The Freedom Center Journal is published twice a year and is based at the University of Cincinnati College of Law. P.O. Box 210040, Cincinnati, OH 45221-0040.
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ISSN: 1942-5856

Typesetting and layout by Laura Kristal

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Domestic Price: $30 per volume (2 issues); $18 per individual issue. Foreign Price: $35 per volume (2 issues); $20 per individual issue

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THE FREEDOM CENTER JOURNAL
Volume 2, Issue 1

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RUNNING AS FAST AS THEY CAN: CHILDREN'S SEARCH FOR WORK ON WEST AFRICAN COCOA FARMS AND THE U.S. BASED PROTOCOL THAT ATTEMPTS TO PROTECT THEM

Anita Sheth
Elke de Buhr

Abstract
West Africa produces 70% of the world global supply of cocoa – the main ingredient in chocolate. Eight years ago the story of migrating West African children who were trafficked from Mali, Burkina Faso and Togo to work in exploitative conditions on Ivorian cocoa farms broke across North America and Europe. The question of trafficked child labor in cocoa production is, however, not new. Contrary to the recently commonly-held view that child trafficking for labor purposes is a relatively new phenomenon, the first reports of migrant children involved in adverse working conditions in the production of this West African commodity publicly appeared as early as in 1901. While serious attempts have been made and tens of millions of dollars have been spent in the last few years to map and then address the problem of the worst forms of child labor, including trafficking for labor purposes, through the US based "Protocol for the Growing and Processing of Cocoa Beans and their Derivative Products," also known as the Harkin-Engel Cocoa Protocol, success is still difficult to measure.

Very little is known about why children in the West African region undertake risky migration to work in trafficked labor situations on Ivorian and Ghanaian cocoa farms. This paper addresses this gap by focusing on children's constructions of how they arrived at the decision to run across borders in search of a better life, the journey encountered, the work conditions experienced, the realization that they had been "trafficked" and their journey back "home." Careful attention is paid to the critiques offered by some experts who suggest that the child
trafficking discourse for labor purposes relies on the assumption that it is better for children to stay at home rather than leave it and get into trouble. Within this backdrop, the paper assesses these children’s struggle to leave “home” in search of “a better life.” It shows how West African children are risking their lives to gain access to income to support their basic need and consumer desires. It concludes by suggesting that efforts to ensure the protection of working children, via the Harkin-Engel Protocol, must factor what children themselves understand as their increased well-being. Working children contribute significantly to a multi-billion dollar economic engine of growth both for West African governments that derive export tax from cocoa beans and the global chocolate industry that depends on it to manufacture their product for world sale. As such working children not only have the right to be heard, but also have the right to have their views factored into any equation that attempts to ensure their development and depends on them to secure sustainable sources of the world most cherished beans.

**Introduction**

There are many children from here [Po, Burkina Faso] working in Côte d’Ivoire, even Ghana...just the other day two more left...followed just today by another two....They are going to work on cocoa farms...I asked them not to go but they did not listen to me...I too used to think working on cocoa farms in Côte d’Ivoire was like ripping gold from trees....Now I know this is not true....I have seen many traffickers in this village and many around here....You can tell who the trafficker is because you see a man travelling with five or six children and then the next day you hear that five or six children have left the village.

— Interview, 16 year old Male, Po, Burkina Faso, February 2008

In September 2000, British Television aired a documentary made by True Vision revealing that “hundreds and thousands of children in Burkina Faso, Mali and Togo were being sold as slaves to cocoa farmers in neighbouring Côte d’Ivoire.” It further claimed that “slavery existed on as many as 90% of cocoa farms in Côte d’Ivoire.” Following this documentary, other media reports claimed that “children as young as six years old were forced to work 80-100 hours a week without pay, suffered malnutrition and were subjected to beating and other abuses.”
In 2001, the U.S. newspaper chain Knight Rider ran a 4 part series of investigative pieces on young boys who were tricked, sold or trafficked into Ivorian cocoa farms. It profiled what it identified as, "cocoa farm slaves between the ages of 12 and 16," and reported that "one Côte d'Ivoire farmer had been prosecuted in Côte d'Ivoire for mistreating 19 boys from Mali and holding them in abysmal conditions." Knight Rider began its first story this way,

Aly Diabate was almost 12 when a slave trader promised him a bicycle and $150 a year to help support his poor parents in Mali. He worked for a year and a half for a cocoa farmer who is known as "Le Gros" ("the Big Man"), but he said his only rewards were the rare days when Le Gros'...didn't flog him with a bicycle chain or branches from a cacao tree...

Aly Diabate and 18 other boys labored on a 49-acre farm, very large by Ivory Coast [Sic] standards, in the southwestern part of the country. Their days began when the sun rose, which at this time of the year in Ivory Coast [Sic] is a few minutes after 6 am. They finished work about 6:30 in the evening, just before nightfall, when fireflies were beginning to illuminate the velvety night like Christmas lights. They trudged home to a dinner of burned bananas. If they were lucky, they were treated to yams seasoned with saltwater "gravy."

After dinner, the boys were ordered into a 24-by-20-foot room, where they slept on wooden planks without mattresses...

"Once we entered the room, nobody was allowed to go out," said Mamadou Traore, a thin, frail youth with serious brown eyes who is 19 now...

"We didn't cry, we didn't scream," said Aly... "We thought we had been sold, but we weren't sure."

The boys became sure one day when Le Gros walked up to Mamadou and ordered him to work harder. "I bought each of you for 25,000 francs (about $35)," the farmer said, according to Mamadou... "So you have to work harder to reimburse me."

A few months later, major international media carried a gripping story of a ship, MV Etireno, off the coast of Benin, suspected of carrying 43 child workers destined to labor in unacceptable conditions in West Africa; 13 of these children were from Benin, eight from Togo, 17 from Mali, one from Senegal and one from Guinea." While this story which was covered
in several newspapers did not report that these children were destined for work on Ivorian cocoa farms, the incident introduced some of the key players and organizations who would become critical in defining trafficking in children for unacceptable labor purposes on Ivorian cocoa farms.\(^{13}\) Kevin Bales, a global advocate against slavery, gave several interviews to the press explaining how children were exploited in Ivorian cocoa farms. He noted, “hundreds if not thousands of young boys are smuggled from Mali and sold into agricultural slavery in the Ivory Coast every year.”\(^{14}\) “We know this works because one of the things we actually did there was to send a local journalist to the market and he bought 2 young men for us in about 30 minutes spending about $40 dollars each.”\(^{15}\) These children were sent “to remote cocoa farms and spent three, four, five years there in very tough conditions raising the cocoa that supplies the world cocoa market and goes into the chocolate that we eat.”\(^{14}\)

If there was any doubt that children were being bought and sold to be exploited on cocoa farms, a 2001 UN Security Council Report of the Inter-Agency Mission to West Africa finally put this to rest. This report carried details on how children were being moved across borders to labor on Ivorian cocoa farms and called on chocolate companies to work with non-governmental organizations and United Nation officials to resolve the problem.\(^{15}\) Both the Economic Community of West African States and the International Organization of Migration (IOM) understood the Security Council’s concerns, but recognized that the promotion of open borders for free trade within the West African regions could inadvertently spark, and encourage, cross-border movement of children for cheap labor purposes. The International Labor Organization issued its own reports in 2001 on child trafficking for forced labor purposes in the West African region.\(^{16}\)

These media claims and UN reports had a powerful effect on audiences—particularly chocolate consumers—worldwide as they told the story of child labor trafficking on Ivorian cocoa farms. Côte d’Ivoire produced roughly 40% of the world’s cocoa supply. Government officials from various European countries and the European Union issued statements condemning all acts of child trafficking and the worst forms of child labour on West African cocoa farms. They raised the possibility of a consumer boycott if chocolate companies did not move to eliminate abuses in the industry. Brian Wilson, the then-U.K. Foreign Office Minister, went to the West African region in 2001 and set up a task force that brought together governments of the U.K., Ghana and Côte d’Ivoire, the cocoa industry, and non-governmental organizations
working for the elimination of forced child labour to examine the issue. He noted that the U.K. wanted West Africa to sign a treaty establishing a legal framework for combating slavery, trafficking and forced labour. In reaction to Wilson’s call to action, Pascal Afii N’Guessan, Côte d’Ivoire’s then-Prime Minister, noted that, “multinational chocolate companies were at the heart of the problem of child trafficking because they keep prices so low driving farmers into poverty and use of forced labour.” He then called for “a tenfold increase in the price of cocoa.” The Government of Côte d’Ivoire further explained that cocoa undertakings involved thousands of remote small family farms where immigrants sometime work and that these were difficult to monitor stating, “these [immigrant workers] have ultimately established their own undertakings and had brought from their countries relatives and children whom they declare as family, which has aggravated the practice of using child labor in the country.”

On the U.S. front, reaction to the news reports of the abusive and slave-like conditions in the growing and harvesting of cocoa led Senator Tom Harkin to say that, “most consumers in America and around the world don’t want to buy chocolate made from cocoa beans harvested by child slaves.” Eliot Engel, the House Representative, also reacted to the media reports and indicated that, “when I learned of children being sold into slavery to work in the cocoa fields of the Ivory Coast, I was horrified.” Both Harkin and Engel took action and called upon the U.S. chocolate industry to design clear and identifiable ways for the removal of “child slaves” on cocoa farms. Representative Engel drafted a bill that called on the U.S Food and Drug Administration (FDA) to create a “no forced labor” certification that could be stamped on chocolate by manufacturers who could prove that their supply chains did not use slave labor. He drafted a rider to a fiscal 2002 agricultural appropriations bill that US$250,000 be set aside to institute a system of labelling chocolate and cocoa, as “No child slave labor.” The bill passed the House of Representatives by a margin of 291-115 in June 2001 and was aimed at looking into the labelling possibility.

The Chocolate Manufactures Association (CMA), which represented all of the U.S.’s cocoa producers and major chocolate companies, was taken by surprise by the legislation and realized that it was moving ahead quickly. They mobilized to block the labelling effort by issuing statements which claimed that had their chocolate products to issue the label it would mean that all other chocolate products were made by child slave labor. They saw this as the wrong move arguing that
it would lead consumers to boycott chocolate and this would have the crushing impact on both the chocolate companies which constituted 50% of the world cocoa consumption and the West African countries that produced over 70% of the beans. Rather than supporting a FDA supervised label on chocolate, the chocolate industry indicated that they instead would be open to an international protocol that would involve groups in industry, national governments and international non-governmental organizations in improving labor conditions and standards on the ground, and work towards a cocoa certification and verification system that reported on the amounts of child labor use in the West African region. Senator Harkin and Representative Engel accepted this offer and insisted on a four year development which would identify and correct abusive child labor and trafficking practices on cocoa farms. The compromise deal, known as the Harkin-Engel Cocoa Protocol, was signed in September 2001 with members of CMA and the World Cocoa Foundation agreeing to work with other stakeholders to establish global standards for child labor in cocoa production. As it would turn out, however, through the various extensions of the Harkin-Engel Protocol, children still continue to toil in hazardous conditions and trafficked labor situations in West African cocoa farms. As one Malian child who had returned from being trafficked to Ivorian cocoa farms in 2008 put it,

When I was young I heard about the trafficking business in my village... Everyone here talks about it... my parents... grandparents... friends... and people in the market garden where I now work... I met my trafficker in Farakara[Mali] and he knew I wanted a cycle very badly and I had been trying for years to save enough money to buy one... but could never come up with it... A cycle costs CFA 60,000 [or about $120 USD]... I wanted it for my pleasure to move around wherever I wanted... I still don't have the money to buy a cycle after all I went through and how hard I worked... My trafficker approached me one day in my village and told me if I went with him and worked on a cocoa farm for two years I would have enough money to buy a cycle... radio... clothes and have money left over... At the time I did not know he was thinking of trafficking me as he knew me... he was Malian and known in my village.4

The story of human beings, including children, being traded and forced to work in “slave-like” conditions on West African cocoa farms is not
new. Carol Off in her book, Bitter Chocolate, carefully researches archival material to look for links between slavery and chocolate dating as far back as the early 18th century to the current times and unravels a prominent trade in West Africans for European and American wealth extraction in the confectionary business.\textsuperscript{45} She notes, "while the great thinkers debated equality, fraternity and liberty and championed the rights of man, they were sipping sugar-sweetened chocolate...produced by the sweat and blood of slaves...and Africans, subjected to the most extreme abuse, struggled to survive the brutality...."\textsuperscript{46} Jeremy Seabrook provides archival specifics, he notes, that before 1800 fewer than 20% slaves were children.\textsuperscript{47} However, by the 19th century when the centre of the trade was West-Central Africa there was a dramatic increase in the number of young slaves, mostly boys, shipped out of or moved within the region. Seabrook states that "between 1811 and 1867 more than 41 percent of slaves were children."\textsuperscript{48} With reference to Côte d'Ivoire, Off reports, "despite worldwide condemnation of slavery, and laws against it,"\textsuperscript{49} by the end of the millennium, "Côte d'Ivoire was one of the most indebted nations on earth, even as it supplied almost half of the world's cocoa to the multi-billion-dollar industry and helped satisfy the world's addiction to chocolate, Cocoa farmers slid deeper and deeper into poverty, and they began to look for cheaper ways to produce their beans."\textsuperscript{50}

Before this paper presents data collected in 2008 from interviewing trafficked children who have worked on Ivorian cocoa farms, it takes a detour to examine the research literature on human trafficking. The aim of this examination, however, is not to provide an assessment of the UN anti-trafficking instruments, the NGO and government anti-trafficking efforts or the scholarship that has developed on this form of labour. Instead, the aim is to highlight the key paradigms that have emerged thus far from the study of human trafficking and to delineate the fault lines that have influenced this work. Furthermore, it is to show how research on this issue has generated more questions than answers, offered limited findings and casted doubt on the role of powerlessness in decisions made by those who move from one area to another in search of a better life. The following section captures the complex clashes of theories and practises in the study of human trafficking, and elaborates the ground on which to listen anew to what self-identified trafficked subjects are saying about their sometimes self-determined decisions to run as fast as they can across borders in search of a better life on West African cocoa farms and their return back.
Trafficking for Labor Purposes: The Research

The allure among nations to jump into the globalization era as a means to prosperity has made human beings more tangled and intertwined with each other...boosting human trafficking. Globalization allows greater and easier access to an overabundance of products and services never seen before, including those intangible goods such as a better life...and the promise of work.51

Even though trafficking in humans has taken place for centuries, the degree of awareness of this form of exploitation has been extremely limited. Research on trafficking has tended to focus on trafficking of women and children for sexual exploitation, neglecting all other forms of trafficking, including child trafficking for forced labor purposes.52 Andrees and van der Linden have noted that, "trafficking for labor exploitation is significant and under-researched."53 According to them, "research on this form of trafficking is in its early stages and though much has been done, even more must be done."54 They note that while the research pool on trafficking for exploitative labor purposes is small, two things can already be known. Firstly, most of the data is anecdotal evidence obtained from secondary sources such as policy analysis, media reports and NGO accounts and reflect the institutional perceptions of a victim. Secondly, in the rare case of primary data, there too a bias exists of the view of the victim which is generated due to a skewed selection process.55 Surtees lists some of the factors contributing to this bias. She suggests that trafficking subjects are drawn from cases of identified victims and are not representative of all trafficked persons, and access to trafficking subjects are usually obtained through NGO service providers who have already classified the subjects into victims and select the type of victims researchers can have access to in the research process.56 As a result, no random sampling data exists; only that which targets a particular population and is generated from data banks of assistance organizations, shelters and/or detention centers.

This tendency to see trafficked subjects exclusively as victims has emerged out of what Howard and Lalani have described as a long historical tradition that dates back to the late nineteenth century Europe and North America. At that time unaccompanied white women living in poverty were “forced” to move to the “New World” exchanging sex for survival.57 These women were part of the so called, “White Slave Trade,” and both the state and civil society worked hard to find solutions
to put an end to what was regarded as the forced movement (abduction and transport) of women for the trade. Kempadoo, among others, have mapped how the first international instrument to suppress such a trade – The International Agreement for the Suppression of the White Slave Trade, constructed the dominant frames by which trafficked subjects were regarded as victims. Surtees suggests that this agreement gave rise to the Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitutions of Others (1949) and the Protocol to Prevent, Suppress and Punishing Trafficking in Persons, Especially Women and Children, Supplementing the Convention on Transorganizational Crime (2000, Palermo Protocol) both of which are rooted in a paradigm that regards trafficking in persons (women and children essentially) as victims, coerced into unacceptable forms of work (sex work mostly) and in need of rescuing by the state and/or civil society. O’Neil is of the similar opinion, he notes, "in some ways, today’s trafficking hysteria is similar to the ‘white slavery’ scare of the late nineteenth and early twentieth centuries." These early readings on trafficking subjects have produced, as some experts suggest, two major consequences in the current day study of human trafficking. Firstly, it has produced a gendering of trafficking subjects as female and with it a focus, on what Kleinman and Kleinman refer to as the “commercialization of suffering.” This consequence has prevented the possibilities of theorizing the agency, however limited, that some women feel in risking their lives and moving in the hope of gaining economic autonomy. Relatedly, it has also had the consequence of preventing analysis of other populations who maybe trafficked for other purposes. Surtees explains, "the failure to expand the application and understanding of anti-trafficking efforts beyond those of prostitution and sexual exploitation has had the effect of denying harm done to persons who suffer similar abuses but who are trafficked for other purposes." Here Surtees is referring specifically to men and boys. Others have argued that in the age of the global movement of capital, people are often trafficked to provide cheap or free labor in sectors that have little to do with the sex trade and everything to do with agriculture, mineral extraction and/or manufacturing. Regarding trafficked subjects in essentially victimized terms has promoted what Sharma describes as the “false image of human trafficking...that draws attention away from the dependence of big capital on the cheap and malleable workers that populate the unregulated and unprotected labor markets.” Bertone confirms this view and offers
an explanation, "demand for cheap labor in which the labor becomes extremely exploitative is probably the most difficult aspect of trafficking to address, because it is wrapped in discussions of globalization and the mainstream capitalist market."

Little is known about the demand side or the driving forces behind trafficking for labor exploitation. Some researchers who have called for the analysis of trafficking to be conducted in the broader context of the global political economy have suggested that wealth inequalities and different opportunities between countries of origin and destinations have facilitated movements of people like never before. It is therefore no coincidence, as Kaye et al note that, "the growth in trafficking has taken place during a period in which there has been an increasing international demand for migrant workers," who provide low or no-wage labor in a competitive and globalized market economy. Tyldum and Brunovskis term these migrants as "hidden populations" from where trafficking for labor purposes draws its numbers. Nagle suggests a possible explanation for the need of hidden populations of labor. She notes:

"The ability of many businesses to stay competitive in a globalizing economy depends on the capacity to assemble and retain a labor force for the least amount of investment. A minimal investment in labor will cushion the impact on profits in unpredictable markets where the cost of raw materials, the transportation of goods, and the price of the finished products can fluctuate wildly."

In fact, she suggests that big business intentionally select countries in the developing world with weak or non-existent labor laws and policies protecting workers. Nagle asks rhetorically, "one wonders if the same corporations would even conceive of 'investing' in the same nations if globalized legislation, policies, and institutions protecting fair wages and human working conditions existed and had been implemented in those nations."

The second consequence of reading trafficking subjects as victims has allowed for the framing of the trafficking issue as a problem of boundaries and state sovereignty and less about human rights. Howard and Lalani illustrates this point, "although trafficked persons are recognized by law as 'victims,' survivors of human trafficking are often only assisted by authorities if they 'cooperate with law enforcement officials and agree to testify.' Otherwise, they are often treated as illegal immigrants in need of deportation." This, despite the fact, as Dotridge
asserts that Principle 8 of the High Commissioner for Human Rights' Recommended Principles and Guidelines on Human Rights and Human Trafficking emphasizes (2002) that "...protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings." Furthermore, other experts have argued, that anti-trafficking efforts directed to increasing border controls rationalized on the grounds of providing protection to victims have actually operated as repressive measures to limit or stop the flow of undocumented workers in finding opportunities for employment. In line with this thinking, they suggest that when borders are tightened presumably to prevent the free movement of people, trafficking subjects are moved through more dangerous and hidden routes and are thus exposed to increased, not decreased, levels of threat. Dottridge also exposes the limits in anti-trafficking policies in working for the best interest of individuals. He demonstrates that his research on anti-trafficking efforts by NGOs and governments has found that repatriation efforts of trafficked subjects take place in the "absence of risk and security assessments...leaving some people...at risk of being re-trafficked." Thus as a number of writers argue that by "prioritizing crime, punishment and immigration control" current anti-trafficking measures fails to acknowledge or address social injustice, and is more likely to result in the violation of rather than in the protection of the rights of individuals.

Perhaps more than any other author, Laura Agustín’s work on non-white migrants has shown how gendered readings of trafficking subjects have influenced current day understanding of this phenomenon. She notes, "women are sometimes called ‘boundary markers’: When States feel threatened, women’s bodies become symbols of home and the nation...they should stay home and be home." The collective fantasy says home is always a lovely place, but many people have a contrary experience. Agustín’s troubling of home as a "lovely place" is not new. Feminist scholars throughout the mid to late 1990s have produced research to re-think home as a lovely, or more appropriately, safe place.

The research has shown how people, women particularly, experience home as both safe and dangerous. The reification of female victimhood in anti-trafficking thinking is a familiar procedure. In referring specifically to NGO anti-trafficking efforts towards non-white trafficked victims, Doeszema notes, "western NGOs construct the ‘third world woman’ as a ‘damaged other’ to justify their “own interventionist impulses” and Agustín adds, "women are infantilized in the name of protecting and
'saving' them, which takes away their power and agency. According to Agustín, "the U.N. protocols on trafficking...of human beings... mentions women and children, and mentions sexual exploitation, but doesn't say anything about voluntary leaving." She explains,

_The 'trafficking' discourse relies on the assumption that it is better for...{people} to stay at home rather than leave it and get into trouble; 'trouble' is seen as something that will irreparably damage...{them}. But if one of our goals is to find a vision of globalisation in which poorer people are not constructed solely as victims, we need to recognise that strategies which seem less gratifying to some people may be successfully utilised by others..."

After interviewing hundreds of people who risk their lives to leave home, Agustín concludes her analysis by suggesting that people who leave home have mixed motives. "They may be poor and without many choices, but they also are human beings who have desires and fantasies. They daydream about all the same pleasurable things that richer people do. The human ability to imagine that things can be better, that getting ahead is possible, is in play. These motivations mix together in the project of leaving home – legally or not – to go somewhere else." She, however, qualifies this sense of wanting to leave home as she notes, "and it's not the most desperate, like famine sufferers, who manage to move. In order to go abroad you have to be healthy and you have to have social capital, including a network that will get you information on how to travel and work." Furthermore, she adds, "frightening or even tragic moments of people’s migrations to work need not forever mark them nor define their whole life experience. Relative powerlessness at one stage of migration need not be permanent; poor people also enjoy 'multiple identities' that change over life-courses composed of different stages, needs and projects." She suggest that "even the poorest and even the partially 'trafficked' or 'deceived' look for and find spaces to be themselves in, run away, change jobs, learn to utilize friends, clients, employers and petty criminals." For Agustín media images or stories handed down on the streets that depict travel to elsewhere as essential for education and pleasure are also the motivating factors as to why some people uproot themselves and risk everything to find a place in the world.

Agustín's call for preserving the agency of the subject who decides to travel, even those who are forced to move, is directed at recasting the dominant representation of the helpless victim in the study of human
trafficking, and with it to preserve the right of work and the search for a better life for people living in poverty. However, she is careful to ensure that the existence of the worst experiences is not to be negated. She writes, "the abuses of agents who sell ways to enter the first world extend to migrants who work as domestic servants and in sweatshops, maquiladoras, mines, agriculture, sex or other industries, whether they are women, men... But these most tragic stories are fortunately not the reality for most migrants." O'Neill agrees with Agustín's assessment.

Migration remains an inspiring expression of human agency and desire, as people take great risks and travel great distances to improve their lives. In labelling such movement as 'trafficking' and 'slavery,' and demanding tougher border restrictions and police-led rescues of trafficking's alleged victims, the anti-trafficking lobby has grossly betrayed the very people it is claiming to help.

The question to now consider in the context of unraveling the dominant anti-trafficking paradigms is the particular place "children" take in this discourse. If the trafficked subject is feminized as victim, then what can we say about the literature examining the trafficked child? The UN protocol against trafficking makes it clear that children cannot consent to work in exploitative conditions (e.g., trafficked labor situations). In other words, it is not possible for children to experience agency (personal autonomy) or make self-determined decisions to move across or within borders in the hope of finding work and find themselves in exploitative situations. The UN protocol is specific on this subject. The element requiring "threat or [the] use of force or other forms of coercion... of deception, of the abuse of power... to achieve the consent of a person having control over another person," is not necessary when it comes to children, as the protocol explicitly assumes that no child can consent to migration for the purpose of labor under exploitative conditions. When it comes to proving that children have been trafficked, the convention requires that "recruitment, transportation, transfer, harboring or reception of persons" is found and that "exploitation" has taken place. Based on ILO Convention 182, the definition of trafficking is broader for children. So a situation may be trafficking if it is a child but if it were an adult it would not be trafficking. Children cannot consent to migrate under exploitative conditions without this being labeled as child trafficking and against the law. Who defines exploitative? It is not the intent of the paper to trouble this definition of child trafficking. It is,
however, the aim of the paper to expose dominant paradigms that frame the study of trafficked children, especially in the West African context.

Child Trafficking for Labor Purposes: The West African Research

On the bus back to Mali we met three other young boys who were also returning from working on Ivorian cocoa farms...they all had terrible experiences and some of them got paid...but not one of them was paid what they were promised....They were frightened to talk about this on the journey back home like we were....I felt horrible and sorry for myself as I was returning home without my cycle and with no money....When I arrived home...my mother cried for a whole day...she told me how she was looking for me and how worried she was that a trafficker got me...I told my father that I did not want to work on his farm and so my parents let me live with my grandparents in Sikasso...I work in a market garden making some money...but it is still not enough...If I don’t get enough money to buy my cycle in the next four months I will go back again to Côte d’Ivoire...but I will work in a corn field closer to the border.71

The study of child trafficking for labor purposes is also a relatively new phenomenon. The UNICEF Innocenti Center research on child trafficking was first initiated in 1998 in Western Africa in collaboration with its West and Central African Regional offices, two years before the UN adopted a new definition of “trafficking in person” and the U.S. adopted its own national law; and one year before the ratification of the ILO Convention 182, banning the worst forms of child labor, including slavery, forced labor and child trafficking. During this period West African countries of Ghana, Côte d’Ivoire, Mali, Burkina Faso, Togo and Benin all reported some efforts to detect, intercept and repatriate children who have been identified as “trafficked” for labor purposes across borders and detain suspected individuals of trafficking in the region.72 These events were reported in the local press, with the earliest report appearing in Mali in 1995 and in Côte d’Ivoire in 1998, inspiring UNICEF (in Abidjan) to investigate and report later that same year that 10,000 to 15,000 Malian children were found working in unacceptable conditions in Côte d’Ivoire.73 A few international NGOs operating in West Africa were quoted heavily in these early local reports identifying children who had been moved across borders through deception and force for exploitative labor purposes. West African government
officials, mostly from embassies in the region, were also quoted along with these international NGOs. For example, working with UNICEF, Anti-Slavery International and Save the Children Canada in 1995, the Government of Mali issued a public statement against Malian children being used for child labor purposes in the Côte d'Ivoire and officially informed the Government of Côte d'Ivoire of the problem. In 1996, a workshop on child trafficking was held in Sikasso, Mali, and a regional response to address the problem was designed. In 1998, Mali established a Consultative National Commission on Child Trafficking. It also established the Ministry for the Promotion of Women, Children and the Family, who was tasked, among other things, to handle the repatriation of trafficked children returning from agricultural farms in Côte d'Ivoire. Agricultural is named as the sector in which these children were recruited and transacted to work in hazardous conditions. West Africa thus became the world's focal point in the generation of data, albeit experimental, on child trafficking for forced labor purposes. As Dottridge and Feneyrol in 2007 note, "in West Africa, nine years' experience of efforts to stop child trafficking can now be reviewed."

Just as the "white slave trade" was transformed into "trafficking in woman" with the focus on women in the developing countries, the stereotypical view of the trafficked child is that he or she too is from non-western countries who is seduced or kidnapped, passive and poor, and moved across borders into situations of forced slavery. The trafficked child is also gendered and in need of rescuing by the state and/or civil society groups and returned "home." Some authors have suggested that this gendering is generated from the western paradigm of the so-called "best interest of the child" and idealized notions of Western families "as the basis for the protection of children." Seabrook's explains, "the predominant development philosophy on children...comes from a totally 'Western' perspective in what constituted 'childhood.' The assumption is that the 'best interest' of the child would mean that children should be free to enjoy their childhood in caring, protective 'families' and in schooling and developmentally sound play." However, as he further states, the version of Western families through which the image of the child is promoted is "already in an advanced state of dissolution." Myers asks, "but who gets to define children's 'best interests', and according to what criterion?" Thorsen suggests that wholesale adoption of a globalised notion of childhood in the anti-child trafficking literature is problematic. "Apart from failing to acknowledge that the conceptualisation of childhood...[varies] over class and space, the treatment of all
children as one category fails to distinguish between the different needs, capabilities and preferences of young children and of almost-adults.\textsuperscript{78}

Despite these problems in conceptualizing children in general, and the trafficked child in particular, Dessy and Pallage found that the "data" on trafficking of children for labor purposes is so horrific and disturbing that there is an intense pressure from governments and civil society groups to apply economic sanctions against states that are allowing the practice to continue with little or no consequences to perpetrators. They note, "why wait? What argument can possibly be put forward to hinder action? The legislative strategy is very understandable. It is based on the presumption that, even if perfect enforcement of a law against child trafficking is utopian, any improvement in enforcement must be synonymous with an improvement in the fate of the children."\textsuperscript{79} However, their research has shown that "this intuition may be wrong...if enforcement is not perfect, the well-intentioned ban on child trafficking may have the adverse effect to increase the number of victims."\textsuperscript{80} Dottridge and Feneyrol analysis of the West African literature on anti-child trafficking efforts also produce the same conclusion. They suggest that the evidence shows that anti-trafficking efforts have stopped children on the move in search of work and they have not been effective in distinguishing between migrant children in general and trafficked children in particular.

Both teenagers and younger children leave home in huge numbers throughout West Africa to seek work away from home. The least fortunate end up in situations which amount to 'exploitation' as it is defined by the UN Trafficking Protocol... Yet other children migrate to seek work voluntarily, without being trafficked, but are unfortunate enough to end up in these same forms of exploitation. Others end up in different 'worst forms of child labour'; for example working... on farms where the pesticides being used are significantly more dangerous to growing adolescents than they are to adults. Although under the definitions used in the UN Trafficking Protocol such children are not considered to be 'trafficked,' nevertheless many commentators have used the term 'trafficking' indiscriminately to refer to situations in which young people migrate to seek work voluntarily, whether or not they not end up in situations defined as 'exploitation' by the Protocol. By failing to focus exclusively on children being trafficked... 'anti-trafficking committees' and other police measures to stop young people migrating have become a source of abuse rather than protection.\textsuperscript{81}
Dottridge and Feneyrol emphasize that there is a “disastrous confusion
in many parts of West Africa between the process of migration, on the
one hand, and the abusive outcomes of migration experienced by just
some of the young people who migrate, on the other.” They explain,
“a significant proportion of the children who have been returned to
their homes after being intercepted or withdrawn from abusive employ-
ment (usually to homes in rural areas) have opted to leave home again
within a matter of days or weeks.”

Castle and Diarra’s assessment of interviews of child victims of traf-
ficking in Mali have found similar findings. They indicate that “child-
ren were unhappy about being brought back to their villages; their
parents were unclear as to why they had been returned.” They found
that “despite the considerable expenditures incurred by NGOs and
government authorities in order to finance their return, such children
often left their villages just several days later to try once again to seek
their fortunes in Côte d’Ivoire.” Thorsen study on child migration
researched against the background of exploitation and trafficking in
Burkina Faso shows, what he terms as “the international and national
agencies [tendency] to see this migration through the lens of crisis.”
According to him child trafficking research in the West African con-
text illustrates “the dilemma of distinguishing between the need for
protective regulation and youngsters’ own view on their opportuni-
ties.” Young people, he tells us, are not passive victims, they have their
“own rationales, choices and strategies to pursue their quest for money
and...intergenerational expectations.” But researchers like Hashim
note that when child migration is studied we tend to regard children’s
decisions to migrate in negative terms. She notes, “For the most part
the independent migration of children tends to be presented in the
policy literature as pathological, since it is often assumed to be the out-
come of disastrous situations (such as war or famine) that lead to the
breakdown of family relations, or result in the increasing vulnerability
of children to economic exploitation, dangers working conditions or
abuse.” Felsmann adds, “we tend to regard the...runaway child as trou-
bled, even emotionally disturbed. In the case of these particular chil-
dren, however, leaving home may be a positive, adaptive move towards
physical and psychological health.” Thorsen agrees with these views
but suggests that even if migrating children are found in exploitative
work condition this need not amount to trafficking. He notes “before
judging whether...[youth workers] are being exploited through having
the most dangerous work...we need to examine the working conditions
for adult employees...to assess whether the problem is a much broader one of security and health measures...generally." With reference to work that relates to slavery and practices similar to slavery, Thorsen asks, "when they [young people] do not receive a wage for their work but are free to leave, are they then working under slavery-like conditions?"

While these researchers are also critical of government and civil society responses in addressing the child trafficking issue and concerned about the impact anti-trafficking policies are having on children's mobility, they are careful to point out that child trafficking for exploitative labor purposes does occur, but suggest that the numbers of trafficked children are small compared to the high volume of children migrating in search of better life experiences. It is not the purpose of this paper to attest to these discoveries. However, it is perhaps relevant to state here that the chocolate-industry supported West African certification studies undertaken in various stages from 2002 to 2008 and exclusively in the cocoa growing areas of Côte d'Ivoire and Ghana also found similar results. They found no evidence of child trafficking; the few suspected cases turned out to be through further investigation cases of either parents in Burkina Faso or Mali sending children to live with "relatives" in Côte d'Ivoire to learn farming skills in a fostering type situations, or immigrant farmers from these areas who were farm workers in Côte d'Ivoire requesting relatives to come and work on their farms due to heavy labor shortages in the cocoa growing areas. In fact, when charges were laid against Ivorian cocoa farmers for employing trafficked child labor for the harvesting and growing of cocoa, the Government of Côte d'Ivoire, noted to the ILO that, "these [immigrant workers] have ultimately established their own undertakings and had brought from their countries relatives and children whom they declare as family." Seasonal migration of adults and children is a common practice in cocoa production, the Government argued and noted that while some types of ILO 182 forms of hazardous labor were found in cocoa production, no cases of child trafficking were discovered.

Trafficking in humans for forced labor purposes is determined not at the start of the journey of movement but at its end point (i.e., destination). That is to say, rather than defining a single unitary and stand alone act, trafficking is used to define a process where three elements are required, namely recruitment, transportation and the exploitative and forced control of the worker. These three aspects are essential, and the defining moment is exploitation at the end point of movement. It is for this reason alone that investigation on trafficking and trafficked
subjects must occur by carefully considering the complex and perhaps still disconnected relations between migrations, forced labor, “family” arrangements of household incomes and human rights. Furthermore, it must also give specific attention to where interviews of potential trafficked subjects are conducted (i.e., source, transit, destinations and/or return sites) and the methods used to interview them. Trafficking is clandestine and involves illegal behavior. People are often stigmatized and thus they either refuse to consent to being interviewed or if they do speak they often give inaccurate answers to protect themselves and/or their perpetrators because they fear for their or their families’ lives. If some of the children had been in a trafficking situation at the time of the interviews or focus groups, they would have been residing “illegally” in the country; would have limited or no knowledge of their rights; would have limited personal freedoms; and would have been susceptible to violence by employers if they were to speak up. Research on trafficking victims has shown that “the factors affecting the security and well-being of a...[child] who has been trafficked are the same factors that affect disclosure.”

This needs to be kept in mind when interpreting the trafficking results of the industry supported West African certification studies undertaken exclusively in the cocoa growing areas of Côte d’Ivoire and Ghana. Had the study interviewed children in the source countries of Mali and Burkina Faso who had returned from working on Ivorian cocoa farms, they might have reported different results on trafficking as the risk to disclose may have been far less than granting interviews when currently working on cocoa farms! Often trafficked subjects are more open to discussing their experiences and/or constructions of how they arrived at the decision to run across borders in search of a better life, the journey encountered, the work conditions experienced, the realization that they had been “trafficked” and their journey back “home” after they have gone through the entire process.

While interviewing only former trafficked subjects has limits too because trafficked subjects also include those at risk of being trafficked and currently in trafficked situations, the pilot study reported on below follows the various suggestions made by researchers like Thorsen, Castle and Diarra, Dottridge, Agustin, Surtees and Kempadoo, among others, namely to avoid reading migrants as trafficked victims, and avoid interviewing trafficked subjects who previously or currently have received support services from NGOs or governments agencies that have identified them as such. The presentation of pilot study findings is not concerned about the scale of the problem of child trafficking; neither is
it concerned about the effectiveness of government and civil society anti-trafficking interventions or conceptual definitions used to mark children as trafficked. The focus of the pilot is to explore what children are saying about their experiences of moving across borders to find work on Ivorian cocoa farms, the work they experienced and the return back. Ten children were interviewed and eight of them self-identified as trafficked subjects, one of them was not sure and the other indicated that he did not think he was trafficked.

Methodology
The data presented in the following sections were collected by the authors in February 2008 in Banfora, Burkina Faso, and Sikasso, Mali. Both Banfora and Sikasso are located in proximity — less than 100 miles — of the border to Côte d’Ivoire and along one of the major trading routes between Côte d’Ivoire and the two neighboring countries. In Banfora and Sikasso, we interviewed five children each, a total of ten children, eight boys and two girls, in a structured interview format. All of the interviewed children had worked on cocoa farms in Côte d’Ivoire and since then returned to their countries of origins. Most of the children self-identified as trafficked children and some of them referred to the person recruiting them as their “trafficker” even naming them by their first name. All children agreed that that they had experienced abuse and exploitation while working on the cocoa farms.

While all interviewed children were identified with the help of local NGOs working in the border area, these identified children had not been in any previous contact with local NGOs, international groups or government agencies working on issues of child trafficking or providing support to trafficked children. All interviews were carried out in local languages with the help of interpreters. The research findings presented in this paper are based on a descriptive analysis of the interviews with these ten children.

Research Findings
The interviewed children were between 15 and 17 years at the time of the interview. When moving to Côte d’Ivoire and starting to work on the cocoa farm, most children were between the ages of 10 and 12. The oldest child, a boy from Mali, was 14 years old at the time and the youngest child, a girl from Burkina Faso, was 7 years old. All of the children interviewed in Mali were male. In Burkina Faso, 3 boys and 2 girls were interviewed. Three of the Burkinabe children were born in Burkina
Faso, while two were born in Côte d'Ivoire to Burkinabe families. All of the children interviewed in Mali were born locally and were Malian.

<table>
<thead>
<tr>
<th>ID#</th>
<th>Country of Residence</th>
<th>Age</th>
<th>Gender</th>
<th>Length of Stay on Cocoa Farm</th>
<th>Year of Return</th>
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</thead>
<tbody>
<tr>
<td>B1</td>
<td>Burkina-Faso</td>
<td>17</td>
<td>Male</td>
<td>6 years</td>
<td>2008</td>
</tr>
<tr>
<td>B2</td>
<td>Burkina-Faso</td>
<td>17</td>
<td>Female</td>
<td>10 years</td>
<td>2007</td>
</tr>
<tr>
<td>B3</td>
<td>Burkina-Faso</td>
<td>16</td>
<td>Male</td>
<td>3 years</td>
<td>2005</td>
</tr>
<tr>
<td>B4</td>
<td>Burkina-Faso</td>
<td>17</td>
<td>Male</td>
<td>3 years</td>
<td>Not sure</td>
</tr>
<tr>
<td>B5</td>
<td>Burkina-Faso</td>
<td>17</td>
<td>Female</td>
<td>2-3 years</td>
<td>Not sure</td>
</tr>
<tr>
<td>M1</td>
<td>Mali</td>
<td>17</td>
<td>Male</td>
<td>2 years</td>
<td>2006</td>
</tr>
<tr>
<td>M2</td>
<td>Mali</td>
<td>16</td>
<td>Male</td>
<td>3 years</td>
<td>2007</td>
</tr>
<tr>
<td>M3</td>
<td>Mali</td>
<td>15</td>
<td>Male</td>
<td>2 years</td>
<td>2006</td>
</tr>
<tr>
<td>M4</td>
<td>Mali</td>
<td>16</td>
<td>Male</td>
<td>3 years</td>
<td>2006</td>
</tr>
<tr>
<td>M5</td>
<td>Mali</td>
<td>17</td>
<td>Male</td>
<td>4 years</td>
<td>2007</td>
</tr>
</tbody>
</table>

At the time of the interview, only two of the children lived with their biological fathers, while all but three lived with their biological mothers. Three of the children reported that their father had died; in the other cases the father or the child had left the family. Half of the children named neither “mother” nor “father” as their current primary caregiver. Two children named an uncle, one a grandmother and one an unspecified guardian. One child reported currently taking care of himself. The children have in common that none of them attended formal schooling at any point of time in their lives. Only one child from Mali had taken an adult literacy course.

Decision to Move Across Borders

The children reported first hearing about working on a cocoa farm from a variety of sources including relatives, community members, and the traffickers themselves. One child from Burkina Faso reported looking for work at that time, and three of the children from Mali were also looking for work. The remaining children did not look for work at the time.

The Burkinabe children were recruited for work in cocoa agriculture by either a family member or another person known to their caregivers. None of these children spoke directly with a recruiter; family members made the decision to send the child to work on the farm. A 16-year-old boy reported: “My father agreed to let me go with one of his friends, so I went. He told me that if I go, he will give me a bicycle. At first, I did not want to,
but my father and his friend told me I would get a bicycle." A 17-year old boy recalled: "My father passed me to someone that brought me to Côte d'Ivoire." A 17-year old girl said: "When I lost my father, my uncle talked to my mother, but I was young, and do not remember how it happened... My uncle told me nothing. He just said I had to go with him and find work. He spoke to my mother." Another 17-year old girl remembered: "A man regularly came to see my dad. One day my father told me to pack some bags to go with him."

All of the Malian children, on the other hand, reported that a "trafficker" approached and recruited them for the work in Côte d'Ivoire and they decided to go. All but one reported speaking with the recruiter, and in none of these cases did family members play a role in the child's decision to leave. A 15-year old boy said: "I met my trafficker, Ibharim, in my village... When I met Ibharim, he knew I wanted a bicycle, so he told me to come and work. He told me that when I come back, he would buy me a bicycle and radio. He had no contact with my parents. I did not know he was going to traffic me. I believed him fully." According to a 17-year old boy: "There is a village close to my village. I met a man in this village, and he took me and other children." A 16-year old boy reported: "I met the trafficker in Sikasso. He told us he would take us to his farm in Côte d'Ivoire. He said he would pay us every month, so we went with him. We got in a bus. There were five of us. We did not know each other, but we were from the same village."

Most of the children said they either were not told or did not understand what exactly they would be doing in Côte d'Ivoire, and some thought the work would entail familiar farm work, such as weeding. All children had worked previously in agriculture in their home countries but they had no experience working on a cocoa farm. The children from Mali were promised money, sometimes in exact amounts ranging from 75,000 CFA (about $150 USD) to 125,000 CFA (about $250 USD). While no specific promises were made to several of the Burkinabe children, others were promised various consumer items such as a bike, a radio and/or clothing. Family members of the Burkinabe children were also promised money and/or clothes in return for sending their children to work in Côte d'Ivoire.

The motivation to earn money for themselves and to support their family were critical factors in the decision of several children to leave. A 16-year old boy from Mali described these expectations while travelling to the cocoa-growing areas together with the trafficker and several other children: "We slept in the bus. There was one adult and five children. We did not realize anything was wrong. To us we were going to make money on the farm. I was going to give money to my mother and father." Another
The 16-year-old male from Mali reported: "I wanted to make myself some money and to buy a bicycle and a radio." Half of the children indicated that they did not inform their family before leaving for Côte d'Ivoire or that they left against the wishes of their caregivers.

The Journey Encountered
All of the interviewed children were trafficked without any other family members, except for one child from Burkina Faso, who reported leaving together with several cousins. All children except one said that the person who arranged the travel also traveled with the child. Only one child spoke of carrying the papers required to legally cross the border to Côte d'Ivoire, the other children crossed the borders without documentation.

The traffickers sometimes used informal border crossings or, when travel documents were asked for, they talked to the border guards and afterwards were given permission to cross the border together with the child. A 17-year-old male from Mali recalled: "We went by bus. We saw the police. We did not speak with the police but the trafficker did. We did not hear a word." A 16-year-old boy from Mali reported: "At the border, we met the police. They asked us if we had papers. The trafficker left us and went to the police. They talked for a while after which the policeman got into his car and left. We did not hear him [the trafficker] talk to the police."

Several of the children were trafficked in a group together with other children to the cocoa-growing areas. Most often, the children traveled by bus and they did not have to pay for their transportation. However, one child was asked to work to pay off the cost of his transportation after arriving at the cocoa farm. Most of the children were brought directly to their final destination, and they were left with the farmer, most often a person previously unknown to the child.

Work Conditions Experienced
All of the children described the work that they had to perform on the cocoa farm as "very hard," "very bad" or "too difficult." All children reported working long hours, with the shortest said to be a nine-hour day. Most children described working from sun up until sun down, and only one child was given one free day per week. A few children were allowed a half hour or hour-long lunch break, but most worked all day without regular breaks. Only two of the ten children said they were allowed to rest when they were sick. All the children expect for one reported being sick while on the cocoa farm, from headaches to con-
tracting malaria, and most did not receive medical treatment. A few children received herbal medicine.

Once on the cocoa farm, all of the interviewed children reported restrictions in their freedom of movement. They described constant supervision, threats, and beatings for taking breaks or leaving the farm. Most cocoa farms were small, around five to seven hectares, and included between two to ten other workers including the owner and his family. All of the children were involved in cocoa harvest activities including the picking and carrying of cocoa pods, and cocoa pod breaking and drying activities. Most of the children performed other agricultural activities in addition to cocoa farming. Three children reported fetching firewood or water, and one reported doing household chores. A 17-year old boy from Burkina-Faso had the following duties: “Clean the farm; picking cocoa pods; drying and preparation; and carrying cocoa to dry storage. I also worked on the coffee farm at night. It was essential work that I had to do. There were many difficulties. I did not cope well. The transport of the load all the way to the truck was bad on the back and the head. This was harsh. The coffee culture is also difficult, because of the work at night and the insects.” A 17-year old Burkinabe girl gave this account of her work: “Since childhood I was the dishwasher and the cook. In the field, one paddled the cocoa for drying in the sun. Once dry, we cracked open the nuts for another drying. Once dried, the cocoa was able to be sold by the farmer. Afterwards, we weeded the rice. If there was a lot of work, we returned to the cocoa farm to weed the field.”

The children listed working with cocoa and especially carrying it as the most difficult part of the work that they had to perform in Côte d’Ivoire. Only three of the ten children were provided with protective equipment, such as boots, to wear while working. All children reported working together with other trafficked children and/or knowing of other trafficked children on farms nearby.

The children stayed with the family of the farmer and slept in a room in the farmer’s house together with many other occupants. One child from Mali reported having to pay for his housing while all other children said that housing was provided by the farmer without charge. Most children completely lost contact with their family while working in Côte d’Ivoire. Only two children from Burkina Faso reported maintaining some contact with their parents in this period of time.

Realization of having been “trafficked”
All of the interviewed children had heard of and understood the concept of child trafficking at the time of the interview. The children reported
having learnt about child trafficking from various sources including parents, family, friends, radio and television, and their own experience. Most of the children thought that they had themselves been trafficked, however, one child was not sure about having been trafficked, and one boy did not think he experienced trafficking. All of the children however report experiences of exploitation on the cocoa farms.

Every single child reported being verbally and/or physically abused while working on the cocoa farm with either insults, threats of physical violence or both. Four of the five children from both countries experienced physical violence. Of these, all were beaten repeatedly. Any child that tried to run away was beaten, including one Malian who said he was “beaten on the back until bleeding.” All children but one from Burkina Faso observed other children being beaten as well. Mental abuse was reported by four children, including being called a “parasite” and “cursed.” One Malian child reported being sexually abused by the farmer’s wife and another Malian child said that he saw aggressive sexual activity, although he never experienced it himself. A 17-year-old girl from Burkina Faso reported: “Often, if I said that I wouldn’t do the work, I was injured and beaten by the farmer, his wife, and, often, the children. What was done to me was bad. It was the insults and beating me that was bad.”

While many children were promised money or material goods in return for their work, only two of the children reported receiving anything other than food and shelter. One child from Burkina Faso received a total of 70,000 CFA (or about $140 USD) for his work, while a second one from the same country received 60,000 CFA (or about $120 USD) after two years of work. None of the other children received any compensation for their work. The Malian, who was asked to repay the cost of transportation to the farm, had to work for three years to pay off the debt.

All of the children report deception and broken promises. They agree that the agreement that they had with the recruiter about their work changed after they arrived on the cocoa farm. A 17-year-old male from Mali described an experience that he shared with several other trafficked children on the farm: “We worked for the farmer for a month. At the end of the month, we asked the farmer for our payment. The farmer told us that we would not be paid by month but at the end of the year, or when we want to leave he would pay us. He said he would pay us CFA 75,000 per year and that we would have to wait. He said he will give us the money after he sold his cocoa. We worked for a year but we were not paid. We worked for another year, and we still were not paid.” A 15-year-old boy from Mali recalled: “The
trafficker used to visit us once a week for a year... He used to collect our money from the farmer. When we asked for pay, he told us not to worry, he had it. After a year, he disappeared. We never saw him again. We asked the farmer for our pay, he said he gave it to the trafficker. We never saw him again.”

Journey Back “Home”
The interviewed children share the experience of eventually leaving the cocoa farm and returning to Burkina Faso and Mali. Several children reported running off to escape the long working hours, the violence, and because they realized that the farmer was not ever going to pay them. One child returned home after learning of the death of a family member, and another child left because of the crisis in Côte d’Ivoire.

Most children returned by bus and some paid for their transportation. Some of the children returned home accompanied by other trafficked children. All of the children reported that they were “very happy” and felt “joy and satisfaction” after reuniting with their family. However, one child, a 17-year-old male from Mali, said that he “was content to rejoin my family, but unsatisfied.” Another 17-year-old Malian boy summarized: “My family was pleased and upset. They had been looking for me.”

It is noteworthy that none of the interviewed children reported any contact with the police at any point of time while in Côte d’Ivoire or after returning to Burkina Faso and Mali. The children also indicated that none of their parents or caregivers had contacted the police even though their family had been searching for them after their departure.

Income and Consumption
Most of the interviewed children were promised consumer goods, such as a bike, a radio, clothing and/or money, in return for their work. The children repeatedly mentioned the promise of these desirable items, especially bikes, as motivation behind their decision to leave with the trafficker. During the interview, the children continued to stress their desire for jobs and income. Several children mentioned the need to earn a “sufficient” income or “a lot of money.” From their perspective, the lack of opportunity in their home countries may be the single most important factor contributing to the trafficking of children: “Give them a fund to start a business or do an apprenticeship in sewing, hair or selling in order to get an income.” “We need jobs. We went there to make money for bikes, radios, clothes, and take money home.” “If children are given good jobs, they won’t go to Côte d’Ivoire. A job is most important for children, boys and girls alike.” “Need to create jobs for children in Mali, so they will stay here.”
Education and Vocational Training

Each of the interviewed children expressed ideas and plans for their individual future including becoming a mechanic, carpenter, dressmaker, chauffeur or civil servant, engaging in "roadsides sales and market gardening to prepare for marriage" and "agricultural work in my village." None of the children considered returning to cocoa farming in Côte d'Ivoire nor would they recommend this occupation to another child. Four out of ten children considered work in agriculture in Burkina-Faso or Mali a future option. When being asked how they plan to achieve their professional goals, many children mention study and training, however, they often indicate that they consider income more important than schooling, and they express an interest in receiving training in specific job skills rather than formal education: "More schools are needed to teach us skills to earn our living." "I want to study, but today I want a bicycle."

Awareness Raising and Information

Several children stressed the importance of awareness raising and information about child trafficking to provide children with the knowledge necessary to make informed decisions and avoid abuse: "Children need awareness that they should not go to Côte d'Ivoire. It is not good." "Tell children not to go to the cocoa farm." "A campaign needs to tell the children the truth about work in Côte d'Ivoire. Children from here should not go there ever again. No child should suffer like I did." "I think that Malians need to speak to one another and regularly concern themselves with the phenomenon, and not allow the children to leave." "I think we can set up projects, activities everywhere and to speak about the situation." "Organize the population to sensitize the children." "Parents should not send their children. Children are talking to their parents about this issue."

Law Enforcement and Social Intervention

In order to prevent children from being trafficked, the children suggested to empower as well as to protect: "Children need to be protected, and informed so that they are not able to be trafficked." Several children stressed the need for more effective law enforcement: "We need more police on the road. If a bus wants to cross, police must check with all the passengers, ask questions to all, and not allow small children to leave without the parents." "I don't know about laws and penalties for trafficking. If there are, I want to know." "I think that the laws have impact, but have to be enforced." When asked about what should happen to their traffickers, most of children said that "they need to be arrested and sent to jail." Only one child said: "I
do not want anything bad to happen to him [the trafficker], even though he treated me badly.” Some children argued for government intervention to satisfy children’s needs: “We need to be supported by the government. We need to have our needs met. We go to Côte d’Ivoire because they are not being met.” “We need to identify needs of children and give it to them.” “Shelter each and every one against the bad.” Two children expressed the desire for more “respect for children” and “respecting their rights.”

Conclusions

If you ask me was I trafficked by my uncle I would say yes as I was mistreated, worked hard and earned nothing. For me this is what I understand as trafficking.

– Interview, 17-year old Female, Burkina Faso, 2008

Young peoples’ descriptions of their consumer desires to move across borders for employment, the decision-making preceding their journeys and the strategies used by them to make sense of their disappointments contradict the assumption that trafficked children are simply passive victims of parental authority or household poverty.

Most of interviewed children understood their experiences on Ivorian cocoa farms as trafficking by connecting the unacceptable labor conditions they faced with the abusive treatment they received and the lack of payment for years of work they had provided. They did view trafficking as an outcome of a lack of employment opportunities in their countries of origin and not as a factor of migration as such. The children indicated that had their countries of origin provided them with decently paid jobs, none of them would have left to work on Ivorian cocoa farms.

Half of the interviewed children left their families based on their own decisions and even though they feel deceived by traffickers and employers, upon returning back several of them chose not to return to the household that they had left when going to Côte d’Ivoire. In fact, one child reported that he might even consider going back to Côte d’Ivoire in case he was not able to earn enough money for his bicycle in his home country. At the same time, while most of the children were aware of having been trafficked, none of them reported any contact with police or government agencies while they traveled to and from the cocoa farms or after their return to Burkina Faso and Mali. They also did not receive any support by non-governmental and private sector interventions upon returning back.
Despite the findings reported by several household surveys undertaken in 2006 and 2007 under the Harkin-Engel Protocol that found little or no evidence of child trafficking in the cocoa producing areas of Côte d’Ivoire and Ghana, this pilot study conducted in the border towns of Mali and Burkina Faso with self-identified trafficked children suggests that trafficking of children for forced labor purposes does exist and may be not uncommon. In fact, the interviewed children all reported other cases of trafficked children in the cocoa-growing areas on the same farm and/or other farms nearby. They also frequently report having been trafficked to the cocoa-growing areas together with other children.

While evidence of child trafficking as a phenomenon is overwhelming, the extent of the problem has remained controversial. Only representative research in the areas or origin as well as the areas of destination may be able to provide certainty about the number of child trafficking cases and the success of prevention and intervention efforts. To achieve this, the Harkin-Engel Protocol may need to extend its reach beyond the cocoa growing areas. Furthermore, it may want to not only research working children, but also factor into the assessments the recommendation made by them. After all, what could be more effective and sustainable than children, previously exposed to the worst forms of child labor, speaking for themselves about their increased well-being?

NOTES

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2. Assistant Professor, Payson Center for International Development, Tulane University, New Orleans, LA.
4. Excerpts from interviews conducted by Anita Sheth on a Save the Children Canada trip organized in February 2008 to Mali and Burkina Faso. The name of the interviewee has not been given to protect their identity.
6. Id.
7. Id.
9. Id.
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21. Id.
26. Id. at 41.
28. Id. at 3.
29. Off, at 71.
30. Id. at 118.
33. Id. at 56. (Interviews with trafficked subjects upon return to their countries of citizenships)
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63. Kerry Howley, The Myth of the Migrant: Laura Maria Agustin Wears Franco Talk About
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69. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and
70. Id.
71. Interview by Anita Sheth, 15 year old male, Sikasso, Mali, February 2008).
73. Id.
74. Mike Dottridge & Olivier Fencyrul, Action to strengthen indigenous child protection
mechanisms in West Africa to prevent migrant children from being subjected to abuse, Terres


76. Id. at 65.


80. Id.


82. Id.

83. Id.


85. Id.


87. Id.

88. Id.


92. Id.

"Immigrants come from other regions of Côte d’Ivoire (in 15 villages), Burkina Faso (15), Mali (18) and elsewhere (5). Immigrants who settle in the villages are from the same countries as those who migrate on a seasonal basis, a result that would indicate an existing relationship between these two groups. Those who come on a seasonal basis may come at the request of relatives who have settled in these villages. All departments in 10 regions have experienced permanent immigration. Moreover, 86.1% of villages believe that the population has increased in the last ten years, while 8.3% believe it has fallen. Young people emigrate from 69.5% of localities. The nature of their emigration varies, but most is tied to looking for work. Young people are more mobile than adults (69.5% of localities, versus 52.8%). Generally there are a number of reasons for this, such as the limited burden represented by dependents, the need to free oneself from family supervision and the weight of tradition and the need of young people to express their economic independence. 93% indicated that leave because there is no opportunities to learn a trade in their home countries." The Government of Côte d’Ivoire Steering Committee For The Child Labour Monitoring System Within The Framework Of Certification Of The Cocoa Production Process, "Diagnostic Survey in Agnibilekro, Tiasale And Sou," November 2007, http://www.cocoaverification.net/Docs/Cdl_pilot_survey_report.pdf.


FEMINIST PERSPECTIVE TO TEENAGE RAPE IN CHINESE CRIMINAL LAW

Gulazat Tursun*

Rape is a very serious offense in many jurisdictions for which potentially substantial prison sentences are either required or permitted. Many jurisdictions, by statute, interpretation, or in application—tend to emphasize either compulsion or lack of agreement in the rape crime. Chinese criminal law uses a similar approach to criminalize rape in Article 236 by stating that whoever, by violence, coercion or other means, rapes a woman is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment. Article 236(2) further states that whoever has sexual relations with a girl under the age of 14 is deemed to have committed rape and is given a heavier punishment. However, a judicial interpretation elaborating on this provision drew a huge amount of public debates in China, which has not stopped until recently. On January 17, 2003, The Supreme People's Court issued a "Reply on the Question of Whether the Perpetrator will Commit a Crime of Rape if He has no Knowledge that the Girl is under the Age of 14 and had Sexual Intercourse with Consent." According to the Judicial Interpretation, if a person has sexual intercourse with a girl with the knowledge that she is under the age of 14, he will be accused of rape in spite of consensual sex and he will be convicted according to Article 236(2). If the person does not know the age of the girl and it is impossible to know it through her physical appearance, and if the circumstances are clearly minor and the harm is not serious, the person is not guilty of rape. When the Interpretation was issued, there had been a lot of serious debates and discussions among scholars. In fact, in early 1995, the Supreme People's Court issued judicial interpretation decriminalizing consensual casual intercourse with a teenage girl, and another judicial interpretation in 2000 reaffirming that provision.

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However, the 2003 Interpretation encountered huge criticism from social science scholars who regard the interpretation as a tolerance of rape, while the scholars of criminal justice supported the interpretation firmly by stating that criminal law should insist on the integrity of objective and subjective elements. According to criminal law scholars, the interpretation promoted the consummation of Chinese criminal law and the signal of Chinese criminal law walking towards the rule by law. Surprisingly, there is scarcely any literature available from Chinese feminists about this interpretation.

This paper reviews the interpretation and provisions in criminal law from a feminist perspective. The purpose of this article is not to offer new ideas for improving Chinese rape provisions, nor to criticize current criminal policies in regard to women. Reforms need to be grounded in accurate perceptions of social reality, including a realistic understanding of teenage sexuality under the backdrop of the current open society. Conversely, the aim of the paper is to lay a foundation for feminist discussion on reforms by reexamining the judicial interpretations in Chinese criminal law. This paper explores three problems: first, it looks at the regulations of teenage sexuality in Chinese law. It reviews interpretations of the Chinese Supreme Court with regard to rape, and analyzes several problems such as consensual sex, minor circumstance and no harm further. Secondly, it describes the integrity principle of object and subject in Chinese criminal law and shows fallacies of this principle by analyzing the criminal concepts in other related articles of Chinese Criminal Law. Finally, it argues the rape provisions in Chinese criminal law from feminist perspectives and suggests that the current interpretation on rape crime not only highlights the contradiction in Chinese criminal law, but also shows the confusion of Chinese criminal policies in regard to teenage sexuality.

1. Rape Crime in Chinese Criminal Law

Rape, as commonly defined, revolves around force and lack of consent in sexual intercourse. In Chinese criminal law, it is a crime of infringing upon the rights of the person and the democratic rights of citizens. The first criminal law promulgated in 1979 divided the rape crime into the crime of raping a woman and the crime of raping an underage girl. These crimes are formed only if a person raped a woman by violence, coercion, or other means, or has a sexual intercourse with an underage girl. According to this provision, although raping an adult woman requires the integrity of act and mental state, sexual intercourse with
an underage girl did not demand mental state or requisite knowledge. The crime of raping an underage girl is formed only if a person has sexual intercourse with an underage girl. In the twenty years since, Chinese criminal law avoided emphasizing the knowledge level in order not to stir up public anger, and did not require knowledge about the age of victim although it is one of the important factors in the process of adjudication on rape crime. Legislators also tried to avoid answering this problem directly. The second amendment of Chinese criminal law also kept the crime of raping underage girl in article 236(2). Before and after the second amendment of Chinese criminal law, the Supreme Court and Supreme Procuratorate issued legal interpretations on rape crime and interpreted the criminalization of sexual intercourse with an underage girl in 1984 and 2000 respectively. In these two explanations, law scholars explained the rape crime in Chinese criminal law as strict liability and advocated strict liability on the Chinese criminal law. In 2002, the crime of raping an underage girl was cancelled and it was put under the crime of rape. The current Chinese criminal law defines rape crime as (1) by violence, coercion or other means, rapes a woman, and (2) has sexual relations with a girl under the age of 14.

The second part of article 236 is concerned is a very ambiguous regulation since it does not elaborate on the required actus reus or mens rea of sexual relations with a girl under the age of 14. Law scholars interpret it either as deliberate or not deliberate while it is hard to judge the age of victim of the rape. That is why this article in criminal law did not attract much attention from the society or scholars until 2003, when the Supreme Court issued a reply to the letter of Liaoning Higher Court. In the letter of Liaoning Higher Court, it said the victim was 13 years old, 1.65 high and 60.2 Kg heavy when the case happened. She talked with many men on the internet with the name of “crazy woman” and met with them outside, and had sexual relations with six of them. When the case came before local prosecutors, although they came to a consensus on the fact of raping underage girl, they could not come to a consensus on whether it amounted to a crime. They asked the Intermediate Court and the Intermediate Court faced the same problem, so it asked the Liaoning Higher Court. The Liaoning Higher Court could not decide whether to apply article 236(2) and wrote to the Supreme Court. On 17 January 2003, the Supreme People’s Court issued a “Reply on the Question of Whether the Perpetrator will Commit the Crime of Rape if He has no Knowledge of the Girl that she is under the Age of 14 and had a Sexual Intercourse with Her by Consent.”
The judicial Interpretation formally elaborated on article 236 (2) for the first time. According to the judicial Interpretation if a person has sexual intercourse with a girl under the age of 14 with the knowledge that she is under the age of 14, he will be accused with the crime of rape, in spite of consensual sex, and he will be convicted according to article 236(2). If the person does not know the age of the girl and it is impossible to know it through her physical appearance, and if the circumstances are clearly minor and the harm is not serious, the person is not guilty of rape. After its release, the 2003 Reply drew serious debate in China's legal society. Criminal law scholars supported this interpretation firmly and advocated that it promotes the legal reform in criminal justice by establishing the position of the principle of subject-object integrity. But scholars from other humanities and jurisprudence objected to this explanation, stating that it only allows more raping of underage girls under the guise of no knowledge about the age of victim.

2. Crime Composition and Rape Crime
In Chinese criminal law, crime and crime composition are different concepts. Article 13 of Chinese criminal law defines crimes as "all acts that endanger the sovereignty, territorial integrity, and security of the state; split the state; subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine social and economic order; violate property owned by the state or property collectively owned by the labouring masses; violate citizen's privately owned property; infringe upon citizen's rights of the person, democratic rights, and other acts that endanger society are crimes, if according to law they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes." According to the enumeration, an act will be a crime if it endangers the society, violates criminal law and is punishable by criminal law. Chinese criminal law excludes minor offenses that do not harm society. Chinese criminal law further elaborates on the elements of crime composition. The essence of Chinese criminal law is the crime composition. Crime composition includes object, subject, objective and subjective elements. Subject and subjective elements include the natural and legal entity who posses the legal ability and mental state in committing a crime. Object and objective elements include criminal behavior and criminal result. A judge looks at the crime composition in adjudicating a case. Integrity of objective and subjective element is the
basis of crime. The principle of the integrity of objective and subjective elements means that the establishment of crime not only requires the person to commit an offense that threatens the social security objectively, and possess intentional and negligent purpose subjectively, but also requires the unity of objective content and subjective content of crime. An act is only a crime if a person conducts an act purposefully and his act endangers the social and personal interest objectively. If the person did not act purposefully, and there is no prerequisite knowledge about the object, he should not be responsible for the offense he committed.

According to this theory, criminal law scholars insist that if a person has no requisite knowledge about the age and mental/physical state of the girl being raped, and it is impossible to know from her appearance, he should not be convicted. Knowledge and behavior are the main factors in criminalizing such offenses. The 2003 Reply only clarified the principle further and established the position of the integrity of objective and subjective elements. It is wrong to convict a person when he has no knowledge about the age of the victim. In rape law, if a man is convicted for raping an underage girl when he has not inflicted upon her any harm, and it is consensual intercourse, it violates the rights of the man and contravenes the principles of Chinese criminal law. Some law scholars advocate strict liability by invoking product liability in Chinese criminal law, and claimed that consensual sexual intercourse with underage girl should be handled by adopting strict liability. However, other criminal law scholars insist on the impossibility of importing strict liability from common law to Chinese criminal law, and advocate that it is not proper and contravenes the Chinese criminal law to apply strict liability for the rape crime.

However, when we look further at the definition of crime and crime composition in Chinese criminal law and analyze the rape crime logically, we may find some logical contradiction which deserves notice.

First, if we look at the statutory and theoretical definition of crime in Chinese criminal law, we will find that Chinese criminal law enumerates several types of threats which endanger state, society and individual interests. As an exception, Chinese criminal law emphasizes that “if the circumstance is minor and harm is not grave, it is not crime.” Therefore, if the circumstance is serious and harm is grave, but the offense is not regulated in criminal law, it still should be put under the criminal law. In practice, in those kinds of cases, local justice systems often ask for a reply or explanation from their higher level courts, and
higher level courts ask the Supreme Court. The Supreme Court issues replies or explanations according to the circumstance. Its explanation sometimes gets away from statutory regulation. In the above case, criminal law jurists confirmed that the Supreme Court issued a correct interpretation, even if it got away from the principle of criminal law.\textsuperscript{13}

Secondly, although strict liability is not welcomed by Chinese criminal law scholars, it was reemphasized through the 2003 Reply, and if we analyze the explanation, we may find the position of strict liability in Chinese criminal law and confirm the applicability of strict liability still by adopting the 2003 Reply and its theory of crime composition.

From the above chart we see that rape crime composes of objective conditions such as violence and non-consent, and subjective elements such as intent and negligence. In regard to raping an underage girl, a person will be convicted of the crime of rape although they have consensual intercourse only if the defendant has some idea about the age
of victim. Or he can be convicted of the crime of rape if he inflicted harm and the circumstance is serious, despite his lack of knowledge about the age of victim. Therefore, may we conclude that the last sentence is equal to strict liability? If we say no and still advocate equal protection of men and women on the basis of integrity of objective and subjective elements, I think we have to adjust criminal composition of the rape crime in Chinese criminal law.

3. Feminist Explanation on Underage Rape in Chinese Criminal Law

Since the early 1970s, China has witnessed a major growth in feminist scholarship in the fields of sociology and literature. This work has begun to challenge the content, as well as the parameters, of knowledge in these areas, and played very important role in empowering women. However, legal area, especially criminal justice, are left unnoticed in Chinese feminism study despite the close connections between criminal justice policy and women.

Similar to other legal systems, Chinese criminal law covers provisions related to women's rights, such as abducting women, buying abducted women, obstructing the rescue of abducted women and raping adolescent and teen girls in its several articles. The Act of "Protecting the Right of Women" emphasizes the rights of women by stating that a woman has the right to be immune from any sexual harassment. In Chinese criminal law, a perpetrator convicted of rape as a crime of infringing upon the personal rights and democratic rights of citizens can be sentenced to anywhere from a three year prison term to the death penalty, based on the factual circumstance. However, like other jurisdictions, Chinese criminal law governing rape developed more with an eye toward protecting men from false accusations of rape, than with a goal of protecting women from sexual assault. A man gets more protection in rape related cases when the victim can not provide elements such as coercion or requisite knowledge. That is the situation reflected in 2003 Reply also.

According to the words of the 2003 Reply, in consensual sex with an underage girl, the perpetrator will not be convicted of rape crime if a circumstance is minor and harm is not grave, and if he does not know the age of the victim. But how does one look at the harm and circumstance and say "that is not serious?" Can temporary physical result or other actual appearances of harm become a basis of judgment? How can courts measure the harm when harm includes mental and physical harms? I think it is not such an easy job to answer these questions. Any
casual judgment on this problem cannot stand up to logical reasoning of law in the long run, particularly in China as the sexual intercourse problem connects with success of the birth control policy of China.

First, exclusion of teenage sex from criminal law on the basis of no harm not only violates the principle of criminal law, but also contravenes the spirit of law. The rape crime is regarded as a crime of no victim if the sexual intercourse is conducted voluntarily. A no-victim crime is a crime conducted by two parties in consensus and the victim accepts the infliction upon him/her voluntarily. Both parties do not feel harm in those cases. But most jurisdictions impose punishment on these offenses in order protect society. For example, prostitution is a crime under "Crimes of Disrupting the Order of Social Administration." The purpose of establishing this crime is to keep the social order. According to a rationalistic model, laws are created as rational means of protecting the members of society from social harm. An act of harming is one which causes harm to people; it is a setback to their interest. State interests, individual interests and the interests of society may be frustrated from different harms. But, the word "harm" is vague in legal sense. As far as the rape crime is concerned, the harm of a rape crime may not be as direct and quick as other crimes against women and teenage girls, and any consensual sex does not reflect the willingness of teenage girls. Social science research already indicates that teenage girls consent to sex for a variety of reasons that lie well beyond sexual desire and love. Some teenage girls have sexual intercourse without understanding the future consequence at all. The state takes the responsibility of protecting teenage girls from harm by regulating special rules and imposing strict responsibility on those who want to harm teens. The reluctance of lawmakers to regulate teenage sex reflects the bias of law, and in the long run, causes the failure of law when many people lose belief in its effectiveness.

Therefore, failure to regulate teenage sex frustrates the whole society by ruining the social morality and order. Consensual sex not only brings setbacks to the interest of teenagers, but also spoils the goal of state to keep good social order. The result of teenage sexual intercourse can be seen in different ways. It is clear that there are considerable risks inherent in adolescent sexual conduct. Let alone a myriad of ways in which minors, because of their inexperience, are vulnerable to exploitation in their sexual interactions. Scholars from various fields have documented these risks, and explored the harms suffered by victims of abusive sexual conduct. Perhaps, the most obvious, though by no
means the most grave, of these risks is unintended pregnancy, and the social consequences of teenage child bearing. Those who are familiar with the problems stemming from teen pregnancy immediately understand the far reaching implications of this information. The failure to use contraception, particularly condoms, exposes teenagers to many additional risks, such as sexually transmitted diseases, and even HIV. Girls who have their first children as teens are less likely to complete high school, less likely to marry, less likely to be able to support their families, more likely to have children who are prone to participate in criminal activities, and more likely to require public assistance at various points in their lives than are girls who postpone childbearing until after their teenage years. At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the years, have significant social, medical and economic consequences for the mother, the child, and the state. Of particular concern to the state is that approximately half of all teenage pregnancies end in abortion, and of those children who are born, their illegitimacy makes them likely candidates to become wards of the state.

Thirdly, the State, as the organizer of social activity, has a compelling interest in preventing such pregnancies and diseases caused by them. China implemented a birth control policy in the 1970's and achieved great success in family planning policy. But moral crises came contingent with the development and challenged the birth control policy, bringing about some social problems. The women in Chinese society used to be conservative, and the "virginity" of a girl was regarded as very important for her happiness. But with the development of China, the moral attitude of people to sex has experienced great changes. Co-living and having a baby before marriage are accepted by people. Teenage maturity sped up as the result of more information that became available to them. Of course, contemporary society's relatively promiscuous climate makes it extremely difficult to articulate the appropriate role for the criminal justice system in approaching non-violent, no-knowledge sexual intercourse, and as the result the interest of women and teenage girls are neglected by legislators. The 2003 Reply reflects the situation. As far as I am concerned, and for many feminists, removing teenage sexual intercourse from the scope of "morality" and emphasizing the factual knowledge of the rape crime does not sit well with many people. The law of statutory rape reflects an attempt to protect teenagers from themselves, as well as from those who may prey upon their vulnerability. The revival of interest in statutory rape in China reflects a concern
with teen pregnancy and the harm it causes to the social fabric, and in particular, to the public coffers. Chinese legislators should consider the logical connection between women’s right and the birth control policy, and put the sexual right of teen age girls on salient position.

Finally, in most jurisdictions, all that is needed to determine culpability is evidence that the victim’s age falls within the framework protected under the state law, and that sexual contact occurred. The defendant’s state of mind, including the extent to which he believed his partner was older than she was, generally is irrelevant. The “Reply” of the Supreme Court intended to embody justice inherent in law under the condition of no harm by repealing consensual sex with teen age sex, contravene to the public policy, and it is a very short-sited decision. Moreover, in spite of the warm welcome by criminal law scholars, the “Reply” neglected the differences of men and women by over mentioning “harm” and “circumstance,” while it did not notice the far-reaching physiological and social impact of teenage sexual intercourse has on the whole society. At the same time, I think “strict liability” can be reasoned from the crime concept in Chinese law and fits in to the interest of teen age girls in the rape crime. Chinese criminal law leaves a reasonable opportunity for jurists and other participators by stating that “it is not crime if the circumstances are clearly minor and the harm is not great” which imply that “it is [a] crime if the circumstances are serious and harm is grave” despite the fact that it is hard to define the level of knowledge required to commit the offences. A Chinese judge may consider the indirect social harm of teen age sex and policy goal of government in defining rape.

**Conclusion**

Legal systems throughout the centuries have treated women as subordinate to men. It is only recently that women have been granted equal rights with men; explicit anti-discrimination statutes are yet more recent. Yet even now, women remain substantially disadvantaged in many aspects of social life, especially teenage girls who do not understand their rights and needs, and are exploited by rapists very easily.

If the safety of even a small group of women is seriously threatened in some way by a particular policy, the policy does not deserve feminist support.¹ In many societies, power is monopolized more by men than women. Criminal law as a state policy reflects the interests of men and protects those interests. Chinese criminal law regulates several provisions in respect to women’s sexual rights. But, like other jurisdictions,
Chinese criminal law cannot avoid favoring men in rape crime in procedural and substantial process. The Supreme Court announced that local courts should not use the 2003 Reply after there had been a lot of resonance objecting to the Reply. But, it is not the success of feminists. It is the just beginning of right conscience. Chinese criminal law is awaiting the active participation of women in its consummation process.

NOTES

1. Criminal Code 1997 regulated the crime of rape and rape of a teenage girl under the age of 14 separately. But the Supplementary Regulation on Crime Names in the Chinese Criminal Code 2002 issued by the Supreme People's Court and Supreme People's Procuratorate redefined the article 236(2) and named it as crime of rape.

2. Article 236 does not state anything about the mental state of perpetrators, it only enumerate several type of acts used in rape. The mental state is stated in the general provision of Chinese criminal law by elaborating intentional and negligent crimes separately. The Chinese criminal law scholars view it applicable to the crimes in specific provisions. But the "Explanations" mentioned clearly the mental element of the crime of rape through this interpretation.

3. These two interpretations emphasized the outcome of rape and stated that it is not crime if the circumstance is minor and does not cause serious harm. Some scholars attribute it to the objective standard.

4. Chinese Criminal law emphasizes the integrity of objective and subjective elements in composing crime. Objective elements include acts, outcome and casual relations; subjective elements include intention, motive. The composition of crime requires objective and subjective elements together. Therefore some Chinese scholars object to the strict liability according to this principle.


7. But these two interpretations (decriminalized the casual volunteer sexual intercourse among minors with the condition of no serious harm and no threat.


9. Article 236 does not state anything about the mental state of perpetrators, it only enumerate several type of acts used in rape. The mental state is stated in the general provision of Chinese criminal law by elaborating intentional and negligent crimes separately. The Chinese criminal law scholars view it applicable to the crimes in specific provisions. But the "Explanations" mentioned clearly the mental element of the crime of rape through this interpretation.
11. It is not a statutory principle, it is deduced from the general and special provisions of Chinese criminal law and supported by criminal law scholars firmly.
15. See supra, note 6.
16. Article 236(3) enumerated ten years of prison term, life term prison and death penalty for raping a woman, teenage girl, and caused serious harm.
WINNFRED FALLERS SULLIVAN
THE IMPOSSIBILITY OF RELIGIOUS FREEDOM
Pp. 286. $29.95. ISBN: 978-0-691-11801-7

Reviewed by Lisa Nicolosi

Introduction

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." The opening words of the First Amendment to the United States Constitution - together known as the religion clauses - have inspired heated debate and evolving interpretations of religious freedom in the U.S. The first religion clause, referred to as the establishment clause, is itself a source of legal dispute. Until 1940, the establishment clause had not been incorporated into the Fourteenth Amendment to bind individual state action, while today's Supreme Court understands the establishment clause to limit state action as well as national. Is incorporation against the states here proper, or was the establishment clause implemented to protect state-endorsed religion from federal oversight? In other words, did the Framers really contemplate a separation of church and individual state, or merely a separation of church and federal state? Does the establishment clause seek primarily to protect the state or the individual? In either event, when does government action rise to the level of "establishment"?

Likewise, the complementary - or oppositional - free exercise clause is often the subject of different interpretations. Is religiously-motivated behavior constitutionally protected in the face of neutral laws of general applicability? Supreme Court decisions have answered these questions differently at different times, and the Court is often met with wide criticism from legal scholars and professionals. At times, the Court has found protection in the First Amendment for religiously-motivated behavior that runs afool of generally-applicable legislation or regula-
tion. In 1990, the Court dramatically reversed course in Employment Div. v. Smith, holding that religiously motivated peyote use, a prohibited practice, was not exempted for the purposes of unemployment insurance eligibility. Scalia, writing for the majority, boldly (and some have argued, disingenuously) asserted: "we have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." Congress, in obvious disagreement, sought to circumvent the Court's decision legislatively, a move the Court swiftly and resoundingly rejected. But, regardless of the current judicial climate, prior to the determination of religion clause applicability, one question must always be answered: What behavior or belief rises to the level of legal recognition and consequent constitutional protection? In other words, what is religion?

In her book, The Impossibility of Religious Freedom, Winnifred Fallers Sullivan uses her experience as an expert witness in a Florida free exercise case to ultimately reach the conclusion that religious freedom, as articulated in the U.S. Constitution and interpreted by the courts, is an impossible achievement. Sullivan thoroughly chronicles the events of the captivating weeklong Florida trial, concluding that religious freedom as contemplated by the First Amendment cannot genuinely or completely be given effect by the court system. In order to invoke the Constitution's shield in free exercise cases, the court must first, she argues, determine whether the behavior or belief rises to the level of legal recognition and consequent constitutional protection. In other words, to examine whether religiously-motivated activity enjoys protection under the First Amendment, the court must determine if the activity is genuinely motivated by religion. In interrogating the legitimacy of "religious" behavior in this first instance, the court fundamentally destroys the very idea of religious freedom. By requiring authentication of the religious motivation, the court extends the free exercise clause only to behavior that is legitimated by virtue of external "proof": sacred texts, clerical pronouncements, widespread adherence, or historical tradition. The court does not, and, Sullivan contends, cannot broaden the reach of the free exercise to all unsubstantiated subjective claims of religious motivation, lest all laws be subject to exception. Moreover, subjective claims cannot be substantiated; that is, it would be impossible to prove the existence of a claimant's religious belief. Even if the free exercise clause were contained to substantiated subjective beliefs, the legal system would be riddled with unworkable exception. Therefore, in order to address free exercise claims, the courts are
forced to award only those claims that can be "legitimated" by external evidence; ultimately, only the "legitimate" religious institution, not the individual manifestation, perseveres.

Sullivan's experience at trial and trial-informed religious freedom discussion are coherently divided into five distinct, yet remarkably cohesive sections. Sullivan deliberately and effectively plots the reader's course in a style that avoids confusion and instead lends itself to a comfortable and engaged reading. The narrative traces the weeklong course of *Warner v. City of Boca Raton,* a Florida federal suit that sought First Amendment protection of gravesite displays in a Boca Raton public cemetery under the free exercise clause. The eleven named plaintiffs, representing different faiths (all Judeo-Christian), were in technical violation of the cemetery's regulations prohibiting grave markers or displays that were not flush with the ground. Each plaintiff asserted that their nonconforming displays were religiously motivated and thus constitutionally protected. The City, in response, sought to show that the plaintiffs had been made aware of the regulations before selecting the cemetery. More importantly, the City argued that the plaintiffs' displays were not sufficiently religious and did not trigger constitutional scrutiny. Under the City's theory, because religion was not involved, but instead purely personal and aesthetic preference, the City need only show that the regulation served a legitimate government interest. In this vein, the City maintained that limiting grave displays to plaques flush with the ground reduced lawn maintenance costs.

The first section, *Outlaw Religion,* sets the stage for the federal trial that will serve as the grounding for Sullivan's legal theory. The local environment in Boca Raton, Florida — the community from which *Warner* sprung — is thoroughly explored. In order to illustrate the contemporary socio-religious and political climate that provoked the clash and subsequent litigation, the last century's urban development is recounted, from migration patterns to aesthetics and zoning. Additionally, the section outlines the substantive effect of the legislative precursor to the lawsuit, the Florida Religious Freedom Restoration Act (FRFRA), signed into law in reaction to and immediately following the Supreme Court's rejection of the federal Religious Freedom Restoration Act (RFRA). The section closes with the background specific to *Warner:* plaintiff histories, the history and regulations of the public cemetery under scrutiny, and the facts culminating in litigation.

The second section, *The Trial: The Plaintiffs,* presents the testimony offered by the eleven *Warner* plaintiffs both in trial and by deposition.
It is here that the reader is introduced to each plaintiff's individual claim, as the trial begins to take shape. The plaintiffs' testimony proves instrumental to the book's argument; each plaintiff seats the source of their respective religious motivations in family and community tradition and lore, as opposed to sacred texts, widespread adherence, or hierarchical pronouncements. The judge admits that he does not doubt the existence of the plaintiffs' deeply-felt personal convictions. Instead, the litigation turns on whether personally-held religious belief is legally sufficient to warrant constitutional protection, or if external legitimization is instead required.

The third section, *The Trial: The Other Witnesses*, recounts the testimony of all other Warner witnesses: among others, the three religion experts for the plaintiffs – including the author – and the two religion expert witnesses offered by the City. As should be expected, the plaintiffs' experts – including the author – attempted to validate the religious nature of the threatened cemetery displays, relying in large part on historical practice and tradition. The City's experts predictably assumed oppositional stances, arguing that the religious texts, teachings, and rules were devoid of any reference to gravesite requirements. The assortment of religion expert witnesses presented by the litigants included a rabbi and four professors of religion, one of whom is also a priest.

In the fourth section, *Legal Religion*, Sullivan recounts the trial's closing arguments and the district judge's final opinion. It is here that Sullivan finally begins the project of her piece: a reflective analysis of the implications of the trial she so painstakingly presented. Rearranging the trial testimony she previously provided by tactic and degree of success, Sullivan attempts to separate the testimony that was given legal weight from that which wasn't, from there hypothesizing the distinction's motivation. Sullivan, at the most basic level, argues that First Amendment protection is conferred by the judge on the basis of recognition, intelligibility, and perceived legitimacy.

The fifth and final section, *Free Religion*, is surprisingly abbreviated, as Sullivan reaches her destination: the post-Warner location that informs her theoretical argument. It is here that the project's purpose is realized. However, the few pages devoted to the finale leaves the reader feeling somewhat shortchanged; after wading with Sullivan through every moment of a weeklong trial, the reader would naturally expect an equally thorough examination of her ultimate assertions. Instead, the closing section shifts style abruptly, lofting ideas and allegations with somewhat loose footing. While the foundation for the project is meticu-
ously laid and the reader carefully guided, the grand finale – perhaps theoretically sound but unexpectedly underdeveloped – falls short.

In addition to the five main sections, the book provides a sampling of images of the disputed displays and three extensive appendices. Appendix A provides all constitutional and legislative material relevant to the case at both the state and federal level. Appendix B contains the expert reports from the five expert witnesses extensively examined throughout both the trial and Sullivan’s text. In Appendix C, Sullivan includes the district judge’s full opinion as Appendix C.

*The Impossibility of Religion*, in the simplest sense, seeks to convince its audience that, because “religion” cannot be reduced to coherent definition, the free exercise clause is internally impossible in the American legal system. In the moment that the legal inquiry demands to define religion, the guarantee of religious freedom is lost. Because the law requires an examination of claimed religious motivation in order to offer the Constitution’s protection, religious freedom, as a legally protected constitutional guarantee, is undermined and impossibly achieved. In other words, religious freedom is possible, but cannot be guaranteed if its protection requires its definition.

Defining religion for the purposes of offering legal protection – defining legal religion – necessarily distinguishes between that which is religious and that which is not, that which is a manifestation of faith and that which is purely cultural. In making these distinctions, the project of freedom is immediately foreclosed, as the definition necessarily creates a realm of the “unprotected,” the behavior that is not acknowledged as religious enough to fall under the sweep of the free exercise clause. “Not religious enough” generally means “not attributable to a larger, classical, hierarchical religious structure that can be turned to by the court to validate the actions of its followers.” Therefore, the free exercise clause offers constitutional protection only to the traditional religious structure, not to the individually felt belief. Absent the “objective” validation of the religious institution, the “subjective” religious motivations of the individual are legally insignificant. This, as Sullivan rightly argues, is far from individual religious freedom.

The book’s ultimate flaws first become evident in the fourth section, reaching the point of project frustration in the conclusion; Sullivan’s ambitious endeavor is revealed as first unmanageable and finally an exercise in futility. The argument falters somewhere between her articulate and insightful observations and the resultant proposal, which, upon further reflection, suggests a change only in terms.
Sullivan seems initially perplexed by the Warner judge’s decision declining to extend constitutional protection to the plaintiffs’ cemetery displays. The two expert witnesses for the City, she notes, both offered the court rubrics for considering the suit, a case of first impression respecting the FRFRA. None of the plaintiffs’ experts suggested an appropriate test for the court to employ. In the end, the judge ultimately resorted to a test of his own fashioning, though his reasoning largely relied on a test provided by an expert for the City. The test sought to protect only that behavior that (1) could be linked to an authoritative sacred text, (2) had been consistently affirmed in classic constructions of religious doctrine and practice, (3) had been traditionally and continuously observed by the faith, or (4) demonstrated consistent adherence by members of the faith everywhere. In other words, according to the Warner court, only religiously-motivated behavior accompanied by coherent and legitimate external validation should enjoy constitutional protection.

Sullivan argues that the judge’s decision to fashion a test favoring the City – ultimately and entirely disregarding the plaintiffs’ expert testimony, including her own – evidences the judge’s personal conviction that the plaintiffs’ experts were unreliable, and that his own definitions of religion would instead suffice. Sullivan’s palpable frustration – a reaction to being largely ignored by the Warner court – informs and inspires her argument against the possibility of a functional free exercise clause, leading to two errors in her argument.

Sullivan’s first error begins with her explanation for the court’s chosen test. Sullivan acknowledges that none of the plaintiffs’ experts offered the court a rubric suitable for the decision required, and provides a detailed discussion of the two tests offered by the City. However, she fails to give this distinction sufficient weight in explaining the court’s test. Jumping from the experts’ testimonies and reports to the judge’s ultimate decision, she argues that the court found the expert witness testimony, without any additional sacred text or religious rule, largely irrelevant. Instead, in relying in large part upon the rubric offered by the City, the court showed deference to expert opinion – simply not the author’s expert opinion, or the opinion of her colleagues. Moreover, in a case of first impression, the court is likely to request and draw from the tests argued by the parties, yet the plaintiffs offered none upon which the court could rely. Here, the court’s reliance on the City’s test could be attributed as much to the failure of the plaintiffs to offer alternatives as to the judge’s disinterest in expert testimony.
Sullivan's next error lies in her failure to interrogate the meaning of her own location in the trial as an expert witness. She argues that the court refused to give credence to the expert witness testimony of herself and her colleagues, opting instead look to religious rules, sacred text, and the judge’s personal convictions. Regardless of the truth of this claim, she insinuates that the outcome would have been more religiously free had the judge fully considered Sullivan’s testimony. Here, Sullivan fails to locate herself in the religious hierarchy or consider her own legitimizing effect.

In other words, Sullivan’s status as an expert of religion is similarly flawed. Her presence does no more to protect the individually-felt beliefs of the plaintiffs than religious law or text. As she readily admits, the expert witnesses testified about historical practices in an attempt to legitimize the plaintiffs’ current rituals. While Sullivan adamantly spoke of the impossibility of religious freedom in response to a court that requires definite terms and verification, she failed to locate herself as part of that process. An individual’s subjectively-held religious beliefs are forced into socially-intelligible legitimacy and historical validity in the first instance by resorting to validation by expert authority, and in the second instance by a court that confers protection only to that which has been legitimized.

Ultimately, the book succeeds in demonstrating by example the inherent impossibility of a religious freedom that relies upon the legal system for effect. Sullivan is able to articulate her reasoning and soundly support her thesis with the Warner case study. Sullivan seamlessly transitions from narrative to argument, conveying a complex argument with relative ease. In proving the impossibility of religious freedom, Sullivan crafts a convincing case.

However, perhaps because the fifth and final section seems hurriedly abrupt, Sullivan misses the mark on her proposed course of action. Because the free exercise clause is specific to “religion,” she argues, it is necessarily unworkable without defining its boundaries and thus excluding unsubstantiated faith. She then begins to outline her proposed solution: a shift to a protection of a more general “equality.” Most religious expression, she suggests, can be adequately protected by existing guarantees of freedom of speech, press, and association. For those religious practices that would remain unprotected, the group or individual would continue to petition the court for an exception to the neutral rule of general applicability. However, instead of calling the basis for protection “religion,” the petitioner would omit the ‘R’
word from the legal lexicon, and proceed largely as before. Not just any whim would be protected, Sullivan assures, as the petitioner would need to prove a history of discrimination and political powerlessness. In practice, however, Sullivan’s solution plays out in the same predictable fashion: the petitioner must legitimize her personal convictions by pointing to a larger system of shared practice.

In fact, Sullivan’s scheme replicates the very structure she resists; by protecting only that which can be supported by a showing of historical existence, the individual as religious subject is again lost in the project of legitimacy. The project divorces itself from religion in name only; the underlying structure of validation remains largely the same. In effect, religious freedom is secularized, with no gain for the uniquely faithful.

While Sullivan’s project succeeds in demonstrating the impossibility of a religious freedom requiring court supervision and interpretation, her endeavor ends more as an exercise in logic than a call-to-action or corrective blueprint. As an examination of the logical perplexities manifest in the current framework, her project delivers, but the reader is left with no alternative to the legal conundrum.

NOTES

1. M.A. Women’s Studies, University of Cincinnati; J.D. expected, University of Cincinnati, May 2010.
2. U.S. Const. amend. I.
4. See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (finding that unemployment insurance benefits were available to a Seventh Day Adventist who, for religious reasons, refused to accept employment requiring Saturday work).
6. Id. at 878-79.
8. 64 F. Supp. 2d 1277 (S.D. Fl. 1999).
9. Examples of non-conforming displays include a Sacred Heart statue, a winged angel, a raised cross, and a Star of David headstone. The plaintiffs testified that the motivation for these displays was informed by religious belief. Pictures of the gravesites are available in the book.
JACK GOLDSMITH
THE TERROR PRESIDENCY, LAW AND JUDGMENT
INSIDE THE BUSH ADMINISTRATION
New York; W.W. Norton & Company, 2009

Reviewed by John Thompson

Introduction
Jack Goldsmith is one of the leading intellectuals in America's conservative legal conscious. He is a professor of law at Harvard, a former clerk for the Supreme Court, and a legal expert on terrorism, international law, presidential war powers and the laws of war. His research interests include, among others, national security law, international law, and foreign relations law. Goldsmith has co-authored The Limits of International Law (2005), Who Controls the Internet? Illusions of a Borderless World (2006), and several other books and legal casebooks. Foreign Affairs has called him one of America's "new sovereignists," in part for his strong views that America is not bound by customary international law, nor should it entertain international human rights law suits in its courts. A proponent of American policies that maximize national interest, he argues that America is justified in refusing to enter treaties such as the Rome Statute which established the International Criminal Court.

The Terror Presidency is less academic and more political than Goldsmith's other works, as it is a chronicle of the author's time as head of the Office of Legal Counsel (OLC) from 2003 to 2004. OLC is the division of the Justice Department that advises the White House on legal matters and the limits of executive power. It is a powerful office that has the ability, in its legal opinions, to define the contours of the executive branch's authority to act on the most delicate matters of national policy. The book offers unparalleled access to the inner offices and personalities of some of the most influential players in the White House, the Department of Justice, and the U.S. Intelligence Community during
a time when the government was answering extremely sensitive questions regarding U.S. policy on the subject of terrorism. Goldsmith was at the eye of the storm in the Bush administration during one of the most significant security crises since World War II. His insider’s view offers penetrating insight as to how and why decisions were made regarding interrogation, surveillance, extended detention of suspects, the applicability of the Geneva conventions, and the scope of Presidential power. The book is written for anyone seeking to learn more about the Bush administration’s policies on the war on terror and their underlying legal foundations. Goldsmith’s analysis, however, extends to cover what future presidents will encounter on issues of terrorism and national security. A background in law or politics, while helpful, is certainly not necessary for a solid understanding of the book.

Although the author is a conservative and a staunch supporter of the fundamental goals of the Bush administration’s policies in the war on terror, Goldsmith is extremely critical of how the Bush administration went about securing the legal foundations for those policies. His opinions put him at odds with the administration, and after only ten months as head of OLC, he realized that he was out of place in an administration in which top officials “blew through [laws] in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.” In a damning account of the executive branch’s pursuit of near-limitless power, Goldsmith is successful in demonstrating how a handful of government officials, combined with a culture of fear, came together to create an administration that was willing to do almost anything, legal or not, to combat the threat of terrorism.

More importantly, through historical comparisons to the wartime presidencies of Lincoln and Roosevelt, Goldsmith persuasively demonstrates what the executive should have done in order to achieve both national security and a more democratic process for the pursuit of those ends. The author’s undying dedication to the underlying conservative goals of the Bush administration gives him particular legitimacy to condemn the methodology employed to reach those ends. His practical approach, unwavering logic, and searing honesty are likely to convince readers that he is worthy of their trust. Essentially an academic, Goldsmith lacks political ambition, which further increases his credibility regarding the subject matter. He has little to gain by his assertions in the book, and his time at the OLC came at the cost of substantial personal sacrifice. As a man who wants to see the U.S. safe, but who refuses to sacrifice the law for that goal, Goldsmith is ultimately writing
a lamentation of what could have been accomplished had the Bush administration had a greater respect for democracy and the rule of law. Whether the reader agrees with his ideological perspective or not, *The Terror Presidency* is an illuminating book regarding the fundamental challenges of terrorism and how the U.S. government can choose to meet those challenges. Goldsmith demonstrates, through an analysis of historical examples and current events, that the presidency can choose to operate with arrogance and disregard for the rule of law or with courage and a respect for democratic principles.

II. Summary of Contents
Goldsmith begins by describing the OLC, the office of the Attorney General, the Solicitor General, and the White House. The individuals who held those offices during the author’s time at the OLC become central characters in Goldsmith’s narrative, and they are introduced to the reader early in the book. The background information in this introductory section provides the reader with an understanding of the structure of the executive legal offices and its members’ personal relationships that would later influence the manner in which policy was formed. Goldsmith then begins to recount a complex and interwoven story that jumps back and forth between events in the administration from 2003 to 2004 and events that took place during the wartime presidencies of Lincoln and Roosevelt. Throughout the book, there are many other references to instances in U.S. history involving security threats, war, presidential power, and national politics. The author also references numerous historians, leaders, academics, politicians, and several of America’s most respected new publications.

With an insider’s view, Goldsmith paints a vivid portrait of the culture of fear that existed in the offices and minds of the key decision makers in the U.S. government after the devastating attacks of 9/11. The author then describes what he sees as the overly legalistic culture in the federal government which has come to dominate much of the decision making process in the executive branch. The preceding topics are tied together to detail what Lincoln and Roosevelt accomplished during the Civil War and WW II: balance between protecting national security and honoring the U.S. democratic tradition of cooperative intergovernmental and interagency decision making. Goldsmith’s favorable treatment of Lincoln and FDR casts a disapproving shadow over the Bush administration’s approach to terrorism. The book concludes with observations on the nature of the fight against terrorism and the challenges it creates
for the U.S. presidency - challenges that will be inherited by both the immediate successors of the Bush administration and those who follow.

III. Textual Analysis
Goldsmith recounts his inconspicuous and unlikely ascent to the powerful position as the head of the OLC. He had previously taught as a professor of law and worked as a legal advisor for the Department of Defense in a relatively minor position from 2002 to 2003. Unlike many of his predecessors, Goldsmith lacked the political credentials for the office. He had never contributed to a Republican campaign, let alone been counted among the prominent officials in the administration. However, what Goldsmith possessed was a devotion to the ideals of the conservative right and a reputation as one of the most talented intellectuals in fields that were central to the issues confronting the administration: terrorism, national security, and international law. In 2003, his name was recommended to the White House by an OLC deputy, a friend of Goldsmith, and a fellow legal expert, John Yoo.

Yoo becomes central to the book and was among the most influential individuals in Washington who shaped the administration's policies on terrorism; he was one of a five member group who dubbed themselves the “War Council.” This secret insiders group planned the thrust of security policy post-9/11. Its members included then White House Counsel Alberto Gonzales, Gonzales's first deputy Tim Flanigan, the Vice President's Counsel David Addington, the Pentagon's top lawyer Jim Haynes, and Yoo. There were strong political tensions in the executive branch when Goldsmith was brought on board, and many of the traditional functions of executive officials had changed during the Bush administration. Goldsmith indicates that the longstanding procedures of past administrations that guided how decisions were made had been short circuited, and almost all of the power had been concentrated in a handful of individuals at the expense of a more democratic, cooperative approach within the executive. For example, the War Council often planned legal strategies without the customary presence of lawyers from the National Security Council, the Joint Chiefs of Staff, and the State Department. Goldsmith notes that, before his arrival, the head of the OLC, Jay Bybee, was even excluded from the War Council. By keeping the decision making process contained within a privileged circle whose members agreed on virtually every substantive issue, dissent was eliminated and the War Council could do as it pleased. Additionally, Yoo, as deputy assistant attorney general in the OLC, officially acted under
the authority of the Attorney General, John Ashcroft. However, Yoo's membership in the War Council allowed him to have unprecedented access to the White House directly. Goldsmith recounts that this frustrated Ashcroft, as Yoo seemed to have greater loyalty to Gonzales and Addington than to the OLC.

Goldsmith argues that the OLC walks a fine line between providing the White House with an unbiased, apolitical legal perspective and, on the other hand, providing advice that will permit the President to do as much as possible while approaching the edge of what is legally permissible. The office is neither wholly detached nor wholly loyal to the President and his staff. The opinions of the OLC are binding, highly influential, and respected; they can provide immunity to an executive official acting on the fringes of the law (e.g., interrogation methods of terrorism suspects). Goldsmith writes that Yoo was the War Council's ace in the hole, and Yoo wrote many opinions that provided a legal basis for all of the administration's most controversial and aggressive policies for the war on terror. As an expert on presidential war powers and someone who believed there should be virtually no restrictions on executive power with regard to matters of national security, Yoo was the administration's ideal choice as author of OLC opinions.

As an author, Goldsmith draws, not only on his academic expertise, but also on his intimate personal knowledge of the people and the interworkings of the OLC. He vividly recounts story after story of specific meetings and conversations with executive officials, and he provides a play by play account of how decisions were made. While preparing the book, in order to provide third party verification of Goldsmith's recollection of the events during those meetings, the author spoke with someone who was either present during each meeting or someone he recounted the events to immediately following the meeting. Although this measure provides additional credibility to the details of the conversations in the book, readers must ultimately trust Goldsmith's version of the events if they are to follow the author's ideas to their logical conclusions. Every member of the executive inner circle would inevitably have a slightly different perspective about the events in question; however, over the course of the book, the reader gets a sense that there was an unspoken pact between the members of the War Council to do whatever was necessary, legal or not, to fight terrorism. According to Goldsmith, dissent was treated as political treason.

Therefore, it was with great hesitancy and regret that Goldsmith had to inform his colleagues that several of the key opinions that provided
the authority for highly sensitive anti-terrorist policies were flawed. It is this sense of duty and respect for the law that lends Goldsmith an additional air of credibility in his book. He describes, in detail, his personal struggle as he was beginning to realize that he simply could not support the reasoning underlying several critical legal opinions of his predecessors and other OLC officials, most notably, John Yoo. He knew the costs of his decisions. In response to a proposed counterterrorism initiative, which Goldsmith did not support, Addington, Cheney’s lawyer and a member of the War Council, replied, “If you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands.”

It was very difficult for Goldsmith to bring himself to oppose the Bush administration time and time again, as he knew the costs of his actions, and he was a strong supporter of the war on terror. His book is full of narratives conveying his understanding of the tremendous pressure that the intelligence community is under to both obey the law and to prevent another terrorist attack. Goldsmith also believes that the U.S. public no longer realizes the seriousness of the terrorist threat that it continues to face. He writes that a substantial part of this phenomenon is due to the Bush administration’s lack of effective communication. Instead of working to bolster public support, Goldsmith argues that the administration used a “go it alone” approach and steadily usurped an unprecedented amount of power from both the courts and Congress. This only heightened public concern while the country was already nervous about executive expansion and an exaggerated terrorist threat. Goldsmith acknowledges the tightrope that the White House must walk. On one hand, the President must do everything reasonably possible to protect the security of the country, but, on the other hand, the President must respect civil liberties and the rule of law. Goldsmith is acutely aware of this predicament, and his recognition of this problem bolsters the legitimacy of the book’s criticisms of the Bush White House. He was comfortable in his role as the head of the OLC and with the corresponding responsibility of giving the President as much power as was legally possible. His conservative policy goals fit the administration’s agenda. The reader is hard pressed to interpret Goldsmith’s criticisms of the administration as being based on partisan or ideological grounds. The author’s commitment to the ideals of conservatism is not in question.

Goldsmith makes many references to U.S. history, but two stories emerge as his most important examples. The author compares the
challenges faced by the wartime presidencies of Abraham Lincoln and Franklin Delano Roosevelt to the threats of modern day terrorism. Goldsmith argues that all three presidencies were forced, in order to preserve the security of the United States, to push the boundaries of executive power to their limits. Goldsmith invokes the spirit of Thomas Jefferson:

A strict observance of the written laws is doubtless one of the high virtues of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.14

It is with this principle in mind that Lincoln rounded up and imprisoned thousands of southern supporters, suspended the writ of habeas corpus, and chose to disregard an order from the Supreme Court commanding him to free a prisoner who was held illegally.15 Goldsmith utilizes the expertise of historian Arthur M. Schlesinger, Jr. who argues that Lincoln's philosophy of emergency powers extended beyond Jefferson's.16 While Jefferson interpreted these powers as something wholly outside the Constitution, Lincoln concluded that crises actually make war powers constitutional.17 FDR, who was very familiar with the legacy of Lincoln, threatened that he would ignore a Congressional act (a price control law) if the legislature did not repeal it, stating, "The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war."18 Bush, Lincoln, and FDR all articulated that the President possesses extralegal powers in order to meet the exigencies of war.

However, Goldsmith argues that Lincoln and FDR interpreted and applied expansive executive powers in a very different manner than did the Bush administration. The author cites historian Kenneth Davis who wrote that FDR was "extremely reluctant" to assert a power that was "normally constitutionally a legislative function."19 Lincoln stated before Congress that his actions, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then as now that Congress would readily
ratify them." The Bush White House, on the other hand, extended Jefferson's principle of extralegal exigencies far beyond Lincoln and FDR's interpretation. The "War Council," spearheaded by Yoo and Addington, reintroduced a Regan-era theory which claimed tremendous and virtually unprecedented executive power, but the Bush administration's use of the theory was even more "aggressive" in its pursuit of power. Goldsmith offers a Washington Post article for support, "Even in a White House known for its dedication to conservative philosophy, Addington is known as an ideologue, an adherent of an obscure philosophy called the unitary executive theory that favors an extraordinarily powerful president." Unlike the Lincoln and FDR administrations, the Bush presidency claimed that the executive had no obligation to defer to the legislature or the judiciary and was totally justified in unilateral executive action.

Goldsmith relies on numerous sources for his accounts of the Bush administration's "unitary executive" approach including, inter alia, presidential signing statements attempting to limit judicial power, a famous Iran Contra Minority Report researched by Addington and used by Cheney (which asserted that Congress had overstepped its bounds by attempting to limit presidential authority), and personal accounts of his time in the OLC. The author's skillful presentation of the Lincoln and FDR histories allows the reader to see the striking similarities between the security threats faced in their time and ours, but the author's insider's view of the OLC demonstrates how the Bush administration was very different from its predecessors in its treatment of national security matters. Although the source of the threat has changed, this does not change the fundamental reaction that security crises provoke in the government.

Central to Goldsmith's analysis are the relationships created between the executive and the other branches of government, and it is the methodology of the executive branch that he examines in detail. Here, Goldsmith highlights one of the most important arguments in his book: although the Lincoln, FDR, and Bush presidencies all asserted extralegal or extralegal powers, Lincoln and FDR, on topics of national security, emphasized the need for a diverse base of political support including the other branches of government and the American people. Although Lincoln and FDR had to flex their political muscle on occasion in order to help generate consensus, the focus was nonetheless on cooperative problem solving. The Bush administration, on the other hand, operated under the ideological belief that the unitary executive
had the power to operate unilaterally without seeking Congressional approval at all. Although President Bush eventually went to Congress for approval for some of the most controversial programs, he did this as a last resort when other means had failed or when the judiciary had forced this upon him. The Bush War Council made decisions under tremendous secrecy whereas FDR, for example, often made his most controversial actions public in order to persuade the nation that, although he was operating outside the bounds of traditional executive power, he did so out of necessity, and he wanted the country to understand the exigencies of the situation.

Goldsmith's use of historical analogy is effective. The author's detailed account of history, often told through the eyes of respected historians, reveals strong parallels between the intergovernmental power dynamics of the Lincoln, FDR, and Bush presidencies. Goldsmith's privileged position at the heart of the Bush administration, combined with his academic expertise, puts him in an unusually well informed position from which he brings these various perspectives together to produce a synthesized and comprehensive analysis of the Bush White House's approach to national security. However, despite the incredibly influential position that the War Council had within the administration, Goldsmith could have provided more concrete examples of Bush's actions instead of the actions of his legal advisors for purposes of the author's comparisons of Bush, Lincoln, and FDR. Goldsmith addresses this issue head on toward the end of the book. He acknowledges that he had little direct contact with the President, and he concludes that history will have to be the judge of our 43rd President. Goldsmith notes that, in their day, Lincoln and FDR were also criticized as extending executive power too far. However, the author's lack of condemnation for Bush himself, while at the same time delivering a damning indictment of Bush's most influential officials, rings a little hollow. Goldsmith does not provide enough justification for the "history will be the judge" approach regarding President Bush. The author does include a passage at the end, though, concluding that Bush's neglect for soft power ultimately weakened the executive. Nevertheless, the historical arguments, which comprise a substantial portion of the book, remain solid, and Goldsmith's focus on the War Council instead of Bush himself does not substantially affect the usefulness of the comparisons. If anything, the author's focus on the actions of the War Council, for purposes of evaluating the position of the President, only serves to further highlight the preeminent role the War Council played. The emphasis on the preeminent nature of the
War Council reinforces the reader’s understanding of how extensively damaged the internal decision-making processes had become. Interestingly, despite Goldsmith’s conservative values, he chose Lincoln and FDR’s presidencies as the standard on which to base his comparison with the Bush administration. In the end, the author expresses disappointment with Bush’s performance. His administration aimed to leave the American Presidency stronger, yet Goldsmith argues that it ultimately left it weaker. By denying the importance of cooperative solutions between the branches of government, the executive invited the distrust of the legislature, the judiciary, and ultimately the American public. Goldsmith argues that the members of the War Council made a fatal error when they disregarded a critical component of wartime leadership: winning the country’s trust. Goldsmith highlights that, although we have not been attacked successfully since 9/11, there has not been a single military commission trial of a suspected terrorist, there is no consensus as to how the detainees should be held or tried, and the executive and the legislature have failed to create a modern, effective, and legal regulatory scheme for monitoring suspected terrorists communications. The author argues that the comprehensive, durable institutional reforms that were necessitated by 9/11 should have been in place by now, and they are not. More significantly, Goldsmith points out that the next president will inherit all of the original challenges created by 9/11 and will additionally face the culture created in the wake of the “unitary” executive: heightened distrust for the White House which will likely weaken the president’s ability to protect and enhance national security.

IV. Discussion

Jack Goldsmith presents his recollections of his time as the head of the OLC in a candid and straightforward manner that engenders trust in the reader. Considering that Goldsmith has never had political aspirations, it is unlikely that the book seeks to grind any axes. The book’s objective and methodical analysis of both the historical examples and their contemporary counterparts may remind the reader why this was the same man that pulled many of the support beams out from underneath the Bush administration’s legal framework for the war on terror. Unyieldingly logical, Goldsmith picks apart his subjects piece by piece as one would expect from an academic of his stature.

On many levels, The Terror Presidency is a lamentation of a failed attempt to find a sustainable long-term approach to combat the modern threat
of terrorism. The comparisons to Lincoln and FDR are extremely convincing because the author justifies the analogy by illustrating how the challenges faced by those presidents are sufficiently similar to the challenges created by terrorism today. The reader begins to see the cyclical nature of executive power and how it ebbs and flows with the changing tides of peace and war. The book highlights the fact that the government’s responsibility to balance civil liberties and national security is always at hand, whether during Lincoln’s day or our own. However, far from concluding that the presidency is somehow defined by the cycles of some sort of historical relativism, Goldsmith concludes that administrations are defined by their willingness to engage the nation and by their commitment to make decisions cooperatively and democratically.

It is critical to remember that Goldsmith is a staunch conservative. From the beginning of the book, he indicates that his policy goals fit closely in line with other members of the Bush administration. He is an individual unequivocally committed to preserving American power even if it means refuting international agreements that sideline national interests. However, his book makes it clear that he insists on pursuing those goals within the legal, democratic framework that has been handed down from generations past. Liberal readers are likely to be disarmed by Goldsmith’s willingness to so painfully lay out the flaws of his fellow conservatives and by his recurring themes of cooperative decision making that reach across ideological divides. Conservative readers are likely to appreciate Goldsmith’s commitment to the goals of the Bush presidency despite their failed execution. Additionally, Goldsmith offers the conservative reader the explanation of how several Bush policies could have been carried out legally, and, conversely, more effectively.

The Bush administration understood terrorism as a security threat that warranted the use of the President’s war powers. The White House pursued, in part, a military solution that involved aggressive physical measures to dismantle terrorist networks abroad. The United States Armed Forces played an important role in the Bush strategy. While alternatives have been suggested, this book review does not seek to analyze the merits of the different approaches. Goldsmith clearly supports many of the Bush administration policies. The instructive value of The Terror Presidency is the book’s criticism of how the White House went about achieving its policy goals.

Perhaps the book could have included more firsthand accounts from other officials directly involved in the legal matters in question.
However, Goldsmith supports his analysis with a myriad of sources, and he does, in fact, include some firsthand evidence from other senior Bush officials. Goldsmith includes a frank and telling quote from Alberto Gonzalez, Bush’s personal lawyer at the time, as he bids farewell to Goldsmith upon his departure from the OLC, “I guess those opinions really were as bad as you said.”

V. Conclusion
Although some may disagree with Goldsmith’s ideological perspective and his insistence on an aggressive solution to terrorism, the reader will have a difficult time finding fault in Goldsmith’s logic regarding the Bush administration’s failure to engender consensus in the other branches of government and the country itself. Goldsmith is incredibly effective in reaching a wide audience and convincing the reader that our common goals of national security and cooperative decision making transcend partisan politics and ideological differences. The author does not state those arguments explicitly, yet they are inherently contained within his analysis of the successes of the Lincoln and FDR war policies vis-à-vis the failures of the Bush administration to create a durable, democratically chosen solution to terrorism. *The Terror Presidency* is an insightful and informative book for anyone seeking to learn more about how America has made policy decisions in its efforts to combat terrorism and how the U.S. should shape those decisions in the future.

**Note on the 2009 Edition Afterword**
The 2009 paperback edition of *The Terror Presidency* contains the identical text as the original 2007 hardback edition, but Goldsmith added an intriguing afterword to the 2009 edition. The author notes that many reviewers of the 2007 edition focused on his criticisms of the Bush administration while glossing over the book’s message that the presidency continues to face unique security challenges while impeded by the countries “excessively legalistic and retributive national security culture.” Goldsmith warns that, indeed, the Bush administration failed on many levels in its approach to an effective and appropriate counter-terrorism framework, yet the United States must forge ahead and recognize the continuing, substantial threat posed by terrorism. The author is concerned that the worst damage caused by the Bush administration is a change in national political and legal culture that will hamper the Obama administration’s ability to protect the country. Goldsmith cautions that the government’s new reticence to vigorously pursue terror-
ists combined with the public's distrust of executive action could lead to disastrous results: another devastating attack on U.S. soil.

However, Goldsmith chooses to end the afterword with a combination of praise for President Obama and a final word of caution for the country. His words reinforce what the reader learns over the course of the book—that Goldsmith approaches his subject matter with insight, experience, and an apolitical perspective that merits the reader's respect and attention:

The credibility with which he [President Obama] speaks will help narrow the public's hazardous skepticism about the reality of the threat and will make clearer than President Bush ever could the difficulties that any president faces in keeping us safe. As I write these words in December 2008, there is every sign that President Obama will enhance trust in the presidency, and thus presidential effectiveness, by embracing the Lincoln-Roosevelt tenets of democratic leadership outlined in chapter 6: a bipartisan and pragmatic national security team, genuine consultation and consent from Congress, a less secretive executive branch, an open public embrace of constitutional values, and a greater commitment to educate the nation regularly about the security threat. Let us hope that these efforts will strengthen the second Terror Presidency such that if it exercises good judgment and is lucky, it can prevent the second and more devastating attack that many believe is inevitable, one that will change our nation in ways that will make George W. Bush seem like a civil libertarian.†

NOTES

1. J.D. expected, University of Cincinnati, May 2010.
4. [JACK GOLDSMITH, THE TERROR PRESIDENCY, LAW AND JUDGMENT INSIDE THE BUSH
Administration 21 (2007).
5. Id. at 33, 66.
6. Id. at 181.
7. Id. at 21-22.
8. Id. at 20.
9. Id. at 25.
10. Id. at 22.
11. Id.
12. Id.
13. Id.
14. Id. at 24.
15. Id. at 33.
16. Id. at 23.
17. Id. at 144-62.
18. Id. at 71.
19. Id. at 210-11.
20. Id. at 106-10.
21. Id. at 80.
22. Id. at 82.
23. Id. at 83.
24. Id.
25. Id. at 84.
26. Id.
27. Id. at 85.
28. Id. at 85.
29. Id.
30. Id. at 85-88.
31. Id.
32. Id. at 84-85, 89, & 191-205.
33. Id. at 98, 207-208.
34. Id. at 191-205.
35. Id. at 213-16.
36. Id. at 214.
37. Id. at 215.
38. Id. at 204-10.
39. Id.
40. Id. at 208-09.
41. Id. at 205-13, 232.
42. Id. at 172.
43. Id. at 219.
44. Id. at 232-33.
JANE FOWLER MORSE
A LEVEL PLAYING FIELD: SCHOOL FINANCE IN THE NORTHEAST
Albany, New York; State University of New York Press, 2006
Pp. 349. $31.95. ISBN: 979-0-7914-6932-3
Reviewed by Sarah Dwidar

1. Introduction
There is a perplexing and unfortunate inconsistency in the level of value that the American public affords our educational system. On the one hand, education is regarded in public discourse as “the great equalizer,” a phrase coined by Horace Mann to indicate that education provides working-class children the opportunity to break through the confines of poverty. However, as Jane Fowler Morse indicates in A Level Playing Field, the reality in the classroom paints a more somber picture. Courts, legislatures and taxpayers have consciously done everything in their power to maintain an inadequate public school system that fails to reflect the liberal, democratic views on education that many so openly espouse.

Morse, a professor of education at the State University of New York at Geneseo, details the historical development of school finance reform in A Level Playing Field. Most states employ a funding scheme that delegates financial autonomy to local school districts which, in turn, rely on local property taxes to fund their schools. Although states retain a minimal amount of financial responsibility, the role of local government is substantial enough to have created an unequal funding scheme. Predictably, school districts with poor property tax bases can only generate a fraction of the funding that their wealthy counterparts can generate.

Morse examines the different measures utilized by reformers in New York, Vermont and Ontario that attempt to create state funding schemes that benefit children equally, regardless of socio-economic
status. She presents us with a comparative analysis of the movement’s successes and the judicial and legislative barriers to equal opportunity, and conducts a thorough examination of the interplay between race, poverty and school funding. Opposition to equitable school funding, she argues, is driven by racist sentiments and the blatant desire to prevent working-class children from climbing the social ladder out of poverty. Nevertheless, despite Morse’s depiction of the disheartening treatment of America’s poorest children, readers are left with a glimmering hope that effective reform is in fact possible in the near future.

II. Summary of Contents
Morse opens with an overview of school finance litigation, setbacks to reform and the legacy of federally mandated desegregation in the wake of *Brown v. Board of Education*. Over the next three chapters, she reviews how the movement has taken shape in New York, Vermont and Ontario, comparing the legal avenues and strategies reformers have utilized in each region. Over subsequent chapters, Morse analyzes the impact poverty and racism have on a child’s academic performance, and successfully debunks the commonly-held myth that increased school spending does not yield academic achievement. In her final chapter, she leaves us with a comprehensive overview of lessons learned from the movement to reform and the strategies she finds to be best effective overall.

III. Textual Analysis
Morse begins by outlining the historical and philosophical foundations of education in the U.S. Deriving foundational support from Plato’s *Republic*, Aristotle’s call for public education, and Mary Wollstonecraft’s plea for public coeducational schooling in *A Vindication of the Rights of Women*, Morse eloquently sets the stage for her impassioned appeal for educational equity. She examines the pivotal *Brown v. Board of Education* decision that historically held that segregated schools violated the Fourteenth Amendment’s equal protection clause. Early proponents of school finance reform assumed that *Brown* precedent would be construed to guarantee equal protection in school funding cases as it did with desegregation; however, a series of subsequent legal battles demonstrated that the courts had no intention of doing so.

Morse characterizes each evolutionary stage of school finance litigation by the legal tactic used by the proponents of reform. Plaintiffs in the first series of cases relied on federal and state constitutional equal protection clauses as the basis of their arguments. In *Serrano v. Priest*,
the California Supreme Court found that California's funding scheme “invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors.” Although the court extended California's equal protection clause to apply to educational funding, it determined that the funding scheme did not violate the Fourteenth Amendment of the federal constitution. According to Morse, any residual hope to seek federal redress was effectively laid to rest by San Antonio Independent School District et al., v. Demetrio Rodriguez, et al., a pivotal case in school finance litigation that turned Brown on its head. In Rodriguez, the U.S. Supreme Court held that education was not a fundamental right and poor children were not a suspect class with rights that trumped any state interest to localize school funding.

When discussing the next stage in the history of school finance litigation, Morse introduces the reader to a reform barrier that becomes recurring throughout book: legislative indifference. Having successfully driven school finance cases into state courts, Rodriguez was the prelude to a second series of cases based on alleged violations of education clauses in state constitutions, clauses often mandating that states provide equal educational opportunities. However, even when courts have found that the discrepancy of funding provided by local school districts was unconstitutional, legislatures rarely implemented court mandates. Inaction is due, in part, Morse argues, to the reality that powerful, suburban constituencies run legislatures. Morse adamantly asserts that without the committed efforts of teachers, parents and citizens to initiate reform, the gross inequities of public education will remain unchanged. Ultimately, Morse concludes, “the will to reform must become political, although it often starts in the judicial arena.” Otherwise, the post- Rodriguez legal tug-of-war that ensued for decades will continue and school funding will remain glaringly unbalanced.

Morse differentiates between the concepts of equality, equity and adequacy of education. Plaintiffs in the first series of cases sought school funding that was allocated equally across the board. Post-Rodriguez plaintiffs went further, pleading for equitable funding. The assumption was that poorer schools required more funding to reach the same level of education provided at wealthier schools. The third series of cases began in the Kentucky Supreme Court in 1989 and concerned the issue of adequacy of education. Rather than comparing one child's education to that of another, the court determined whether that education was adequate in and of itself. The Kentucky Supreme Court found
the state’s funding scheme inadequate and formulated a list of factors necessary for an adequate education. Although this ambitious model was thereafter cited by other state courts, Morse points out that it fell short of creating a uniform definition of educational adequacy. For example, New York courts narrowly interpreted their state constitution to hold that education need only be “minimally adequate,” enough to provide only the ‘sound basic education’ required in the state’s education clause.

Morse next discusses the lack of political will to reform school finance schemes and blames a number of factors. A main impediment, she argues, is the reluctance by the courts to afford equal protection for fear of being accused of judicial activism or violating separation of powers principles. Even the courts that have deemed funding schemes unconstitutional have largely refused to establish templates for funding reform for fear they will not be honored by legislatures. Yet another impediment to centralized funding is the tenuous assumption that local governments cannot retain control of schools without locally based financing. Moreover, despite evidence that state aid even out funding inequities, there exists a deep-seated tradition of local autonomy in education that even the principles of social justice cannot uproot.

Ultimately, the most discouraging deterrent, which Morse discusses at length, is the taxpayer’s efforts to thwart the formation of a state-wide sharing pool of taxes that would allocate funds equally across the board. Public welfare inevitably takes a back seat to the self-interest of wealthy, suburban constituents who may publicly lament the state of urban schools but refuse to share their tax dollars.

Chapters 2 through 4 of Morse’s book examine the development of reform in New York, Vermont and Ontario. These ninety pages make up the meat of the book. However, after reading page after page of case law, one may find that the content and presentation is quite similar to that of a constitutional law textbook. It would not be difficult to imagine a reader untrained in the legal profession losing oneself in a perpetual timeline of appeals, court remands and abstruse statutory interpretations.

Morse details the thirty year struggle for equitable funding in New York, a struggle marked by countless judicial and legislative setbacks and resulting in little to no progress. New York litigators sought redress through the Civil Rights Act of 1964. The courts, however, continued to block progress, finding no right to sue for the disparate impact the state’s funding scheme may have on poor children. Rather, in order to
seek relief under the Act, Plaintiffs were required to prove the state had the intention to discriminate against poor children when implementing their funding scheme—a nearly impossible burden to prove. After thirty years of ineffective court battles, New York now has the widest income gap between rich and poor in the nation, a grossly high drop-out rate, and remains among the most segregated states in the nation. One of Morse’s most compelling and recurring assertions is that the court-mandated resegregation in New York and other states flies in the face of Brown precedent. One is left wondering if judges even attempted to reconcile their decisions with Brown. It is hard to believe that Brown, one of the most applauded landmark cases of the twentieth century, could have slipped through the cracks so discreetly without requiring even the slightest distinction to justify the seemingly inconsistent school finance cases.

While the cases in Chapters 2 through 4 seem superfluous, one in particular perfectly demonstrates the role racism and classism play in education. Nothing better exemplified New York’s unwillingness to accept reform than the New York Court of Appeal’s holding in Campaign for Fiscal Equity v. State of New York. In this case, the court refused to recognize a causal link between poverty, race and low government funding and a child’s quality of education. It went on further to find that the state is only obligated to provide a “sound, basic education” and that any inability on the student’s part to achieve that level of education was not the state’s fault. Moreover, the decision provoked a media outcry when it indicated that the state need only give children an education that will provide them the ability to “function productively” (i.e. obtain employment) and noted that plenty of vacant low-level, low-paid jobs were available for children who did not take advantage of education provided to them. Morse vehemently condemns the opinion, stating that “to blame public schoolchildren of New York City because they don’t take advantage of the glorious opportunity offered them seems callous at best; at worst, it is both criminal and overtly racist.”

Vermont proved to be a case study perfectly demonstrative of Morse’s main arguments: that centralized, equitable funding leads to academic achievement and that if the public will to reform is lacking, equitable funding can never be a reality. Vermont’s struggle for reform was quick but unsuccessful in the end. After a 1997 case finding the state’s funding scheme unconstitutional, legislators immediately enacted reforms that were effective in equalizing property tax burdens and providing school districts with a relatively equal share of tax revenues. Even more
notably, the legislation reduced the achievement gap between students in rich and poor school districts. However, a recapture provision that required wealthy districts to share extra tax money with poorer ones evoked harsh opposition from wealthy tax bases.

After a discouraging chapter illustrating the self-interest and greed that thwarts efforts to improve public education, one would hope that the chapter's final heading "What Next in Vermont?" would provide some sort of tangible solution. Instead, Morse expresses doubt that subsequent legislation in Vermont will prove as effective in narrowing the funding and achievement gaps. She then enters into an economic analysis demonstrating that the wealthy benefit the most from educating the poor. The question becomes how much effort will it take for educational and economic researchers to establish this conclusion in public discourse? If the public will is, as Morse argues, the critical instrument for reform, the reader hopes that what lies ahead somewhere in the next four chapters is a framework to change it. Regrettably, this is a lofty expectation and most likely beyond the scope of this book.

Morse's Ontario case study perfectly demonstrates her contention that an equitable funding scheme lacking adequate funding cannot rectify the ills of public education. Ontario's reform took the form of a tax-cutting initiative endorsed by an executive branch with a fiscally conservative agenda. While the executive established an equitable funding scheme by creating a uniform property tax rate, its focus on economy led to underfunding of crisis proportions and a revolt by three urban school boards. To add insult to injury, the scheme was comparable to the No Child Left Behind Act (NCLB) in that it centralized control to such an extent that teachers lost nearly all autonomy over curriculum. In later chapters, Morse delves into philosophical analyses of the importance of valuing education in and of itself rather than merely as an economic tool of a capitalist society. Similarly, she notes that "part of the difficulty is that the Ontario reforms were motivated by a desire to lower taxes rather than to improve schooling."

The next two chapters examine the impact poverty and racism have on a child's academic performance and how school finance reform cannot be effective without addressing these underlying issues. While the judicial and legislative timelines of the previous three chapters may have been lengthy and detailed, Chapters 5 and 6 feel quite the opposite – often wrought with abstractness. Nonetheless, Morse makes a number of insightful observations all of which demonstrate that society's emphasis on standards, testing, and accountability in education
“neglect to take into account the social injustice that impede children’s performance.”

Morse criticizes throughout her book a 1966 government-commissioned study known as the Coleman Report. The study’s purpose was to examine equality of educational opportunity in the wake of the Civil Rights Act of 1964. It had a tremendously inimical impact on school finance reform in that it perpetuated the myth that increased funding has little to no effect on academic achievement. Coleman argued that academic achievement had more to do with a child’s aspirations and expectations than school facilities.97 The report reaffirmed the belief that no amount of money could ever help poor, urban, minority children excel and that they were inevitably destined for menial labor. In the span of seven pages, Morse eloquently discredits Coleman’s argument, attacking his methodology, exposing his shoddy logic, and warning her readers of the implications its legacy has on education reform.98 Morse contemptuously notes that if there were, in fact, no casual link between academic achievement and increased funding, school boards in wealthy districts would be wasting taxpayer money.

Morse details how poverty lies at the root of poor academic achievement and thus should be addressed before any reform in public education can be expected. She emphasizes the need for cash assistance for needy families, successful job placement and training programs, higher minimum wage, universal health care coverage and quality early childhood education programs. In the Chapter 5 section entitled "Lead Poisoning and Other Toxins"99 and "Other Health Hazards for Children of Color and Children Living in Poverty,"10 Morse provides us with a comprehensive look at the devastating effects of lead poisoning on mental development and academic performance, and shocks readers with statistics showing its prevalence among urban, minority children. At this point in the book, Morse is able to suggest relatively attainable measures to alleviate these social ills, urging readers to encourage our leaders to enforce the federal Fair Housing Act and the Department of Housing and Development’s (HUD) building codes.101

Chapter 6 looks at the impact racism has on the inequities of school funding and academic achievement. Morse examines the “hypersegregation” of school children due to racist factors such as redlining and tipping. She notes that once black student enrollment in a school reaches a “tipping point” (approximately 20%), white parents are more reluctant to enroll their children.102 She offers us solutions that will create integrated neighborhoods: redistricting, busing, enforcing
laws already in place like the Fair Housing Act, urban renewal, and allowing for subsidized low income housing in suburban districts. However, once Morse begins to detail the incurable problem of juvenile incarceration vis-à-vis school dropout rates, the reader cannot help but feel helpless once again. The statistics she provides illustrate the school-to-prison pipeline system whereby urban, minority children are prepped for incarceration at an early age. Juveniles are channeled from school to prison for minor offenses with no regard to the role poverty and poor health (e.g. violent symptoms of lead poisoning) played in their delinquency.

The final chapter of the book is the least insightful. It has little to add, only reiterating the themes and issues covered in previous chapters. However, in the chapter’s section entitled “Theories of Justice and Social Justice,” Morse rightly reviews the history of meritocracy in our educational system and criticizes it for its inherent racism. Finally, in “Factors that Promote School Finance Reform,” she concludes the book on a hopeful note tying together all her main arguments.

IV. Discussion
A Level Playing Field successfully demonstrates the need for school finance reform and the barriers to its success. While the book’s comprehensive analysis of school finance litigation may be a cumbersome read for some, Morse’s attention to detail is illustrative of her firm grasp of the subject matter and the complicated nature of reform. Both educators and litigators can benefit from her work, drawing from its pages the necessary tools and ideas to further implement reform in their respective fields.

Structurally speaking, however, the book lacks fluidity in some parts and is far too redundant in others. Most notably in Chapters 5 and 6 (poverty and racism), Morse tirelessly revisits issues of resegregation, standardized test bias, and the Coleman report. Additionally, when tangible solutions to funding inequities are proposed, they seem to get lost in the abyss of theories and case law. For example, the book devotes relatively little time to the issue of federal funding and the No Child Left Behind Act (NCLB). Given that the NCLB is the subject of such contentious public debate, it could have been expected to comprise a larger share of the book. In Morse’s concluding pages, she states that “another fiscal policy that would help equalize spending would be to fund state and federal mandates fully.” However, she devotes little time, if any, to an analysis that would compare and contrast the benefits
of state and federal funding. Educators cannot be expected to accept a plea to delocalize funding when many have had such bad experiences with federal mandates. Rather than proposing the option of federal funding as a cursory note, she could have more effectively reached readers by weighing the option's benefits and disadvantages.

Morse stresses the importance of public will in school finance reform. Although reform begins in the courts, she argues, it will inevitably fail without the support of legislatures and their constituents. She discusses the various philosophical theories regarding social justice, public welfare and self-interest in order to explore reasons why public will is lacking. However, apparent futility reemerges when she states that “until society develops a sense of social justice, individuals will have to continue to seek redress for inequitable school funding in the courts.”

One cannot help but regard funding equality and reform of the status quo as unattainable goals. However, Morse does mitigate these fears in Chapter 5 when she proposes tangible ways to use the law already in place to alleviate poverty (e.g. enforcement of the Fair Housing Act).

V. Conclusion

A Level Playing Field serves as an invaluable resource for those concerned with the state of public education. Morse successfully takes the initial step in dismantling the status quo in our educational system by exposing the racism and fiscal greed that cause the system’s inequities. By the book’s final pages, hopefully litigators are equipped with the legal knowledge necessary to face the barriers that await them in the courtroom and educators have a better understanding of the incredibly vital role they play in the struggle for reform. Moreover, Morse’s work provides the public, as a whole, with a better appreciation for the value of public education and its role as a component of social justice.

NOTES

1. J.D. expected, University of Cincinnati, May 2010
3. Id. at 1-2.
4. Id. at 6.
5. Id. at 5 (quoting Serrano v. Priest, 5 Cal. 3d 584, 389 (Cal. 1971)).

7. Suspect classification is a principle of 14th Amendment equal protection jurisprudence that determines the constitutional scrutiny that government discrimination must endure. Groups must meet certain criteria of suspect classification in order to receive strict scrutiny of their equal protection claims by the courts. Groups that are traditionally subjected to discrimination receive heightened scrutiny of their claims. The criteria for suspect classification was established in footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

8. *Id.* at 6.

9. *Id.* at 13.

10. *Id.* at 199.

11. *Id.* at 8-9.

12. *Id.*

13. *Id.* at 27.

14. *Id.* at 13.

15. *Id.* at 37-38.


2002)).

17. *Id.* at 57.

18. *Id.* at 58.


20. *Id.* at 75.

21. *Id.* at 72.

22. *Id.* at 84.

23. *Id.* at 85.

24. *Id.* at 89.

25. *Id.* at 114.

26. *Id.* at 119.

27. *Id.* at 124.

28. *Id.* at 123-29.

29. *Id.* at 141.

30. *Id.* at 146.

31. *Id.* at 144.

32. *Id.* at 154.

33. *Id.* at 156.

34. *Id.* at 182.

35. *Id.* at 188.

36. *Id.* at 211.

37. *Id.*

38. *Id.* at 218.
The Freedom Center Journal is a joint, scholarly publication of the University of Cincinnati College of Law and the National Underground Railroad Freedom Center. The purpose of the Journal is to foster discussion and debate about the scope and nature of freedom, broadly defined. The Freedom Center Journal will pursue its mission by publishing interdisciplinary works by scholars and law students and by serving as an intellectual arm of the National Underground Railroad Freedom Center.