinct disadvantage. The communication gap between cultures is vast, and courtroom interpretation suffers from many well-documented inadequacies that can profoundly affect a fact-finder’s conclusions about a non-English speaker’s credibility. In other circumstances, when it is reliable and will assist the trier of fact, courts routinely admit expert testimony. This Note advocates for a similar solution: where non-English speaking parties or witnesses would otherwise suffer prejudice, courts should abandon the “province of the jury” rule and allow expert testimony regarding a witness’ credibility.

Introduction

On a summer night in July 1986, in the strawberry fields of Sandy, Oregon, someone murdered Ramiro Lopez Fidel by stabbing him twice in the chest.1 The series of events culminating in his death is unclear, but it began the previous evening with an argument during an unruly birthday party held at a nearby camp for migrant workers.2 Witnesses recall that around two o’clock in the morning, Lopez jumped into a car and “tore out” toward the strawberry fields; seven men followed him in “hot pursuit,” one of whom was an eighteen-year-old fruit picker named

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2 See Carlin, supra note 1; Ellis, supra note 1. According to an eyewitness to the chase, the scene was chaotic: “It was like watching ‘Miami Vice’ that night, it was crazy.” Ellis, supra note 1.

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Santiago Ventura Morales. Around dawn, a farm hand discovered López’s body amid a grisly crime scene. That same day, seven men from the camp—including Ventura—were arrested and questioned by local police. The following morning, Ventura alone was accused of murder.

The subsequent investigation and trial of Mr. Ventura illustrate how “linguistic and cultural differences can unfairly penalize immigrants thrust into the cauldron of the American justice system.” At the time of his arrest, Ventura did not speak English or Spanish, but rather Mixtec—an indigenous Indian tongue native to the province of Oaxaca, Mexico. Nevertheless, to the extent that investigators and court personnel were aware of this language comprehension problem, they largely ignored it. During the trial, interpreters complained that Ventura and several Mixtec witnesses were not speaking Spanish, but the court disregarded their concerns. In addition to a basic language barrier, broader and more complex problems of verbal, cross-cultural communication pervaded the investigation and trial. For example,
“the officer who initially questioned Ventura insisted that [his] lowered eyes during questioning were an obvious guilt reflex.” In Mixtec culture, however, lowered eyes are a sign of respect. Interpretation of such seemingly obvious mannerisms is considered a common element of a fact-finder’s credibility determinations and likely played an undue role in the trial’s outcome.

Less than four months after his arrest, an Oregon jury found Santiago Ventura Morales guilty of murdering Ramiro Lopez Fidel. When the verdict was announced, Ventura “threw himself against the defense table and let loose a wail so chilling and anguished that it even seemed to shock the judge.” Although it was a ten-day trial, this visceral protest marked the first and only time that the jury heard Ventura’s voice. He received a sentence of life in prison. The verdict ignited a national media frenzy, and Ventura’s defense counsel pressured the district attorney into reopening the investigation.

Cultural Barriers at Different Stages of a Criminal Proceeding, 19 W. New Eng. L. Rev. 193, 196 (1997). Courts have acknowledged the difficulties attending non-verbal, cross-cultural interpretation. See, e.g., Apouviapsekoda v. Gonzales, 475 F.3d 881, 897 (7th Cir. 2007) (Posner, J., dissenting) (“Reading the facial expressions or body language of a foreigner for signs of lying is not a skill that either we or [the trial judge] possess.”); Zhen Li Iao v. Gonzales, 400 F.3d 530, 534 (7th Cir. 2005) (suggesting that courts are insensitive to cross-cultural demeanor evidence); Mak v. Blodgett, 970 F.2d 614, 617 n.5 (9th Cir. 1992) (holding that counsel was ineffective when he failed to present evidence via expert testimony that could have explained his Chinese immigrant client’s apparent lack of emotion at trial as consistent with Chinese cultural expectations during sentencing in a death penalty case).

12 See DeMuniz, supra note 7, at 4. “The Mixtec witnesses displayed a similar inability to look into the eyes of the deputy district attorney or judge when questioned. Jurors interpreted that characteristic and the witnesses’ linguistic problems as some sort of combined effort by Ventura and other Mixtecs to thwart the trial process.” Id. The Mixtecs gave answers “with blank faces or wild non sequiturs” that caused at least one juror to comment, “‘They all acted kind of guilty.’” See Carlin, supra note 1.

13 See DeMuniz, supra note 7, at 234 n.7.

14 See id. at 4; Cole & Maslow-Armand, supra note 11, at 195–96; Joshua Karton, Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony, 41 Vand. J. Transnat’l L. 1, 29 (2008). Ventura’s demeanor certainly affected the investigating officer, who stated that he “was convinced without a doubt that [Ventura] was guilty.” See Carlin, supra note 1.

15 DeMuniz, supra note 7, at 3; Carlin, supra note 1; Ellis, supra note 1.

16 See Carlin, supra note 1.

17 See DeMuniz, supra note 7, at 3; Carlin, supra note 1.

18 See Ellis, supra note 1.

19 See Carlin, supra note 1. The case garnered nationwide attention after several jurors publicly expressed serious doubts about the accuracy of their decision. See id.; Ellis, supra note 1. The reinvestigation of the case showed that the state’s forensic evidence was deeply flawed and clearly established that someone else at the camp had killed Lopez that night in 1986. See Carlin, supra note 1. Additionally, a previously unexamined witness in the case
years later, in January 1991, armed with new evidence and the support of an outraged public, Ventura succeeded in having the jury’s verdict overturned by the trial court. See 

The adversarial model employed by the American justice system presupposes that a fact-finder can reach a reasonable conclusion about the truth based upon the information presented at trial by opposing parties. As the Ventura case demonstrates, however, that goal is frustrated by the evolving linguistic demography of the United States. Nearly twenty percent of the U.S. population over the age of five speaks a language other than English at home. Forty-four percent of that population speaks English ‘less than very well.’ Minorities speaking a primary language other than English compose a “discouraging proportion of offenders.” Thus, the demand for foreign language interpretation services has boomed in recent decades. In the modern multilingual courtroom, interpreters are an essential tool for ensuring fundamental fairness at trial. Nevertheless, courtroom interpretation testified that he saw a second car chase Lopez into the field that night, and that a man named Herminio Luna Hernandez confessed to Lopez’s murder. See id. That night, Luna abandoned his family and fled. See id.

See Carlin, supra note 1. The court found for Ventura in his suit for post-conviction relief because “no expert witnesses were called in his defense and because he had been denied his constitutional right to testify.” Id. The district attorney did not express a belief in Ventura’s innocence and implied that he would retry him if given the opportunity. See id.


See American Community Survey, supra note 22.

See id.


See Susan Berk-Seligson, The Bilingual Courtroom: Court Interpreters in the Judicial Process 1 (2d ed. 2002). Importantly, interpretation is a distinct subfield within translation. See Karton, supra note 14, at 17. As one scholar describes it, “The word translation refers to the transfer of thoughts and ideas from one language (the source language) into another (the target language), in either written or oral form. Interpretation, on the other hand, encompasses only oral communication . . . .” See id. (footnote omitted) (internal quotation marks omitted).

See United States ex rel. Negron v. New York, 434 F.2d 386, 389 (2d. Cir. 1970). The U.S. Supreme Court has never decided the question of whether due process includes the right to an interpreter. See Michael B. Shulman, Note, No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants, 46 VAND. L. REV. 175, 183
suffers from considerable, well-documented inadequacies.\textsuperscript{28} Errors relating to vocabulary, syntax, and dialects abound and can vary in magnitude from innocuous to severe.\textsuperscript{29} These inaccuracies may be compounded with “prejudicial misimpressions” of a party based upon his or her demeanor because he or she lacks a shared cultural consciousness with the fact-finder.\textsuperscript{30} Yet, reversals on appeal for interpretation errors alone are rarely successful.\textsuperscript{31} As one scholar strongly stated, “Any assumption that interpreted testimony in our courtrooms today is largely adequate and accurate is a fiction.”\textsuperscript{32}

Misinterpretation and misapprehension can profoundly affect a fact-finder’s conclusions regarding the credibility of linguistic minorities.\textsuperscript{33} In the American justice system, the jury serves as the “ultimate and exclusive finder of fact.”\textsuperscript{34} Consistent with that role, courts have applied an ancient doctrine that prohibits any witness from “invading the province of the jury.”\textsuperscript{35} This prohibition has been invoked at different times regarding various types of evidence, but over time much of the jury’s “protected province” has arguably been eroded.\textsuperscript{36} Nevertheless, courts continue to apply this maxim vigorously in one particular

(1993). In the federal system, foreign language interpreters are guaranteed in criminal and civil cases under certain circumstances. See Court Interpreters Act, 28 U.S.C. § 1827 (2006). Most state courts recognize that non-English speaking criminal defendants have a right to an interpreter. See Berk-Seligson, supra note 26, at 241 (App. 1).

\textsuperscript{28} See, e.g., Berk-Seligson, supra note 26, at 142–45; Karton, supra note 14, at 26–30; Cassandra L. McKeown & Michael G. Miller, Say What?: South Dakota’s Unsettling Indifference to Linguistic Minorities in the Courtroom, 54 S.D. L. Rev. 33, 41–51 (2009); Shulman, supra note 27, at 184–87.

\textsuperscript{29} See Cole & Maslow-Armand, supra note 11, at 194; Marina Hsieh, “Language-Qualifying” Juries to Exclude Bilingual Speakers, 66 Brook. L. Rev. 1181, 1189 (2001); Karton, supra note 14, at 26–27.

\textsuperscript{30} See Cole & Maslow-Armand, supra note 11, at 196. Examples of such nonlinguistic cues include the failure of a witness or defendant to maintain eye contact with an interrogator or fact-finder, speaking in an unusually soft or loud voice, appearing emotionless, or the excessive and exaggerated use hand gestures. See id.

\textsuperscript{31} See Berk-Seligson, supra note 26, at 200. One such case was People v. Starling, in which an Illinois appellate court overturned an English-speaking criminal defendant’s conviction for robbery because a Spanish-speaking witness had testified, but neither the defendant nor any of the principal players in the trial understood Spanish. See 315 N.E.2d 163, 168 (Ill. App. Ct. 1974). It was obvious that the interpreter inaccurately translated the questions posed by the attorney and the witness’ answers, and the defendant placed objections on the record. See id.

\textsuperscript{32} Hsieh, supra note 29, at 1192.

\textsuperscript{33} See Cole & Maslow-Armand, supra note 11, at 196; Karton, supra note 14, at 28.


\textsuperscript{35} See id. at 1020.

\textsuperscript{36} See id. at 1018–27.
area: judgments regarding witness credibility.\textsuperscript{37} Courts typically reason that the specific topic of witness credibility is so “inextricably intertwined” with the role of the fact-finder as to preclude any outside opinions on the matter, including those of expert witnesses.\textsuperscript{38} Moreover, appellate courts typically review interpreter errors under the deferential abuse of discretion or plain error standards.\textsuperscript{39}

The common law prohibition “rests on the premise that the jury is adequately equipped to assess a witness’s credibility,” which renders an expert’s testimony unnecessary.\textsuperscript{40} Despite its deep roots and consistent application, social science research shows that this long-standing judicial assumption is unfounded.\textsuperscript{41} The liberal thrust of the Federal Rules of Evidence favors the admissibility of “all relevant evidence” and relaxes traditional barriers to opinion testimony.\textsuperscript{42} There is no consensus that the Rules prohibit one witness from commenting on the credibility of another.\textsuperscript{43} This is particularly true in the case of expert opinions, which are permitted if they are helpful to the trier of fact and based on “scientific, technical, or other specialized knowledge.”\textsuperscript{44} It is unrealistic to harbor the belief that the use of expert witnesses can completely overcome the problems associated with interpretation and cross-cultural communication.\textsuperscript{45} Nonetheless, where the testimony of a linguist or cultural expert could assist the jury in its fact-finding role, the


\textsuperscript{38} Simmons, \textit{supra} note 34, at 1028.

\textsuperscript{39} See Lynn W. Davis et al., \textit{The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation}, 7 Harv. Latino L. Rev. 1, 7 (2004). Where there is a timely objection placed on the record, the abuse of discretion standard of review is typically employed. See \textit{id}. Where there is no objection, the court utilizes the plain error standard. See \textit{id}. “Reversals based on plain error are rarely granted.” \textit{Id}.

\textsuperscript{40} Poulin, \textit{supra} note 37, at 1001.


\textsuperscript{42} See \textit{Fed. R. Evid.} 401; see also Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988) (stating that the Federal Rules of Evidence adopted a “general approach of relaxing the traditional barriers to ‘opinion’ testimony”).


\textsuperscript{44} See \textit{Fed. R. Evid.} 702.

\textsuperscript{45} See Hsich, \textit{supra} note 29, at 1192.
testimony should be admitted at trial in order to preserve an individual’s right to a fundamentally fair judicial proceeding.46

This Note argues that courts should abandon their strict application of the “province of the jury” rule and allow expert opinions regarding a witness’ credibility where non-English speaking parties or witnesses might otherwise be prejudiced.47 Part I examines the linguistic demographics of the United States and the evolving composition of litigants in the American justice system. Part II briefly describes the right of trial participants to an interpreter and the mechanics of interpretation, and explores why the current system is insufficient. It describes the inadequacies of foreign language translation and their impact on a fact-finder’s credibility determinations. Part III examines the nature of credibility determinations in the American justice system and summarizes the federal law regarding opinion testimony at trial. Finally, this Note concludes in Part IV that the province of the jury rule regarding witness credibility is outmoded, and that where expert testimony would assist the trier of fact to assess the credibility of a linguistic minority at trial, it should be admitted.

I. The Linguistic Demographics of the United States

John Jay’s statement in The Federalist, that Americans are “a people descended from the same ancestors, speaking the same language,” is false.48 America has always been a nation of linguistic pluralism.49 Prior to the founding of the republic, the North American continent was a cacophony of more than one thousand different languages.50 Colonization added Spanish, English, French, Dutch, and Swedish to the din.51 In the early twentieth century, an influx of European immigrants introduced the sounds of innumerable languages to the country’s chorus of voices.52 America’s embrace of multilingualism has been not only

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46 Cole & Maslow-Armand, supra note 11, at 196; Karton, supra note 14, at 28; Poulin, supra note 37, at 1068; Simmons, supra note 34, at 1064–65.
47 See Cole & Maslow-Armand, supra note 11, at 196; Karton, supra note 14, at 28; Poulin, supra note 37, at 1068; Simmons, supra note 34, at 1064–65.
49 See Perea, supra note 48, at 273.
50 See id.
51 See id. at 274, 285.
52 See id. at 274.
The Framers actively avoided declaring English to be the official language of the United States in the Constitution, and it was not until the nineteenth century that “English only” laws appeared. During the country’s infancy, a number of Founding Fathers as well as several states embraced the country’s linguistic diversity. Thus, although the English language maintains a special prominence in the United States, John Jay’s confident declaration that it is the language of the nation is, at best, misleading.

Despite America’s long history of linguistic diversity, the nation’s demography illustrates the strain that multilingualism places on its judicial system. In 2008, at least fifty-four million people over the age of five spoke a language other than English at home. Over the last three decades, this population has increased dramatically. In 2008, forty-four percent of those speaking another language at home spoke English “less than very well.” Therefore, at least twenty-four million people would require translation services if they found themselves in court. Moreover, the burden of providing interpreters for linguistic

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53 See id. at 309–28 (describing the “rich legal histor[y] of multilingualism” in the United States and the official recognition of multiple languages in Pennsylvania, California, New Mexico, and Louisiana, along with several other states).

54 See GONZÁLEZ ET AL., supra note 48, at 38. The rise of the “English Only” movement is associated with the dramatic increase in the immigrant population at that time, which was met with intolerance for both foreign language and culture. See id. For example, in the late nineteenth century, Native American children were effectively prohibited from speaking their indigenous languages and were forced to attend English language boarding schools. See Michael DiChiara, Note, A Modern Day Myth: The Necessity of English as the Official Language, 17 B.C. THIRD WORLD L.J. 101, 103 (1997).

55 See Perea, supra note 48, at 287–92 (comparing the views of Benjamin Franklin, Thomas Jefferson, and Benjamin Rush on multilingualism); supra note 53.

56 See THE FEDERALIST, supra note 48, at 9; Perea, supra note 48, at 273, 276. The reality of linguistic diversity does not undercut the significance of the English language in the United States. See Perea, supra note 48, at 276 (“English is, without question, the dominant language of America and a key characteristic of America’s core culture.”).

57 See American Community Survey, supra note 22; Shin & Bruno, supra note 22, at 3.

58 See American Community Survey, supra note 22.

59 See Shin & Bruno, supra note 22, at 4. In 1990, there were an estimated 31.8 million non-English speakers in the United States; in 2000, that number increased to 46.9 million. See id. In 2008, there were about fifty-five million non-English speakers in the United States. See American Community Survey, supra note 22. This rate is far higher than was predicted just twenty years ago. See GONZÁLEZ ET AL., supra note 48, at 21 (predicting that the number of limited- or non-English speaking individuals in the United States would reach fifty million by 2020).

60 See American Community Survey, supra note 22.

61 See id. Pursuant to the Court Interpreters Act, courts must employ interpreters whenever a party or witness “speak[s] only or primarily a language other than the English language.” See Court Interpreters Act, 28 U.S.C. § 1827 (2006); infra Part II.A.1. State
minorities is not equally distributed across the country: nearly one-third of all non-English speaking individuals live in the West.  

The variety of languages spoken in the United States constitutes an additional burden. As of 2009, Americans spoke approximately 364 different languages. Spanish is the most common non-English language spoken in the United States; thus, it is also the most frequently used in courtroom interpretation. However, there are at least nineteen distinct Spanish dialects. Currently, the U.S. federal courts certify interpreters in only three languages: Spanish, Navajo, and Haitian-Creole.  

II. COURTROOM INTERPRETATION: RIGHTS, MECHANICS & INADEQUACIES  

A. The Right to an Interpreter  

1. The Federal System  

The U.S. Supreme Court has never decided the question of whether a non-English speaking individual enjoys a right to a courtroom interpreter. Several Circuit Courts of Appeals, however, have ruled that criminal defendants may claim a right to an interpreter in
connection with the Confrontation Clause of the Sixth Amendment. In the seminal case, United States ex rel. Negron v. New York, the Second Circuit held that, where a court is on notice of a criminal defendant’s inability to understand English, it is required to “make unmistakably clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial.” Because Negron lacked the ability to comprehend the testimony of witnesses against him, his Confrontation Clause rights were violated. More importantly for the court, he was constructively absent from his own trial because of his inability to consult with his attorney “with any reasonable degree of rational understanding.”

Unsatisfied with the rulings of the judiciary, public pressure for a federal statutory right to an interpreter began to mount in the 1960s. The desire for “equal access” to the justice system for linguistic minorities was realized on October 28, 1978, when Congress passed the Court Interpreters Act (the “Act”). The Act requires the use of “qualified interpreters” in any criminal or civil action initiated by the United States if any party or witness “speaks only or primarily a language other than the English language . . . so as to inhibit such party’s comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness’ comprehension of questions and the presentation of such testimony.” The benefits of the Act were threefold: (1) it mandated the use of interpreters in courts

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69 See, e.g., United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973) (“The right to an interpreter rests most fundamentally . . . on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.”); United States ex rel. Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970).

70 See Negron, 434 F.2d at 391. Negron was an indigent, Spanish-speaking defendant accused of fatally stabbing his housemate during a drunken brawl. See id. at 387–88.

71 See id. at 389.

72 See id. The Court of Appeals strongly rebuked the trial court:

Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.

Id. at 390.

73 See BERK-SELIGSON, supra note 26, at 1; GONZÁLEZ ET AL., supra note 48, at 41–42.

74 See Court Interpreters Act, 28 U.S.C. § 1827 (2006). The passage of the act was “one seminal event [that] can be seen as the driving force behind the current growing trend toward greater use of court interpreting in American courtrooms . . . .” BERK-SELIGSON, supra note 26, at 1; see also GONZÁLEZ ET AL., supra note 48, at 60 (describing the “ripple effect” of the Court Interpreters Act throughout the states).

of the United States; (2) it appreciated the defendant’s need to comprehend the proceedings and assist in his or her defense; and (3) it recognized the need for qualified interpreters, for which it established an objective certification program.\(^7\) By passing this legislation, Congress affirmed the existence of inequality based on language, thus marking an important step in the history of political access rights based on language remedies.\(^7\) The Act was far from perfect, however, and has been criticized for its failure to articulate the necessary qualifications of interpreters and for its overreliance on judicial discretion.\(^8\)

2. State Court Systems

In the wake of the Court Interpreters Act, many states began addressing the issue of courtroom interpretation.\(^9\) California led the way in November 1974 by passing a constitutional amendment recognizing that criminal defendants unable to speak English possess a right to an interpreter.\(^10\) Constitutional amendments, however, are rare; most states guarantee some form of interpretive service either by statute or through administrative and judicial regulations.\(^11\) Today, in one way or another, most states recognize that non-English speaking criminal defendants have a right to an interpreter.\(^12\) Despite advances, change has been slow: according to one study, court officials doubt “that they have the obligation to bridge the linguistic barrier faced by non-English speaking individuals” and, “having been required to nevertheless bridge that barrier, they have done so in a highly formalistic fashion, committing as little of their time, effort, and budget as possible . . . .”\(^13\)

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\(^7\) See González et al., supra note 48, at 57.
\(^8\) Id. at 42.
\(^9\) See id. at 61–63.
\(^10\) See id. at 71.
\(^11\) See Cal. Const. art. 1, § 14 (“A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.”); González et al., supra note 48, at 73. Notably, New Mexico’s constitution has provided for court interpretation since 1911. See N.M. Const. art. 2, § 14 (“In all criminal prosecutions, the accused shall have the right . . . to have the charge and testimony interpreted to him in a language that he understands . . . .”); González et al., supra note 48, at 74.
\(^12\) Berk-Seligson, supra note 26, at 27.
\(^13\) Id. at 241 (App. 1); Shulman, supra note 27, at 178.
\(^14\) See Carlos A. Astiz, But They Don’t Speak the Language: Achieving Quality Control of Translation in Criminal Courts, 25 Judges’ J. 32, 56 (Spring 1986).
B. Courtroom Interpretation Practices

Interpretation is “the transfer of meaning from a source language to a receptor or target language, [and] allows oral communication between two or more persons who do not speak the same language.”84 The role of the courtroom interpreter is “to place the non-English speaker, as closely as is linguistically possible, in the same situation as an English speaker in a legal setting.”85 In the delivery of his or her services, an interpreter is expected to refrain from providing defendants or witnesses with any unfair advantage.86 In practice, courtroom interpretation occurs in one of three main ways: sight translation, simultaneous interpretation, and consecutive interpretation.87 The consecutive mode is preferable for in-court interpretation.88 In the course of this process, interpreters must practice “attending,” a concentrated form of listening that “requires a concerted effort to process the incoming message.”89 In addition to these responsibilities, interpreters’ work must be speedy.90 Simply put, language interpretation is difficult.91

85 González et al., supra note 48, at 155.
86 See id. at 155–56. Ironically, as the Ventura case demonstrates, witnesses and defendants are more often than not disadvantaged by the use of a courtroom interpreter. See generally Carlin, supra note 1; Ellis, supra note 1.
87 See de Jongh, supra note 84, at 288. There are significant differences between the three modes of interpretation. See González et al., supra note 48, at 163–66. One scholar compares them as follows:

Sight translation is the oral rendition into the target language of material written in a source language . . . . Consecutive interpretation requires that that the source language speaker pause at regular intervals to allow the interpreter to convey the target language interpretation and is used for on-the-record testimony . . . . The simultaneous mode . . . demands that the interpreter listen and speak concurrently with the primary speaker whose monologue is being translated.

88 González et al., supra note 48, at 164–66. Consecutive interpretation allows for “thought-wholeness,” increased control, and may in some cases be more efficient. See id. at 164.
89 Karton, supra note 14, at 21. “The difference [between hearing and attending] is that hearing is a passive process involving an involuntary reaction of the senses and the nervous system, while listening is a voluntary, conscious effort to process the input selectively. Attending is the most alert, deliberate form of listening.” González et al., supra note 48, at 380.
90 See Karton, supra note 14, at 21.
91 See Patricia Walther Griffin, Beyond State v. Diaz: How to Interpret “Access to Justice” for Non-English Speaking Defendants?, 5 Del. L. Rev. 131, 134 (2002); see also Shulman, supra note 27, at 186 (“Foreign language interpretation is one of the most difficult tasks a human being can perform.”).
C. Interpreted Language: What’s Lost in Translation?

Courts have historically clung to the “conduit theory” of interpretation, which “views the interpreter as a machine into which one language enters and another language exits.” This theory is premised on a number of false assumptions. “It is a truism of linguistics that all language is inherently ambiguous.” Diversity of syntax and vocabulary provide a constant challenge for courtroom interpreters. Even innocuous alterations in the formality of speech have a demonstrable impact on the perception of trial participants. Compounded with pure human error are the inevitable challenges posed by cross-cultural communication. Each of these factors significantly affects the ability of the trier of fact to assess the weight and credibility of particular testimony. In Mr. Ventura’s case, these factors undeniably contributed to his wrongful conviction.

1. Tongue Tied: Vocabulary, Dialect, and Inaccurate Interpretation

The misinterpretation of words and idioms can easily prejudice a non-English speaking party in court. Neither the vocabularies nor syntax of different languages are necessarily equivalent. Although empirical studies are lacking, there is a substantial amount of dramatic anecdotal evidence involving egregious misinterpretation. For example, in a New York federal court, a Cuban defendant stated over an undercover wire, “‘Hombre, ni tengo diez kilos!’” In light of its context and the defendant’s native dialect, the term “kilo” should have been inter-

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92 McKeown & Miller, supra note 28, at 41.
93 See id. at 42 (“The presumption that linguistic accuracy is sufficient to properly convey meaning has been soundly rejected by linguists and communication scholars.”).
95 Karton, supra note 14, at 26.
96 See id. at 27–29.
97 See Ahmad, supra note 94, at 1033; de Jongh, supra note 84, at 290–92.
98 See Karton, supra note 14, at 26–27; Hsieh, supra note 29, at 1189.
99 See Carlin, supra note 1.
100 See Berk-Seligson, supra note 26, at 118; Cole & Maslow-Armand, supra note 11, at 195–96.
101 See Karton, supra note 14, at 26–27. The term syntax denotes “the arrangement of word forms to show their mutual relationship in a sentence.” Webster’s Third New International Dictionary of the English Language 2321 (Philip Babcock Grove ed., 1986).
102 See Hsieh, supra note 29, at 1189.
103 See Shulman, supra note 27, at 176; Alain Sanders et al., Libertad and Justicia for All, Time, May 29, 1989, at 65.
interpreted to mean a form of Cuban currency, or in English, “cents.”\footnote{See Shulman, supra note 27, at 176, n.3; Sanders et al., supra note 103, at 65.} Instead, the phrase was mistakenly interpreted as, “Man, I don’t even have ten kilos,” where “kilo” referred to kilograms of drugs.\footnote{See Shulman, supra note 27 at 176.} Similar errors abound.\footnote{See, e.g., Hsieh, supra note 29, at 1189; Joanne I. Moore & Ron A. Mamiya, Interpreters in Court Proceedings, in IMMIGRANTS IN COURTS, supra note 7, at 29, 39. In one pivotal exchange during a prosecution of two men for rape, the victim was asked, “Do you remember the day [the defendant] sexually assaulted you?” See Hsieh, supra note 29, at 1189. The interpreter rendered the attorney’s question as, “Do you remember the day [the defendant] made love to you?” See id. Similarly, in a Washington murder trial, an interpreter rendered the statement, “I will aim at you,” as “I will kill you.” See Moore & Mamiya, supra, at 39.}

Even more subtle forms of misinterpretation can significantly affect a fact-finder’s evaluation of the evidence.\footnote{See Berk-Seligson, supra note 26, at 169.} In one study, 551 mock jurors, nearly forty percent of whom were Hispanic and spoke Spanish, heard recordings of testimony by a Spanish-speaking witness.\footnote{See id. at 155, 158.} One group of jurors heard a recording in which the interpreter would use “politeness markers.”\footnote{See id. at 155.} For example, the interpreter would render “sí, señor” using the polite address form “yes, sir.”\footnote{See id.} In the recording heard by the other group, the interpreter would simply render the witness’ response as “yes.”\footnote{See id.} This seemingly minor difference in politeness caused non-Spanish speaking members in the second group, those relying solely on the interpreter, to find that the witness’ testimony was less convincing, less competent, less intelligent, and less trustworthy.\footnote{See Berk-Seligson, supra note 26, at 165.} On the contrary, Spanish speakers who heard the witness’ original, polite response found the witness both more convincing and more trustworthy.\footnote{See id. at 164.}

There are few, if any, safeguards to prevent these inaccuracies.\footnote{See Shulman, supra note 27, at 186.} Even the most experienced and well-trained interpreters inevitably make mistakes, but unless another foreign language speaker is in the courtroom, an interpreter’s accuracy is subject to virtually no scru-
tiny.\textsuperscript{115} The best way to prevent inaccurate interpretation is interpreter certification, but few states provide such programs.\textsuperscript{116} If states are unwilling to shoulder the burden of ensuring equal access to justice by providing qualified interpreters for linguistic minorities, then the judicial system should intervene and empower non-English speaking individuals to protect themselves against inaccurate interpretation.\textsuperscript{117}

2. Mixed Signals: Cross-Cultural Communication

Words alone do not create understanding.\textsuperscript{118} Subjects, nouns, and verbs strung together as sentences are “merely signs, cues, or hints as to what a speaker intends the listener to understand.”\textsuperscript{119} Because interaction between speakers creates meaning, linguistic communication is best understood as a “social process . . . rather than a static code.”\textsuperscript{120} It is a metaphor for culture, and rests on a foundation of assumptions that may be similar or starkly different.\textsuperscript{121} This is particularly evident in the legal field: even if a lawyer and her client speak the same language, conveying meaning is difficult.\textsuperscript{122} Thus, contrary to the underlying assumptions of conduit theory, the problems of language difference are not susceptible to a mechanical solution.\textsuperscript{123} “How something is said may at times be more important than \textit{what} is actually said.”\textsuperscript{124}

This fact is all the more apparent in light of the tremendous challenges posed by cross-cultural communication.\textsuperscript{125} Intonation, pitch,

\begin{itemize}
\item \textsuperscript{115} See Hsieh, \textit{supra} note 29, at 1187; Shulman, \textit{supra} note 27, at 186 (“Typically, errors in interpretation are corrected only when another interpreter or other courtroom personnel fluent in that language are present.”).
\item \textsuperscript{116} See Hsieh, \textit{supra} note 29, at 1187; Moore & Mamiya, \textit{supra} note 106, at 40. “With the exception of the few states that require interpreters to be certified, no state provides judges with criteria by which to evaluate an interpreter other than stating that he must be ‘qualified’ or ‘competent.’” Shulman, \textit{supra} note 27, at 179, n.21. Although not as effective, an even simpler, more cost-effective solution would be to require the tape recording of all interpreted testimony for subsequent review. See Moore & Mamiya, \textit{supra} note 106, at 40.
\item \textsuperscript{117} See discussion \textit{infra} Part IV.
\item \textsuperscript{118} See Ahmad, \textit{supra} note 94, at 1032–33.
\item \textsuperscript{119} \textit{Id.} at 1033 (footnote omitted).
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} See de Jongh, \textit{supra} note 84, at 288.
\item \textsuperscript{122} See \textit{id.} at 290 (analyzing the many possible interpretations of the word “charged” in the legal context).
\item \textsuperscript{123} See \textit{id.}; McKeown & Miller, \textit{supra} note 28, at 41–42; see also David Bellos, Op-Ed., \textit{I, Translator, N.Y. Times}, Mar. 21, 2010, at A20 (noting that statistical machine translation, despite recent improvements, is still wrought with inaccuracies).
\item \textsuperscript{124} de Jongh, \textit{supra} note 84, at 292.
\item \textsuperscript{125} See Cole & Maslow-Armand, \textit{supra} note 11, at 195–96; de Jongh, \textit{supra} note 84, at 290–91.
\end{itemize}
body language, and nonverbal gestures are not necessarily fungible between cultures.\textsuperscript{126} Thus, in monolingual and monocultural courtrooms, a fact-finder’s unguided reliance on demeanor evidence based upon the conduct of a limited- or non-English speaking individual is dangerous.\textsuperscript{127} A common example of this phenomenon is the gaze pattern.\textsuperscript{128} In American culture, “observers impute less credibility to persons who avoid eye contact during a conversation.”\textsuperscript{129} Social science research demonstrates, however, that gaze patterns vary among cultures.\textsuperscript{130} Like the Mixtec witness, “when a Haitian witness looks at the floor when asked a question by the judge, he or she may not be doing so out of guilt but rather as a result of a culturally learned respect for the judge as an authority figure.”\textsuperscript{131} Moreover, one recent study suggests that interpreters can be as harmful as they are helpful in dealing with cross-cultural communication issues.\textsuperscript{132} Ultimately, the ability of limited- or non-English speaking individuals to present evidence to the court is undermined because the failure to engage in accurate cross-cultural communication may affect the weight fact-finders assign to the testimony of non-English speaking witnesses.\textsuperscript{133}

\textsuperscript{126} See de Jongh, supra note 84, at 290, 292; see also John M. Conley et al., The Power of Language: Presentational Style in the Courtroom, 1978 Duke L.J. 1375, 1395 (concluding that even “relatively subtle variations in courtroom speaking styles can influence jurors’ reactions and deliberations”).

\textsuperscript{127} See Karton, supra note 14, at 29.

\textsuperscript{128} See de Jongh, supra note 84, at 292; Neal P. Pfeiffer, Note, Credibility Findings in INS Asylum Adjudications: A Realistic Assessment, 23 Tex. Int’l L.J. 139, 144 (1988); supra note 30.

\textsuperscript{129} Pfeiffer, supra note 128, at 144.

\textsuperscript{130} See de Jongh, supra note 84, at 292; Pfeiffer, supra note 128, at 144.

\textsuperscript{131} de Jongh, supra note 84, at 292.

\textsuperscript{132} See Berk-Seligson, supra note 26, at 196 (noting that “the court interpreter in the examination of a witness affects the impressions of that witness” and that “perceptions of some of the witness’s social/psychological attributes—namely convincingness, truthfulness, intelligence, and competence—are affected by pragmatic alterations made by the interpreter”).

\textsuperscript{133} See Cole & Maslow-Armand, supra note 11, at 195–96. This fact cannot be understated: a recent study comparing Spanish-speaking witnesses’ answers with interpreters’ renditions into English concluded that, although the competence of the interpreter was a significant factor, “[w]hat is indisputable . . . is that all interpreters tended to omit those seemingly unimportant features of speech style that can impinge on the evaluation of witnesses’ speech by those judging them. The interpreter’s stylistically inaccurate renditions can therefore potentially alter the outcome of the case.” Sandra Hale, How Faithfully Do Court Interpreters Render the Style of Non-English Speaking Witnesses’ Testimonies? A Data-Based Study of Spanish-English Bilingual Proceedings, 4 Discourse Stud. 25, 44 (2002). The study specifically found that alterations by interpreters tend to be “detrimental to the evaluation of witnesses’ character and credibility.” See id. at 43–44.
III. CREDIBILITY DETERMINATIONS: THE LEGACY OF THE COMMON LAW

All of us know that, in every-day life, the way a man behaves when he tells a story—his intonations, his fidgetings or composure, his yawns, the use of his eyes, his air of candor or of evasiveness—may furnish valuable clues to his reliability. Such clues are by no means impeccable guides, but they are often immensely helpful. So the courts have concluded.

—Jerome Frank

For nearly three thousand years, jurists have held fast to the notion that observing an individual’s demeanor is of the utmost importance in the determination of his or her credibility as a witness. This principle has wound its way through the jurisprudence of nations; in the United States, demeanor evidence has been “endowed . . . with precedential value to the extent that the concept is reified in both case law and the Federal Rules of Evidence.” Accordingly, immense discretion has been conferred upon fact-finders relying on oral testimony. Regard-

135 See NLRB v. Dinion Coil Co., 201 F.2d 484, 487–88 (2d. Cir. 1952) (tracing the history of demeanor evidence); Frank, supra note 134, at 21; Blumenthal, supra note 41, at 1158.
136 Blumenthal, supra note 41, at 1158 (footnotes omitted).
137 Dinion, 201 F.2d at 488. Regarding in-court interpretation, this discretion has been circumscribed by a small degree: in most jurisdictions, jurors are allowed to consider only the testimony of a non-English speaking witness rendered by the interpreter into English as evidence; they must disregard anything said in the original language. See Hernandez v. New York, 500 U.S. 352, 379 (1991) (Stevens, J., dissenting); Hsieh, supra note 29, at 1193. Moreover, bilingual jurors who speak the same language as the witness are typically instructed to disregard all interpreting errors they think may have been made. See William E. Hewitt, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 132 (1995). Controversy over the validity of this rule and the fairness of allowing bilingual jurors to serve came to a head in Hernandez v. New York, where the Court found that a prosecutor’s peremptory strike of a bilingual juror whom the lawyer suspected was unable to rely solely on the interpreter’s English rendering of the testimony was a “valid for-cause challenge.” See 500 U.S. at 362–63 (majority opinion). Scholars have attacked the basis of this ruling, arguing that scientific evidence and common sense demonstrate that it is inherently impossible for a bilingual juror to turn off one of his or her language inputs. See Hsieh, supra note 29, at 1194; see also Juan F. Perea, Buscando América: Why Integration and Equal Protection Fail to Protect Latinos, 117 HARV. L. REV. 1420, 1436 (2004) (“All of the opinions in Hernandez made erroneous assumptions about bilinguals. . . . Bilinguals understand and think in two languages simultaneously and interdependently; it is how their brains work. The prosecutor in Hernandez was asking the impossible when he asked the bilingual jurors to ignore the Spanish-language testimony . . . .”). Allowing peremptory strikes in a heavily bilingual area arguably disenfranchises an entire ethnic group. See Deborah A. Ramirez, EXCLUDED VOICES: THE DISENFRANCHISEMENT OF ETHNIC GROUPS FROM JURY SERVICE, 1993 WIS. L. REV. 761, 805. Therefore, at least one scholar proposes allowing bilingual jurors to acknowledge both the original foreign language testi-
less of accuracy, a fact-finder may choose to weigh the telltale indicators of a witness’ veracity more heavily than the testimony itself.138 In the mid-1800s, this concept began to take shape as the so-called “province of the jury” rule.139 In short, the subject of witness credibility is simply off-limits to any trial participant other than the fact-finder.140 Despite strong evidence suggesting that the underlying assumptions of the doctrine are false, courts “tenaciously cling” to this last outpost of the jury.141 The following section details the substance of the province of the jury rule, the degree to which the doctrine has been incorporated into the Federal Rules of Evidence, and how its theoretical supports have been steadily eroded by social science analysis.142

A. The Province of the Jury: A Legal Landscape

An examination of the history of the province of the jury rule reveals the maxim’s peculiar relationship to expert opinion testimony and suggests that modern courts have expanded the doctrine’s application beyond its traditionally narrow scope.143 Originally, “invading the province of the jury” referred not to the relationship between the jury and witnesses at trial, but rather to the sacred boundary that exists between the jury and the judge.144 The maxim continues to be invoked in its traditional sense where a trial judge improperly rules on issues of fact or an appellate court incorrectly overturns a verdict supported by facts in evidence.145 Thus, the scope of the province of the jury rule was initially

mony and its English interpretation to “enhance the truth-seeking function of the proceedings, give jurors the full respect and power due their office, and bypass the constitutional thicket of racial discrimination that every strike of a bilingual juror must now attempt to skirt.” Hsieh, supra note 29, at 1199.

138 See Virgin Islands v. Aquino, 378 F.2d 540, 548 (3rd Cir. 1967).
139 See Simmons, supra note 34, at 1018–19.
140 See id. at 1021.
141 See Poulin, supra note 37, at 1001 n.40 (citing numerous cases emphasizing the jury’s unique role in making credibility determinations); see also Blumenthal, supra note 41 at 1192–1203 (comparing the actual physical cues associated with deception with commonly perceived ones); Steven I. Friedland, On Common Sense and the Evaluation of Witness Credibility, 40 CASE W. RES. L. REV. 165, 178–87 (1990) (describing the psychological data refuting a juror’s ability to judge a witness’ memory and sincerity); Joseph W. Rand, The Demeanor Gap: Race, Lie Detection, and the Jury, 33 CONN. L. REV. 1, 6–16 (2000) (detailing inaccuracies associated with cross-racial credibility determinations).
142 See infra Part III.A.
143 Poulin, supra note 37, at 1004–08; Simmons, supra note 34, at 1018–23.
144 See Simmons, supra note 34, at 1020–21.
145 See, e.g., Moore v. Chesapeake & Ohio Ry. Co., 340 U.S. 573, 576 (1951) (“[I]t is the jury’s function to credit or discredit all or part of the testimony.”); Cole v. Ralph, 252 U.S.
limited to the context of “determining the interplay between [a] judge’s instructions and the jury’s decisions” regarding matters of credibility, and did not touch on the substance of a witness’ actual testimony.\footnote{See Simmons, supra note 34, at 1020 n.40.}

In the United States, \textit{Phillips v. Kingfield} is regarded as the first application of the province of the jury prohibition to the substantive testimony of one witness regarding the credibility of another.\footnote{See \textit{Phillips v. Kingfield}, 19 Me. 375, 379 (1841); Simmons, supra note 34, at 1018.} In \textit{Phillips}, an attorney attempted to elicit from one witness whether “he would believe” the testimony of the individual he was called to impeach.\footnote{See \textit{Phillips}, 19 Me. at 375.} The court distinguished testifying to an individual’s reputation for truthfulness with a direct opinion on credibility, and held:

\begin{quote}
To permit the opinion of a witness, that another witness should not be believed, to be received and acted upon by a jury, is to allow the prejudices, passions, and feelings of that witness, to form, in part at least, the elements of their judgment. To authorize the question to be put, whether the witness would believe another witness on oath . . . is to depart from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it.\footnote{See \textit{id.} at 379.}
\end{quote}

Thus, the court’s holding broadened the application of the province of the jury rule beyond its roots to encompass the witness-jury relationship.\footnote{See \textit{id.}; Poulin, supra note 37, at 1005; Simmons, supra note 34, at 1020 n.40.} Fear that the jury will abandon its duty to weigh witness credibility has led courts to apply the reasoning articulated in \textit{Phillips} aggressively, particularly in the case of expert witnesses.\footnote{See Poulin, supra note 37, at 1002–03. Interestingly, Wigmore drew an express distinction between the “province of the jury” to decide facts and the admission of helpful expert opinion testimony. \textit{See} 7 \textit{John Henry Wigmore, Wigmore on Evidence} § 1917 (Chadbourn rev. 1978); Simmons, supra note 34, at 1024–25.} As stated by the Pennsylvania Supreme Court, most courts find that such testimony “would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise that the expert is in a better position to make such a judgment.”\footnote{Commonwealth v. O’Searo, 352 A.2d 30, 32 (Pa. 1976). In \textit{United States v. Johnson}, the U.S. Supreme Court came to a notably different conclusion. See 319 U.S. 503, 519–20 (1943). The Court found that the province of the jury rule did not prohibit an expert}

Since 1975, the Federal Rules of Evidence have governed the admissibility of testimony in federal court. The rules favor the admissibility of all relevant evidence and, consistent with this liberal thrust, relax many of the common law restrictions on opinion testimony. In particular, the rules abandoned the stringent common law requirements for the admissibility of expert testimony. Rule 702 provides, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion . . . .” In addition, Rule 704 states that “testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

Dean Wigmore suggested, “If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it.” Facially, Rules 702 and 704 open the door to expert testimony bearing on credibility and invite courts down the path that Wigmore described.

from testifying on any particular subject so long as the jury was properly instructed so that they could not “possibly have been misled into the notion that they must accept [the opinion].” See id. at 519. The Court concluded: “[W]e ought not to be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules.” See id. at 519–20. Nevertheless, the province of the jury rule’s prohibition on credibility experts is well-documented. See Mark S. Brodin, Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic, 73 U. Cin. L. Rev. 867, 916–17 (2005) (citing numerous cases barring credibility experts).


See Fed. R. Evid. 402; Imwinkelried, supra note 153, at 1019 (“There is only an inkling left of the general rule [against bolstering] in Federal Rule 608(a)(2).”).

Poulin, supra note 37, at 999.

Fed. R. Evid. 702.

Fed. R. Evid. 704. The Advisory Committee characterized the argument that the ultimate issue rule prevented witnesses from “usurping the power of the jury” as merely “empty rhetoric.” See id. advisory committee’s note.

3a Wigmore, supra note 151, § 875 n.1.

See Poulin, supra note 37, at 1000.
Nevertheless, courts persistently raise the province of the jury prohibition to justify exclusion of this type of expert testimony at trial. Thus, fact-finders are left to weigh credibility based purely upon their own experiences and common sense notions of veracity.

C. Debunking the Myth of Demeanor Evidence

When expert testimony regarding credibility is excluded pursuant to the province of the jury rule, the court necessarily assumes that jurors are adequately equipped to make accurate judgments about individuals’ truthfulness. For centuries, the observation of demeanor evidence has been considered critical to this function. Moreover, in the United States, “physical confrontation, whenever possible, is considered crucial to the Confrontation Clause.” The legal perspective presumes that a rational observer knows what to look for in evaluating credibility, and that those indicators accurately reflect whether a witness is telling the truth. Over the last several decades social scientists have probed this premise, and a large number of experiments involving thousands of subjects have produced clear results: ordinary people possess no greater capacity for the detection of falsehood than pure chance. Therefore, continuing to allow unguided reliance on demeanor evidence only “promotes faulty judgments and greatly disserves

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160 See id. at 1000–01; Simmons, supra note 34, at 1028.
161 See Simmons, supra note 34, at 1037.
162 See Poulin, supra note 37, at 1001. The Supreme Court explicitly reinforced this notion in United States v. Scheffer, where it upheld the exclusion of polygraph evidence in military trials. See 523 U.S. 303, 312–13 (1998) (“A fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’”).
163 See Blumenthal, supra note 41, at 1165–66. What attorneys and judges commonly call “demeanor” has been broken down by researchers into three channels of communication: facial expression, body language, and voice. See Rand, supra note 141, at 8; Olin Guy Wellborn III, Demeanor, 76 Cornell L. Rev. 1075, 1078 (1991). Paul Ekman and Wallace Friesen, pioneers in the field of deception research, developed this model and devised a method to analyze each of these channels for cues of deception. See Blumenthal, supra note 41, at 1189 (citing Paul Ekman & Wallace V. Friesen, The Repertoire of Nonverbal Behavior: Categories, Origins, Usage, and Coding, 1 Semiotica 49 (1969)).
164 Blumenthal, supra note 41, at 1182.
165 Id. at 1193. Reliance on demeanor evidence in the American judiciary extends beyond a party’s truthfulness; the prevailing belief is that demeanor is “probative of [a party’s] truthfulness and his entire ethos, and can and should be used in determining his prospects for rehabilitation or even whether his sentence warrants an increase.” Id. at 1188–89.
166 See Wellborn, supra note 163, at 1078–88, 1105 (surveying the extensive history of empirical studies examining the ability of lay persons to detect deception or inaccuracy through observation of nonverbal behavior).
the truth-seeking process.” Ignoring this overwhelming evidence harms the integrity of the judicial system.

There are three basic misconceptions that undercut any meaningful reliance on demeanor evidence: the sender fallacy, the observer fallacy, and the accuracy fallacy. The sender fallacy is the erroneous belief that “an average deceptive speaker will give off certain cues to his deception in his physical mannerisms.” Years of research have shown that there is little support for believing that liars change facial expression, shift their posture, gesture, or otherwise exhibit the kind of furtive movements that have concerned Judge Jerome Frank and much of the judiciary for centuries. Second, observers tend to focus on the wrong cues when evaluating another person’s truthfulness and to ignore those that are most important. For example, observers tend to attach deeper meaning to possible manifestations of nervousness and stress. Lastly, there is the ultimate fallacy of accuracy: experiments have consistently found that observers simply cannot detect deception with any significant degree of reliability; most studies conclude that individuals accurately detect deception only forty-five to sixty percent of the time.

This “demeanor gap” widens significantly when jurors confront witnesses of different races and cultures. The first study of cross-cultural lie detection involved a comparison of university students from the United States and Jordan, and evaluated their relative ability to detect deceit in one another as well as the cues they relied upon when

167 See Blumenthal, supra note 41, at 1189.
168 See id. at 1163 (“The integrity of the truth-seeking process is irremediably violated when a capricious or even uninformed judgment is made or perpetuated as to how a particular factor serves the ends of that process.”).
169 See Rand, supra note 141, at 7–16.
170 Id. at 11. Studies of these phenomena have developed into the concept known as “differential controllability.” See id. Succinctly stated, it is the understanding that liars can control the communication channels of facial expression and body language more precisely than vocal intonation. See Bella M. DePaulo et al., Deceiving and Detecting Deceit, in THE SELF AND SOCIAL LIFE 323, 328–29 (Barry R. Schlenker ed., 1985).
171 See DePaulo et al., supra note 170, at 340; Miron Zuckerman et al., Verbal and Nonverbal Communication of Deception, in 14 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1, 12 (Leonard Berkowitz, ed., 1981).
172 See DePaulo et al., supra note 170, at 343–44.
173 See Zuckerman et al., supra note 171, at 19. This erroneous conclusion has been called the “Othello error” because “it is excellently illustrated by Othello’s mistaken interpretation of Desdemona’s distress and despair in response to his accusation of infidelity.” Wellborn, supra note 163, at 1080; see also Rand, supra note 141, at 7 n.20.
174 See Zuckerman et al., supra note 171, at 26.
175 See Rand, supra note 141, at 4.
trying to recognize truthfulness. The results of the study were staggering: in the cross-cultural encounters, the accuracy rate for the detection of deception was less than fifty percent; the observers—both Jordanian and American—had a better chance of accurately predicting whether their subject was telling the truth by flipping a coin. Even when subjects were instructed to try and telegraph their deception by sending nonverbal cues to their observers, accuracy rates only improved by about two percent. The study concluded that these persistent inaccuracies stemmed from the different sets of actual and perceived deception cues in American and Jordanian culture.

Beyond jurors’ inherent inability to evaluate credibility accurately, a court’s instructions regarding demeanor evidence may actually increase the likelihood of inaccurate juror evaluations. Research has shown that when jurors are instructed to presume that a witness is testifying truthfully, as is the common practice, it has the effect of focusing jurors on the least reliable indicator of deception: facial expressions. Mock jurors given the equivalent of a common demeanor instruction “performed no better than those who were given no instructions at all and markedly worse than those who were instructed to focus on vocal or paralinguistic cues.” When instructed as to paralinguistic characteristics such as tone of voice, however, observers’ abilities to detect deception improved. Thus, rather than encouraging the jury to abdicate its fact-finding responsibilities, specific instructions and information from a source beyond the province of the jury may actually enhance its ability to accurately determine the credibility of witnesses presented at trial.

177 See id. at 197. The accuracy rate was higher, though not dramatically so, when observers viewed subjects from their own culture. See id. at 195. When observing their fellow countrymen, American observers had an accuracy rate of 54.9%; Jordanian observers, by comparison, correctly gauged truthfulness 57.18% of the time. See id.
178 See id. at 197.
179 See id. at 196–97.
180 See Blumenthal, supra note 41, at 1197.
181 See id. at 1197–98.
182 See id. at 1199.
183 See id. The paralinguistic aspects of communication include “the emotional content and background of utterances, as expressed through the speaker’s body language, linguistic style and nuance, pauses, hedges, self-corrections, hesitations, and displays of emotion.” Karton, supra note 14, at 24.
184 See Blumenthal, supra note 41, at 1199.
IV. THE EXPERT WITNESS: BRIDGING THE GAP

“[J]uries are composed entirely of untrained observers who receive no special instructions regarding lie detection or the misleading aspects of demeanor.”¹⁸⁵ When linguistic minorities testify, the rift between the witness and the fact-finder only widens.¹⁸⁶ Although the use of courtroom interpreters is aimed at alleviating some of these difficulties, the effect of interpreted testimony can be more detrimental than advantageous.¹⁸⁷ Nevertheless, despite sound behavioral studies demonstrating the inaccuracies associated with demeanor evidence and the particular prejudice it inflicts on non-English speakers, courts continue to cling white-knuckled to the province of the jury rule.¹⁸⁸ In the words of one scholar, “It is unforgivable that the legal system deliberately ignores demonstrated, relevant findings . . . and willfully adheres to an ineffec-
tual traditional approach.”¹⁸⁹ The roots of the ancient common law doctrine are choking off meaningful access to justice without cause; therefore, courts should abandon the province of the jury rule and allow expert opinion testimony regarding credibility where non-English speaking parties or witnesses would otherwise suffer prejudice.¹⁹⁰

A. Factors Favoring the Admissibility of Expert Testimony

Expert opinion testimony touching on the credibility of non-
English speaking witnesses falls within the framework established by the Federal Rules of Evidence.¹⁹¹ Expert testimony is generally admissible so long as it

will assist the trier of fact to . . . determine a fact in issue . . . [and] if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and me-

¹⁸⁵ See Rand, supra note 141, at 14.
¹⁸⁶ See Cole & Maslow-Armand, supra note 11, at 196; Karton, supra note 14, at 28; Rand, supra note 141, at 4.
¹⁸⁸ See Poulin, supra note 37, at 1002.
¹⁸⁹ See Blumenthal, supra note 41, at 1204.
¹⁹⁰ See Poulin, supra note 37, at 1068; Rand, supra note 141, at 74; Simmons, supra note 34, at 1065–66.
¹⁹¹ See Fed. R. Evid. 702, 704.
thods, and (3) the witness has applied the principles and method reliably to the facts of the case.\textsuperscript{192}

Simply put, the expert’s opinion must be helpful and reliable.\textsuperscript{193} As decades of behavioral research have demonstrated, ordinary jurors simply do not have the innate capacity to detect falsehood accurately that the legal community consistently attributes to them.\textsuperscript{194} The consequences of this inadequacy are most acute where cross-cultural communication is required.\textsuperscript{195} Therefore, where a party offers the testimony of a qualified linguist or cultural expert with specialized knowledge of cultural behavioral cues relevant to the credibility of a party or witness, his or her testimony should be admitted because it is undeniably helpful to the trier of fact.\textsuperscript{196}

Courts have opened the door to expert witness testimony on issues of credibility in the context of eyewitness identification testimony based upon a similar rationale.\textsuperscript{197} For instance, experiments have long shown that eyewitness identifications are surprisingly inaccurate, even when there is a relatively short lapse of time between initial perception and recall.\textsuperscript{198} Until the 1980s, courts uniformly rejected any attempt by de-

\textsuperscript{192} Fed. R. Evid. 702. Rule 702 codifies the Supreme Court’s rulings regarding the specific requirements for the admissibility of expert testimony. See id. advisory committee’s note. Specifically, in Daubert v. Merrell Dow Pharmaceuticals, Inc., the Court made trial judges the “gatekeepers” of expert testimony by entrusting them with the responsibility for determining its reliability. See 509 U.S. 579, 589 (1993). The non-exclusive factors trial judges are to consider in assessing an expert’s reliability include: (1) whether the technique or theory is testable; (2) whether it has been subject to peer review; (3) the technique or theory’s rate of error; (4) the existence of standards and controls; and (5) whether the technique or theory has gained general acceptance in the relevant scientific community. See id. at 593–95. In Kumho Tire Co. v. Carmichael, the Court clarified that the ruling in Daubert applied to all proffered expert testimony, including that from non-scientists. See 526 U.S. 137, 147 (1999). In the last of the so-called “trilogy” cases, General Electric Co. v. Joiner, the Court clarified that a judge’s decision to admit or reject expert testimony would be reviewed under the deferential “abuse of discretion” standard. See 522 U.S. 136, 142 (1997).

\textsuperscript{193} See Fed. R. Evid. 702; see also United States v. Shay, 57 F.3d 126, 132–33 (1st Cir. 1995) (identifying Rule 702’s three distinct requirements as helpfulness, qualification, and expertise or specialized knowledge).

\textsuperscript{194} See Wellborn, supra note 163, at 1104.

\textsuperscript{195} See Bond et al., supra note 176, at 196–97; Cole & Maslow-Armand, supra note 11, at 196; Karton, supra note 14, at 28.

\textsuperscript{196} See Fed. R. Evid. 702; Rand, supra note 141, at 71–74 (discussing the admissibility of expert testimony for cross-racial testimony of African Americans).

\textsuperscript{197} See Poulin, supra note 37, at 1028.

\textsuperscript{198} See id. at 1030–31. In one experiment, subjects were shown four slides of a “target” human face for about thirty seconds. See Kenneth R. Laughery et al., Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph, 55 J. Applied Psychol. 477, 477 (1971). After only eight minutes, they were asked to pick out...
fense attorneys to introduce expert witnesses to testify as to the credibility of eyewitness identifications, often invoking the province of the jury prohibition. Over the last several decades, however, courts of appeals have generally accepted that, at least in some cases, such testimony is indeed helpful to the jury. Although expert testimony regarding an eyewitness’ credibility is typically allowed only under narrow circumstances, one such circumstance is that of cross-racial identification. According to one scholar, “unless we assume that every jury is familiar with the psychological experiments and scientific conclusions about factors that affect eyewitness reliability, we should conclude that eyewitness reliability experts have something probative to say about nearly every eyewitness identification.” The factors involved in a jury’s consideration of a non-English speaking witness’ testimony are no different: social science research openly refutes the argument that the common sense of the average juror is so extensive as to include knowledge about other cultures’ cues of deception. Therefore, as in the case of cross-racial identifications, expert testimony should be allowed.

B. Addressing Arguments Against Admissibility

1. Rule 403: Balancing Probative Value Against Prejudice

One foreseeable objection to abolishing the province of the jury rule regarding matters of credibility is that jurors will give too much weight to the expert’s opinion. Even if the testimony is probative, Rule 403 permits a court to exclude otherwise relevant evidence if “its probative value is substantially outweighed by the danger of unfair pre-

the individual’s image from an array of 150 photos. See id. Only fifty-two percent of subjects were capable of identifying the correct photo. See id.

199 See Poulin, supra note 37, at 1032. For example, in United States v. Amaral, the Court of Appeals for the Ninth Circuit rejected testimony attacking the credibility of an eyewitness’ identification because “it would not be appropriate to take from the jury their own determination as to what weight or effect to give to the evidence of the eye-witness.” See 488 F.2d 1148, 1153 (9th Cir. 1973).

200 See Poulin, supra note 37, at 1032.

201 See Simmons, supra note 34, at 1036.

202 Id. at 1037.

203 See, e.g., Bond et al., supra note 176, at 196–97.

204 See Poulin, supra note 37, at 1068; Rand, supra note 141, at 74; Simmons, supra note 34, at 1065–66.

205 See Simmons, supra note 34, at 1053.
Some courts are concerned that “jurors will be dazzled and overpowered by the qualifications of the expert and the scientific sheen of the technique and give the testimony more weight than it deserves.” Again, numerous studies have demonstrated that this fear is baseless. Even if there is some effect on the jury’s decision making, it hardly rises to the “substantial” prejudice required to exclude evidence under Rule 403. Moreover, excluding this one particular subject, as opposed to expert opinion per se, implies that credibility is qualitatively different from other topics of expert testimony. Like testimony about polygraph evidence or eyewitness identification, there is nothing particularly flashy or awe-inspiring about cultural behavioral cues or linguistics that would likely sway a jury through an improper appeal to emotion. Testimony of this nature plainly possesses no “aura of infallibility” that encourages jurors to relinquish their duty. Additionally, courts regularly admit expert testimony based on far more complicated and technical issues to which jurors must inevitably give substantial weight. As one scholar summarizes:

[T]he battle to allow experts to present their opinion in court has already been fought . . . . [V]ictory was followed by the logical and inexorable (if inconsistent) broadening of that ability to every reliable field of expertise; witness credibility is simply the last such field that remains to be covered.

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206 See Fed. R. Evid. 403. “‘Unfair prejudice’ [in this] context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” See id. advisory committee’s note.

207 See Simmons, supra note 34, at 1053 (discussing one court’s finding that such testimony is “likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi”).


209 See Fed. R. Evid. 403; Carlson et al., supra note 208, at 151 (finding that nearly sixty percent of jurors would not change their vote based on the presence or absence of expert polygraph testimony).

210 Simmons, supra note 34, at 1054.

211 See Fed. R. Evid. 403 advisory committee’s note; Simmons, supra note 34, at 1054.

212 See United States v. Scheffer, 523 U.S. 303, 314 (1998); Simmons, supra note 34, at 1056.

213 Simmons, supra note 34, at 1053 (stating that courts routinely admit fingerprint, DNA, and ballistics evidence).

214 See id. at 1054.
Thus, even if a court engages in Rule 403 balancing regarding credibility testimony by experts, it should conclude that the testimony is admissible.215

2. Quality Control of Expert Witnesses

A second argument against ending the province of the jury prohibition is that it will “open the door to hundreds of different kinds of witnesses claiming to be ‘credibility experts’” with no method of discerning who the real experts are.216 Weeding out experts relying on unreliable methods could strain the court’s time and limited resources.217 The concern is legitimate, but the answer is easily contained within Rule 702 itself: only individuals with “specialized knowledge” based on “skill, experience, training, or education” may render an expert opinion in court.218 Concerning the specific issue of the credibility of non-English speaking witnesses, the burden is on the party offering the expert opinion to show that the individual is qualified as an expert on linguistics or on a particular culture’s behavior.219 Thus, courts would not need to expend needless energy on a searching inquiry.220

3. The Symbolic Function of Fact-Finding

The third and most compelling argument in favor of retaining the province of the jury rule is that it “represents the final step of the professionalization of fact-finding in our courts.”221 Rather than suggesting that jurors will lend too much weight to the expert’s testimony, this objection suggests that jurors will become entirely disenfranchised from

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215 See Poulin, supra note 37, at 1032; Simmons, supra note 34, at 1057.
216 See Simmons, supra note 34, at 1057.
217 See id.
218 See Fed. R. Evid. 702.
219 See id. advisory committee’s note. The Advisory Committee noted:

In Daubert the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony . . . . Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.

See id. (citations omitted).
220 See Simmons, supra note 34, at 1058.
221 See id. at 1057.
their role in the trial process.\textsuperscript{222} The Oregon Supreme Court expressed this very concern:

The cherished courtroom drama of confrontation, oral testimony, and cross-examination is designed to let a jury pass judgment on [witnesses’] truthfulness and on the accuracy of their testimony. The central myth of the trial is that truth can be discovered in no better way, though it has long been argued that the drama really serves symbolic values more important than reliable fact finding. One of these implicit values surely is to see that parties and the witnesses are treated as persons to be believed or disbelieved by their peers rather than as electrochemical systems to be certified as truthful or mendacious by a machine.\textsuperscript{223}

Advocates desiring to maintain inviolate the province of the jury submit that the result of abandoning the rule “is not a trial by peers, but a trial by experts (or by machines) that is rubber-stamped by peers.”\textsuperscript{224}

This objection is both overly alarmist and overly sentimental.\textsuperscript{225} Allowing testimony regarding credibility does not relieve the jury of its burden of reconstructing the past or applying the law to the facts of the case.\textsuperscript{226} Although the jury’s role would inevitably be reduced by some degree, it is in a capacity in which, by all objective measurement, jurors perform poorly.\textsuperscript{227} Moreover, abandoning this outmoded rule does not undercut “the cathartic effect and sense of procedural justice felt by parties and victims when their story can be told in a public tribunal.”\textsuperscript{228} Given the potentially dire consequences of an adverse judgment on credibility—as in the Ventura case—concerns about accuracy and fairness should outweigh the symbolic social benefits afforded by the province of the jury prohibition.\textsuperscript{229}

\textsuperscript{222} See id.
\textsuperscript{223} State v. Lyon, 744 P.2d 231, 240 (Or. 1987) (Linde, J., concurring) (citation omitted).
\textsuperscript{224} See Simmons, supra note 34, at 1061.
\textsuperscript{225} See id. at 1061, 1063.
\textsuperscript{226} See id. at 1062.
\textsuperscript{227} See id.
\textsuperscript{228} Id.
\textsuperscript{229} See Simmons, supra note 34, at 1062.
Conclusion

In the modern multilingual courtroom, linguistic minorities stand at a distinct disadvantage compared to English speakers. Unable to communicate directly with the trier of fact, non-English speaking witnesses and parties must rely on courtroom interpreters to deliver their messages to the jury. Although interpreters are an essential tool for ensuring at least a modicum of fairness at trial, the inadequacies associated with courtroom interpretation are considerable. Misinterpretation is common, and even seemingly innocuous alterations have a demonstrable impact on trial participants. Simple errors in vocabulary and syntax are compounded with the inevitable problems associated with cross-cultural communication and the misapprehension of behavioral cues. As research has shown, the already mediocre ability of jurors to make accurate assessments of witnesses’ credibility decreases dramatically when the speaker is from a different culture.

The prejudice faced by linguistic minorities in the multilingual courtroom is only further enhanced by courts’ reluctance to abandon the archaic province of the jury rule. The prohibition rests on an unsupported premise that jurors are adequately equipped to make credibility determinations without outside assistance. Countless studies have demonstrated that ordinary jurors are simply unable to make an accurate assessment of a witness’ credibility in any consistent manner. Expert opinion testimony touching on the credibility of non-English speaking witnesses would particularly assist the trier of fact and falls easily within the boundaries established by the Federal Rules of Evidence. Therefore, courts should abandon their strict application of the province of the jury rule and allow expert opinion testimony regarding credibility in order to ensure fundamental fairness at trial for linguistic minorities.

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Abstract: The United States’ policy of deporting noncitizen criminals to their countries of origin is fueling a proliferation of gang membership both in Central America and in the United States. Deportation does not deter gang activity but instead helps to facilitate the transnational movement of youth gangs. Rather than continue this failed approach, this Comment proposes that the United States work with Central American nations to develop an internationally cooperative model for regulating criminal gang activity. In order to strengthen its response, the United States must end its ineffective deportation policy. It must also impose sanctions and make the United States a more costly and less desirable place to conduct criminal activity. With insight from political economic theory, this Comment concludes that any new legislation must be part of an international crime control effort to combat the threat of gang transnationalization most efficiently.

Introduction

A central tenet of U.S. immigration policy is the removal and return of criminal noncitizens to their home countries. In 1996, broad legislative reform ushered in a new immigration policy in an effort to curb the growth of gang culture in the inner cities of the United States. Under the new laws, the United States began the large-scale


removals of noncitizens to their countries of origin that continues today.\(^3\) Not only has this deportation policy failed in its attempt to combat gang violence in the United States, but the sharp increase in criminals abroad has also led to myriad problems.\(^4\) Most striking is how the influx of criminals to Central America has helped spread the gang phenomenon that began in Los Angeles to nations that are unprepared and ill-equipped to handle such burdens.\(^5\) Specifically, the proliferation of Mara Salvatrucha (MS-13), the largest and most violent gang in Central America with U.S. roots, illustrates the failure of the removal policy at home and abroad.\(^6\)

MS-13 is a phenomenon born in the United States.\(^7\) The catalyst that created these violent gangs was a period of civil unrest and violence in El Salvador in the 1980s that caused Salvadorans to flee their country and settle in U.S. cities.\(^8\) A large number of these Salvadorans settled in lower-income urban communities—primarily in Los Angeles—which were already overrun with drugs and crime, forcing the incoming Salvadoran population to adapt to violent urban life.\(^9\) Sala-

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\(^3\) See Deportees in Latin America, supra note 1, at 4–5 (statement of Rep. Eliot L. Engel, Chairman, H. Subcomm. on the W. Hemisphere) (“Early last decade, deportations were running at about 40,000 per year. Today, we are removing more than 200,000 people per year.”). Between 1999 and 2008, the United States deported 85,538 immigrants with criminal records to Central America. Office of Immigration Statistics, U.S. Dep’t. of Homeland Sec., 2008 Yearbook of Immigration Statistics 96–102 (2009) [hereinafter 2008 Yearbook].


\(^7\) No Place to Hide, supra note 6, at 50–51.

\(^8\) Id.

dorans struggled to assimilate into the unwelcoming communities and, to protect themselves, they formed gangs such as MS-13.  

The 1996 U.S. immigration reform soon followed, spurring mass deportations of MS-13 members that increased the gang’s activities and contributed to its transnationalization. The first wave of deported MS-13 gang members arrived in Central America in the late 1990s. From there, MS-13 began to expand into an international gang undefined by national borders. Thus, U.S. removal has done little to contain MS-13 and gangs like it. Instead, gang membership has grown in recent years and expanded across North America.

It is the removal policy’s inability to combat gang violence effectively within the United States, however, that is perhaps the policy’s biggest failure. This Comment focuses on the failings of noncitizen removal in the United States. Part I provides an overview of the history, growth, and current organization of MS-13. It also explains U.S. removal procedures and summarizes the Central American response to the increase in criminal removals. Part II shows how the removal policy has failed to reduce gang activity in the United States. Part III uses political economic theory to better understand the root of the failure of the policy. It then presents the idea that the policy of removing criminals falsely suggests that our nation removes crime to other countries, while in reality this policy insources crime by encouraging gang members to conduct profitable criminal activity in the United States. Finally, the

10 No Place to Hide, supra note 6, at 50–51; Fogelbach, supra note 9, at 226, 229–30.
11 See No Place to Hide, supra note 6, at 50–51.
12 Id.
13 See id. at 51–53.
16 See Chacón, supra note 14, at 1878–79 (“[A]s deportation is on the rise, violent crime is increasing, not decreasing.”).
19 See infra Part III. See generally Broude & Teichman, supra note 18, at 807–15 (explaining that criminal activity will shift to where its expected payoff is most profitable).
Comment concludes by suggesting the United States should work with other nations to create international crime control regulations.


A. U.S. REMOVAL POLICY

In the 1990s, the United States experienced an increase in Central American youth gang membership.\(^{20}\) Partially in response to problems related to crime and illegal immigration, the United States began to discuss immigration reform.\(^{21}\) The resulting change in policy and law led to a sharp increase in the number of criminals deported to El Salvador and other Central American countries.\(^{22}\) Specifically, the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA or “Act”) targeted criminal noncitizens for deportation.\(^{23}\) The IIRIRA expanded crime-related removal grounds for noncitizens, permitting deportation based on lesser violations than previous policy allowed.\(^{24}\) For example, the Act provided that any noncitizens convicted of crimes with a sentence of one year or longer be eligible for deportation after their completed sentence.\(^{25}\) By expanding the categories under which immigrants could be removed on criminal grounds, the IIRIRA led to thousands of deportations to Central American nations.\(^{26}\)

\(^{20}\) No Place to Hide, supra note 6, at 50–51; Fogelbach, supra note 9, at 226, 229–30.


\(^{25}\) See IIRIRA § 321; Funes, supra note 4, at 306–07.

The nations that receive noncitizen criminals experience numerous problems that are exacerbated by a lack of information sharing and inadequate notice from the United States. Typically, when an immigrant is removed from the United States and returned to his country of origin, that country receives notice of his grounds for removal and his date of arrival. The current notification process, however, requires receiving countries be provided only three days notice before a deportation. Additionally, notification procedures require only minimal information sharing between countries. This lack of information cripples receiving nations’ efforts to monitor incoming gang members and contain gang violence. While communication regarding removals has improved, some countries still do not receive any information about whether returned nationals belong to a gang. Furthermore, while receiving countries are given information regarding the specific criminal offense causing deportation, the United States does not regularly provide full criminal records.

27 See Sibaja et al., supra note 22, at 53 (noting general agreement that the “perceived lack of sharing information among countries about deportees with criminal records . . . [has] exacerbated the problem”); Funes, supra note 4, at 310–13 (stating that Central American nations are overwhelmed by the removals that are causing increased poverty and crime, overwhelming prison systems, and weakening legal infrastructures).


31 See id. at 22–25; Sibaja et al., supra note 22, at 53.

32 See Violence in Central America, supra note 30, at 22–25 (testimony of Roberto Flores Bermudez, Ambassador to Honduras) (noting that the United States deported 90,000 Hondurans in 2006 but provided no information concerning whether those deportees were members of gangs).

33 See Deportees in Latin America, supra note 1, at 24 (testimony of Gary Mead, Assistant Director for Management, Office of Detention & Removal Operations, United States Department of Homeland Security) (explaining that the United States does not provide receiving nations with the entire criminal history of deportees). For example, if a hardened criminal is deported for committing a minor offense, but has previously committed more serious crimes, the United States will only provide the receiving nation with information regarding the minor criminal charge that led to the deportation. See id. at 25–26.
B. Cycle, Expansion, and the Central American Response

This policy of removal and lack of notice has led to an “unending chain” of gang members being removed to Central America and then returning to the United States.34 This chain of movement—initiated by removal from the United States—has allowed MS-13 to expand into an international gang.35 Additionally, gang members deported back to El Salvador actively recruit new gang members at home, leading to the expansion of U.S. gang culture abroad.36 In turn, gang members frequently return to the United States illegally and spread the gang into new areas.37 The cycle of immigration and deportation increases the size and geographic reach of MS-13 and gangs like it, leading to systematic problems in both the United States and in Central America.38

The movement of deported gang members back into the United States may be driven in part by the Central American response that has increased the cost of gang activity in the region.39 The large number of well-organized and criminally sophisticated gang members deported to Central America puts significant burdens on “already weak criminal


35 See Sibaja et al., supra note 22, at 45; see also Lopez et al., supra note 5. Estimates of gang membership in Central America are currently as high as 300,000 members. See Violence in Central America, supra note 30, at 2 (statement of José Guillermo Castillo Villacorta, Ambassador of Guatemala to the United States). El Salvador has become a centralized hub for rapidly growing transnational gangs. See Lopez et al., supra note 5 (describing El Salvador as a “pivot point” in the spread of MS-13 to the United States).

36 See Lopez et al., supra note 5. El Salvador’s Vice Minister of Security, Rodrigo Avila, has characterized the cycle of removal and return as a “merry-go-round.” See id.

37 See id. (“[F]or a sizable number of MS-13 members, deportation is little more than a taxpayer-financed visit with friends and family before returning north.”); see also Gangs and Crime in Latin America, supra note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (“[W]e know that gang members who are arrested in the United States and deported are making their way back into the United States, and by the same token influencing and expanding their recruitment of new members in Mexico and Central America along the way.”).

38 See Sibaja et al., supra note 22, at 45–46; Lopez et al., supra note 5.

39 See Thale et al., supra note 6, at 10–11 (describing the harsh police methods used in El Salvador to regulate gang violence); Broude & Teichman, supra note 18, at 809, 817 (giving several examples of how increased regulations will drive criminals to other less regulated localities); see also Funes, supra note 4, at 329–30 (suggesting that rising crime rates and diminishing economic opportunities in Central America are creating an incentive for youth gang members to flee to the United States).
Justice systems.” Crime and violence rates in the region have increased dramatically and are among the highest in the world, largely due to gang-related violence.41 This sharp increase in crime, caused in part by the forced return of thousands of criminals from the United States, has destabilized the region because Central American nations face widespread poverty that makes it difficult to stem the steady wave of crime.42

In response to the return of gang members from the United States, Central American governments have enacted regulatory schemes which increase the cost of criminal activity, promoting the movement of deported gang members back into the United States.43 The receiving countries have focused their response efforts on strengthening law enforcement and toughening anti-gang laws.44 Their inability to cope with the surge in returning criminals, however, has caused many governments to overreact in response, enacting mano dura, or “firm hand,” legislation that focuses on repressive and discriminatory enforcement policies.45 These responses too often sacrifice citizens’ civil liberties and, in

40 See Gangs and Crime in Latin America, supra note 34, at 13 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development). The explosive return of deported noncitizen criminals contributed directly to the growth of gangs, primarily in El Salvador, Honduras, and Guatemala. See Thale et al., supra note 6, at 4; see also Violence in Central America, supra note 30, at 13 (testimony of Roberto Flores Bermudez, Ambassador to Honduras) (placing partial blame for the growth in gangs on the deportation of thousands of “active gang members” from the United States to Honduras).

41 See Seelke & Meyer, supra note 26, at 3–4; Sibaja et al., supra note 22, at 44.

42 See Gangs and Crime in Latin America, supra note 34, at 11–14 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development); Id. at 2 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (“[H]igh crime rates destabilize Latin American society by undermining support for democratic institutions . . . , by inhibiting economic development . . . , [and] by discouraging people’s participation in community activities.”).

43 See No Place to Hide, supra note 6, at 107–166; Broude & Teichman, supra note 18, at 814–15.

44 Gangs and Crime in Latin America, supra note 34, at 12 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development).

45 See Lainie Reisman, Breaking the Vicious Cycle: Responding to Central American Youth Gang Violence, 26 SAIS REV. INT’L AFF. 147, 148 (2006) (noting that anti-gang initiatives in El Salvador and Honduras are controversial because of their connection to increased human rights and due process violations). Mano dura policing strategies include “massive detentions of young people for the crime of gang membership, relaxed evidentiary standards, and harsh prison sentences.” Thale et al., supra note 6, at 3. For example, the first year after the mano dura policies were implemented in El Salvador, “19,275 people were detained by police on the charge of belonging to a gang,” and ninety-one percent of those detained were eventually released because of a lack of evidence. Id. at 11. Growing public
turn, weaken the country’s democratic ideals. Thus, the U.S. removal policy has caused shifts in law enforcement practices that compromise individual rights in the name of combating the growing youth gang problem.

Moreover, these *mano dura* approaches have proven highly ineffective. Strong-arm tactics have only strengthened the gangs by causing them to unify in response to the harsh laws and limits on civil liberties. Gangs have simply adapted, increasing coordination and becoming more organized. With over 39,000 gang members in El Salvador,
MS-13 is currently a “fluid” and “complex” organization. Gang membership continues to expand, with members also participating in more violent crimes.

The mano dura policies are quick-fix responses that do not address root causes. Rather, the hard-line approach to gang proliferation has inadvertently legitimized the use of force and fostered a culture of violence, furthering the unrest and insecurity of the region. Mano dura policies have made Central America an undesirable and less profitable region to conduct criminal gang activity.

II. THE FAILURE OF THE U.S. REMOVAL POLICY

The current U.S. removal policy is not an effective domestic crime control measure. Instead of reducing gang activity, the U.S. removal policy has contributed to the global growth of youth gangs such as MS-13. The legislative reforms expanding noncitizen criminal removals were enacted in part as crime control initiatives. It is clear, however, that the approach is not working. In fact, the policy has increased
crime by furthering the “transnationalization” of gangs and the proliferation of gang activity across the United States.\textsuperscript{60}

The major motivation driving the increase in noncitizen removal was law enforcement and crime control.\textsuperscript{61} Congress’s intent was to fight crime and illegal immigration in the United States and to address the problems that noncitizens pose to the justice system.\textsuperscript{62} In theory, increasing the deportation of criminal noncitizens would increase the public safety of U.S. citizens.\textsuperscript{63} In part, the immigration reforms were enacted with the intent of removing criminal noncitizens in an effort to curb gang activity.\textsuperscript{64}

In the first year following the enactment of the 1996 immigration legislation, deportations almost doubled.\textsuperscript{65} The increase in removals had some initial success in combating gang problems.\textsuperscript{66} After a brief decline, however, gang activity quickly began a steady growth that continues today, a clear indication the policy was a quick-fix solution, shortsighted in its potential for success and its consequences.\textsuperscript{67}

\textsuperscript{60} See Gangs and Crime in Latin America, supra note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (explaining that deported gang members frequently return to the United States while “influencing and expanding their recruitment of new members in Mexico and Central America along the way”); Lopez et al., supra note 5.

\textsuperscript{61} See Proposals for Immigration Reform, supra note 21, at 15–17 (statement of Sen. William V. Roth, Jr.) (arguing for the need for immigration reform because current law is too complex and unenforceable and noting that only four percent of the total number of criminal aliens in the United States were deported in 1993); see also Chacón, supra note 14, at 1831 (“Discussions about the removal of non-citizens have been treated as ‘national security’ issues, when in fact the driving motivation is basic criminal law enforcement.”).

\textsuperscript{62} See Proposals for Immigration Reform, supra note 21, at 15–17 (statement of Sen. William V. Roth, Jr.) (“My legislation addresses the serious problem of criminal aliens by simplifying, streamlining, and strengthening the deportation process for criminal aliens.”).

\textsuperscript{63} See id.

\textsuperscript{64} See id. at 26–35 (prepared statement and testimony of Janet Reno, Att’y Gen. of the United States) (advocating for stronger regulations allowing for the deportation of criminal noncitizens).

\textsuperscript{65} See Chacón, supra note 2, at 326. In 1997, 34,000 noncitizens were removed on the basis of criminal violations, and that number jumped to 61,000 in 1998. Id.


While overall crime rates in the United States have decreased since 1996, gang-related crime continues to increase steadily.\textsuperscript{68} Moreover, the increase in gang membership does not show signs of slowing.\textsuperscript{69} In particular, the first decade of the twenty-first century saw a “dramatic increase in the number and size of transnational street gangs.”\textsuperscript{70} As of 2006, the Federal Bureau of Investigation estimated that there were 38,000 MS-13 gang members in the United States.\textsuperscript{71}

The failure of the U.S. removal policy is also evident in the country’s growing prison population.\textsuperscript{72} In part, Congress intended the 1996 reforms to reduce the number of criminal noncitizens in the prison population.\textsuperscript{73} During debates on the immigration policy, members of Congress noted that in 1994, criminal aliens accounted for twenty-five percent of the federal prison population, and that there were 58,000

\textsuperscript{68} See Immigration and the Alien Gang Epidemic, supra note 67, at 13 (testimony of Heather Mac Donald, Senior Fellow, the Manhattan Institute) (noting that gang crime is “exploding nationally”); Chacón, supra note 14, at 1878 n.278 (noting that there is no empirical evidence to support a link between an increase in deportation and decrease in crime). Additionally, violent crime has increased. See Chacón, supra note 14, at 1878 n.278. The percentage of both homicides and firearm homicides committed by gang members increased from 1993 to 2003. See ERIKA HARRELL, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T. OF JUSTICE, VIOLENCE BY GANG MEMBERS, 1993–2003, at 2 (2005).

\textsuperscript{69} See EGLEY & O’DONNELL, supra note 67, at 1–2. There were an “estimated 788,000 gang members and 27,000 gangs . . . active in the United States in 2007.” See id. By September 2008, the estimate had risen to approximately one million gang members, an increase of twenty-one percent since 2007. See id.; THREAT ASSESSMENT 2009, supra note 67, at iii. “Gangs were criminally active within all 50 states and the District of Columbia as of September 2008.” See THREAT ASSESSMENT 2009, supra note 67, at iii.

\textsuperscript{70} See MS-13, and Counting, supra note 17, at 78 (statement of James Spero, Acting Assistant Special Agent in Charge, United States Immigrations and Customs Enforcement).

\textsuperscript{71} See THALE ET AL., supra note 6, at 3. This number also includes members of Calle 18, a gang closely related to MS-13. See id.


\textsuperscript{73} See Proposals for Immigration Reform, supra note 21, at 52 (testimony of Sen. Diane Feinstein) (advocating for improvements to law allowing transfer of illegal aliens from U.S. prisons to prisons in their own country).
noncitizen prisoners in U.S. prisons. Yet, in 2007, there were 96,707 noncitizen criminals in U.S. prisons, an increase of over thirty-eight percent since 1994.

Beyond increasing the gang population, the removal policy is not an effective means of deterring or preventing criminal noncitizens from returning to the United States after deportation. The United States remains a desirable place for gang activity because deportation does not increase the cost of conducting crime. As a result, gang members freely reenter the country and reoffend without consequence. This movement of criminal gang members across national borders, initiated by the U.S. removal policy, has played a “key role in the transnationalization” of gangs such as MS-13.

The frequent movement of gang members between the United States and Central America has strengthened the connections and influences between the gangs in each country. Newly organized cells from El Salvador and other Central American nations are returning to

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74 See id. at 16, 52 (testimony of Sen. William V. Roth and Sen. Diane Feinstein) (“[A]nywhere from 13,000 to 15,000 illegal aliens are serving time in California State prison today, returning just a few hundred aliens a year is just a drop in the bucket.”).

75 Sabol & Couture, supra note 72, at 8; see also Proposals for Immigration Reform, supra note 21, at 52 (testimony of Sen. Diane Feinstein).

76 See Gangs and Crime in Latin America, supra note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); Chacón, supra note 14, at 1873 (“[T]here is no reason to believe that removal will be an effective security tool.”); Lopez et al., supra note 5.

77 See Gangs and Crime in Latin America, supra note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); Broude & Teichman, supra note 18, at 807; Chacón, supra note 14, at 1873; Lopez et al., supra note 5.

78 See Deportees in Latin America, supra note 1, at 38 (statement of Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica) (“While deportation may solve a few problems within the deporting country, the removal of criminal offenders to another geographical location does not protect the United States from further criminal actions by those persons.”); id. at 58 (statement of Marsha L. Garst, Commonwealth’s Attorney, Rockingham County, Virginia) (“[C]riminal aliens are reentering our community and reoffending.”); Nagle, supra note 5, at 11–13, 16; Reisman, supra note 45, at 149 (noting that it is common for deported gang members to return to the United States “within a matter of months”); Lopez et al., supra note 5.

79 See Gangs and Crime in Latin America, supra note 34, at 17 (testimony of Chris Swecker, Assistant Director, Criminal Investigation Division, Federal Bureau of Investigation) (“[D]eportation of MS-13 and [Calle] 18 Street gang members from the United States to their countries of origin is partially responsible for the growth of these gangs in Central America.”); Thale et al., supra note 6, at 4; Nagle, supra note 5, at 11–13, 16.

80 See Gangs and Crime in Latin America, supra note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); No Place to Hide, supra note 6, at 51–53; Reisman, supra note 45, at 149.
establish cliques and strongholds throughout the United States. In particular, their expansion to smaller U.S. communities that lack adequate resources has allowed gangs to increase their influence and revenue, recruit new members, and grow as criminal enterprises. Many deported gang members simply return to their home country, establish bonds with other gang members, and then reenter their U.S. communities. Thus, the overall increase in gang members and the spread of

81 See Gangs and Crime in Latin America, supra note 34, at 40–41, 44 (testimony of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation) (“[I]ncreasing migrant flows over porous borders, deportations, as well as improved transportation and communication have helped transnational gangs grow in North America.”); Lopez et al., supra note 5. A prominent example of gang growth is the surge of MS-13 gang members into the Washington, D.C. metropolitan area and surrounding communities of northern Virginia and Maryland. See MS-13, and Counting, supra note 17, at 92–94 (testimony of Diego G. Rodriguez, Assistant Special Agent in Charge, Washington Field Office, Federal Bureau of Investigation). MS-13 gang members from Los Angeles and El Salvador have traveled to the northern Virginia and Washington, D.C. area in an effort to recruit members and coordinate the creation of new cells. See id. at 89; Lopez et al., supra note 5 (explaining how a local MS-13 clique in El Salvador, known as the Marineros, sent members to the Washington, D.C. area to open new cells). MS-13 began by establishing independent cliques with regional leaders exercising influence over them and today, MS-13 is one of the fastest growing and the most violent gang in the region. See MS-13, and Counting, supra note 17, at 93–94, 95 (testimony of Diego G. Rodriguez, Assistant Special Agent in Charge, Washington Field Office, Federal Bureau of Investigation).

82 See Deportees in Latin America, supra note 1, at 59 (statement of Marsha L. Garst, Commonwealth’s Attorney, Rockingham County, Virginia); Threat Assessment 2009, supra note 67, at iii (“[G]ang members are increasingly migrating from urban to suburban areas and are responsible for a growing percentage of crime and violence in many communities.”); see also Egley & O’Donnell, supra note 67, at 2 (noting that the number of gang-problem jurisdictions in rural counties increased by nearly twenty-five percent between 2002 and 2007). In some communities, “criminal gangs commit as much as 80 percent of the crime.” See Threat Assessment 2009, supra note 67, at iii. Local law enforcement for communities experiencing an increase in criminal gangs have found it difficult to combat the problem as the criminal activity has become increasingly “extensive, pervasive, and sophisticated.” See Gangs and Crime in Latin America, supra note 34, at 49–51 (testimony of Kelly L. Smith, Detective First Class, Howard County Police Department, Ellicott City, Maryland) (noting difficulty in addressing the emerging presence of MS-13 because the gang “frequently migrate[s] to new communities that are not familiar with the threat that they pose”).

83 See Gangs and Crime in Latin America, supra note 34, at 40–44 (testimony of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation). The increased removal of criminal gang members has failed to curb the growth of gangs because removed criminals are simply reentering rural communities and reoffending. See Deportees in Latin America, supra note 1, at 58–59 (statement of Marsha L. Garst, Commonwealth’s Attorney, Rockingham County, Virginia) (stating a need for change in immigration policy “to assure that our communities are safe from the illegal-alien serial offenders”); Egley & O’Donnell, supra note 67, at 2. For example, Harrisonburg, Virginia has seen an explosion of gang activity. See Deportees in Latin America, supra note 1, at 59 (statement of Marsha L. Garst, Common-
gang activity throughout the United States is a direct byproduct of current immigration removal policy.  

The failure of this policy as a crime control measure extends beyond the United States and has had major consequences internationally. Central American nations receiving criminals from the United States experience numerous problems such as harsh, inefficient overenforcement policies that create a culture of fear and violence and threaten the stability of Central American governments. Beyond inundating unstable Central American nations with criminals, the United States has failed to provide adequate support to or coordination with the receiving countries. Thus, criminal removals have simply shifted

wealth’s Attorney, Rockingham County, Virginia). In 2005, the community had 10 gangs and over 100 gang members; by 2007, the city had 25 active gangs with over 450 gang members. See id. Moreover, there were two cases in 2007 where “gang members were arrested, deported, and then reentered the . . . community to reoffend.” See id.

See Gangs and Crime in Latin America, supra note 34, at 39–41 (testimony of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation); Reisman, supra note 45, at 149–50; Lopez et al., supra note 5.

85 See Violence in Central America, supra note 30, at 21 (statement of Rep. Eliot L. Engel, Chairman, H. Subcomm. on the W. Hemisphere) (noting that various governments have criticized the U.S. deportation strategy for thwarting international efforts to reduce gang membership and violence); Gangs and Crime in Latin America, supra note 34, at 36 (statement of Rep. Barbara Lee, Comm. on Int’l Relations) (suggesting the IIRIRA has had “a negative effect on these [receiving] countries, due to the expanded and retroactive deportation standards”); see also Deportees in Latin America, supra note 1, at 1–2 (statement of Rep. Eliot L. Engel, Chairman, H. Subcomm. on the W. Hemisphere) (“Displacement of that many people is bound to have repercussions that must be dealt with.”).

86 See Gangs and Crime in Latin America, supra note 34, at 60–62 (prepared statement of Manuel Orozco, Senior Associate, Inter-American Dialogue); THALE ET AL., supra note 6, at 5; Sibaja et al., supra note 22, at 49; see also No Place to Hide, supra note 6, at 50 (“The rapid growth in the power and prevalence of Salvadoran street gangs . . . in El Salvador in the 1990s resulted in part from major shifts in U.S. immigration laws during that decade . . . .”). In El Salvador, the detrimental effect of gang activity “obstructs economic progress and democratic social development.” Sibaja et al., supra note 22, at 47, 51–53. Gang violence costs the country approximately 11.5% of its gross domestic product annually and “contributes to deterred trade and investment.” See id. at 47–48. Gang activity is also influencing policy decisions and affecting democratic stability because hard-line government responses have diverted resources from other social issues. See id. at 49; Reisman, supra note 45, at 149 (“Because they have had to channel a disproportionate percentage of their scarce resources into security, the governments of the region have continually and consistently short-changed social investment.”). Discriminatory tactics, extra-judicial violence, and media stigmatization has all led to a pervading sense of insecurity and instability in the country. See No Place to Hide, supra note 6, at vii–ix; THALE ET AL., supra note 6, at 3; Sibaja et al., supra note 22, at 47–49.

87 See Deportees in Latin America, supra note 1, at 35–39 (statements of Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica, and Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs); Gangs and Crime in Latin America, supra note 34, at
the burden to these nations, to the detriment of both the United States and the global community.88

III. POLITICAL ECONOMIC THEORY ANALYSIS

With the understanding that the large-scale removal of gang members has fueled the proliferation of transnational gangs, a new approach to the problem is required.89 Political economic theory may offer some insights on how to chart that new course.90 Political economic theory suggests that criminal activity will shift to where the “expected criminal payoff” is most profitable.91 In other words, criminal activity moves in reaction to cost-imposing regulation and legislation that makes crime less lucrative.92 This economic analysis suggests that effective crime control must impose significant legal costs and sanctions that criminals will consider as major factors when deciding where to commit crimes.93 In theory, costs and sanctions will force criminal activity to countries where expected sanctions are lowest.94

Tomer Broude and Doron Teichman, two professors who recently examined political economic crime control, have concluded that “crime control policies adopted by individual states influence the global distribution of crime and subsequently impact the crime control poli-

41 (statement of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation). For example, in 2008, the United States provided less than thirty-two million dollars in foreign aid to El Salvador. See Seelke & Meyer, supra note 26, at 5. In contrast, the United States spent over seventy-three million dollars in 2007 for the costs of charted aircraft flights used in deportations to Central and South America. See Deportees in Latin America, supra note 1, at 27 (written response from Gary Mead, Assistant Director for Management, Office of Detention & Removal Operations, United States Department of Homeland Security).

88 See Deportees in Latin America, supra note 1, at 65 (statement of Rep. Yvette D. Clarke) (explaining that the United States places receiving countries in a “very difficult and expensive position to cope with an influx of offenders”); Thale et al., supra note 6, at 3.

89 See Deportees in Latin America, supra note 1, at 35 (statement of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs); Gangs and Crime in Latin America, supra note 34, at 41 (statement of Stephen C. Johnson, Senior Policy Analyst for Latin America, the Kathryn and Shelby Cullom Davis Institute for International Studies, the Heritage Foundation); No Place to Hide, supra note 6, at 52–53.

90 See Broude & Teichman, supra note 18, at 801.

91 See id.; see also Michael Woodiwiss, Gangster Capitalism: The United States and the Global Rise of Organized Crime 20, 112–13 (2005) (“[T]he chance to make large illegal profits with minimal risks encourages organized crime.”).

92 See Broude & Teichman, supra note 18, at 801.

93 See id. at 807 (noting that criminals commit a crime “only if . . . its benefits outweigh its costs”).

94 See id. at 801 (“[I]f the expected sanction in one jurisdiction rises, some crime from that jurisdiction will shift to areas in which the sanction is lower.”).
cies adopted by other states.” 95 Broude and Teichman point out two major approaches to crime control. 96 In one approach, national governments can adopt lenient crime control policies to attract crime that generates economic benefits. 97 In the other approach, governments “outsource” crime by imposing harsher sanctions expected to “shift and displace crimes to other jurisdictions.” 98 Although outsourcing has the benefit of pushing crime to other countries, it also creates an “arms race” in which nations compete with one another to have the harshest crime control policies in an effort to repel crime and shift the burdens to other nations. 99 The resulting regulatory competition has been criticized as detrimental to transnational crime control efforts. 100

A. U.S. Removal Policy Has Triggered Regulatory Competition

U.S. removal policy has created a prime example of this kind of regulatory competition. 101 The United States and the Central American nations that receive deported criminals, most notably El Salvador, are engaged in an outsourcing race that fuels the transnationalization of youth gangs. 102 In the past, El Salvador could have been characterized as an insourcing nation that attracted criminal activity with a lack of sanctions and minimal legal costs. 103 In contrast, the United States increas-

95 See id. at 826–27.
96 See id. at 800.
97 See Broude & Teichman, supra note 18, at 800. An example of a crime that generates economic benefits is human trafficking. See Stephanie L. Mariconda, Note, Breaking the Chains: Combating Human Trafficking at the State Level, 29 B.C. THIRD WORLD L.J. 151, 165 (2009). Many developing countries depend on human trafficking to “flourish” and “implicitly condone” the activity by either not enforcing the law or not criminalizing the act. See id.
98 See Broude & Teichman, supra note 18, at 800, 807 (discussing the effect of “legal costs” on criminal behavior).
99 See id. at 800, 812.
100 See id. at 827–31 (noting that there are “those who argue that regulatory competition is inefficient” and, on the other side of the debate are those who “agitate[] against international harmonization”).
101 See No Place to Hide, supra note 6, at 107–66; Broude & Teichman, supra note 18, at 800; Chacón, supra note 2, at 352; Reisman, supra note 45, at 147; Lopez et al., supra note 5.
102 See Broude & Teichman, supra note 18, at 800; Reisman, supra note 45, at 147 (explaining that youth gang violence is exacerbated by countries enacting policies in their self-interest that “both explicitly and implicitly impact other countries in the region, thus establishing a vicious cycle of violence that is difficult to stem”).
103 See No Place to Hide, supra note 6, at 53–56; Broude & Teichman, supra note 18, at 814–15 (noting that Central American nations “may have in the past generally considered gang activity . . . desirable or tolerable”); Nagle, supra note 5, at 16; Reisman, supra note 45, at 149, 151.
ingly combats gang violence by strengthening crime control policies in an effort to outsource crime.104 While there may have been a previous symbiotic relationship between the United States, an outsourcing nation, and El Salvador, an insourcing nation, recent policy changes undertaken by both nations have led to an ineffective model of regulatory competition that is detrimental to international crime control.105

The IIRIRA increased the removal of criminal noncitizens which, in turn, greatly affected the crime control policies in Central America.106 El Salvador was unprepared for the influx of criminal gang members that resulted from U.S. removals and overcompensated in its response, creating a backlash.107 El Salvador enacted the repressive mano dura policies as a reactive response to U.S. deportations and as the first step in an outsourcing race with the United States.108 By implementing harsh sanctions, El Salvador quickly transformed from an insourcing nation to an outsourcing nation.109 Thus, there has been an observable shift in the traditional regulatory dynamic, as El Salvador has become an outsourcing nation competing with the United States for the harshest crime control policies.110

The result of this backlash is that El Salvador has increased its crime control policies to the point where they exceed the sanctions im-

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105 See Deportees in Latin America, supra note 1, at 38 (statement of Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica); Gangs and Crime in Latin America, supra note 34, at 17 (testimony of Chris Swecker, Assistant Director, Criminal Investigation Division, Federal Bureau of Investigation); Broude & Teichman, supra note 18, at 814–15 (the influx of gang members returned to Central America has caused the receiving nations to cease considering gang activity as desirable); Chacón, supra note 2, at 352–56; Reisman, supra note 45, at 148–49.
106 See Thale et al., supra note 6, at 4–5; Broude & Teichman, supra note 18, at 814–15; Chacón, supra note 2, at 352–56.
107 See Thale et al., supra note 6, at 3 (noting that Central American governments responded to the increase in youth gang violence with repressive policing strategies); Reisman, supra note 45, at 149 (“[T]he resource-strapped Central American countries have little to no capacity to deal adequately with the influx of gang members.”).
108 See Broude & Teichman, supra note 18, at 812; see also Thale et al., supra note 6, at 3; Chacón, supra note 2, at 352–56.
109 See No Place to Hide, supra note 6, at 107–66; Broude & Teichman, supra note 18, at 814–15.
110 See Broude & Teichman, supra note 18, at 814–15.
posed by the United States. The mano dura response and its strong-arm and oppressive tactics are forcing gang members back into the United States to conduct criminal activity. The United States’ reliance on deportations as a criminal control tactic is therefore “not an effective means of achieving either deterrence or incapacitation within the crime control context.”

While the United States has not become an insourcing nation—it’s policies do not aim to attract criminal activity—it is losing the outsourcing race with El Salvador. One explanation for why the removal policy is losing to El Salvador’s mano dura policies is that removal simply does not increase a gang’s cost of doing business in the United States. Gang members do not voluntarily move from the United States to Central America because it is more profitable for them to operate there. Rather, criminals relocate because they are physically removed from one location to the other. Thus, criminal activity may not actually move in reaction to cost-imposing regulation.

The U.S. removal policy does not provide strict sanctions nor impose costs that make crime less lucrative within its borders. Deportation is not a working deterrent, as evidenced by the large number of

111 See No Place to Hide, supra note 6, at 107–66 (providing an overview of El Salvador’s government response to gang violence); Broude & Teichman, supra note 18, at 814–15; Lopez et al., supra note 5.

112 See Broude & Teichman, supra note 18, at 814–15; Lopez et al., supra note 5 (“[H]arsh police reactions in Central America [are] . . . pushing more and more gang members . . . toward the U.S., according to law enforcement officials and gang members.”).

113 See Broude & Teichman, supra note 18, at 814–15; Chacón, supra note 14, at 1879, 1888.

114 See Broude & Teichman, supra note 18, at 812, 815; Chacón, supra note 2, at 321–27; Kraul et al., supra note 15 (“Now, law enforcement crackdowns in Honduras and El Salvador are helping reverse the flow.”).

115 See Deportees in Latin America, supra note 1, at 8 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (stating that one failing of the U.S. deportation policy is that many removed gang members simply come back into the United States); Broude & Teichman, supra note 18, at 807; Chacón, supra note 14, at 1879, 1888; Chacón, supra note 2, at 352; Lopez et al., supra note 5.

116 See No Place to Hide, supra note 6, at 51–53.

117 See id. Thus, U.S outsourcing could be described as mechanical or artificial because the movement of criminals out of the country is not the result of regulatory outsourcing in the traditional sense. See Broude & Teichman, supra note 18, at 807 (basing their model of regulatory outsourcing on economic considerations and motivations).

118 See Broude & Teichman, supra note 18, at 807.

119 See Chacón, supra note 14, at 1888. Rather, after removal, “the locus of their criminal activity simply shifts” without addressing the willingness of gang members to commit future crimes in the United States. See id.
deportees who return to the United States and reoffend. The increase in gang membership and crime in the United States since the IIRIRA’s passage illustrates that the threat of removal does not make the United States a less desirable location for gang activity.

B. Regulatory Cooperation as a Possible Solution

One of the factors in the domestic growth of youth gangs is the movement of gang members to the United States because it may be the more desirable—and profitable—location for criminal activity. While there is no easy solution to the growing global gang phenomenon, it has become clear that forced removals have only exacerbated the problem. National and international gang activity and membership are currently at higher rates than when the legislative reform was implemented in 1996 to combat gang problems. Yet, even in the face of

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120 See Deportees in Latin America, supra note 1, at 8 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere). In 2007, over thirty thousand noncitizens were re-apprehended in the United States after being formally removed to their home countries. See id. at 77 (written responses from Gary Mead, Assistant Director for Management, Office of Detention & Removal Operations, United States Department of Homeland Security). Additionally, in a survey of three hundred deportees removed to El Salvador in 2002, twenty-three percent stated that they had already been deported once before from the United States and thirty-eight percent said they were planning to return. See id. at 48–50 (statement of Nestor Rodriguez, Chairman, Department of Sociology, University of Houston).

121 See Egley & O’Donnell, supra note 67, at 1–2; see also Deportees in Latin America, supra note 1, at 38 (statement of Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica) (“[T]he removal of criminal offenders to another geographical location does not protect the United States from further criminal actions by those persons.”); Chacón, supra note 14, at 1888 (“[R]emoved noncitizens . . . are not likely to cease [criminal] conduct simply because they have been removed.”); Chacón, supra note 2, at 352–56; Lopez et al., supra note 5 (quoting Federal Bureau of Investigation Assistant Director Chris Swecker on the end result of deporting gang members: “I think most of the police departments will agree that you’re just getting them off the street for a couple of months.”).

122 See Deportees in Latin America, supra note 1, at 8 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere); Thale et al., supra note 6, at 4 (“As migration between the U.S. and the region continues to surge, the connections and influences between the gangs in each country have only become stronger.”); Broude & Teichman, supra note 18, at 807–08.

123 See Deportees in Latin America, supra note 1, at 1 (statement of Rep. Eliot L. Engel, Chairman, H. Subcomm. on the W. Hemisphere); Reisman, supra note 45, at 148–50 (noting that this gang removal policy has had a complex impact on the United States and Central America, including the proliferation of youth gangs throughout the region).

124 See Immigration and the Alien Gang Epidemic, supra note 67, at 13 (statement of Heather Mac Donald, Senior Fellow, the Manhattan Institute); Egley, supra note 66, at 1–2; Egley & O’Donnell, supra note 67, at 1–2; Reisman, supra note 45, at 148–50.
failed results, the U.S approach remains wrongly focused on deportation and increasing removal efforts.\textsuperscript{125}

Legislative efforts to harden our criminal removal tactics further are not the solution.\textsuperscript{126} Several problems might result if the United States takes a more drastic approach to gang-related crime.\textsuperscript{127} First, such an approach would increase self-serving regulatory competition.\textsuperscript{128} It would lead to a system of crime prevention which would not account for the collective international impact of gang crime.\textsuperscript{129} Second, regulatory competition has proven to be ineffective as a crime reduction method.\textsuperscript{130} Rather than limit gang activity, deportations create a “merry-go-round” without borders, enabling the movement and transnational spread of MS-13.\textsuperscript{131} The failure of the current U.S. removal policy in reducing gang crime is an example of the trouble that can result from a

\textsuperscript{125} See Alien Gang Removal Act of 2005, H.R. 2933, 109th Cong. (2005); Thale et al., supra note 6, at 4 (discussing the Alien Gang Removal Act as an example of stronger deportation legislation). Such proposed legislation would provide broader definitions of gang crimes in an effort to strengthen and expand U.S. deportations. See Alien Gang Removal Act of 2005: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary, 109th Cong. 11–12 (2005) (statement of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs) (noting that the Alien Gang Removal Act would allow individuals to be deported for “being a member of a group or association of three or more individuals that have been designated by the Attorney General as a criminal street gang”). Recently proposed legislation mirrors the repressive mano dura policies in many ways and would also increase the possibility of innocent and legally present individuals being deported. See Chacón, supra note 2, at 333–36.

\textsuperscript{126} See Gangs and Crime in Latin America, supra note 34, at 3 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere) (“[W]e must also rethink what we do with illegal immigrants . . . once we catch them . . . . Simply exporting our problems obviously is not the solution.”); Thale et al., supra note 6, at 4 (“Some in the United States have proposed a still stronger emphasis on deportation, as a way to get criminals out of the United States.”); Broude & Teichman, supra note 18, at 807–08.

\textsuperscript{127} See Thale et al., supra note 6, at 4 (“Increasingly aggressive deportation policies are likely to further strengthen the transnational links between gangs in Central America and in the United States and to worsen the problems in the region.”); Broude & Teichman, supra note 18, at 828; Reisman, supra note 45, at 147 (advocating that governments should work together in developing enforcement policies in order to end the cycle of ineffective state responses).

\textsuperscript{128} See Broude & Teichman, supra note 18, at 830–31 (stating that independent “crime control efforts” of one nation displace criminal activity to other nations, creating “negative externalities”).

\textsuperscript{129} See id. at 831 (noting that when nations engage in regulatory competition it can lead to “suboptimal crime control policies that do not maximize aggregate welfare”).

\textsuperscript{130} See Deportees in Latin America, supra note 1, 34–35 (statements of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs, and Rep. William D. Delahunt, Member, H. Subcomm. on the W. Hemisphere) (noting the failure of current U.S. deportation policy as a crime control measure).

\textsuperscript{131} See Sibaja et al., supra note 22, at 45; see also Lopez et al., supra note 5.
regulatory competition that ignores international impact. Finally, a race to the strictest sanctions may threaten civil liberties, especially for underrepresented groups. This is already evidenced by the discriminatory practices implemented in El Salvador. The United States has also shown recent willingness to compromise constitutional rights in an effort to toughen immigration policy and combat gang crime. Thus, continuing to engage in regulatory competition will only exacerbate the problems resulting from the already decentralized international system of crime control.

It is time to accept the failure of U.S. removal policy and create new ways for immigration law to combat criminal gangs. While concrete solutions do not present themselves readily, political economic theory suggests that international cooperation will provide the most beneficial path to alleviate the problem of gang proliferation. Rather than compete with Central American nations, the United States and the international community must take a cooperative approach in controlling the proliferation of youth gangs. The United States needs to

132 See Broude & Teichman, supra note 18, at 830–31; Chacón, supra note 14, at 1888 (noting that the U.S. removal policy does not "trouble itself" with the consequences for nations receiving the gang members).
133 See Broude & Teichman, supra note 18, at 831 ("[D]ecentralization brings about inequalities that benefit wealthier groups."). Nations that engage in regulatory competition often adopt harsher sanctions and policies than necessary. See id. at 831, 835.
134 See Thale et al., supra note 6, at 3; Broude & Teichman, supra note 18, at 831 (noting that outsourcing races lead to inefficiencies associated with over-enforcement); Reisman, supra note 45, at 148.
135 See Chacón, supra note 2, at 331–36. For example, one federal task force focused on noncitizen gang activity is able to remove noncitizens believed to be gang members even when state and federal law may provide no basis for criminal prosecution. See id. at 332 ("[Seventy] percent of the people removed [by this task force] have not been charged with crimes and are deported on the grounds of immigration violations alone."). By identifying gang members without any legal standards, this task force depends on discretionary policing, which leads to concerns of abusive law enforcement. See id. at 332–33, 341–42. Additionally, there are few procedural checks to ensure abuse does not take place because there is no legal process to challenge this type of removal. See id.
136 See Broude & Teichman, supra note 18, at 830–31. In the current decentralized system, nations make independent and self-serving policy decisions that displace crime to other nations, leading to over-enforcement and inefficient crime control. See Reisman, supra note 45, at 147.
137 See Deportees in Latin America, supra note 1, at 35 (statement of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs).
138 See Broude & Teichman, supra note 18, at 801.
139 See Gangs and Crime in Latin America, supra note 34, at 13 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development) ("[B]y working together with other governments and other U.S. government agencies to implement effective cross-sectoral measures that strengthen institutions and build local capacity, we can—and must—have an
work with other nations to implement actual laws and legal costs that
no longer make any location a profitable place for criminal activity.140
Through international cooperation, the nations of the Americas can
develop new forms of international crime control to combat the rising
gang problem and avoid inefficient regulatory competition.141

The proliferation of youth gangs is a transnational problem that
requires a coordinated transnational response.142 The United States
and Central American nations that have been inundated with removed
criminals must work together to implement uniform crime control
standards that are in the best interests of the international commu-
nity.143 While a model for this level of international cooperation does
not currently exist and may be difficult to achieve, it is necessary to un-
derstand that it is the best approach to combating gang prolifera-
tion.144 A first step might be the formation of an international commit-
tee to provide benchmark standards of enforcement and sanction.145
This “cooperative-outsourcing” approach will provide many advantages
over regulatory competition.146 International crime control standards

\[\text{impact.}\]; Broude & Teichman, supra note 18, at 837 (recommending international normative regimes designed to increase the efficiency of crime control); Reisman, supra note 45, at 147.

140 See *Gangs and Crime in Latin America*, supra note 34, at 3, 13 (statement of Rep. Dan Burton, Chairman, H. Subcomm. on the W. Hemisphere, and prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development); Broude & Teichman, supra note 18, at 800, 807. To make criminal activity unprofitable, the United States should not blindly increase its sanctions; instead it must focus on international cooperation. See Thale et al., supra note 6, at 4; Broude & Teichman, supra note 18, at 837; Reisman, supra note 45, at 147. As part of an international approach, the United States should, as others have called for, provide monetary aid and other resources to help improve the law enforcement response of the Central American nations. See *Deportees in Latin America*, supra note 1, at 35–36, 38 (statements of Rep. Sheila Jackson Lee, Member, H. Comm. on Foreign Affairs, and Annemarie Barnes, Chief Technical Director, Ministry of National Security, Jamaica) (recommending increased aid for social reintegration programs and increased support for receiving nations’ law enforcement).

141 See *Gangs and Crime in Latin America*, supra note 34, at 13 (prepared statement of Adolfo A. Franco, Assistant Administrator, Bureau of Latin America and the Caribbean, United States Agency for International Development); Broude & Teichman, supra note 18, at 848 (“[T]he traditional concept of state sovereignty over criminal justice must make way for new concepts of international cooperation if efficient crime control is to be achieved.”).

142 See Reisman, supra note 45, at 147, 151.

143 See Broude & Teichman, supra note 18, at 836 (stating that internationally agreed-upon “maximum criminal standards” would allow for optimal crime control without imposing externalities on other nations and without wasting resources).

144 See id. at 835–37.

145 See id. at 838.

146 See id. at 848.
will ensure that criminal activity will not be negatively displaced and will lead to the most internationally efficient crime control regulations.147

**Conclusion**

U.S legislation that focuses on deporting noncitizen gang members and the harsh policy response from Central American nations has contributed to rather than eliminated transnational gang violence. Rather than engage in such regulatory competition, the United States should work to develop an internationally cooperative model for regulating criminal gang activity. While the United States must implement new regulations that deter crime by imposing sanctions that make the United States a more costly and less desirable place to conduct criminal activity, any new legislation must be a part of a coordinated international crime control effort. The United States must develop new international strategies with Central American nations to avoid overburdening them with the influx of criminal gang members and to combat the threat of gang transnationalization most efficiently.

147 See id. at 830–31, 836 (suggesting that enforcement-related externalities and inefficiencies could result from the absence of centralized international crime control). For example, if engaged in an outsourcing race, El Salvador could not afford to relax its current repressive enforcement tactics because to do so would cause even more crime to be displaced from the United States. See id. at 835. A cooperative crime control effort between the nations, however, would avoid this inefficient regulatory competition and allow nations to adopt policies that are mutually beneficial. See id. at 835–36.